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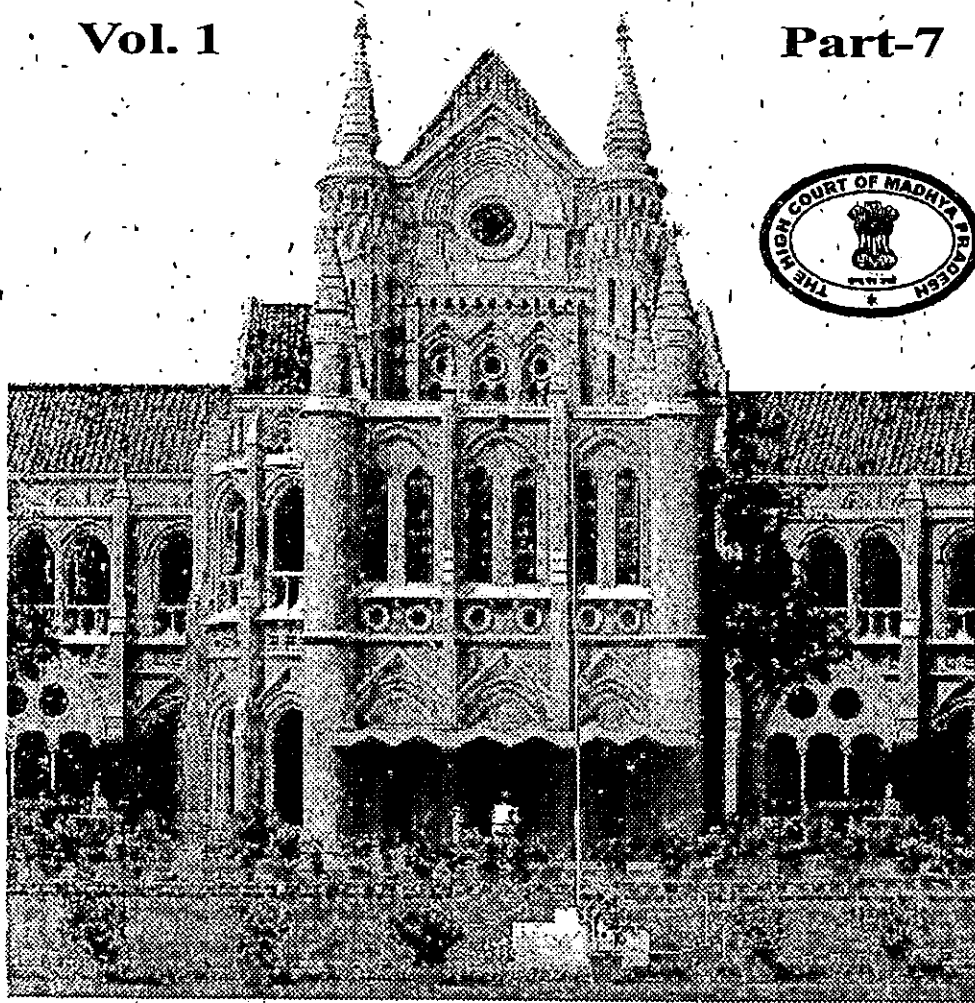


**THE INDIAN LAW REPORTS**  
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**CASES DECIDED BY THE SUPREME COURT OF INDIA AND  
THE HIGH COURT OF MADHYA PRADESH**

# Vol. 1

## Part-7



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**Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - Alternative accommodation - Plaintiff allowed his son to start business in a small shop which was unsuitable for wholesale business of plaintiff - Held - Permitting his own son to start business was a natural act of plaintiff in which no fault can be found - It is not a case that the plaintiff let out the shop to some other person. [Danpati Addhahat Bhandar v. Ganshyam Das Agrawal] ...2060**

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

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

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(Note An asterisk (\*) denotes Note number)

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money on failure to perform work - Plaintiff himself admitted that he has requested for refund of earnest money on account of failure to perform work - Held - Plaintiff is not entitled for refund of earnest money in view of his admission and terms of contract - Appeal allowed - Suit dismissed. [Western Coalfields Ltd. v. Prdeep Kumar Soni] ...2047

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

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

Coal Bearing Areas (Acquisition and Development) Act (20 of 1957), Sections 10 & 11, Stamp Act, 1899, Section 2(14) - Central Government has ordered u/s 11(1) of Act of 1957 for vesting of lands in favour of Government Company - Such an order would not be an instrument - Government was unjustified in demanding the stamp duty in view of a direction/order issued by Central Government. [State of M.P. v. Western Coalfields Ltd.] ...1887

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

Constitution, Article 226 - Allotment of dealership - Appellant was appointed ad-hoc dealer by respondent Corporation for one year - He provided land on lease for 30 years, spent amount and obtained license - Termination of dealership - Held - Clause 12 of guidelines for selection of retail outlet provides that advertisement has to be issued for allotment and preference can be given while awarding marks under the head "Land and infrastructure" - Letter of intent issued also provides that allotment in favour of appellant was purely a stopgap and temporary arrangement - In the matter of distribution of public largesse, if outlet is given to appellant without selection process, it would be violative of concept of fair play - Appellant has no right to continue with outlet - Appeal dismissed. [Mohan Auto Supply Centre (M/s.) v. (M/s.) Hindustan Petroleum Corporation Ltd.] ...1898

Constitution, Article 226 - Contract - After termination of contract without issuance of show cause notice or making any enquiry into damages

करने का उपबंध — वादी ने स्वयं स्वीकार किया कि कार्य संपादित करने में असफल रहने के कारण उसने अग्रिम धन वापसी के लिए निवेदन किया है — अभिनिर्धारित — वादी की स्वीकारोक्ति और सविदा की शर्तों को दृष्टिगत रखते हुए वादी अग्रिम धन वापसी का हकदार नहीं — अपील मंजूर — वाद खारिज। (वेस्टर्न कोलफील्ड्स लि. वि. प्रदीप कुमार सोनी) ...2047

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

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

कोयला धारक क्षेत्र (अर्जन और विकास) अधिनियम (1957 का 20), धाराएँ 10 व 11, स्टाम्प अधिनियम, 1899, धारा 2(14) — केन्द्र सरकार ने 1957 के अधिनियम की धारा 11(1) के अधीन सरकारी कम्पनी के पक्ष में भूमियाँ निहित करने का आदेश दिया — ऐसा आदेश लिखत नहीं होगा — केन्द्र सरकार द्वारा जारी निदेश/आदेश को देखते हुए सरकार स्टाम्प शुल्क की माँग करने में अन्यायपूर्ण थी। (म.प्र. राज्य वि. वेस्टर्न कोलफील्ड्स लि.) ...1887

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

संविधान, अनुच्छेद 226 — डीलरशिप का आबंटन — प्रत्यर्थी कॉर्पोरेशन द्वारा अपीलार्थी को एक वर्ष के लिए तदर्थ डीलर नियुक्त किया गया — उसने 30 वर्ष के पट्टे पर भूमि उपलब्ध करायी, रकम खर्च की और लायसेंस प्राप्त किया — डीलरशिप की समाप्ति — अभिनिर्धारित — रिटेल आउटलेट के चयन के लिए मार्गदर्शक सिद्धांत का खण्ड 12 उपबंधित करता है कि आबंटन के लिए विज्ञापन जारी करना होगा और "भूमि और अवसंरचना" शीर्ष के अन्तर्गत अंक प्रदान करते समय वरीयता दी जा सकती है — जारी किया गया आशय पत्र (Letter of Intent) भी उपबंधित करता है कि अपीलार्थी के पक्ष में आबंटन पूर्णतः स्थानापन्न और अस्थायी व्यवस्था थी — सार्वजनिक उदारदान के वितरण के मामले में यदि अपीलार्थी को चयन प्रक्रिया के बिना आउटलेट दिया जाता है तो यह निष्पक्ष व्यवहार की परिकल्पना का उल्लंघनकारी होगा — अपीलार्थी को आउटलेट जारी रखने का कोई अधिकार नहीं है — अपील खारिज। (मोहन ऑटो सप्लाय सेंटर (मे.) वि. मे. हिन्दुस्तान पेट्रोलियम कारपोरेशन लि.) ...1898

संविधान, अनुच्छेद 226 — सविदा — सविदा के पर्यवसान के बाद कारण बताओ सूचना पत्र जारी किये बिना या हरजाने के संबंध में या सविदा निरस्त किये जाने के लिए जो कारण था,

or into the cause which led to cancellation of contract, Railway issued demand notice - Held - Matter was not referred to the arbitrator nor any competent and authorized person has ever adjudicated upon the dispute - Respondent Railway would not be entitled to recover the money on their lopsided calculation - Order of withholding amount quashed - Petition disposed of. [Bridge and Roof Infrastructures (M/s.) v. Union of India] ... 1952

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

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

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

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

Criminal Procedure Code, 1973 (2 of 1974), Section 125, Evidence Act, 1872, Section 112 - Non-applicant No.1 living with paramour applicant and son non-applicant No.2 has been born - Claim of maintenance by non-applicant No.2 from applicant - Held - Whether non-applicant No.2 is legitimate or illegitimate son of applicant - Presumption is that non-applicant

उसकी कोई जाँच किये बिना रेलवे ने मांग का सूचना पत्र जारी किया - अभिनिर्धारित - मामला आर्बीट्रेटर को संदर्भित नहीं और न ही किसी सक्षम और अधिकृत व्यक्ति ने कमी विवाद का विनिश्चय किया - प्रत्यर्थी रेलवे को उनकी एक तरफा गणना के अनुसार रूपया वसूल करने का अधिकार नहीं - राशि रोकने का आदेश अपास्त - याचिका निराकृत। (ब्रिज एन्ड रूफ इन्फास्ट्रक्चर्स (मे.) वि. यूनियन ऑफ इंडिया) ...1952

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

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

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

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

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125, साक्ष्य अधिनियम 1872, धारा 112 - अनावेदक क्रमांक 1 उपपति आवेदक के साथ निवासरत और पुत्र अनावेदक क्रमांक 2 का जन्म हुआ - अनावेदक क्रमांक 2 द्वारा आवेदक से भरण-पोषण का दावा - अभिनिर्धारित - क्या अनावेदक क्रमांक 2 आवेदक का धर्मज पुत्र है या अधर्मज - उपधारणा यह है कि अनावेदक

No.2 is legitimate son of non-applicant No.1's husband - Presumption could have been rebutted by evidence that husband had no access at the time when non-applicant No.2 have been begotten - Non-applicant No.1 was living with paramour applicant is no evidence of non-access of husband - Case remanded for recording evidence of both the parties on this aspect after framing of point of determination. [Premlal v. Leelabai] ...2129

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

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

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

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

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

क्रमांक 2 अनावेदक क्रमांक 1 के पति का धर्मज पुत्र है — उपधारणा का इस साक्ष्य द्वारा खण्डन किया जा संकता था कि पति की उस समय कोई पहुँच नहीं थी जब अनावेदक क्रमांक 2 का गर्भाधान किया गया — अनावेदक क्रमांक 1 उपपति आवेदक के साथ रह रही थी पति की पहुँच न होने का कोई साक्ष्य नहीं है — मामला अवधारण का बिन्दु विरचित करने के बाद इस पहलू पर दोनों पक्षकारों की साक्ष्य अभिलिखित किये जाने हेतु प्रतिप्रेषित किया गया। (प्रेमलाल वि. लीलाबाई) ...2129

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

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

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

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

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



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

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

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

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

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

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

**Evidence Act (1 of 1872), Section 60 - Hearsay evidence - PW-2 stated that he was informed by PW-7 that deceased was seen in the company**

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

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

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

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

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

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

साक्ष्य अधिनियम (1872 का 1), धारा 60 — अनुश्रुत साक्ष्य — अ.सा.-2 ने कथन किया कि उसे अ.सा.-7 द्वारा जानकारी दी गई कि मृतक अपीलार्थियों के साथ देखा गया — अ.सा.

of appellants - PW-7 has nowhere stated that he gave information to PW-2 - Statement of PW-2 hit by Sec. 60 of Act. [Nasir v. State of M.P.] ...2078

Evidence Act (1 of 1872), Section 67 - *Proof of signature and handwriting* - Inquest report written and signed by SDOP - Neither SDOP examined before Court nor signature and handwriting proved by witnesses acquainted with his handwriting and signature - Held - Contents of that inquest report can not be looked into. [Chandan v. State of M.P.] ...2083

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

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

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

Hostel Rules, 1966-67, Rule 17 - *Expulsion from Hostel* - Natural Justice - Appellants were expelled from hostel - Collector was directed to pass fresh order - Collector after hearing appellants passed fresh orders of expulsion - Held - Elaborate enquiry is not necessitous - Mere non-recording of independent opinion that if appellants stay in hostel, it will be objectionable from the point of discipline or harmful effect to other students of hostel will not vitiate order - Appeal dismissed. [Lalita Jharia (Ku.) v. State of M.P.] ...1913

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

Income Tax Act (43 of 1961), Sections 271(1)(c) & 273A - *Waiver of penalty* - Survey of business premises of petitioner was carried out on 06.10.1995 - Petitioner filed revised returns of income for assessment years 1992-93, 1993-94 and 1994-95 - Penalty was imposed as revised returns were filed after survey and they were not voluntary - Held - Revision of return was for the assessment years 1992-93, 1993-94 and 1994-95 and not

-7 ने यह कहीं भी कथित नहीं किया कि उसने अ.सा.-2 को जानकारी दी थी - अ.सा.-2 का कथन अधिनियम की धारा 60 से बाधित है। (नासिर वि. म.प्र. राज्य) ...2078

साक्ष्य अधिनियम (1872 का 1), धारा 67 - हस्ताक्षर और हस्तलेख का साक्ष्य - मृत्यु-समीक्षा रिपोर्ट एस.डी.ओ.पी. द्वारा लिखित और हस्ताक्षरित की गई - एस.डी.ओ.पी. की न तो न्यायालय के समक्ष परीक्षा करायी गई और न ही उसके हस्ताक्षर और हस्तलेख से परिचित साक्षियों द्वारा हस्ताक्षर और हस्तलेख साबित किये गये - अभिनिर्धारित - उस मृत्यु-समीक्षा रिपोर्ट की अन्तर्वस्तु की जाँच-पड़ताल नहीं की जा सकती। (चंदन वि. म.प्र. राज्य) ...2083

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

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

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

छात्रावास नियम, 1966-67, नियम 17 - छात्रावास से निष्कासन - नैसर्गिक न्याय - अपीलार्थियों को छात्रावास से निष्कासित किया गया - कलेक्टर को नया आदेश पारित करने का निदेश दिया गया - कलेक्टर ने अपीलार्थियों को सुनने के बाद निष्कासन के नये आदेश पारित किये - अभिनिर्धारित - विस्तृत जाँच आवश्यक नहीं है - केवल इस स्वतंत्र राय का अभिलिखित न किया जाना कि यदि अपीलार्थी छात्रावास में रहे, तो यह अनुशासन के बिन्दु से आपत्तिजनक होगा या छात्रावास के अन्य छात्रों पर हानिकारक प्रभाव पड़ेगा, आदेश को दूषित नहीं करेगा - अपील खारिज। (लालिता झारिया (कु.) वि. म.प्र. राज्य) ...1913

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

आयकर अधिनियम (1961 का 43), धाराएँ 271(1)(सी) व 273ए - शास्ति का अधित्यजन - याची के कारोबारी स्थल का सर्वेक्षण 06.10.1995 को किया गया - याची ने निर्धारण वर्ष 1992-93, 1993-94 व 1994-95 के लिए आय के पुनरीक्षित रिटर्न पेश किये - शास्ति अधिरोपित की गई क्योंकि पुनरीक्षित रिटर्न सर्वेक्षण के बाद पेश किये गये और वे स्वैच्छिक नहीं थे - अभिनिर्धारित - रिटर्न का पुनरीक्षण निर्धारण वर्ष 1992-93, 1993-94 व 1994-95 के लिए था न कि निर्धारण वर्ष 1995-96 के लिए - कमिश्नर द्वारा आदेश पारित करने में मस्तिष्क का प्रयोग

for the assessment year 1995-96 - Order passed by Commissioner suffers from non-application of mind - Matter remanded back to reconsider application u/s 273A and pass fresh orders. [Shrinath Caramics (M/s.) v. Commissioner Income Tax-II, Indore] ...1984

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

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

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

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

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

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

नहीं किया गया — मामला धारा 273ए के आवेदन पर विचार करने और नवीन आदेश पारित करने के लिए वापस प्रतिप्रेषित किया गया। (श्रीनाथ सेरेमिक्स (मे.) लि. कमिश्नर इनकम टैक्स-II] इंदौर) ...1984

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

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

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

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

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

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

**Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Sections 52 & 53** - Criminal cases were pending against the applicant before Sessions Court - It was alleged that applicant was juvenile on the date of offence - Matter referred to Juvenile Justice Board - After inquiry Board held that the age of applicant is more than 18 years - Order challenged before High Court - Held - No opportunity was given to the applicant to cross-examine medical evidence which was adduced and also no opportunity given to adduce further evidence to prove his date of birth - Orders set aside with certain directions. [Lakhan v. State of M.P.] ...2116

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

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

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

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

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

किशोर न्याय (बालकों की देख-रेख और संरक्षण) अधिनियम (2000 का 56), धाराएँ 52 व 53 - आवेदक के विरुद्ध सेशन न्यायालय के समक्ष दाण्डिक मामले लम्बित थे - यह अभिकथित किया गया कि आवेदक अपराध की तारीख को किशोर था - मामला किशोर न्याय बोर्ड को संदर्भित - जाँच करने के बाद बोर्ड ने अभिनिर्धारित किया कि आवेदक की आयु 18 वर्ष से अधिक है - आदेश को उच्च न्यायालय के समक्ष चुनौती - अभिनिर्धारित - आवेदक को जो चिकित्सीय साक्ष्य पेश किया गया था उसके प्रतिपरीक्षण का अवसर नहीं दिया और उसकी जन्मतिथि को सिद्ध करने के लिए भी कोई साक्ष्य पेश करने का अवसर नहीं दिया - आदेश कतिपय निदेशों के साथ अपास्त। (लाखन वि. म.प्र. राज्य) .....2116

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

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

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

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

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



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

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

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

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

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

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

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

परिसीमा अधिनियम (1963 का 35), अनुच्छेद 70 - गिरवी रखे जेवरों की वापसी के लिए वाद - जेवरों 02.12.1987 को गिरवी रखे गये - गिरवी रखे जेवरों की वापसी का सूचनापत्र अपीलार्थी द्वारा 14.05.1998 को प्राप्त किया गया - वाद 26.06.1998 को पेश किया - वाद परिसीमा के भीतर - अपील खारिज। (सेठ रामदयाल जाट वि. लक्ष्मी प्रसाद) SC...1847

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

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

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

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

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

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

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

**Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 27** - *Accused convicted u/s 20 of the Act for illegal possession of 100 gm Ganja - Appeal before High Court - Held - Accused is not bound by his pleadings - He can prove his defence even from the admission made by the prosecution witnesses - Detecting Officer admitted that accused explained the possession of contraband by saying that it was meant for his personal consumption - In the light of circumstances surrounding seizure of only 100 gm Ganja, favoured the defence that the contraband was not meant for sale or distribution - It ought to have been inferred that Ganja was possessed for personal consumption - Impugned conviction & consequent sentences set-aside - Instead, appellant is convicted u/s 27 of the Act and sentence to undergo R.I. for six months - Appeal partly allowed. [Khanchadilal v. State of M.P.]* ...2093

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

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

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

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

**Penal Code (45 of 1860), Section 302** - *Last seen together - PW-7 stated that he had seen appellants along with one boy - He has not stated that he was able to identify the boy - Dead body of boy was not got identified*

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

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 27 - अभियुक्त को 100 ग्राम गांजे के अवैध कब्जे के लिए अधिनियम की धारा 20 के अधीन दोषसिद्ध किया गया - उच्च न्यायालय के समक्ष अपील - अभिनिर्धारित - अभियुक्त अपने अभिवचनों से विवंधित नहीं है - वह अभियोजन साक्षियों द्वारा की गई स्वीकृति से भी अपनी प्रतिरक्षा साबित कर सकता है - खोजी अधिकारी ने स्वीकार किया कि अभियुक्त ने विनिषिद्ध के कब्जे को यह कहते हुए स्पष्ट किया कि वह उसके निजी उपभोग के लिए अभिप्रेत था - केवल 100 ग्राम गांजे के अभिग्रहण के आसपास की परिस्थितियों के प्रकाश में प्रतिरक्षा का समर्थन किया कि विनिषिद्ध विक्रय या वितरण के लिए अभिप्रेत नहीं थी - यह निष्कर्ष निकाला जाना चाहिए था गांजा निजी उपभोग के लिए कब्जे में रखा गया - आक्षेपित दोषसिद्धि और पारिणामिक दण्डादेश अपास्त किये गये - इसके स्थान पर, अपीलार्थी को अधिनियम की धारा 27 के अन्तर्गत दोषसिद्ध किया गया और 6 माह का सश्रम कारावास भोगने का दण्डादेश दिया गया - अपील अंशतः मंजूर। (कन्छेदी लाल वि. म.प्र. राज्य) ...2093

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 50 - अभियुक्त द्वारा ले जाये जा रहे प्लास्टिक के थैले से 100 ग्राम गांजा लोक स्थल पर बरामद किया गया - धारा 50 लोक स्थल पर तलाशी में व्यक्ति द्वारा ले जाये गये थैले की तलाशी को लागू नहीं होती है। (कन्छेदी लाल वि. म.प्र. राज्य) ...2093

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

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

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

दण्ड संहिता (1860 का 45), धारा 302 - अंतिमतः साथ-साथ देखा गया - अ.सा.-7 ने कथन किया कि उसने अपीलार्थियों को एक लड़के के साथ देखा था - उसने यह कथन नहीं किया कि उसने लड़के को पहचाना था - इस साक्षी द्वारा लड़के के शव की शिनाखा नहीं

by this witness - Statement of witness not sufficient to establish circumstance of last seen together. [Nasir v. State of M.P.] ...2078

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

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

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

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

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

करवाई गई - साक्षी का कथन अंतिमतः साथ-साथ देखे जाने की परिस्थिति को साबित करने के लिए पर्याप्त नहीं। (नासिर वि. म.प्र. राज्य) ...2078

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

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

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

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

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

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

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

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

Prisoners' Release on Probation Act, M.P. (16 of 1954), Section 9, Prisoners' Release on Probation Rules, M.P. 1964, Rule 4 - *Eligibility for release - Constitutional validity of notification dated 24.03.2008 making 14 years of actual imprisonment for becoming eligible for release challenged - Rule 4 not ultra vires to Section 433-A of Cr.P.C. or any of the provisions of the Act.* [Gori Shankar v. State of M.P.] ...1966

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

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

Rajya Suraksha Adhiniyam, M.P., 1990 (4 of 1991), Section 8 - *Petitioner served with show cause notice of externment on the basis of report of police - In the proceeding, the District Magistrate after preponing the date of hearing and without informing the petitioner of preponed date examined the independent witnesses and fixed the case for final decision - Held - Right of hearing to arrive at a finding that the stay of petitioner would not be in larger public interest - Right of hearing under the Act can*

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

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

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

बंदियों का परिवीक्षा पर छोड़ा जाना अधिनियम, म.प्र. (1954 का 16), धारा 9, बंदियों का परिवीक्षा पर छोड़ा जाना नियम, म.प्र. 1964, नियम 4 - छोड़े जाने के लिए पात्रता - छोड़े जाने के लिए पात्र होने के लिए वास्तविक कारावास को 14 वर्ष करने वाली अधिसूचना तारीख 24.03.2008 की संवैधानिक विधिमान्यता को चुनौती दी गई - नियम 4 द.प्र.सं. की धारा 433-ए या अधिनियम के किसी उपबंध के अधिकारातीत नहीं। (गौरी शंकर वि. म.प्र. राज्य)...1966

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

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 9 व 37 - आवेदकों ने कथित रूप से अधिनियम के अधीन 12.11.2005 से 06.06.2006 के मध्य अपराध किया - अधिनियम 26.10.2006 को प्रवृत्त हुआ - विचारण न्यायालय ने अपराध को निरंतर प्रकृति का होना मानकर आवेदकों को दोषी ठहराया - अभिनिर्धारित - यह कहीं भी उल्लिखित नहीं किया गया कि अनावेदक के साथ 06.06.2006 के बाद हिंसा की गई - अधिनियम कोई भूतलक्षी प्रभाव नहीं रखता है - आवेदकों को अधिनियम के प्रवर्तन की पूर्ववर्ती कालावधि के लिए अभियोजित नहीं किया जा सकता - दण्डिक कार्यवाही बंद की गई। (नवीन वि. रजनी) ...2120

राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 8 - याची पर पुलिस की रिपोर्ट के आधार पर निष्कासन का कारण बताओ सूचनापत्र तामील किया गया - कार्यवाही में जिला मजिस्ट्रेट ने सुनवाई की तारीख प्रस्तावित करने के बाद और याचियों को प्रस्तावित तारीख की सूचना दिये बिना स्वतंत्र साक्षियों की परीक्षा की और मामला अंतिम विनिश्चय के लिए नियत किया - अभिनिर्धारित - सुनवाई का अधिकार इस निष्कर्ष पर पहुँचने के लिए कि याची की रोक व्यापक लोक हित में नहीं होगी - अधिनियम के अन्तर्गत सुनवाई का अधिकार साक्षियों की प्रतिपरीक्षा तक विस्तारित नहीं किया जा सकता, अन्यथा सुरक्षा करने और लोक व्यवस्था का अनुरक्षण करने का



not be stretched to cross-examine witnesses, otherwise, the very purpose of the Act to provide security and maintenance of public order would be defeated - Noticee under the Act has no right to cross-examination - Petition dismissed. [Guddu @ Amit Sahu v. State of M.P.] ... 1917

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

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

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

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

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

अधिनियम का वास्तविक प्रयोजन विफल हो जायेगा - अधिनियम के अन्तर्गत सूचनागृहीता को प्रतिपरीक्षा करने का कोई अधिकार नहीं है - याचिका खारिज। (गुड्डू उर्फ अमित साहू वि. म.प्र. राज्य) ...1917

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

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

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

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

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

**Service Law - Departmental Enquiry - Enquiry Officer after recording of evidence found employee to be not guilty of any charge - Disciplinary authority on the basis of final finding recorded by the Board holding employee to be guilty of charge, issued show cause notice - Held - Since show cause notice issued was containing final decision taken by the Board holding employee guilty - An opportunity of hearing should have been provided to employee so that there may still be some room left for convincing the Disciplinary Authority that findings recorded by the enquiry officer were just and proper - Findings of Board and Disciplinary Authority are perverse - Impugned order imposing penalty quashed - Petition allowed. [Nilu (Smt.) v. M.P. State Electricity Board] ...1959**

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

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

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

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

**Stamp Act (2 of 1899), Article 35(a)(ii) - Petitioner granted right to extract 8400 cubic meter of sand in lieu of payment of fixed amount of Rs.5,04,000 - Lessor is parting right to extract fixed quantity of numeral for a fixed period of time - Amount required to be paid in instalments is not a periodical payment of enjoyment of benefits of lease - Premium though**

सेवा विधि - विभागीय जाँच - जाँच अधिकारी ने साक्ष्य अभिलिखित करने के बाद कर्मचारी को किसी भी आरोप का दोषी नहीं पाया - अनुशासनिक प्राधिकारी ने बोर्ड द्वारा अभिलिखित अंतिम निष्कर्ष के आधार पर कर्मचारी को आरोप का दोषी ठहराया; कारण बताओ सूचना पत्र जारी किया - अभिनिर्धारित - चूंकि जारी कारण बताओ सूचना पत्र में बोर्ड द्वारा कर्मचारी को दोषी ठहराते हुए लिया गया अंतिम निर्णय अन्तर्विष्ट था - कर्मचारी को सुनवाई का एक अवसर दिया जाना चाहिए था ताकि अनुशासनिक प्राधिकारी को विश्वास दिलाने की कोई गुंजाइश बची रह सकती कि जाँच अधिकारी द्वारा अभिलिखित निष्कर्ष न्यायसंगत और उचित थे - बोर्ड और अनुशासनिक प्राधिकारी के निष्कर्ष विपर्यस्त - शास्ति अधिरोपित करने वाला आक्षेपित आदेश अभिखण्डित - याचिका मंजूर। (नीलू (श्रीमति) वि. एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड) ...1959

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

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

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

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

स्टाम्प अधिनियम (1899 का 2), अनुच्छेद 35(ए)(ii) - याची को 5,04,000 रुपये की निश्चित राशि के संदाय के बदले 8400 घन मीटर रेत निकालने का अधिकार प्रदान किया गया - पट्टाकर्ता संख्या की निश्चित मात्रा निकालने का अधिकार निश्चित कालावधि के लिए अलग कर रहा है - किस्तों में अदा करने के लिए अपेक्षित राशि पट्टे के लाभों के उपभोग का कालिक संदाय

*payable in instalments cannot be said to be rent - Petition dismissed. [Rakesh Singare v. State of M.P.] ...1922*

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

### **WORDS AND PHRASES :**

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

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नहीं है — प्रीमियम यद्यपि किस्तों में देय है तथापि किराया नहीं कहा जा सकता — याचिका खारिज।  
(राकेश सिंगारे वि. म.प्र. राज्य) ...1922

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

### शब्द और वाक्यांश :

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

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### **Justice A. K. Saxena**

Born on June, 30, 1947 and was enrolled as an Advocate in 1968 and practiced at Vidisha before different Courts including the Sessions Court. Joined Judicial Service as Civil Judge, Class-II on 6th of July 1970, was promoted as Civil Judge, Class-I, on 14th of June 1982 and as Chief Judicial Magistrate on 12th of March 1984. Worked as Additional Registrar, Office of the Welfare Commissioner, Bhopal Gas, from June 1, 1993 to May 11, 1996, District Judge, Shahdol and Jabalpur from May 13, 1996 to May 20, 2002, O.S.D. High Court, Jabalpur from May 20, 2002 to May 31, 2002, Director, J.O.T.R.I, Jabalpur from June 1, 2002 to August 6, 2004. He served as Member Secretary, M.P. State Legal Service Authority, Jabalpur, from August 7, 2004. Was appointed as an Additional Judge of the Madhya Pradesh High Court on April 13, 2005 and permanent Judge on 02.02.2007. Demitted Office on 30th of June 2009.

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

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## **farewell**

### **Hon'ble the Chief Justice Mr. A. K. Patnaik, bids farewell to the demitting Judge :-**

We have assembled here to bid farewell to Justice Aryendra Kumar Saxena who is demitting office as Judge of the High Court of Madhya Pradesh tomorrow.

Hon'ble Mr. Justice Aryendra Kumar Saxena was born on June 30, 1947 and was enrolled as an Advocate in 1968 and practiced at Vidisha before different Courts including the Sessions Court. After he joined judicial service on 6.7.1970, Justice Saxena has worked in different capacities in the judicial hierarchy. " He worked as Additional Registrar, Office of the Welfare Commissioner, Bhopal Gas, from June 1, 1993 to May 11, 1996; District Judge, Shahdol and Jabalpur from May 13, 1996 to May 20, 2002; O.S.D. High Court, Jabalpur from May 20, 2002 to May 31, 2002; Director J.O.T.R.I. Jabalpur from June 1, 2002 to August 6, 2004. He served as Member Secretary, M.P. State Legal \ Service Authority, Jabalpur, from August 7, 2004. He was appointed as an Additional Judge of the Madhya Pradesh High Court on April 13, 2005 and permanent Judge on 2.2.2007".

Justice Saxena has made his mark as a Judge of the High Court of Madhya Pradesh. He has been very prompt in deciding Bail Applications and other cases. He has won the confidence of the Bar and the litigant public by his judicial conduct, which was fair and transparent. As the Chief Justice of the High Court, I relied heavily upon Justice Saxena on many administrative matters because of his varied experience in the Judiciary and his balanced approach to all matters. He was a Member of the High Court Rule Sub Committee and was also a Member of the Committees for revising units of disposal by Judicial Officers of the Sub-ordinate Judiciary and for rationalizing the unit system. He was also Member of the Committee monitoring the work of Fast Track Judges. He was associated with the selection of Civil Judges Class II and Additional District Judges. The contribution of Justice Saxena to the justice delivery system in Madhya Pradesh has been immense and the Judiciary in Madhya Pradesh will suffer great loss on his retirement. I hope Justice Saxena will minimize this loss to the Judiciary by continuing to render valuable services as and when required by the High Court and the Government. His wife, Mrs. Saxena, is a very gracious and decent lady and we will miss the company of Justice Saxena and Mrs. Rita Saxena after the couple leaves Jabalpur.

**We wish Justice Saxena and Mrs. Saxena good health and long and happy life.**

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

We all have gathered here today to bid farewell to Hon'ble Justice Shri A. K. Saxena.

It is always a sad occasion when such a luminary with impeccable legal knowledge and an unmatched persona leaves this great institution. But such is the circle of life where coming and going are the two faces of the same coin.

The more we speak about Hon'ble Justice Shri S.K. Saxena the lesser it seems.

There are certain personalities whose essence cannot be captured in words and Hon'ble Justice Shri A.K. Saxena is one of them.

Throughout his Judicial life he has successfully climbed various rungs in the ladder of success from District Judge and then Hon'ble Justice High Court and it can be safely concluded that he did justice to all his duties with single-minded determination and hard work which was second to none.

The process of dispensation of justice followed by him has helped this great institution achieve great heights. He has been an inspiration for all of us and we have learnt a lot under his guidance.

His caring and just attitude to one and all has been exemplary. There has never been an occasion where he has not lend a helping hand when needed.

He is also one of the major protagonists in maintaining cordial relation with the Bench and the Bar which is of utmost importance in the smooth functioning of the day-to-day court affairs.

To say that we will miss him will be a gross understatement. This august institution has made giant leaps forward but we have a lot of challenges to overcome and I am certain that we will continue to receive the same guidance from him in the future as well.

On behalf of the Central Government and my colleagues, I wish Hon'ble Justice Shri A.K. Saxena best of luck for his future endeavors and may he have the best of health.

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**Shri T. S. Ruprah, Addl. Adv. General of M. P. bids farewell :-**

Today we all have assembled here to bid farewell to Hon'ble Shri Justice Aryendra Kumar Saxena, who is demitting the office of the Judge of the High Court of Madhya Pradesh on 30.6.2009.

My Lord joined the Judiciary on 6.7.1970. We the lawyers at Jabalpur came in touch with Your Lordship when you were posted at Jabalpur as Additional District and Sessions Judge, and made indelible mark. Soon, Your Lordship was appointed as District Judge Jabalpur and earned a name as one of the most impartial and bold Judge in the Higher Judicial Services. Because of Your Lordship's legal acumen and experience as the District and Sessions Judge, Your Lordship was posted as Director of the Judicial Officers Training and Research Institute wherein you contributed immensely in training the young Judicial Officers and left upon them an impression to be remembered for all times to come.

On 13th of April 2005, we all witnessed one of the finest Judges being elevated to this Hon'ble Court from the State's Higher Judicial Services. In your reply to ovation Your Lordship reproduced the following godly advice given by your Late father Shri Prakash Chandra Saxena Ji, a very renowned advocate and man of principles. He said- "You may join in but keep in your mind that the duties of a Judge are sacrosanct and whenever you find at any point of time that you are not able to do justice with your sacred and divine duties, leave the office immediately without any hesitation." My Lord we all have no doubt that today your Late father would have felt extremely proud of you as you have always been a great Judge, who has been gifted with a personality which conquered all who had the privilege to know you. It had a rare appeal combining with awesome magic and subtle power, a dignity and a courtesy which was unfailing, an integrity which was unbending, a warmth and a gentility which was rich and infectious, reservoirs of courage and persistence, and a deep and abiding compassion for the conditions of so much of humanity, oppressed by poverty and injustice and degraded by their awesome consequences.

It is only today that we truly understand the meaning of the two beautiful lines of the great saint and poet Kabirdas, the lines which influenced the philosophy of your life-

**'kabira jab hum paida huay, jag hasa hum roye  
aisi karni kar chalo, hum hanse jag roye'**

Your Lordship would be missed by each and every one of us, as Your Lordship has always been extremely courteous to everyone and gave equal treatment to Senior and Junior Members of the Bar. My Lord will always be remembered with fond memories for the warmth and responsiveness displayed towards us.

I, on behalf of the State Government, the Advocate General, Law Officers and my own behalf extend good wishes to Your Lordship and hope that you will

continue to engage yourself in other activities, which will be beneficial to the Society. We are sure that Your Lordship's legal knowledge and experience gained during the last four decades shall be utilized for the betterment of the poor and the needy. I extend my heartfelt good wishes to My Lord, My Lord's Lady Wife Smt. Rita Saxena and your children for a healthy, peaceful and happy long life.

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**On behalf of Senior Advocates, Shri P. Sadasivam Nair, President, Senior Advocates' Council bids farewell :--**

We have assembled here to bid farewell to Hon'ble Shri Justice Aryendra Kumar Saxena who has completed 39 years of judicial service of which 4 years as Hon'ble Judge of High Court of Madhya Pradesh at Jabalpur. Your Lordships has vast experience in different sphere of the judicial hierarchy from Civil Judge to the Hon'ble Judge of the High Court. This varied experience has helped your Lordship in deciding cases effectively.

It was always a pleasure to appear before your Lordship. You were always kind, sympathetic and cooperative. You always used to give patient hearing to lawyers. In your Court there is total freedom for lawyers to make submission.

You were extremely quick in disposing of cases. While your Lordship was sitting in Criminal Bench you disposed of thousands of cases. Your ability in disposing Bail matters is amazing. In bail matters you had your own philosophy which was very balancing. The lawyers were extremely happy the way you disposed off the bail applications quickly, effectively and efficiently. Your Lordship has wonderful personal qualities. You are quick in making decision, sympathetic towards lawyers, un-assuming, and is always calm and composed. It made no difference to your Lordship who appear before him whether it is a Senior Lawyer or Junior Lawyer. To Junior Lawyers you were very sympathetic. You used to guide them and encourage them which gave the lawyers lot of confidence. You were the embodiment of all qualities of a Judge.

Your Lordship is one of the best Judges coming from Higher judicial service appointed to the High Court. Your absence on retirement will be greatly felt by the lawyers especially the Junior Lawyers.

I am sure your vast knowledge, experience and ability will not go waste and ways and means will be found to utilize your ability and knowledge for extremely useful purpose which will benefit the public at large.

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**On behalf of M. P. High Court Bar Association, Shri Anil Khare, President, bids farewell :-**

From the annals of the History of The law, the words of Lord Mansfield penned in R V. John Wilkes still echo... "I will not do what my conscience tells me is wrong, upon this occasion, to gain the huzzas of the thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow" and today when we have assembled here to bid adieu to My Lord Hon'ble Shri Justice A.K.Saxena, I could not find more befitting expression in language to evince at the virtues, possessed, practised and demonstrated by My Lord Hon'ble Shri Justice A.K.Saxena and that were the leitmotif of voyage in the oceans of law.

My Lord Hon'ble Shri Justice A.K.Saxena was born on 30th of June of 1947 and the professional biography begins when he joined the Judicial Services as Civil Judge, Class-II on 6th of July of 1970. He was promoted as Civil Judge Class-I on 14th of June of 1982 and as C.J.M. on 12th of March of 1984. He became the officiating District Judge on 13th of April of 1987 and was granted selection grade on 8th of November of 1994 and super time scale on 27th of April of 1998. From November 1991 to May 1993 he performed the duties of Deputy Secretary (law) and from May 1993 to May 1996 he rendered his services as Additional Welfare Commissioner, Bhopal Gas Commission. He was posted as District Judge, Shahdol on 13th of May 1996 and as District Judge, Jabalpur on 10th of September 1998. From 1st of June 2002 till 6th of August 2004 he held the post of Director, Judicial Officer's Training and Research Institute. He has also worked as Member Secretary, M.P. State Legal Services Authority from 7th of August 2004 and on 13th of April 2005 he stood elevated as Additional Judge of the High Court of Madhya Pradesh.

Today, when I stand here and read the professional profile of My Lord Hon'ble Shri Justice A.K.Saxena, I, without a hesitation, perceive that the erudition and the perspicuity that were the hallmark of the words, spoken and written, of My Lord Hon'ble Shri Justice A.K.Saxena, emanated from the gamut of experiences that he must have had during his voyage from one legal harbor to another.

The proverb says that all good things come to an end and so has the tenure of My Lord Hon'ble Shri Justice A.K.Saxena. Never, shall fade the imprints of the occasions when, amidst the maelstrom of facts impeccable justice sans the enigma, was rendered by My Lord Hon'ble Shri Justice A.K.Saxena. An astounding legal acumen and the skills honed with utmost care were the mainspring of the performance of My Lord Hon'ble Shri Justice A.K.Saxena.

The perception of the world as a stage is proverbial and a conspectus may prompt us to define the roles and tenures as ephemeral but the transient can not and must not baulk us from adorning ourselves with new robes and commence

fresh acts. The dusk, definitely, indicates a new dawn. The culmination of a stage is, by no means, an end to our journey. Hon'ble Shri Justice A.K. Saxena, as suggested by a lifeless service book, is retiring today but I firmly believe that this is a commencement. The sanguinity shall not sink and the world shall again be a stage.

Venerated and loved by all, we shall always remember Hon'ble Shri Justice A.K. Saxena as a man of adjuring demeanor and his accent on justice. The chair of Court Room No 14 shall never forget that here sat a man of few words but in his court the law was never silent.

On behalf of the M.P. High Court Bar Association I avail this opportunity to express my gratitude for My Lord's deep concern for Bar Association and further express my best wishes to My Lord Hon'ble Shri Justice A.K. Saxena.

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**Shri R. P. Agrawal, President, High Court Advocates' Bar Association, bids farewell :-**

We have assembled here today, to bid farewell to Hon'ble Shri Justice A.K. Saxena, who is demitting his office on 30th of June 2009.

Hon'ble Shri Justice A.K. Saxena, before his elevation to the Bench had functioned in different capacities and had a distinguished and unblemished record. I had the privilege of appearing before him while he was posted as Additional District Judge, Jabalpur about twenty years back and at that time it had abundantly become clear that My Lord was destined to be elevated to the Bench. There is an old saying that coming events cast their shadows before. This was aptly true in case of My Lord. After My Lord was elevated to the Bench, he within a short tenure of about four years, earned a name for himself as an able and fearless Judge. His working has been very methodical. He has been very courteous and had no pre-conceived notion as he was open to the last. My Lord heard every lawyer patiently and without interruption. Every lawyer went outside his Court room fully satisfied. My Lord was unassuming. My Lord has been a very good administrator while functioning as a District Judge. My Lord's integrity has always been above board. It can be said in My Lord's case that when he became a Judge and put on his robes, he put off his relations with every one and became without pedigree.

My Lord's judgments showed mastery over the language, clarity of thoughts and deep knowledge of law.

Parting with such an ideal Judge is always sad. I hope and trust that My Lord's honesty, integrity, ability, experience and knowledge would be utilized by giving him suitable assignments after demitting his office as a Judge of this Court.

My Lord will always be remembered as a distinguished and upright Judge in the history of this High Court. I on behalf of the High Court Advocates' Bar Association, and on my own behalf, wish My Lord a very happy and cheerful life.

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**Shri Rameshwar Neekhara, President M. P. State Bar Council, bids  
farewell :-**

एक बेहतरीन और अनुभवी न्यायाधिपति के रूप में माननीय जस्टिस श्री ए. के. संक्सेना जी ने प्रदेश में न्यायदान की ज्योति को आलोकमान तो किया ही है, साथ ही इस न्यायदान की प्रक्रिया के विभिन्न स्तरों पर भी उन्होंने अथक परिश्रम, सेवा और साधना से अपने दायित्वों का निर्वाह किया है, और अपने मृदुल और सहज स्वभाव से बेंच और बार के बीच संदेव सभी का संतुलन बनाये रखा है ।

माननीय श्री जस्टिस ए. के. संक्सेना जी आज के इन अवकाश के क्षणों में मैं आपके अथक योगदान के प्रति मध्य प्रदेश राज्य अधिवक्ता परिषद की ओर से, और प्रदेश के अधिवक्ताओं की ओर से सम्मान व्यक्त करता हूँ और आज के इस विशिष्ट अवसर पर यह अभिव्यक्त करना चाहूँगा, कि आपने न्यायदान की प्रक्रिया में कानूनी दांव पेंच और प्रक्रिया की जटिलता के चलते विवादों के निराकरण में लगने वाले लंबे समय, श्रम और धन से हताश आम आदमी की पीड़ा को बहुत बारीकी से समझा और अपने न्याय निर्णयों में शीघ्रता और सुलभता के साथ इतने संतुलित न्याय निर्णय किये हैं, जो सभी पक्षों के लिये स्वीकार एवं संतोषप्रद रहे हैं ।

वर्ष 1970 से आपने प्रदेश की न्यायिक सेवाओं में व्यवहार न्यायधीश वर्ग-2 के पद से अपना योगदान आरंभ किया, और अधीनस्थ न्यायालय के विभिन्न पदों पर अपेक्षित दायित्वों का पूरी कुशलता एवं साधना के साथ निर्वाह किया ।

अप्रैल 2005 में आपको इस प्रदेश के न्यायमंदिर में न्यायाधिपति के रूप में नियुक्त किया गया। मुझे वे क्षण आज भी याद हैं जब आपने अपनी शपथग्रहण के समय न्यायदान को अपने अनुभव ज्ञान और श्रम साधना से आलोकमान करने हम सभी को आश्चस्त किया था, और तब से अब तक की अवधि में आपने अपनी भावनाओं एवं वायदे को मूर्तरूप देने के लिये कोई कसर नहीं छोड़ी है ।

मैं आपके महान् योगदान और सुलझी कार्यशैली के प्रति इस अवसर पर सम्मान व्यक्त करते हुये आपका हार्दिक अभिनंदन करता हूँ ।

आपके अवकाश ग्रहण करने से जहां प्रदेश के न्यायजगत एवं विधिजगत के न्यायाधिपति के रूप में आपकी अनुपस्थिति एवं कमी महसूस होगी वहीं यह भी सत्य है, कि समाज को आपकी उपलब्धता अपेक्षाकृत और सहज रूप में होगी, और आप और अधिक स्वतंत्रता के साथ समाज का मार्गदर्शन कर सकेंगे । खास कर उन मुद्दों के प्रति जहां अभी भी विकास की रोशनी का पहुंचना बाकी है ।

मैं मध्य प्रदेश राज्य अधिवक्ता परिषद की ओर से, प्रदेश के विधि जगत की ओर से और स्वयं अपनी ओर से आने वाले समय में आपके उत्तम स्वास्थ्य एवं आपके दीर्घायु होने की कामना करता हूँ, ताकि समाज आपकी मेधा, कुशलता और सहृदयता से लाभान्वित होता रहे ।

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## **Farewell Speech delivered by Hon'ble Shri Justice A. K. Saxena.**

I am extremely grateful to Hon'ble the Chief Justice and the esteemed speakers for the kind words spoken about me. According to wont and usage, the speakers never highlight the shortcomings of a person who is leaving the office, so I do not know whether I am a congruous person for the sentiments expressed by you.

After completion of almost 35 years of service as a Judicial Officer and 4 years as a High Court Judge, I am demitting the office today. I took the oath at swearing-in-ceremony and thereafter, at the time of ovation, I referred a composition of high beauty of a thought of poet Kabirdas and I told that this composition reflects the philosophy of my life.

I was constantly reminded of the oath taken by me and the composition of Kabirdas. I tried to serve the institution to the best of my ability. Now, I am before you and request you to judge me and my life and to decide whether I worked in accordance with the oath and philosophy of life implied in the composition.

I am deeply indebted to Hon'ble the Chief Justice for his guidance. His Lordship takes care of everybody. The High Court of Madhya Pradesh and we all are fortunate enough to have the Chief Justice like Hon'ble Shri Justice Shri A.K. Patnaik. I am grateful for the affection shown to me and my family by Hon'ble the Chief Justice and Mrs. Patnaik.

I am thankful to Brother and Sister Judges for their co-operation extended to me during my tenure as a High Court Judge. I also enjoyed the work of various administrative committees and particularly, the Rule Making Sub-Committee and for that, I am thankful to Hon'ble the Chairman, Co-Chairman and all the members of different committees.

I worked with the members of Jabalpur Bar for more than 11 years in different capacity and I found that the members of Jabalpur Bar are intellectual, labourious and co-operative. The Senior Advocates and senior members of the Bar used to work as a guide and they are the teachers in true sense. It is a matter of pleasure that the younger members of the Bar are taking keen interest in their work. They should always keep in mind that industry is fortune's right hand. They should come out of the shell and try to become pearl of the Bar. I can see the bright future of the Bar in younger generation.

All the Judicial Officers are performing their duties very well in difficult conditions. At this occasion, I must appreciate their work and I congratulate them.

I thank Shri Sharad Shrivastava, Registrar General, all the officers of the Registry and all the employees of the High Court for their assistance extended to me.

I would like to thank my Court Reader Shri Shiv Sahay Singh, Private Secretary Shri Ashish Datta, Personal Assistant Shri Prashant Bagjilewale, Stenographer Shri Shiv Narayan Biswal and Jamadar Shri Narendra Dubey, who really worked very hard with me.

I am also thankful to my personal staff who served me very well during my stay at Jabalpur.

I wish to thank Dr. A.C. Sonkar who was always ready to extend his assistance. He is really very helpful.

If I had hurt the feelings of anybody, I do hope you will forgive me.

May the glory and fortune of the Institution last long.

Thanks,

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*Short Note*  
(34)

K.S. Chauhan, J

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

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

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

*Ramesh Tamrakar, for the applicants.*

*Ramesh Shukla, Dy.G.A., for the non-applicant/State.*

**\*Cr.R. No.783/1999 (Jabalpur), D/- 5 January, 2009.**

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## NOTES OF CASES SECTION

### Short Note

(35)

Ajit Singh, J

KANHAIYALAL & anr.

Vs.

STATE OF M.P.

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

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

Akshat Tiwari, for the appellants.

Pramod Choubey, G.A., for the respondent.

\*Cr.A. No.613/1999 (Jabalpur), D/- 6 January, 2009.

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**SETH RAMDAYAL JAT Vs. LAXMI PRASAD**

12. In this case, from perusal of the impugned order, it appears that the applicant could not appear on the date of appearance in the case fixed for evidence and on the previous date also he remained absent. Due to this, the trial of the case could not be proceeded due to want of identification and therefore, the court rejected the application for exemption of appearance and issued the non-bailable warrant.

13. It appears that the applicant purposely avoided to appear in the court so that the case may be adjourned at evidence stage. In this case, the accused was already granted bail and he did not appear before the court therefore, the court issued non-bailable warrant which is distinguishable on the fact that when the court takes cognizance and issues non-bailable warrant of arrest to appear before the court in that case he has apprehension for arrest and was not on bail prior to the passing of the order of the court.

14. Hence, in view of the above discussion and relying on the earlier decision of this court in *Yogendra Singh* (supra) in which *Nirbhay Singh* (supra) was discussed, in the present case the applicant was released on bail and thereafter non-bailable warrant was issued by the trial court after forfeiting his bail bonds. He has a remedy to approach the court for recalling the order or may avail other remedy available at law.

15. Therefore, in view of the above discussion, it is not a fit case in which the provision of Section 438 of Cr.P.C is to be extended to the applicant and hence, the application is rejected. However, it is further directed that if the applicant is brought before the court in compliance of the non-bailable warrant, or if he surrenders before the court and moves an application for bail, the court shall dispose of the same on the same day.

16. With such observation, Misc stands dismissed accordingly.

*Petition dismissed.*

I.L.R. [2009] M. P., 1847

SUPREME COURT OF INDIA

*Before Mr. Justice S.B. Sinha & Mr. Justice Dr. Mukundakam Sharma*

15 April, 2009\*

SETH RAMDAYAL JAT

... Appellant

Vs.

LAXMI PRASAD

... Respondent

A. Evidence Act (1 of 1872), Section 43 - *Judgment passed in criminal case - Judgment passed in a criminal case is admissible for a limited purpose - Relying on the basis thereof, civil proceeding cannot be determined, but that would not mean that it is not admissible for any purpose whatsoever.* (Para 15)

**SETH RAMDAYAL JAT Vs. LAXMI PRASAD**

क. साक्ष्य अधिनियम (1872 का 1), धारा 43 - दाण्डिक मामले में पारित निर्णय - किसी दाण्डिक मामले में पारित निर्णय सीमित प्रयोजन के लिए ग्राह्य है - उसके आधार पर विश्वास करके सिविल कार्यवाही अवधारित नहीं की जा सकती, किन्तु इसका यह अर्थ नहीं होगा कि यह किसी भी प्रयोजन के लिए ग्राह्य नहीं है।

**B. Evidence Act (1 of 1872), Section 43 - Judgment - Appellant was convicted on his pleading guilty in criminal case - Appellant admitted in civil proceedings that he had made admission in criminal proceedings - Held - Judgment in a criminal case was not relevant for the purpose of proving civil liability but his admission in civil suit was admissible. (Para 21)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 43 - निर्णय - अपीलार्थी को उसके दाण्डिक मामले में दोष का अभिवचन करने पर दोषसिद्ध किया गया - अपीलार्थी ने सिविल कार्यवाही में स्वीकार किया कि उसने दाण्डिक कार्यवाही में स्वीकारोक्ति की थी - अभिनिर्धारित - दाण्डिक मामले में निर्णय सिविल दायित्व साबित करने के प्रयोजन के लिए सुसंगत नहीं था किन्तु सिविल वाद में उसकी स्वीकारोक्ति ग्राह्य थी।

**C. Limitation Act (36 of 1963), Article 70 - Suit for recovery of jewellery pledged - Jewellery pledged on 02.12.1987 - Notice to return of pledged jewellery received by appellant on 14.05.1998 - Suit filed on 26.06.1998 - Suit within limitation - Appeal dismissed. (Para 23)**

ग. परिसीमा अधिनियम (1963 का 36), अनुच्छेद 70 - गिरवी रखे जेवरातों की वापसी के लिए वाद - जेवरात 02.12.1987 को गिरवी रखे गये - गिरवी रखे जेवरातों की वापसी का सूचनापत्र अपीलार्थी द्वारा 14.05.1998 को प्राप्त किया गया - वाद 26.06.1998 को पेश किया - वाद परिसीमा के भीतर - अपील खारिज।

**Cases referred :**

AIR 1955 SC 566, AIR 1974 Mad 14, AIR 2005 Pat 51, (2004) 1 SCC 438, (2002) 8 SCC 87, AIR 1954 SC 397, (1970) 3 SCC 694, 2009(3) Scale 604, (2005) 4 SCC 370, AIR 2008 SC 1884, (2004) 6 SCC 325, (2006) 2 SCC 269, (2006) 12 SCC 552, (2007) 10 SCC 296, (2008) 7 SCC 85, 2008(9) Scale 144.

**J U D G M E N T**

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

2. What would be the period of limitation for institution of a suit for recovery of 'pledged ornaments' is the question involved herein.

3. It arises in the following factual matrix:

On or about 26.06.1998, the respondent filed a civil suit against the appellant for recovery of certain items of jewellery allegedly pledged with him on 2.12.1987 for the purpose of obtaining loan of a sum of Rs. 7000/-.

On the premise that the appellant had violated the provisions of the Madhya

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Pradesh Money Lenders Act, 1934 in relation to the aforementioned grant of loan, a criminal proceeding was initiated against him, which was marked as Case No. 511 of 1997. In the said criminal case, he admitted his guilt. A fine of Rs. 150/- was imposed on him. The charge was read over to him, which reads as under:

"The charge on you is that before date 29.3.97 complainant Laxmi Prasad was paid borrowed money to you but even after that you were demanding interest at 5%. Your this act is criminal offence under section 3, 4 of Money Lenders Act. Therefore, show cause as to why you should not be held guilty of the said offence."

4. Respondent thereafter, as noticed hereinbefore, filed the aforementioned Civil Suit before the XIVth Civil Judge, Class II, Jabalpur being civil suit No. 4-A/1998 for recovery of the pledged jewellery. The said suit was decreed directing the appellant to return the said jewellery or in the alternative a decree for a sum of Rs. 20,000/-.

5. Aggrieved by and dissatisfied therewith the appellant preferred an appeal thereagainst. The said appeal was allowed by the learned XVIth Additional District Judge, Jabalpur, holding:

(i) The judgment of the criminal court rendered on the basis of the purported admission of guilt made by the appellant was not admissible in evidence.

(ii) An admission of the guilt on the basis of a wrong legal advice is not binding on the appellant.

(iii) The suit was barred in terms of Article 70 of the Limitation Act.

6. The second appeal preferred by the respondent herein has been allowed by the High Court by reason of the impugned judgment.

The High Court formulated the following substantial questions of law:

"1. Whether the suit filed by the appellant was barred by limitation while the suit was filed within 3 years from the date of demand and refusal by the respondent?

2. Whether the admission of guilt in criminal case in respect of some transaction made by respondent is admissible in the present case to the extent of fact that there was transaction between the parties?"

By reason of the impugned judgment, the High Court opined that the suit had been filed within the prescribed period of limitation having been brought within a period of three years from the date of refusal of the demand to return the pledged

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ornaments. The question No. 2 was also determined in favour of the respondent holding that admission of guilt in a criminal case would be admissible in evidence being relevant to the fact in issue.

7. Mr. Anurag Sharma, learned counsel appearing on behalf of the appellant would urge:

(i) The alleged pledge of jewellery having admittedly been made in the year 1987 and the suit filed on 26.06.1998, the same must be held to be barred by limitation.

(ii) No document of pledge having been produced, service of notice by itself cannot give rise to a cause of action for filing a suit for recovery of the pledged ornaments.

8. Mr. Rohit Arya, learned senior counsel appearing on behalf of the respondent, on the other hand, would contend:

(i) in view of Article 70 of the Limitation Act, 1963, the suit has rightly been found to have been instituted within the period of limitation.

(ii) Having regard to the provisions contained in Section 43 of the Indian Evidence Act, the judgment of the criminal court was admissible in evidence.

(iii) In terms of Section 58 of the Indian Evidence Act, things admitted need not be proved. The suit filed by the respondent has rightly been decreed.

9. Before advertng to the rival contentions of the parties raised before us, we may notice that the purported pledge of jewellery was made by the respondent herein for taking a loan of Rs. 7,000/- on 2.12.1987. Appellant indisputably is a money lender. A criminal case for charging excess interest was instituted against him on 29.03.1997. On or about 29.11.1997, he pleaded guilty by reason whereof a fine of Rs. 150/- was imposed on him.

Respondent thereafter served a notice upon the appellant asking him to return the pledged jewellery. As neither the said noticed was replied to nor the jewellery was returned, he filed the suit on 26.06.1998.

10. The cause of action for filing the suit was stated in para 3 of the plaint, which reads as under:

"3. The plaintiff through counsel sent registered notice dated 12.5.98 and demanded the pledged jewels. Still the defendant has not returned the jewels of the plaintiff. Therefore, this suit is being preferred. The aforesaid notice sent by the counsel of the plaintiff was received by the defendant on 14.5.98."

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11. Respondent examined himself as a witness in the suit. He stated that the appellant being his cousin brother, no document was executed. He also testified that in the criminal case, appellant having admitted his crime and pledge of jewellery with him, a fine of Rs. 150/- was imposed and on in default thereof, imprisonment of five days was ordered.

12. Indisputably, the judgment in the criminal case was marked as an exhibit. Appellant also in his deposition stated as under:

"...This is correct that plaintiff filed a complaint against me before police and case was registered. This is also correct that I confessed upon advise from my advocate. This is correct that fine of Rs.150/- was imposed on me in that case. This is correct that I do the money lending."

He admitted that even one Chandra Kumar had borrowed money from him.

It was furthermore admitted by him that he received the notice (Exhibit P1) from the plaintiff but he had not replied thereto.

13. Indisputably, the law relating to the admissibility of a judgment in a criminal proceedings vis-à-vis the civil proceedings and vice-versa is governed by the provisions of the Indian Evidence Act.

14. Section 43 of the Indian Evidence Act reads, thus:

"43. Judgments, etc., other than those mentioned in Sections 40, 41 and 42, when relevant -Judgments, orders or decrees other than those mentioned in Sections 40, 41 and 42 are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant, under some other provision of this Act."

In terms of the aforementioned provision, the judgment in a criminal case shall be admissible provided it is a relevant fact in issue.

Its admissibility otherwise is limited.

It was so held in *Anil Behari Ghosh v. Smt. Latika Bala Dassi and others* [AIR 1955 SC 566] in the following terms:

"The learned counsel for the contesting respondent suggested that it had not been found by the lower appellate court as a fact upon the evidence adduced in this case, that Girish was the nearest agnate of the testator or that Charu had murdered his adoptive father, though these matters had been assumed as facts. The courts below have referred to good and reliable evidence in support of the finding that Girish was the nearest reversioner to the estate of the testator. If the will is a valid and genuine will, there is intestacy in respect of the interest created

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in favour of Charu if he was the murderer of the testator. On this question the courts below have assumed on the basis of the judgment of conviction and sentence passed by the High Court in the sessions trial that Charu was the murderer. Though that judgment is relevant only to show that there was such a trial resulting in the conviction and sentence of Charu to transportation for life, it is not evidence of the fact that Charu was the murderer. That question has to be decided on evidence."

In *Perumal v. Devarajan and others* [AIR 1974 Madras 14], it was held:

"2. Even at the outset, I want to state that the view of the lower appellate court that the plaintiff has not established satisfactorily that the first defendant or the second defendant or both were responsible for the theft is perverse and clearly against the evidence and the legal position. The lower appellate Court refused to rely on Exhibit A-3 which is a certified copy of the judgment in C.C.No. 1949 of 1965. It is true that the evidence discussed in that judgment and the fact that the first defendant had confessed his guilt in his statement is not admissible in evidence in the suit. But it is not correct to state that even the factum that the first and the second defendants were charged under Sections 454, and 380, I.P.C. and they were convicted on those charges could not be admitted. The order of the Criminal Court is, in my opinion, clearly admissible to prove the conviction of the first defendant and the second defendant and that is the only point which the plaintiff had to establish in this case..."

A similar issue is dealt in some details in *Lalmuni Devi and Ors. v. Jagdish Tiwary and Ors.* [AIR 2005 Patna 51] wherein it was held:

"14. Relying on the judgment of the Supreme Court in *Anil Behari Ghosh v. Smt. Latika Bala Dassi and Ors.*, (supra), a Division Bench of this Court in its judgment reported in 1968 BLJR 197, *Mundrika Kuer v. President, Bihar State Board of Religious Trusts, and 8 others*, has laid down to the same effect. Paragraph 7 of the judgment is set out hereinbelow for the facility of quick reference :-

"7. It is true that, if the Board acted capriciously and arbitrarily without any material whatsoever and attempts to administer private property, saying that it is a public religious trust, this Court may have to interfere in appropriate cases; but it cannot be said here that there were no prima facie materials to show that the trust is a public religious trust. The acquittal of the petitioner in the criminal



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case (Annexure-A) was very much relied upon; but it is well settled that acquittal or conviction in a criminal case has no evidentiary value in a subsequent civil litigation except for the limited purpose of showing that there was a trial resulting in acquittal or conviction, as the case may be. The findings of the criminal Court are inadmissible."

15. A judgment in a criminal case, thus, is admissible for a limited purpose. Relying only on or on the basis thereof, a civil proceeding cannot be determined, but that would not mean that it is not admissible for any purpose whatsoever.

16. Mr. Sharma also relies upon a decision of this Court in *Shanti Kumar Panda v. Shakuntala Devi* [(2004) 1 SCC 438] to contend that a judgment of a civil court shall be binding on the criminal court but the converse is not true. Therein it was held:

"(3) A decision by a criminal court does not bind the civil court while a decision by the civil court binds the criminal court. An order passed by the Executive Magistrate in proceedings under Sections 145/146 of the Code is an order by a criminal court and that too based on a summary enquiry. The order is entitled to respect and wait before the competent court at the interlocutory stage. At the stage of final adjudication of rights, which would be on the evidence adduced before the court, the order of the Magistrate is only one out of several pieces of evidence."

With respect, the ratio laid down therein may not be entirely correct being in conflict with a Three-Judge Bench decision of this Court in *K.G. Premshanker vs. Inspector of Police and anr.* [(2002) 8 SCC 87].

17. A civil proceeding as also a criminal proceeding may go on simultaneously. No statute puts an embargo in relation thereto. A decision in a criminal case is not binding on a civil court.

In *M.S. Sheriff & Anr. v. State of Madras & Ors.* [AIR 1954 SC 397], a Constitution Bench of this Court was seized with a question as to whether a civil suit or a criminal case should be stayed in the event both are pending. It was opined that the criminal matter should be given precedence.

In regard to the possibility of conflict in decisions, it was held that the law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. It was held that the only relevant consideration was the likelihood of embarrassment.

If a primacy is given to a criminal proceeding, indisputably, the civil suit must be determined on its own keeping in view the evidence which has been brought on record before it and not in terms of the evidence brought in the criminal proceeding.

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The question came up for consideration in *K.G. Premshanker* (supra), wherein this Court inter alia held:

"30. What emerges from the aforesaid discussion is -- (1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of *res judicata* may apply; (3) in a criminal case, Section 300 CrPC makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein.

31. Further, the judgment, order or decree passed in a previous civil proceeding, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act then in each case, the court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein. Take for illustration, in a case of alleged trespass by A on B's property, B filed a suit for declaration of its title and to recover possession from A and suit is decreed. Thereafter, in a criminal prosecution by B against A for trespass, judgment passed between the parties in civil proceedings would be relevant and the court may hold that it conclusively establishes the title as well as possession of B over the property. In such case, A may be convicted for trespass. The illustration to Section 42 which is quoted above makes the position clear. Hence, in each and every case, the first question which would require consideration is -- whether judgment, order or decree is relevant, if relevant -- its effect. It may be relevant for a limited purpose, such as, motive or as a fact in issue. This would depend upon the facts of each case.

It is, however, significant to notice a decision of this Court in *M/s Karam Chand Ganga Prasad & Anr. etc. v. Union of India & Ors.* [(1970) 3 SCC 694], wherein it was categorically held that the decisions of the civil court will be binding on the criminal courts but the converse is not true, was overruled, stating:

"33. Hence, the observation made by this Court in *V.M. Shah case* that the finding recorded by the criminal court stands superseded by the finding recorded by the civil court is not correct

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enunciation of law. Further, the general observations made in Karam Chand case are in context of the facts of the case stated above. The Court was not required to consider the earlier decision of the Constitution Bench in *M.S. Sheriff* case as well as Sections 40 to 43 of the Evidence Act."

[See also *Syed Askari Hadi Ali Augustine Imam and Anr. v. State (Delhi Admn.) and Anr.* 2009 (3) SCALE 604]

Another Constitution Bench of this Court had the occasion to consider the question in *Iqbal Singh Marwah & Anr. v. Meenakshi Marwah & Anr.* [(2005) 4 SCC 370]. Relying on *M.S. Sheriff* (supra) as also various other decisions, it was categorically held:

"32. Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given."

The question yet again came up for consideration in *P. Swaroopa Rani v. M. Hari Narayana @ Hari Babu* [AIR 2008 SC 1884], wherein the law was stated, thus :

"13. It is, however, well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case."

18. It is now almost well-settled that, save and except for Section 43 of the Indian Evidence Act which refers to Sections 40, 41, and 42 thereof, a judgment of a criminal court shall not be admissible in a civil suit.

19. What, however, would be admissible is the admission made by a party in a previous proceeding. The admission of the appellant was recorded in writing. While he was deposing in the suit, he was confronted with the question as to whether he had admitted his guilt and pleaded guilty of the charges framed. He did so. Having, thus, accepted that he had made an admission in the criminal case, the same was admissible in evidence. He could have resiled therefrom or explained away his admission. He offered an explanation that he was wrongly advised by the counsel to do so. The said explanation was not accepted by the trial court. It was considered to be an afterthought. His admission in the civil proceeding was admissible in evidence.

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20. Section 58 of the Indian Evidence Act reads as under:

"58 - Facts admitted need not be proved

No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings..

Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admission."

In view of the aforementioned provision, there cannot be any doubt or dispute that a thing admitted need not be proved. [See *Vice-Chairman, Kendriya Vidyalaya Sangathan and Another v. Girdharilal Yadav* (2004) 6 SCC 325, *L.K. Verma v. HMT Ltd. and Another* (2006) 2 SCC 269, *Avtar Singh and Others v. Gurdial Singh and Others* (2006) 12 SCC 552, *Gannmani Anasuya and Others v. Parvati Amarendra Chowdhary and Others* (2007) 10 SCC 296].

21. We, therefore, are of the opinion that although the judgment in a criminal case was not relevant in evidence for the purpose of proving his civil liability, his admission in the civil suit was admissible. The question as to whether the explanation offered by him should be accepted or not is a matter which would fall within the realm of appreciation of evidence. The Trial Court had accepted the same. The first appellate court refused to consider the effect thereof in its proper perspective. The appellate court proceeded on the basis that as the judgment of the criminal court was not admissible in evidence, the suit could not have been decreed on the said basis. For the said purpose, the admission made by the appellant in his deposition as also the effect of charge had not been taken into consideration.

We, therefore, are of the opinion that the High Court cannot be said to have committed any error in interfering with the judgment of the first appellate court.

22. So far as the question of the applicability of the period of limitation is concerned, Article 70 of the Limitation Act would be applicable. It reads as under:

| "Description of suit                                                             | Period of limitation | Time from which period begins to run |
|----------------------------------------------------------------------------------|----------------------|--------------------------------------|
| 70. To recover movable property deposited or pawned from a depository or pawnee. | Three years          | The date of refusal after demand."   |

In terms of the aforementioned provision, the period of limitation, thus, begins to run from the date of refusal after demand.

23. Appellant did not respond to the notice issued by the respondent asking him to return the pledged jewellery. The date of receipt of such a notice is 14.05.1998.

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The suit having been filed on 26.06.1998, thus, must be held to have been filed within the prescribed period of limitation.

24. Having regard to the fact that the averments contained in the paragraph 3 of the plaint were not traversed, the same would be deemed to have been admitted by him in terms of Order VIII, Rule 5 of the Code of Civil Procedure.

In *Gautam Sarup v. Leela Jetly* [(2008) 7 SCC 85], this Court held:

"14. An admission made in a pleading is not to be treated in the same manner as an admission in a document. An admission made by a party to the lis is admissible against him proprio vigore."

[See also *Ranganayakamma and Another v. K.S. Prakash (D) By LRs and Others* 2008 (9) SCALE 144].

25. For the reasons aforementioned, there is no merit in this appeal, which is dismissed accordingly. However, in the facts and circumstances of this case, there shall be no order as to costs.

*Appeal dismissed.*

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**I.L.R. [2009] M. P., 1857**  
**SUPREME COURT OF INDIA**

*Before Mr. Justice Dr. Arijit Pasayat & Mr. Justice Asok Kumar Ganguly*  
 15 April, 2009\*

STATE OF M.P.

... Appellant

Vs.

CHUNNILAL @ CHUNNI SINGH.

... Respondent

**A. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xii), Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, Rule 7 - Investigating Officer - Investigation to an offence u/s 3 of Act, 1989 by an officer not appointed in terms of Rule 7 is illegal.** (Para 6)

क. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xii), अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) नियम, 1995, नियम 7 - अन्वेषण अधिकारी - अधिनियम, 1989 की धारा 3 के अन्तर्गत किसी अपराध का ऐसे अधिकारी द्वारा अन्वेषण, जो नियम 7 के निबंधनों के अनुसार नियुक्त नहीं किया गया है, अवैध है।

**B. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xii), Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, Rule 7, Penal Code, 1860, Sections 376 & 506 - Investigating Officer - Order framing**

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*charge quashed by High Court on the ground that offence under Act, 1989 was not investigated by Dy.S.P., but by Sub-Inspector - Held - Offences complained are both under IPC and any of offence enumerated in Section 3 of Act, 1989 - Investigation made by competent police officer in accordance with provisions of Cr.P.C. cannot be quashed for non-investigation of offence u/s 3 of Act, 1989 by a competent police officer - Proceedings shall proceed in appropriate Court for offences punishable under IPC - Appeal allowed.*

(Para 6)

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

## J U D G M E N T

The Judgment of the Court was delivered by DR. ARIJIT PASAYAT, J. :- In this appeal, an interesting point has been raised. A learned Single Judge of the Madhya Pradesh High Court allowed the revision application filed by the respondent (hereinafter referred to as the 'accused') quashing the order framing charge.

2. Background facts in a nutshell are as follows:

On 6.3.2001 a complaint was made to the Police Station, Rampur Gurra by the victim stating that the accused promised her that he will marry her and committed sexual intercourse with her due to which she was carrying a pregnancy of 7 months. But he refused to marry her because she belongs to a lower caste. A criminal case was registered for alleged commission of offence punishable under Sections 376 and 506 of the Indian Penal Code, 1860 (in short the 'IPC') and Section 3(1)(xii) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short the 'Act'). A First Information Report was registered.

According to the appellant, since at that time nobody had joined the post of Deputy Superintendent of Police, Hoshangabad Additional Superintendent of Police authorized S.I. B.S. Parihar to investigate into the case who undertook inspection and recorded the statement of the witnesses. After due verification of the case by the Additional Superintendent of Police challan was submitted to the Chief

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Judicial Magistrate, Hoshangabad. The accused filed objections and written reply was filed by the investigating officer. The basic grievance was that the investigating officer was not authorized to make investigation in the absence of any authorization by the competent authority. The stand taken before the High Court by the investigating officer was that he had been authorized by the competent authority i.e. Additional Superintendent of Police. The learned Chief Judicial Magistrate committed the case to the Court of Sessions. Here again, the only objection of the accused was that the investigation was carried out by an officer who was not competent to do so. Learned Special Judge, (Scheduled Caste and Scheduled Tribes) Hoshangabad passed an order framing the charges against the accused who filed a revision petition under Sections 397 and 401 of the Code of Criminal Procedure, 1973 (in short the 'Code') for quashing the entire criminal proceedings by revision of the order of learned special judge. A reply was filed by the prosecuting agency contending that the investigation was carried out under the supervision of Additional Superintendent of Police since the post of Deputy Superintendent of Police was lying vacant for about 4 months. After verification of the statements of the prosecution witnesses and on being satisfied with the materials collected during investigation the Additional Superintendent of Police prepared the challan and filed the same before the High Court. No prejudice was caused to the accused. The High Court quashed the entire proceedings.

3. Mr. C.D. Singh, learned counsel for the appellant submitted that the approach of the High Court was clearly erroneous. The offence related to both under the IPC and the Act. Therefore, the High Court was not justified in quashing the entire proceedings.

4. Learned counsel for the respondent on the other hand supported the judgment.

5. For appreciating the rival submissions, reference needs to be made to Section 9 of the Act and Rule 7 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (hereinafter referred to as the 'Rules').

Section 9 of the act and Rule 7 of the Rules read as follows:

**"Section 9-Conferment of powers.--** (1) Notwithstanding anything contained in the code or in any other provision of this Act, the State Government may, if it considers it necessary or expedient so to do,-

(a) for the prevention of coping with any offence under this act, or

(b) for any case of class of group of cases under this Act, in any district or part thereof, confer, by notification in the Official Gazette, on any officer of the State Government the powers exercisable by a police officer under the Code in such

**STATE OF M.P. Vs. CHUNNILAL @ CHUNNISINGH**

district or part thereof or, as the case may be, for such case or class or group of cases, and in particulars, the powers of arrest, investigation and prosecution of persons before any Special Court.

(2) All officers of police and all other officers of Government shall assist the officer referred to in Sub-section (1) in the execution of the provisions of this Act or any rule, scheme or order made thereunder.

(3) The provisions of the Code shall, so far as may be, apply to the exercise of the powers by an officer under Sub-section (1).

**Rule 7-Investigating Officer,--** (1) An offence committed under the Act shall be investigated by a Police Officer not below the rank of a Deputy Superintendent of Police. The Investigating Officer shall be appointed by the State Government/Director-General of Police Superintendent of Police after taking into account his post experience sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time.

(2) The Investigating Officer so appointed under Sub-rule (1) shall complete the investigation on top priority within thirty days and submit the report to the Superintendent of Police who in turn will immediately forward the report to the Director General of Police of the State Government.

(3) The Home Secretary and the Social Welfare Secretary to the State Government, Director of Prosecution, the Officer-in-charge of Prosecution and the Director-General of Police shall review by the end of every quarter the position of all investigation done by the Investigating Officer."

6. By virtue of its enabling power it is the duty and responsibility of the State Government to issue notification conferring power of investigation of cases by notified police officer not below the rank of Deputy Superintendent of Police for different areas in the police districts. Rule 7 of the Rules provided rank of investigation officer to be not below the rank of Deputy Superintendent of Police. An officer below that rank cannot act as investigating officer. The provisions in Section 9 of the Act, Rule 7 of the Rules and Section 4 of the Code when jointly read lead to an irresistible conclusion that the investigation to an offence under Section 3 of the Act by an officer not appointed in terms of Rule 7 is illegal and invalid. But when the offence complained are both under the IPC and any of the offence enumerated in Section 3 of the Act the investigation which is being made by a competent police officer in accordance with the provisions of the Code cannot



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be quashed for non investigation of the offence under Section 3 of the Act by a competent police officer. In such a situation the proceedings shall proceed in appropriate Court for the offences punishable under the IPC notwithstanding investigation and the charge sheet being not liable to be accepted only in respect of offence under Section 3 of the Act for taking cognizance of that offence.

7. In the present case there is no denial of the fact that the accusations related to offences under both the Act and the I.P.C. The High Court was therefore not justified in quashing the entire proceedings. The order shall be restricted to the offence under Section 3 of the Act and not in respect of offences punishable under the IPC.

8. The appeal is allowed to the aforesaid extent.

*Appeal allowed.*

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**I.L.R. [2009] M. P., 1861**  
**SUPREME COURT OF INDIA**

*Before Mr. Justice Dr. Arijit Pasayat & Mr. Justice Asok Kumar Ganguly*  
 24 April, 2009\*

**RAM BABU TIWARI**

... Appellant

**Vs.**

**STATE OF M.P. & anr.**

... Respondents

**A. Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) - Cancellation of bail - Considerations - Re-appreciation of evidence as done by Court granting bail is to be avoided, the Court dealing with application for cancellation of bail can consider whether irrelevant materials of a substantial nature were taken into consideration.** (Paras 10 & 12)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) — जमानत का रद्दकरण — विचार — जमानत के रद्दकरण के आवेदन पर कार्यवाही कर रहा न्यायालय यह विचार कर सकता है कि क्या तात्त्विक प्रकृति की असंगत सामग्री को विचार में लेना था, न्यायालय द्वारा जमानत देते समय जैसा साक्ष्य का पुनर्मूल्यांकन किया गया उसे टाला जाना चाहिए।

**B. Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) - Cancellation of bail - Bail cancelled on the ground that co-accused did not oppose application for cancellation - Could not have been a ground to cancel bail granted to appellant - Matter remanded back.** (Para 13)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) — जमानत का रद्दकरण — जमानत इस आधार पर रद्द की गई कि सह-अभियुक्त ने रद्दकरण के आवेदन का विरोध नहीं किया — अपीलार्थी को प्रदत्त जमानत को रद्द करने का आधार नहीं हो सकता था — मामला प्रतिप्रेषित।

**Cases referred :**

(2004) 7 SCC 528, (2001) 6 SCC 338.

**J U D G M E N T**

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

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court, Jabalpur Bench, directing cancellation of bail granted to the appellant.

3. Background facts are as follows:

The present appellant along with two others was arrested in connection with Crime no. 149/2008 registered at Kotwali Sehore, for alleged commission of offence punishable under Sections 307 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC').

Appellant prayed for bail in terms of Section 439 of the Code of Criminal Procedure, 1973 (in short 'the Code'), which was allowed by order dated 27.5.2008 passed by learned 1st Additional Sessions Judge, Sihore. An application for cancellation for bail was filed by the present respondent no.2.

Prosecution version is that in the wake of a property dispute present appellant had hired with the assistance of one Deepak Harnath Singh, respondent nos. 2 and 3 for killing Shyam Tiwari who is his real brother. The shot fired by the present appellant hit one Ravi @ Rinku in his neck.

The cancellation was prayed on the following grounds:

(a) There is specific allegation against appellant that it was he who had fired the shot.

(b) The respondent nos. 2 and 3 have consistent criminal antecedent.

(c) After being released on bail, appellant by making a telephonic call to Nikhlesh Tiwari, nephew of Shyam Tiwari, had threatened to kill him in case he does not resile from his case diary statement.

(d) Co-accused Deepak Harnath Singh is still absconding.

Accordingly, the High Court cancelled the bail granted. It was noted that since the other co-accused have not opposed the prayer for cancellation of bail that was also a factor so far as the appellant is concerned.

4. Learned counsel for the appellant submitted that no reason has been indicated to cancel the bail. The parameters for grant of bail and for cancellation of bail operate in different fields. Therefore, the High Court on the irrelevant reason that

## RAM BABU TIWARI v. STATE OF M.P.

co-accused did not oppose the prayer should not have cancelled the bail granted to the appellant.

5. Learned counsel for the respondent no.2, on the other hand, supported the order.

6. The parameters for grant of bail and cancellation of bail are different. There is no dispute to this position. But the question is if the trial Court while granting bail acts on irrelevant materials or takes into account irrelevant materials whether bail can be cancelled. Under the scheme of the Code the application for cancellation of bail can be filed before the Court granting the bail if it is a Court of Sessions, or the High Court.

7. This Court in *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Anr.* (2004 (7) SCC 528), in para 11 noted as follows:

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See *Ram Govind Upadhyay v. Sudarshan Singh* (2002 (3) SC 598) and *Puran v. Rambilas* (2001 (6) SCC 338).

8. It was also noted in the said case that the conditions laid down under Section 437 (1)(i) are sine qua non for granting bail even under Section 439 of the Code.

9. In para 14 it was noted as follows:

"14. We have already noticed from the arguments of learned counsel for the appellant that the present accused had earlier made

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seven applications for grant of bail which were rejected by the High Court and some such rejections have been affirmed by this Court also. It is seen from the records that when the fifth application for grant of bail was allowed by the High Court, the same was challenged before this Court and this Court accepted the said challenge by allowing the appeal filed by the Union of India and another and cancelled the bail granted by the High Court as per the order of this Court made in Criminal Appeal No. 745 of 2001 dated 25-7-2001. While cancelling the said bail this Court specifically held that the fact that the present accused was in custody for more than one year (at that time) and the further fact that while rejecting an earlier application, the High Court had given liberty to renew the bail application in future, were not grounds envisaged under Section 437(1)(i) of the Code. This Court also in specific terms held that the condition laid down under Section 437(1)(i) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail."

10. Even though the re-appreciation of the evidence as done by the Court granting bail is to be avoided, the Court dealing with an application for cancellation of bail under Section 439(2) can consider whether irrelevant materials were taken into consideration. That is so because it is not known as to what extent the irrelevant materials weighed with the Court for accepting the prayer for bail.

11. In *Puran v. Rambilas and Anr.* (2001 (6) SCC 338) it was noted as follows:

"11. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear

**RAMBABU TIWARI vs. STATE OF M.P.**

by this Court in *Gurcharan Singh v. State (Delhi Admn.)*. In that case the Court observed as under: (SCC p.124, para 16)

"If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court."

12. The perversity as highlighted in *Puran's case* (supra) can also flow from the fact that as noted above, irrelevant materials have been taken into consideration adding vulnerability to the order granting bail. The irrelevant materials should be of a substantial nature and not of a trivial nature. It is nature of the acts which are to be considered. By way of illustration, it can be said that the accused cannot take a plea while applying for bail that the person whom he killed was a hardened criminal. That certainly is not a factor which can be taken into account.

13. The order of the High Court is very sketchy. The High Court has not considered the relevant aspect in detail. Only because the co-accused did not actually oppose the prayer for cancellation of bail, that could not have been a ground to cancel bail granted to the appellant.

14. In the circumstances we set aside the impugned judgment and remit the matter to the High Court for fresh consideration. We make it clear that we have not expressed any opinion on the merits of the case. The High Court shall examine the matter afresh keeping in view the parameters indicated above. The appeal is accordingly disposed of.

*Appeal disposed of.*

**RATAN SINGH Vs. STATE OF M.P.**

I.L.R. [2009] M. P., 1866

**SUPREME COURT OF INDIA***Before Mr. Justice Dr. Arijit Pasayat & Mr. Justice Asok Kumar Ganguly*

24 April, 2009\*

**RATAN SINGH**

Vs.

... Appellant

**STATE OF M.P. & anr.**

... Respondents

**Penal Code (45 of 1860), Section 307, Criminal Procedure Code, 1973, Section 482 - Attempt to murder - Quashing of charge - To justify conviction u/s 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted - Court has to see whether the act, irrespective of its result, was done with intention or knowledge and under circumstances mentioned in Section - Intention to kill or knowledge that death will be caused is a question of fact - Injury caused by accused was simple or minor will not by itself rule out application of Sec. 307 - Order quashing charge not sustainable - Appeal allowed.** (Paras 5, 6 & 9)

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

**Cases referred :**

(1983) 2 SCC 28, (2004) 3 SCC 793, JT 2004(2) SC 348, (2005) 5 SCC 554, (2008) 11 SCC 523, AIR 1965 SC 843.

**J U D G M E N T**

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

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court allowing the petition filed by respondent no.2. The High Court by the impugned order accepted the petition filed under Section 482 of the Code of Criminal Procedure, 1973 (in short the 'Code'). Respondent no.2 had filed the petition questioning framing of charges against him along with co-accused for offence punishable under Sections 307, 148, 323 read with Section 149, 307 read with Section 149, 341 and 294 of the Indian Penal Code, 1860 (in short the 'IPC'). The petition was filed primarily on two grounds. One was that

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the present respondent no.2 had suffered injuries in the incident which admittedly had happened at two different places at a distance of 7 kms. from each other and, therefore, the case was falsely foisted. The other was that injuries were simple in nature and no injury was found on the vital part of the body and, therefore, Section 307 read with Section 149 IPC has no application. The High Court accepted the latter submissions and held that framing of charge for offence punishable under Section 302 or 307 read with Section 149 IPC is an abuse of process of court.

3. Learned counsel for the appellant submitted that the scope and ambit of Section 307 has not been kept in view. The stand was supported by learned counsel for the State. Learned counsel for the respondent no.2, on the other hand, supported the judgment.

4. It is to be noted that the alleged offences are of very serious nature. Section 307 relates to attempt to murder. It reads as follows:

"Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to (imprisonment for life), or to such punishment as is hereinbefore mentioned."

5. To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

6. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The Section

**RATAN SINGH V. STATE OF M.P.**

makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.

7. This position was highlighted in *State of Maharashtra v. Balram Bama Patil and Ors.* (1983 (2) SCC 28), *Girija Shanker v. State of Uttar Pradesh* (2004 (3) SCC 793), *R. Parkash v. State of Karnataka* (JT 2004 (2) SC 348) and *State of M.P. v. Saleem @ Chamaru and Anr.* (2005 (5) SCC 554) and, *State of Madhya Pradesh v. Imrat and Anr.* 2008 (11) SCC 523.

8. In *Sarju Prasad v. State of Bihar* (AIR 1965 SC 843) it was observed in para 6 that the mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not by itself sufficient to take the act out of the purview of Section 307.

9. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 IPC. The determinative question is intention or knowledge, as the case may be, and not nature of the injury. The basic differences between Sections 333 and 325 IPC are that Section 325 gets attracted where grievous hurt is caused whereas Section 333 gets attracted if such hurt is caused to a public servant.

10. Section 307 deals with two situations so far as the sentence is concerned. Firstly, whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and secondly if hurt is caused to any person by such act the offender shall be liable either to imprisonment for life or to such punishment as indicated in the first part i.e. 10 years. The maximum punishment provided for Section 333 is imprisonment of either description for a term which may extend to 10 years with a liability to pay fine.

11. In view of what has been stated above, the impugned order of the High Court is clearly unsustainable. The scope of interference under Section 482 of the Code at the present juncture as was done by the High Court is clearly unsustainable. The appeal is accordingly allowed. It is made clear that we have not expressed any opinion on merits of the case and this appeal is being decided keeping in view the parameters relating to exercise of power under Section 482 of the Code.

*Appeal allowed.*



**GREAT GALLEON LTD. Vs. UNION OF INDIA**

I.L.R. [2009] M. P., 1869

**FULL BENCH***Before Mr. Justice Dipak Misra, Mr. Justice K.K. Lahoti &  
Mr. Justice Rajendra Menon*

19 February, 2009\*

**GREAT GALLEON LTD. & ors.**

... Appellants

**Vs.****UNION OF INDIA & anr.**

... Respondents

**Constitution, Article 226 - Suppression of material fact - First W.A. withdrawn stating that Service Tax due already deposited so it become infructuous - Court permitted for withdrawal with liberty to approach appropriate forum - Second W.A. filed in a quite different manner suppressing that order was challenged previously in W.P. and order of CESTAT was modified and appellant was directed to deposit amount - Held - Liberty to approach appropriate forum would not include filing second W.A. - Effort has been made to reiterate the grievance in different manner unknown to law and the same is nothing but abuse of process of Court - Since second W.A. is not maintainable - Reference need not be answered - W.A. dismissed.**  
(Paras 37 to 39, 41 & 42)

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

**Cases referred :**

1917 KB 486, 1953 SCR 1009, 1964(3) SCR 480, AIR 1983 SC 1015, (1994) 1 SCC 372, (1996) 5 SCC 312, (2004) 7 SCC 166, (2006) 3 SCC 100, (2007) 8 SCC 449, (2007) 10 SCC 635, 2008 AIR SCW 932, (2008) 1 SCC 560, (2008) 1 SCC 650, 2008 AIR SCW 1215, (1987) 1 SCC 5, (2008) 1 SCC 494.

*A.M. Mathur with Ashutosh Upadhyay & Sanjay Agrawal, for the appellants.*

*Shekhar Sharma, for the respondents.*

## GREAT GALLEON LTD. V. UNION OF INDIA

## O R D E R

The Order of the Court was delivered by DIPAK MISRA, J. :- Questioning the defensibility and the legal substantiality of the order dated 15-11-2006 passed by the learned Single Judge in W.P. No.4641/06, the present writ appeal was filed with a prayer to set aside the same. That apart, it was also mentioned in the memorandum of appeal that the writ appeal has been filed to refer the matter to a larger bench for consideration under Rule 12, Chapter I of the M.P. High Court Rules & Orders in respect of the following questions:

*"(1) Whether in view of the definition of 'manufacture' in Section 2(14) of the M.P. Excise Act, 1950 and the license issued to manufacturer in Form CS-1 for supply of country liquor in sealed bottles is to be awarded only to the distilleries who are producers of rectified spirit under the provisions of M.P. Country Spirit Rules, 1995 and the distillers are given the license to manufacture country spirit by colouring and flavouring at the manufacturing warehouse and the manufacturing warehouse has been defined as a bonded liquor warehouse wherein rectified spirit for manufacturing of country liquor is received, stored, blended, reduced, bottled at issue strength, sealed and issued to retailers license or storage warehouse, the bottling activity is not a separate activity, but part of manufacturing activity and is not covered by "packaging activity" as defined in Section 65(76g) of the Finance Act, 2005 read with definition of "taxable service" in Section 65 (105) (zzzf) of the Service Tax Act.*

*(2) Whether the decision in the case of Som Distilleries (Supra) in para 11, that bottling is a part of manufacturing process. No liquor can be supplied without bottling and, therefore, it was held that in fact, bottling is a part of manufacturing process. 'Bottle' has been defined u/s. 2(2) of the Act of 1915, while another Division Bench in the case of Vindhyachal Distilleries (Supra) has held that bottling and sealing charges are not included in manufacturing process and therefore, they are covered by the definition of "packaging activity" in Finance Act, 2005. Which of the two decision is correct?*

*(3) Whether there is a service provider and service receiver are different persons, no service tax is leviable under*

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*Section 65 (105) (zzzf) of the Service Tax Act. Here in this case, it is the distiller who undertakes the activity of bottling and this activity is done under the control of distiller. There may be two different departments of distillation and bottling, but the person undertaking both activities is one i.e. the distiller. In such circumstances, the decision in the case of Vindhyachal Distilleries Ltd. (supra) does not lay down correct law.*

Be it noted, the appeal was presented on 23-8-07.

2. The appeal was listed for admission on 21-9-07 and it was admitted for hearing. On 22-11-07, a Division Bench of this Court, on the basis of an application filed forming the subject-matter of I.A. No.13536/07, impleaded the appellants No.2 and 3 in the writ appeal.

3. After such impleadment, the Division Bench proceeded to state as follows:

*"The question that has to be decided in this appeal is whether bottling of liquor amounts to manufacture or only amounts to packaging activity.*

*In a judgment delivered in Som Distilleries & Breweries Pvt. Ltd. vs. State of M.P. and another, (1997)1 J.L.J. 319, a Division Bench of this Court while upholding a notification issued by the State Government of Madhya Pradesh under the M.P. Excise Act 1995, held that the State is competent to legislate because bottling is a part of manufacturing process.*

*But we also find that in M/s Vindhyachal Distilleries Pvt. Ltd. Vs. State of M.P. and others, another Division Bench of this Court has delivered the judgment on 29-4-2006, holding that bottling of liquor is a packaging activity as defined in Section 65(76-b) of the Finance Act, 2005, on which service tax is payable.*

*On a reading of Judgment dated 29-4-06 of the Division Bench in M/s Vindhyachal Distilleries Pvt. Ltd. vs. State of M.P. and others, we find that the Division Bench has elaborately discussed the provisions of the Central Excise Act 1944 and the provisions of the Finance Act, 2005, but has not discussed the entries List I and List II of Seventh Schedule of the Constitution of India under which the excise duty and service tax are levied by the Union Legislature and the State Legislature.*

*Under Entry 84 of List I of Seventh Schedule of the*

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*Constitution, duties of excise can be levied by Parliament on goods manufactured or produced in India but not on alcoholic liquors for human consumption. This is because under Entry 51 of List II of Seventh Schedule of the Constitution, duties of excise on manufacture or production of alcoholic liquors for human consumption in the State can be levied only by the State Legislature of that State. There is no specific Entry in List I of Seventh Schedule providing for levy of service tax by the Parliament. But Entry 97 of List I of Seventh Schedule is clear that power of Parliament to levy tax extends the matters which are not mentioned either List II or List III and it is under this Entry that Parliament has power to levy service tax. Since the manufacture or production of alcohol for human consumption is a matter which has been mentioned in Entry 51 of List II of Seventh Schedule in respect of which the State Legislature has got power to levy excise, Parliament cannot levy service tax on manufacture or production of alcohol for human consumption.*

*Thus, if bottling of liquor is held to be manufacture of liquor, excise duty is payable on such bottling of liquor under the State Excise Act but if bottling of liquor is held to be not manufacture of liquor but only a packaging activity, then the service tax is payable under the Finance Act, 2005.*

*These aspects have not been considered by the Division Bench in the judgment delivered on 29-3-06 in M/s Vindhyachal Distilleries Pvt. Ltd. vs. State of M.P. and others and, therefore, we direct that the matter be placed before the Chief Justice for referring the following question to a Larger Bench.*

*"Whether bottling of liquor amounts to manufacture of liquor or only packaging so as to attract the service tax ?"*

On the basis of the aforesaid order, the matter has been placed before us.

4. When the matter was taken up for hearing, Mr. Shekhar Sharma, learned standing counsel for the Union of India raised a preliminary objection that regard being had to the factual matrix, the Full Bench need not dwell upon the reference made by order dated 22-11-07. He has filed an objection with regard to the maintainability of the writ appeal and making the same as edifice and foundation propounded that the reference need not be answered as the writ appeal deserves to be dismissed.

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5. Mr. A.M. Mathur, learned Senior Counsel, being assisted by Mr. Ashutosh Upadhyay and Mr. Sanjay Agrawal, learned counsel for the appellants filed, a synopsis on behalf of the appellants to show that it is incumbent on the part of the Full Bench to answer the reference without adverting to the maintainability of the appeal inasmuch as that has to be dealt with by the Division Bench. The learned counsel for the parties have commended us to a host of decisions in support of their respect rivalised contentions. Keeping in view the preliminary objection raised by Mr. Shekhar Sharma and the resistance put forth by Mr. A.M. Mathur, learned senior counsel, it was thought apposite to advert to the preliminary objection, the same being a vital one, in the first instance. Hence, we proceed to delineate on that aspect.

6. The present appellants, who are engaged in the manufacture and sale of different kinds of liquor, preferred W.P. No.4641/06 under Articles 226 and 227 of the Constitution of India assailing the show cause notices dated 23-02-06 issued by the Excise Commissioner, Motimahal Gwalior and the order dated 2-9-05 passed by the Commissioner, Customs and Excise. The said notices and the orders were challenged as service tax was imposed pursuant to the provisions contained in the Finance Act, 2005.

7. The learned Single Judge took note of the fact that identical show cause notices and the orders imposing service tax were issued to similarly situate persons in W.P. No.2346/06 (*M/s Vindhyachal Distilleries Pvt. Ltd. vs. State of M.P. and others*) and a Division Bench of this Court by order dated 29-4-2006 had expressed the opinion that the said service tax is recoverable from the service provider under Section 65 (76b) the provisions of the Finance Act on the packaging activities as inserted by Finance Act 2005 and further service provider can pass on the liability to the retail contractors and accordingly dismissed the writ petition in limine.

8. Being dissatisfied with the order passed in the writ petition, M/s Associated Alcohols & Breweries Ltd., Indore and two others filed W.A. No.718/06. When the said appeal was pending, I.A. No.3540/07 was filed seeking permission for withdrawal of the appellant No.3, namely, Gwalior Distilleries Ltd., from this appeal. It is imperative and necessitous to reproduce the contents of the said application:

*"01. That, the appellant No.3 (Gwalior Distilleries Ltd.) has filed this writ appeal along -with appellants No.1 and 2 against the imposition of service tax and the recovery thereof by the respondent No. 1.*

*02. That, during the pendency of the writ appeal, the appellant no.3 has deposited the service tax recoverable along with the penalty and interest vide Form TR-6 on 20-03-07. The copy of Form TR-6 is appended herewith the application.*

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03. That, as the amount has already been deposited, no cause of action remains to be adjudicated by this Hon'ble Court vis-a-vis this appellant no. 3 in this writ appeal. The writ appeal in respect of appellant No. 3 has thus become infructuous.

04. That, the appellant no. 3 seeks kind permission of this Hon'ble Court to withdraw from the present writ appeal and may further be permitted to pursue any appropriate remedy available to the appellant No. 3 before the competent authority.

05. That the appellant No. 3 is submitting an affidavit in support of this application.

PRAYER

It is, therefore, humbly prayed that this application may kindly be allowed and this Hon'ble Court may graciously be pleased to order and permit appellant No. 3 to withdraw from this writ appeal, in the interest of justice."

(Emphasis supplied)

9. The W.A. No.718/06 was listed on 18-7-07. The Division Bench, upon hearing the learned counsel for the parties, passed the following order:

"18-07-07"

Shri S.C. Bagadia, Senior Advocate with Shri D.K. Chhabra, Advocate for the appellants.

Shri V. K. Zelawat, Assistant Solicitor General for the respondent No. 1.

Shri A.S. Kubumbale, Additional Advocate General with Ms. Mamta Shandilya, Advocate for the respondent No.2.

Learned senior counsel for the appellants submits that though I. A. No. 3540/07 had been filed for seeking permission for withdrawal of appellant No. 3 from this appeal, he has instructions from all the appellants for withdrawal of this appeal.

Accordingly, the appeal is dismissed as withdrawn. It is however, made clear that the appellants shall be at liberty to approach such other Forum or seek remedy as permissible in law."

(underlining is ours)

10. Thereafter, the present appeal was filed for setting aside the order dated 15.11.2006 and seeking reference to a larger bench.

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11. At this juncture, it is requisite to state certain other facts as they are absolutely essential for proper appreciation of the preliminary objection. While the writ petition i.e. W.P. No.4641/06 was pending, a reply to the show cause was filed before the Commissioner, Central Excise on 27-10-06 and thereafter, the Commissioner, Customs and Central Excise, Indore passed an order dated 28-11-06 confirming the recovery of service tax and the penalty. Being dissatisfied with the said order, the appellants preferred an appeal on 22-02-07 before the Customs & Excise Appellate Tribunal, New Delhi [for short the 'CEAT']. Along with the appeal, an application under Section 35-F of the Central Excise Act was filed for dispensing with the pre-deposit. The tribunal dismissed the said application on 19-6-07. How the said facts have been projected is revealable from paragraphs 28 and 29 of the memorandum of the present appeal. They read as under:

*"28. That, the appellant wanted to challenge the order dated dismissing the stay application u/s 35-F of the Act passed by the Tribunal before this Hon'ble Court. As in the "writ petition No.718/06. the appellant had challenged both letter dated 9-9-05 issued by the Commissioner, Central Excise as well as the show -cause notice dated 23-2-06 issued by the Commissioner, Central Excise, the appellant could not challenge the order dated 19-6-07 before the learned Single Judge because the show-cause notice dated 23-2-06 had been challenged along with order/letter dated 9-9-06 in W.A. No. 718/06, therefore, the appellant withdrew the W.A. No.718/06 on 18-7-07 with liberty. A copy of the said order is filed and marked as Annexure-A/6*

*29. That, the appellant challenged order of the tribunal dated 17-5-07 before the learned Single Judge of this Court by W.P. No.4160/07 and W.P. No.4467/07. The said petition was disposed of by the learned Single Judge of this Court on 1-8-07, a copy of which is filed and marked as Annexure-A/7. Learned Single Judge permitted the appellants to deposit 50% of the demanded tax up to 31-8-07. Another part of the demanded amount was also dismissed by order dated 19-6-07 (same order and it was challenged in W.P. No.4467/07 which was also disposed of by order dated 10-8-07, Annexure-A/8."*  
(Underlining is ours)

12. At this juncture, it is apposite to mention what was exactly challenged in W.P. No.4160/07. The particulars of the order against which the petition was made read as under:

*"By this petition petitioner is challenging the order*

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dated 19-6-07 (Annexure-P/8) passed by the respondent No. 1, Customs, Excise & Service Tax Appellate Tribunal, New Delhi in application No. ST/STAY/491/2007 in-Service Tax Appeal No. ST/98/07."

13. The learned Single Judge has also referred to the order dated 19-6-07 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT). In the said case, the learned Single Judge passed the following order:

*"Shri A.M. Mathur, learned Senior Counsel, appearing for the petitioner company states that as a matter of fact the petitioner company is a sick company and the proceedings are already pending for its restructure/rehabilitation before the BIFR. The learned Senior Counsel states that at this stage petitioner-company is ready to make a deposit of 50% of the demanded tax amount, which is Rs. 82,00,000/-. Shri Mathur, further states that out of Rs. 82,00,000/- approximately Rs. 9,00,000/- has already been deposited by the petitioner company.*

*The offer made by Shri A.M. Mathur, under the facts and circumstances of the case, and also keeping in view the fact that the petitioner company is a sick company is very fair.*

*After hearing learned counsel for the parties and taking into consideration the offer made by the learned Senior Counsel, I deem it appropriate to direct that if the petitioner company makes a total deposit of Rs. 41,00,000/- (including the amount already deposited) then the Tribunal should be directed to hear the appeal filed by the petitioner-company.*

*Consequently, the present petition is disposed of with a direction that if the petitioner company deposits the total amount of Rs. 41,00,000/- (including the amount of approximately 9,00,000/- deposited by the petitioner company) then Tribunal (CESTAT), shall hear the appeal filed by the petitioner company in accordance with law. The amount, as directed by this Court, shall be deposited by the petitioner company on or before August 31, 2007."*

*(Emphasis supplied)*

14. In W.P. No. 4467/2007, the learned single Judge has passed the following order:

*"The petitioner company is aggrieved against an order dated June 19, 2007 passed by Customs, Excise & Service Tax Appellate Tribunal (C.E.S.T.A.T.), whereby the petitioner*



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company has been required to deposit the entire amount of service tax which is claimed to be due and recoverable from it, before adjudication of the appeal filed by the company before Tribunal.

Shri A.M. Mathur, learned Senior counsel, appearing for the petitioner company states that as a matter of fact the petitioner company is a sick company and the proceedings are already pending for its restructure/rehabilitation before B.I.F.R. The learned Senior counsel states that at this stage petitioner company is ready to make a deposit of 50% of the demanded tax amount, which is Rs. 29,00,000/-.

The offer made by Shri A.M. Mathur, under the facts and circumstances of the case, and also keeping in view the fact that the petitioner company is a sick company, is very fair.

After hearing learned counsel for the parties and taking into consideration the offer made by the learned Senior counsel, I deem it appropriate to direct that if the petitioner company makes a total deposit of Rs.15,00,000/- then the Tribunal should be directed to hear the appeal filed by the petitioner company.

Consequently, the present petition is disposed of with a direction that if the petitioner company deposits the total amount of Rs.15,00,000/- then Tribunal (C.E.S.T.A.T.) shall hear the appeal filed by the petitioner company in accordance with law. The amount, as directed by this Court, shall be deposited by the petitioner company on or before August 31, 2007.

The present petition is disposed of with the aforesaid liberty and directions” (Emphasis supplied)

15. From the aforesaid, it is quite luminescent that the order dated 19.6.2007 was assailed before the writ court and there was modification of the order of the tribunal as regards the pre-deposit. As is evincible from paragraphs 28 and 29 of the memorandum of appeal, the said facts have not been correctly stated and, in fact, put forth equivocally as if determined to yoke a confusion.

16. Regard being had to the exposition of facts in the memorandum of appeal and the conduct of the appellants, it is to be determined whether this Court should answer the reference or put an end to the appeal at this stage being not tenable as the filament of the lis has really hung loose and everything has fallen asunder. In this context, we think it apt to refer to certain authorities in the field.

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17. In Halsbury's Laws of England, 4th Edn. Vol. 16 in paragraph 1305, it has been stated thus:

*"1305. He who comes into equity must come with clean hands. A court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper. This was formerly expressed by the maxim 'he who has committed iniquity shall not have equity', and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation, or where the plaintiff sought to enforce a security improperly obtained, or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money. Later it was said that the plaintiff in equity must come with perfect propriety of conduct, or with clean hands. In application of the principle a person will not be allowed to assert his title to property which he has dealt with so as to defeat his creditors or evade tax, for he may not maintain an action by setting up his own fraudulent design."*

18. In Story's Equity Jurisprudence, it has been expressed as follows:

*"It is one of the fundamental principles upon which equity jurisprudence is founded is that before a complainant can have a standing in court, he must show that not only has he a good and meritorious cause of action, but also he must come to court with clean hands. He must be frank and fair with the Court and nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the Court."*

19. In Pomeroy's Equity Jurisprudence the learned author has stated thus:

*"The maxim of equity says that whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the Court will be shut against him in limine, the Court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."*

In the said book, it has been further observed:

*"While a court of equity endeavours to promote and enforce justice, good faith, uprightness, fairness and conscientiousness on the part of the parties who occupy a*

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*defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies. This fundamental principle is expressed in the maxim - 'he who comes into a Court of equity must come with clean hands', and although not the source of any distinctive doctrines, it furnished a most important and even universal rule affecting the entire administration of equity jurisprudence as a system of remedial rights."*

20. In *Daniel's Chancery Practice*, 3rd Edn., 1218, the following principle has been laid down:

*"It is a general rule illustrated by an abundance of cases that wherever a party by fraud, accident, mistake or otherwise has obtained an advantage in proceedings in a Court of ordinary jurisdiction which must necessarily make that Court an instrument of injustice, a Court of Equity will interfere to prevent a manifest wrong by restraining the party whose conscience is thus bound from using the advantage he has gained."*

21. In *The King v. The General Commissioners For The Purpose Of The Income Tax Acts For The District of Kensington*, 1917 KB 486, the Bench found that the rule was granted upon an affidavit which was not candid and did not fairly state the facts but stated them in such a way as to mislead and deceive the Court. It was held by their Lordships that there is power inherent in the Court, in order to protect itself and prevent an abuse of its process, to discharge the rule nisi and refuse to proceed further with the examination of the merits. Their Lordships, while dealing with the merits of the case, discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to the application.

22. In *Namdeo Lokman Lodhi v. Narmadabai and others*, (1953) SCR 1009, it has been opined that it is axiomatic that the courts must apply the principles of justice, equity and good conscience to a transaction even though the statutory provisions are not made applicable to these transactions. It is a maxim of equity that a person who comes in equity must do equity and must come with clean hands.

23. In *Rajabhai Abdul Rehman Munshi v. Vasudev Dhanjibhai Mody*, (1964) 3 SCR 480, their Lordships observed that a party who approaches the Court invoking exercise of the jurisdiction of the Court under Article 136 of the Constitution must come with clean hands and when a deliberate attempt had been made in the petition for special leave to appeal withholding the facts and an erroneous impression has been created, the grant of special leave must be vacated.

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24. In *Welcome Hotel and Others v. State of Andhra Pradesh and Others*, AIR 1983 SC 1015, a two-Judge Bench of the Apex Court expressed the view that when a party obtains ex parte stay suppressing material fact, he is not entitled to any consideration at the hands of the Court.

25. In *S.B. Noronah (Smt.) v. Union of India and Others*, (1994) 1 SCC 372, it has been held as under:

*"4. Existence of constitutional right cannot be disputed. But one of the well-established principles of invoking extraordinary jurisdiction is to approach the Court with clean hands and honest conscience. One cannot abuse the process of Court and yet claim its protection. Since, the Bench revoking the leave, found that the petitioner had obtained interim order by suppression of facts, it would not be proper on our part to grant any indulgence to such a litigant."*

(Emphasis supplied)

26. In *J.H. Patel etc. v. Subhan Khan, etc.*, (1996) 5 SCC 312, it has been opined by their Lordships that it is not merely a question of equity but a question of principle that a person who deliberately and designedly fails to disclose information within his special knowledge and fails to produce material in that behalf thereby virtually engineering the rejection of his nomination cannot be permitted to raise a fresh ground which would adversely affect the opposite party. A party who does not come to court with clean hands cannot seek such an indulgence.

27. In *S.J.S. Business Enterprises (P) Ltd. vs. State of Bihar and Others*, (2004) 7 SCC 166, it has been held as under:

*"The suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. The rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the court, whatever view the court may have taken."*

28. The aforesaid principle has been reiterated in *Mayor (H.K.) Ltd. and Others v. Owners & Parties, Vessel M.V. Fortune Express and Others*, (2006) 3 SCC 100.

29. In *Prestige Lights Ltd. v State Bank of India*, (2007) 8 SCC 449 it has been held as under:

*"33. ....The High Court is exercising discretionary and*

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extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a court of law is also a court of equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the writ court may refuse to entertain the petition and dismiss it without entering into merits of the matter." (Underlining is ours)

Thereafter, their Lordships proceeded to state as follows:

"35. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a writ court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppress relevant materials or is otherwise guilty of misleading the court, the court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

(Emphasis supplied)

30. In *Raj Kumar Soni and Another v. State of U.P. And Another*, (2007)10 SCC 635, it has been ruled thus:

"11..... It is a fundamental principle of law that a person invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India must come with clean hands and must make a full and complete disclosure of facts to the Court. Parties are not entitled to choose their own facts to put forward before the Court. The foundational facts are required to be pleaded enabling the Court to scrutinise the nature and content of the right alleged to have been violated by the authority.

12. The appellants in this case failed to establish that they have lawfully secured allotment of land. It is the duty cast upon the appellants to plead and establish that the order of allotment/grant by the Sub-Divisional Officer in favour of their predecessor-in-title created any legal right and

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*also further establish the transfer of land in their favour has been validly made by the Sub-Divisional Officer. In such view of the matter we are of the opinion, justice has been done in the matter and the High Court rightly refused to resurrect or resuscitate the order of the Sub-Divisional Officer which is unenforceable in law."* (Emphasis supplied)

31. In *Food Corporation of India and Another v. M/s Seil Ltd. and Others*, 2008 AIR SCW 932, the Apex Court has held that a writ Court exercises its power of review under Article 226 of the Constitution of India itself. While exercising the said jurisdiction, it not only acts as a Court of law but also as a court of equity. We have referred to the aforesaid decision only to highlight the principle of equity can be applied in judicial review under Article 226 of the Constitution.

32. In *Udyami Evam Khadi Gramodyog Welfare Sanstha and Another v. State of Uttar Pradesh and Others*, (2008) 1 SCC 560, the Apex Court has expressed thus:

*"A writ remedy is an equitable one. A person approaching a superior court must come with a pair of clean hands. It not only should not suppress any material fact, but also should not take recourse to the legal proceedings over and over again which amounts to abuse of the process of law. In Advocate General, State of Bihar v. M.P. Khair industries this Court was of the opinion that such a repeated filing of writ petitions amounts to criminal contempt."* (Emphasis supplied)

33. In *Indian Overseas Bank, Annasalai and Another v. P. Ganesan and Others*, (2008) 1 SCC 650, it has been held as follows:

*"...the discretionary writ jurisdiction under Article 226 of the Constitution of India should be exercised keeping in view the conduct of the parties...."*

34. In *Abhishek Malviya v. Addl. Welfare Commissioner and Another*, 2008 AIR SCW 1215, it has been held as under:

*"We find no merit in appellant's contention. The order dated 4.5.1999 of this Court specifically refers to the error in the order describing the appellant as 'deceased' and dismissed the SLP as withdrawn with the following observation: "He wants to apply to the Additional Welfare Commissioner for correction. We express no opinion in that behalf." No liberty was reserved to file a fresh appeal or seek review of the order dated 13.3.1997 on merits. The order dated 13.3.1997 having attained finality, his efforts to reagitate the*

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*issue again and again is an exercise in futility. We are therefore of the view that appeal is liable to be dismissed."*

35. We have referred to the aforesaid authorities which pertain to the manner in which a litigant should approach the Court and how his conduct is to be taken note of. In this regard, we have reproduced the application for withdrawal, the order of withdrawal, and the assertions and asseverations made in paragraphs 28 and 29 of the memorandum of appeal. The submission of Mr. Mathur, learned senior counsel appearing for the appellants, is that this Court had granted liberty to approach the appropriate forum and, therefore, the second writ appeal could be filed as a reference was sought to a larger bench. In this regard, Mr. Shekhar Sharma has invited our attention to the decision rendered in *Sarguja Transport Service v. STAT*, (1987) 1 SCC 5 to bring home the point that no liberty was granted to file a fresh writ appeal and hence, the present writ appeal is not maintainable. The learned senior counsel appearing for the appellants has submitted that the said decision has been explained in a different manner in *Sarva Shramik Sanghatana (KV), Mumbai v. State of Maharashtra and Others*, (2008) 1 SCC 494. Their Lordships in *Sarva Shramik Sanghatana (KV), Mumbai* (supra) while dealing with the concept of precedent of *Sarguja Transport Service* (supra) referred to paragraphs 8 and 9 of the said decision and expressed the view as under:

"We are of the opinion that the decision in *Sarguja Transport case* has to be understood in the light of the observations in paras 8 and 9 therein, which have been quoted above. The said decision was given on the basis of public policy that, if while hearing the first writ petition the Bench is inclined to dismiss it, and the learned counsel withdraws the petition so that he could file a second writ petition before what he regards as a more suitable or convenient Bench, then if he withdraws it he should not be allowed to file a second writ petition unless liberty is given to do so. In other words, Bench-hunting should not be permitted."

Thereafter, their Lordships proceeded to state as follows:

"It often happens that during the hearing of a petition the Court makes oral observations indicating that it is inclined to dismiss the petition. At this stage the counsel may seek withdrawal of his petition without getting a verdict on the merits, with the intention of filing a fresh petition before a more convenient Bench. It was this malpractice which was sought to be discouraged by the decision in *Sarguja Transport case*."

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36. Thereafter, the Apex Court opined that the decision in *Sarguja Transport Service* (supra) cannot be treated as a Euclid's formula. Eventually, their Lordships proceeded to opine thus:

*"Hence, Sarguja Transport case is clearly distinguishable, and will only apply where the first petition was "withdrawn in order to do Bench-hunting or for some other mala fide purpose."*

37. It is noteworthy that Mr. Mathur has placed heavy reliance on the above quoted lines of the aforesaid decision. The submission of the learned senior counsel for the appellant is that the decision in *Sarguja Transport Service* (supra) would only apply if the first petition was withdrawn in order to do Bench-hunting or for some other mala fide purpose. We clearly state with all the humility at our command that the first petition was not withdrawn in order to indulge in Bench-hunting. The question that still remains is whether the same was withdrawn for some other mala fide purpose. It is urged by Mr. Mathur that no mala fide purpose can be attributed to the appellants. The submission of Mr. Sharma, learned standing counsel for the Union of India, is that mala fide purpose should not be present at the time of withdrawal but it can arise subsequently. In quintessentially, the submission of the learned counsel for the respondents is that when it was withdrawn for one purpose and the Bench was given a different impression but the same has been utilised for a different purpose altogether by stating certain facts in a manner which tantamounts to suppression, it would amount to mala fide and would come in the compartment of abuse of the process of Court. It is worth mentioning that a picture was projected while filing the memorandum of withdrawal that as the amount had already been deposited, no cause of action remained to be adjudicated and the appeal had been rendered infructuous. It is a truism that initially the petition for withdrawal was filed on behalf of the appellant No.3 but the learned counsel for the appellant had instructions to withdraw the appeal on behalf of all the appellants. This Court granted liberty to approach such other forum or seek remedy as permissible in law. The liberty was not taken to file writ appeal. To approach other forum would not mean to file another writ appeal challenging the same order and seek reference to a larger bench by incorporation of such a prayer in the relief clause. That apart, as is evincible from paragraphs 28 and 29 of the appeal, the appellants could not challenge the order dated 19.6.2007 before the learned single Judge because the show-cause notice dated 23.2.2006 had been challenged along with the order/letter dated 9.9.2006 in Writ Appeal No.718/2006. On a perusal of the subject matter and delineation by the learned single Judge, it is manifest that the order dated 19.6.2007 passed by the Customs & Excise Appellate Tribunal was challenged in W.P. No.4160/2007. We have reproduced the order in extenso.

38. On a perusal of the pleadings and other orders, by refiling of the writ appeal,



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we are inclined to think, a deliberate, adroit and ingenious attempt has been made to create a different kind of impression. The appellants have chosen their own facts and put forth them before the Court. Once they had filed the writ appeal, they could have got it adjudicated. They chose not to do so and filed an application in writing and withdrew the same by stating that after the deposit of the amount due, the appeal had been rendered infructuous.

39. In *Sarva Shramik Sanghatana (KV), Mumbai* (supra), their Lordships were dealing with the situation where the application for withdrawal of the first petition under Section 25-O(1) was made bona fide because the respondent company had received a letter from the Deputy Labour Commissioner calling for a meeting of the parties so that an effort could be made for an amicable settlement. Their Lordships observed that the respondent company could have waited for sixty days on the expiry of which the application would have deemed to have been allowed under Section 25-O (3) of the Industrial Disputes Act, 1947. The fact that it did not do so and instead applied for withdrawal of its application under Section 25-O(1) shows it to be bona fide. Under these circumstances, their Lordships distinguished the decision rendered in *Sarguja Transport Service* (supra) and observed which we have reproduced hereinbefore. The factual matrix of the present case is totally different. Before the Division Bench the petition was filed, under what foundation the appeal was sought to be withdrawn. The Division Bench dismissed the appeal as withdrawn and granted liberty to the appellants to approach other forum or seek remedy as permissible in law. The submission of Mr. Mathur is that the appeal was not withdrawn for some other mala fide purpose. There may not be a mala fide intention at the time of withdrawal. But, the pleadings and the conduct of the appellants would go a long way to reflect and project that in the present writ appeal, a prayer has been made to refer the matter to a larger bench and certain facts have been put forth in an equivocal manner to create a maze and the same, we are disposed to think, tantamounts to abuse of the process of the Court. The appellants were very well aware of the decision rendered by the Division Bench in *M/s Vindhyachal Distillery (P.) Ltd.* (supra). It is within their special knowledge that the learned single Judge in W.P. No.4160/2007 had passed a conditional order and modified the order passed by the tribunal as regards the deposit. Similar modification has been done in W.P. No.4467/2007. Despite the same, the pleadings have been put forth in a quite different manner that the order dated 19.6.2007 was not assailed before the learned single Judge. True it has been mentioned in a different way in paragraph 29 but that would not tantamount to complete pleading. Nothing has been stated whether the amount directed by the learned single Judge has been deposited or not. Nothing has been brought to the notice of this Court whether the tribunal has dismissed the statutory appeal or not. Under these circumstances, the order of withdrawal by which the appeal was dismissed with liberty to approach appropriate forum, in our humble view,

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would not include filing of another writ appeal. That was not the purpose of the application for withdrawal and that is not the import of the order of withdrawal. It can be said in a most indubitable and irrefragable manner that an effort has been made to reiterate the grievance in a different manner unknown to law and the same is nothing but abuse of the process of Court.

40. We would be failing in our duty if we do not take note of another submission of Mr. Mathur, learned senior counsel for the appellants. It is contended by him that this Court should answer the reference and directed the matter to be placed before the Division Bench. In this context, we may refer with profit to the decision rendered in *Pabitra Mohan Das v. State of Orissa and Others*, (2001) 2 SCC 480 wherein it has been held as under:

*"Having examined the rival contentions and on a thorough scrutiny of two earlier Full Bench decisions as well as the impugned Judgment of the Special Bench we are of the considered opinion that the Special Bench rightly thought it appropriate to reconsider the entire matter afresh and re-determine the issues involved in the light of the relevant provisions of the Act, Rules and Regulations after hearing at length on all issues and there was no infirmity on that score even though the point of reference was of a limited nature. Courts exist to interpret the law and while examining the provisions of any Act, Rule or Regulation, if it is felt that the earlier decision on the question is not clear on any particular issue or has created confusion in resolving the disputes or has caused hardship to a group of people, it would be the duty of the Court to re-examine the matter after giving opportunity to all parties concerned and by such process question of taking away anybody's vested right does not arise. In the case in hand it is not a particular writ or order that had been issued infavour of any individual is sought to be nullified by the subsequent Special Bench decision. On the other hand the erroneous conclusion of the relevant provisions of the Act, Regulation and Rules are sought to be corrected and we see no infirmity in this approach of the Special Bench. That apart, though point of reference may be of a limited nature but in answering the same if the Court feels that it would be in the interest of justice to constitute a larger Bench and examine the correctness of any earlier conclusion which might have been made on an erroneous interpretation of any provision, then there would be no fetter for adopting that procedure."*

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41. We have referred to the aforesaid decision only to highlight that a larger bench has jurisdiction to reconsider the entire matter afresh and redetermine the issue involved in the light of the provisions of the Act, Rules and Regulations. Their Lordships have further held that no efforts should be made to annul a writ or order that has been issued in favour of any individual. We would have been under obligation to answer the reference had we been convinced that the writ appeal was maintainable and further that the reference at the instance of the appellants deserved to be answered but as the factual matrix would exposit, the writ appeal was dismissed as withdrawn. That apart, as is luminescent from paragraphs 28 and 29 of the memorandum of writ appeal, the facts have been stated in a different manner as if to fresco a picture to create an imbroglio and confusion.

42. In view of the aforesaid analysis, we have no hesitation in our mind that the present writ appeal is not maintainable inasmuch as the order impugned was assailed in W.A. No.718/2006 which was dismissed as withdrawn on the basis of an application filed by one of the appellants which was later on concurred by the learned counsel for other appellants making a submission that it has been rendered infructuous inasmuch as the amount had already been deposited. That apart, we have referred to the nature of pleadings. Ergo, the inevitable result is the dismissal of the writ appeal which we direct. We cannot refrain ourselves from reiterating what we have said earlier that filing of the present writ appeal is an abuse of the process of Court and, therefore, we decline to entertain the writ appeal.

43. Consequently, the writ appeal is dismissed with costs which is assessed at Rs.50,000/- (Rupees Fifty Thousand only).

*Appeal dismissed.*

I.L.R. [2009] M. P., 1887

## WRIT APPEAL

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

12 September, 2008\*

STATE OF M.P. & anr.

Vs.

WESTERN COALFIELDS LTD. & anr.

... Appellants

... Respondents

A. Coal Bearing Areas (Acquisition and Development) Act (20 of 1957), Sections 10 & 11, Stamp Act, 1899, Section 2(14) - Central Government has ordered u/s 11(1) of Act of 1957 for vesting of lands in favour of Government Company - Such an order would not be an instrument - Government was unjustified in demanding the stamp duty in view of a direction/order issued by Central Government. (Paras 10 & 11)

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क. कोयला धारक क्षेत्र (अर्जन और विकास) अधिनियम (1957 का 20), धाराएँ 10 व 11, स्टाम्प अधिनियम, 1899, धारा 2(14) - केन्द्र सरकार ने 1957 के अधिनियम की धारा 11(1) के अधीन सरकारी कम्पनी के पक्ष में भूमियाँ निहित करने का आदेश दिया - ऐसा आदेश लिखत नहीं होगा - केन्द्र सरकार द्वारा जारी निदेश/आदेश को देखते हुए सरकार स्टाम्प शुल्क की माँग करने में अन्यायपूर्ण थी।

**B. Stamp Act (2 of 1899), Section 3 -** *Assuming that the vesting order is to be understood to be an instrument then the proviso to Section 3 of Stamp Act would protect the Central Government so also the State Government - In any case, the vesting would have its own effect and cannot be treated to be a lease executed by the Central Government in favour of Government Company.* (Para 14)

ख. स्टाम्प अधिनियम (1899 का 2), धारा 3 - यह मानते हुए कि निहित करने वाला आदेश लिखत होना समझा जाने वाला है तब स्टाम्प अधिनियम की धारा 3 का परन्तु केन्द्र सरकार और राज्य सरकार का भी संरक्षण करेगा - किसी भी दशा में निहित करना अपना स्वयं का प्रभाव रखेगा और केन्द्र सरकार द्वारा राज्य सरकार के पक्ष में निष्पादित पट्टा होना नहीं माना जा सकता।

*T.S. Ruprah, Addl.A.G., for the State.*

*Prabhat K. Shrivastava, for the respondents.*

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

The Judgment of the Court was delivered by **R.S. GARG, J. :-** The appellant-State being aggrieved by the judgment dated 18.7.2006 passed by the learned Single Judge of this Court in group of writ petitions No. 359/02 (Western Coalfields Limited and others Vs State of M.P. and another), 717/2002 (Western Coalfields Limited and others Vs State of M.P. and another), 1742/2002 (Western Coalfields Limited and others Vs State of M.P. and another), 1743/2002 (Western Coalfields Limited and others Vs State of M.P. and another), 1744/2002 (Western Coalfields Limited and others Vs State of M.P. and another) and WP No. 1745/2002 (Western Coalfields Limited and others Vs State of M.P. and another) have filed these five writ appeals No. 1203/2006 (State of M.P. and another Vs. Western Coalfields Limited and another), 1204/2006 (State of M.P. and another Vs. Western Coalfields Limited and another), 1205/2006 (State of M.P. and another Vs. Western Coalfields Limited and others), 1206/2006 (State of M.P. and another Vs. Western Coalfields Limited and another) and 1207/2006 (State of M.P. and another Vs. Western Coalfields Limited and another) submitting inter alia that the orders passed by the learned Single Judge were absolutely unjustified and were running contrary to the provisions of Section 10 and Section 11 of the Coal Bearing Area (Acquisition and Development) Act, 1957 and the orders are also contrary to the provisions of the Indian Stamp Act, 1899 and the provisions of the Mines and Minerals (Development and Regulation) Act, 1957.

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2. The short facts necessary for disposal of the present appeals are that the appellants/State issued certain directions to the respondents demanding the stamp duty on the ground that transfer of the land by the Central Government in favour of the respondent Western Coalfields Limited amounts to execution of a lease and transfer, therefore, the order issued by the Government would be an instrument and appropriate stamp duty will have to be paid. The said notices were challenged in the different writ petitions.

3. The learned Single Judge after hearing the parties came to the conclusion that a juxtapose reading of Section 10 and Section 11 of the Coal Bearing Areas Act, 1957 would clearly provide that if there is statutory vesting then question of execution of the lease deed would not arise. The learned Single Judge also opined that from Section 3 of the Indian Stamp Act, it would clearly appear that the Government would not be liable to pay the duty chargeable in respect of such instrument in view of the proviso appended to Section 3 of the Indian Stamp Act.

4. Shri Ruprah, learned counsel for the appellant/State after taking us through the pleadings of the parties and the provisions of the different Acts submitted that if there is vesting of the land or Coal Bearing Areas in the Central Government under Section 10 of the Act, then there would be no lease but in case the Central Government directs that the vesting would not be in favour of the Central Government but would be in favour of a Government Company then that would amount to a lease. In relation to Section 3 of the Indian Stamp Act, it was submitted that the learned Single Judge did not appreciate that the case of the respondent would not be covered by the provisions of Section 3 of the Indian Stamp Act.

5. On the other hand learned counsel for the respondents submitted that if an instrument is executed by the Central Government in favour of a government company/coal company only then the provisions of Indian Stamp Act would apply. According to him, Section 10 and Section 11 of the Coal Bearing Areas Act would clearly provide that a property would vest in the Central Government or may vest in the Coal Company. According to him, if there is a statutory vesting of the property either in the Central Government or in the Coal Company then no instrument or document is required to be executed. In the alternative, it is submitted by him that Section 3 of the Act comes to the rescue of the government (Central Government in this case).

6. For a proper appreciation of the dispute between the parties a reference to Section 10 and Section 11 would be necessary. The said Sections read as under:

**“10. Vesting of land or rights in Central Government.-**

(1) On the publication in the Official Gazette of the declaration under Section 9, the land or the rights in or over the land, as the case may be, shall vest absolutely in the Central Government free from all encumbrances.

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(2) Where the rights under any mining lease granted or deemed to have been granted by a State Government to any person are acquired under this Act, the Central Government shall, on and from the date of such vesting, be deemed to have become the lessee of the State Government as if a mining lease under the Mineral Concession Rules had been granted by the State Government to the Central Government, the period thereof being the entire period for which such a lease could have been granted by the State Government under those rules.

**"11. Power of Central Government to direct vesting of land or rights in a Government company.-**

(1) Notwithstanding anything contained in Section 10, the Central Government may, if it is satisfied that a Government company is willing to comply, or has complied, with such terms and conditions as the Central Government may think fit to impose, direct, by order in writing, that the land or the rights in or over the land, as the case may be, shall, instead of vesting in the Central Government under section 10 or continuing to so vest, vest in the Government company either on the date of publication of the declaration or on such other date as may be specified in the direction.

(2) Where the rights under any mining lease acquired under this Act vest in a Government company under sub-section (1), the Government company shall, on and from the date of such vesting, be deemed to have become the lessee of the State Government as if a mining lease under the Mineral Concession Rules had been granted by the State Government to the Government company, the period thereof being the entire period for which such a lease could have been granted by the State Government under those rules and all the rights and liabilities of the Central Government in relation to the lease or the land covered by its shall, on and from the date of such vesting, be deemed to have become the rights and liabilities of the Government company."

7. Section 10 refers to vesting of land or rights in the Central Government. According to Section 10 on the publication in the Official Gazette of the declaration under Section 9, the land or the rights in or over the land, as the case may be, shall vest absolutely in the Central Government free from all encumbrances. The effect of the vesting would be that the Central Government would become the absolute owner of the properties and would be entitled to deal with the property as it so desires. Section 11 provides regarding powers of the Central Government to direct

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vesting of land or rights in a Government company. Sub-section (1) of Section 11, provides that the Central Government after recording its satisfaction that a Government company is willing to comply, or has complied, with such terms and conditions as the Central Government may think fit to impose, direct, by order in writing, that the land or the rights in or over the land, as the case may be, shall, instead of vesting in the Central Government under Section 10 or continuing to so vest, vest in the Government company either on the date of publication of the declaration or on such other date as may be specified in the direction.

8. Sub-section (1) of Section 11 nowhere uses the word "instrument" or "lease". It nowhere says that upon execution of an instrument the rights of the Central Government would stand transferred in favour of the Coal Company. Sub-section (1) of Section 11, instead of using the word "instrument" uses the word 'Order'. Section 11 provides that by issuing an order in writing the Central Government can direct vesting of the land in favour of a Government Company. Such an order would be statutory order and by no stretch of imagination can be termed to be an instrument.

9. The word "instrument" has been defined in Section 2(14) of the Indian Stamp Act, 1899 to say "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.

10. In the present matter, undisputedly no document has been executed by the Central Government in favour of the Government company or by the Government Company in favour of the Central Government. An order would not be an instrument. An instrument is to be executed for creating, transferring, extending, extinguishing or recording the right or liability of a party while by an order in case of present nature the property would vest in favour of a particular party.

11. The Government certainly was unjustified in demanding the stamp duty on vesting of the property in favour of the Government company in view of a direction/order issued by the Central Government.

12. It also has to be seen in the alternative that Section 3 of the Indian Stamp Act protects the Government from paying duty chargeable in respect of an instrument.

13. Section 3 of Indian Stamp Act reads as under:

**"Sec.3 Instruments chargeable with duty.**-Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefore, respectively, that is to say,-

(a) every instrument mentioned in that Schedule which, not

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having been previously executed by any person, is executed in [India] on or after the first day of July, 1899;

(b) every bill of exchange payable otherwise than on demand or promissory note drawn or made out of India on or after that day and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in India; and

(c) every instrument other than a bill of exchange or promissory note mentioned in that Schedule, which not having been previously executed by any person, is executed out of India on or after that day, relates to any property situate, or to any matter or thing done or, to be done, in India and is received in India;

Provided that no duty shall be chargeable in respect of --

(1) any instrument executed by, or on behalf of, or in favour of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument;

14. The proviso appended to Section 3 of the Indian Stamp Act provides that no duty shall be chargeable in respect of any instrument executed by, or on behalf of, or in favour of, the Government in cases where, but for the exemption, the Government would be liable to pay the duty chargeable in respect of such instrument. Assuming that the vesting order is to be understood to be an instrument then the proviso to Section 3 of the Stamp Act would protect the Central Government so also the State Government. In any case the vesting would have its own effect and cannot be treated to be a lease executed by the Central Government in favour of the Government Company.

15. So far as the question of application of provisions of Mines and Minerals (Development and Regulation) Act, 1957 is concerned, in our opinion the provisions of the said Act would also not be applicable.

16. A mining lease is defined in Sub-section (3) of Section 3 to mean a lease granted for the purpose of undertaking mining operations, and it would also include a sub-lease granted for such purpose. A lease may be granted by the State Government or may be approved by the Central Government but in case of a lease as is understood even under the Mines and Minerals Act, the person who is executing the lease or granting the lease would continue to have the power of dispossession or authority of an owner to cancel the lease and resume the land. Vesting would however mean that the property would vest in a person in whose favour such an order has been made. Vesting would be permanent and it would be by an order under the Coal Bearing Areas Act. In case of a mining, lease deed has to be executed between the State Government and the other person, authorizing



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him to undertake mining operations etc. There is a great distinction between mining lease and vesting of the property in particular authority or a party.

17. Taking into consideration the totality of the circumstances and the provisions of law, we are of the considered opinion that the learned Single Judge was not unjustified in granting the relief to the respondents.

18. All the appeals are hereby dismissed. There shall be no orders as to cost.

*Appeal dismissed.*

I.L.R. [2009] M. P., 1893

**WRIT APPEAL**

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

10 December, 2008\*

**SAURABH SINGH**

... Appellant

**Vs.**

**STATE OF M.P. & ors.**

... Respondents

**A. Service Law - Constitution, Articles 14 & 16 - Recruitment - Advertisement for recruitment to the post of Constable - Condition in advertisement that the candidates must have passed Higher Secondary or obtained Bachelor degree from school/college situated in M.P. - Name of appellant deleted from select list as he had not obtained educational qualification from any school situated in M.P. - Held - Condition is discriminatory and violative of Articles 14 & 16 in as much as it denies equality of opportunity in the matters of public employment in M.P. to persons who have passed Higher Secondary from other State - Respondents directed to appoint appellant - Appeal allowed.** (Paras 6 & 8)

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

**B. Waiver - Fundamental right of appellant to equality of opportunity in matter relating to public employment has been violated - There could be no waiver of any fundamental right guaranteed by part III of Constitution - Relief cannot be denied to appellant only on the ground that**

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*pursuant to advertisement which contains a condition that requisite educational qualification should have been obtained from school situated in M.P., the appellant participated in recruitment process.* (Para 7)

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

**Case referred :**

2006(3) MPLJ 53.

*Sanjay Ram Tamrakar, for the appellant.*

*Vivekanand Awasthy, G.A., for the respondents.*

**ORDER**

The Order of the Court was delivered by A.K. PATNAIK, C. J. :- This is an appeal filed by the appellant under Section 2(1) of the Madhya Pradesh Uchchya Nyalaya (Khand Nyay Peeth Ko Appeal) Adhiniyam, 2005 against the order dated 20.02.2008 passed by learned Single Judge under Article 226 of the Constitution of India in W.P. No.14220/2007(S).

2. The facts briefly are that the appellant was born in District Rewa in the State of Madhya Pradesh in 1986 and did his schooling in schools situated in District Rewa upto Class IX, but he studied in Class X in Durg and passed Higher Secondary School Examination conducted by the Chhattisgarh Board of Secondary Education, Raipur in 2002. Pursuant to an advertisement dated 25.3.2006 for recruitment to the post of Constable, the appellant applied and was selected, but by a communication dated 22.9.2007 of the respondents he was informed that his name has been deleted from the select list as he had not obtained educational qualification from any school situated in Madhya Pradesh. Aggrieved, the appellant filed W.P. No. 14220/2007(S) praying for a direction to the respondents to appoint him on the post of Constable. By order dated 20.2.2008 the learned Single Judge dismissed the writ petition after holding that the appellant had not acquired the requisite educational qualification from the State of Madhya Pradesh as per the condition contained in the advertisement dated 25.3.2006. The learned Single Judge further held in the impugned order that in the circular dated 27.3.1998, the State Government has stipulated the condition for recruitment to all civil posts in the departments of Government of Madhya Pradesh that the candidates must have passed the Higher Secondary School Examination or obtained Bachelor Degree from the school/college situated in Madhya Pradesh and this condition in the circular has not been challenged by the appellant in the writ petition.

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3. Mr. Sanjay Ram Tamrakar, learned counsel for the appellant, submitted that the appellant was not aware of the circular dated 27.3.1998 issued by the General Administration Department of the Government of Madhya Pradesh laying down the condition that the candidates applying for any civil post must have passed Higher Secondary Examination or Graduate Degree Examination from Madhya Pradesh and therefore the appellant had not challenged this circular. He further submitted that in any case the appellant had challenged the advertisement dated 25.3.2006 which stipulated the condition that the educational qualification must have been obtained by the candidate from a school situated in Madhya Pradesh and the learned Single Judge ought to have decided the validity of this condition stipulated in the advertisement. He submitted that in a recent decision in *State of Madhya Pradesh vs. Ritesh Kumar Sharma and others*, 2006 (3) MPLJ 53, a Division Bench of this Court has held that such a condition providing that only those candidates who have passed Higher Secondary Examination or obtained Graduate Degree from the State of Madhya Pradesh are eligible is discriminatory and violative of Article 14 of the Constitution of India. He submitted that the Court should therefore strike down this condition in the impugned advertisement dated 25.3.2006 as ultra vires the Constitution.

4. Mr. Vivekanand Awasthy, learned Government Advocate for the State, submitted that no return had been filed in the writ petition but a return has been filed in the Writ Appeal by the respondents and in para 3 of the return the respondents have taken a stand that a condition had been stipulated in the advertisement that the candidate should have passed the Xth Class examination under -10+2 system or should have passed Higher Secondary Examination from the State of Madhya Pradesh pursuant to a circular dated 27.3.1998 of the State Government. Mr. Awasthy further submitted that law is well settled that the recruitment process has to be completed in accordance with the rules and for this reason the recruitment has been done in accordance with the circular and the advertisement and therefore the appellant is not entitled to appointment to the post of Constable.

5. In a Division Bench judgment in *State of Madhya Pradesh vs. Ritesh Kumar Sharma and others* (supra), this Court has held that Article 14 of the Constitution, which guarantees equal protection of law and equality before law, permits reasonable classification but any such reasonable classification must be based on an intelligible differentia which differentiates the persons who are included in the class from the persons who are excluded from the class and such differentia must have a reasonable nexus with the object sought to be achieved. This Court has further held in this decision that classifying of candidates for recruitment to State Civil Services excluding those candidates who have passed out Higher Secondary Examination or obtained Graduate Degree from the schools/colleges of the State other than State of Madhya Pradesh from competition and restricting

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the competition to only those candidates who have passed Higher Secondary Schools of from the institutions of Madhya Pradesh has no reasonable nexus with the object of State Civil Services examination. This Court has further held in the aforesaid decision:

"It is not necessary that those who have passed higher secondary examination or obtained graduate degree from schools or colleges in the State of M.P. would be more meritorious than those who have passed higher secondary examination or obtained graduate degree from the schools or colleges outside the State of M.P. Similarly, it is not necessary that only those who have passed higher secondary examination or obtained graduate degree from schools or colleges in the State of M.P., will have better knowledge of geography, history and culture of the State of M.P. Even those who have passed higher secondary examination or obtained graduate degree from the schools or colleges outside the State of M.P., may have good knowledge of geography, history and culture of the State of M.P. As has been held by the Tribunal in para 10 of the impugned order, restricting the competition to only those candidates who have passed their Higher Secondary or Graduate Degree examinations from institutions in Madhya Pradesh, is not in the larger public interest. As has been pointed out by the Tribunal many bright students go outside the State to study in good institutions and denying the opportunity of employment to them within Madhya Pradesh has the effect of panalising merit and encouraging mediocrity which is certainly not in the interest of the State. Thus, although there is a differentia adopted for classifying persons by the Circular dated 2-12-1997 and the condition No.4 in the advertisement issued by the PSC, such differentia has no rational nexus with the object sought to be achieved. The classification adopted by the circular dated 2.12.1997 and condition No.4 in the advertisement issued by the PSC is thus not a reasonable classification and, as has been held by the Tribunal, the said circular-dated 2-12-1997 and condition No.4 in the advertisement issued by the PSC deny the equality of opportunity in matters relating to public employment in the State of Madhya Pradesh and are thus in contravention of Articles 14 and 16 of the Constitution of India."

6. It will be clear from the aforesaid judgment in *State of Madhya Pradesh Vs. Ritesh Kumar Sharma and others* (supra), that a condition in the advertisement issued by the PSC pursuant to circular dated 2.12.1997 was held to be in contravention of Articles 14 & 16 of the Constitution because it denied equality of

## SAURABH SINGH V. STATE OF M.P.

opportunity in matters relating to public employment in the State of Madhya Pradesh. For the self same reasons, we hold that the condition stipulated in the advertisement dated 25.3.2006 pursuant to the circular dated 27.3.1998 of the State Government is discriminatory and violative of Articles 14 & 16 of the Constitution inasmuch as it denies equality of opportunity in the matters of public employment in the State of Madhya Pradesh to persons who have passed Class Xth (High School) Examination from other States.

7. Mr. Awasthy, however submitted that the appellant having applied pursuant to that advertisement and having participated in the selection cannot now challenge the condition in the advertisement that only candidates who have passed Higher Secondary Examination from a school in Madhya Pradesh is eligible to be considered for selection. This submission of Mr. Awasthy is based on the principle of waiver or estoppel. In *Olga Tellis and others vs. Bombay Municipal Corporation and others*, AIR 1986 SC 180 the Supreme Court relying on its earlier decision in *Basheshar Nath vs. Commissioner of Income Tax, Delhi and Rajasthan and another*, AIR 1959 SC 149 has held that there could be no waiver of any of the fundamental rights guaranteed by Part III of the Constitution. Once we have held that the fundamental right of the appellant to equality of opportunity in the matters relating to public employment in the State of Madhya Pradesh under Articles 14 & 16 of the Constitution had been violated, we cannot deny relief to the appellant only on the ground that pursuant to the advertisement which contains a condition that the requisite educational qualification should have been obtained from a school situated in Madhya Pradesh the appellant participated in the recruitment process.

8. In the result, we allow this appeal and direct the respondents to appoint the appellant on the post of Constable within a period of two months by the competent authority from the date of receipt of the certified copy of this order. The appellant will be paid salary from the date of his appointment but his seniority will determine as per rules as if he was appointed on the basis of selection made pursuant to the advertisement dated 25.3.2006.

*Appeal allowed.*

I.L.R. [2009] M. P., 1898

WRIT APPEAL

Before Mr. Justice Arun Mishra &amp; Mr. Justice B.M. Gupta

29 January, 2009\*

MOHAN AUTO SUPPLY CENTRE (M/S)

... Appellant

Vs.

HINDUSTAN PETROLEUM CORPORATION LTD. (M/S)

&amp; anr.

... Respondents

**Constitution, Article 226 - Allotment of dealership - Appellant was appointed ad-hoc dealer by respondent Corporation for one year - He provided land on lease for 30 years, spent amount and obtained license - Termination of dealership - Held - Clause 12 of guidelines for selection of retail outlet provides that advertisement has to be issued for allotment and preference can be given while awarding marks under the head "Land and infrastructure" - Letter of intent issued also provides that allotment in favour of appellant was purely a stopgap and temporary arrangement - In the matter of distribution of public largesse, if outlet is given to appellant without selection process, it would be violative of concept of fair play - Appellant has no right to continue with outlet - Appeal dismissed. (Paras 6 & 8)**

संविधान, अनुच्छेद 226 - डीलरशिप का आबंटन - प्रत्यर्थी कॉर्पोरेशन द्वारा अपीलार्थी को एक वर्ष के लिए तदर्थ डीलर नियुक्त किया गया - उसने 30 वर्ष के पट्टे पर भूमि उपलब्ध करायी, रकम खर्च की और लायसेंस प्राप्त किया - डीलरशिप की समाप्ति - अभिनिर्धारित - रिटेल आउटलेट के चयन के लिए मार्गदर्शक सिद्धांत का खण्ड 12 उपबंधित करता है कि आबंटन के लिए विज्ञापन जारी करना होगा और "भूमि और अवसंरचना" शीर्ष के अन्तर्गत अंक प्रदान करते समय वरीयता दी जा सकती है - जारी किया गया आशय पत्र (Letter of Intent) भी उपबंधित करता है कि अपीलार्थी के पक्ष में आबंटन पूर्णतः स्थानापन्न और अस्थायी व्यवस्था थी - सार्वजनिक उदार दान के वितरण के मामले में यदि अपीलार्थी को चयन प्रक्रिया के बिना आउटलेट दिया जाता है तो यह निष्पक्ष व्यवहार की परिकल्पना का उल्लंघनकारी होगा - अपीलार्थी को आउटलेट जारी रखने का कोई अधिकार नहीं है - अपील खारिज।

**Case referred :**

(2008) 5 SCC 325.

Piyush Kalra with C.P. Singh, for the appellant.

Harish Dixit, for the respondents.

**ORDER**

The Order of the Court was delivered by ARUN MISHRA, J. :- Appellant/Petitioner M/s Mohan Auto Supply Centre filed a Writ Petition through Partner Mohanlal Nigotia praying for the relief to quash the order of termination of dealership (P/1) dated 10th August 2007.

**MOHAN AUTO SUPPLY CENTRE (M/S) Vs. HIND. PETROLEUM CORP. LTD. (M/S)**

2. It is averred in the petition that petitioner-firm is the dealer of respondent No.1 Company. Earlier dealership was of ESSO. ESSO merged into the respondent company i.e. M/s Hindustan Petroleum Corporation Limited. Respondent company wanted to open outlet at Malanpur Industrial area. Respondent No.1 Company requested the petitioner to arrange for suitable land. Assurance was given to provide the dealership of the retail outlet on making the land available. Petitioner requested his brothers to provide a piece of land admeasuring 150ft. x 150ft. = 22500 sq.ft. to the respondent company for establishing retail outlet. A lease deed (P/3) for a period of 30 years at the premium of Rs. 4500/- per month was executed. On 25.4.2003, the company issued a Letter of Intent for appointing the petitioner as its dealer at Malanpur. Initially the said dealership was for a period of one year. It was promised that dealership will be made permanent. Petitioner obtained licence (P/6) under M.P. Motor Spirit and High Speed Diesel Oil (Licencing and Control) Order 1980, spent amount and employed 12 persons. Due to efforts made by the petitioner sale of petrol as well as that of diesel increased. Award of best performance was also given to the petitioner. Without there being any complaint, all of a sudden, letter (P/1) was issued on 10.8.2007, which was received by the petitioner on 3.9.2007, by which the petitioner was informed that his dealership has been terminated. Petitioner filed the representation (P/8), but of no avail. Hence, the Writ Petition has been preferred submitting that the order is illegal and arbitrary. No opportunity of hearing has been given. Order is not speaking one. Land was given on lease by the brothers of the petitioner. Thus, there was expectation of grant of outlet. The action is not based on any rhymes or reasons.
3. Learned Single Judge vide order dated 26.9.2007 dismissed the petition on the ground that the arrangement entered into with the petitioner was a stop gap arrangement till appointment of regular incumbent at Malanpur. No right accrued to the petitioner. Appointment was a temporary one. By the impugned order, ad hoc arrangement was terminated. The appointment was made without following due process. Writ Petition has been dismissed. Review petition was preferred, that too has been dismissed. Consequently, the Writ Appeal has been preferred.
4. Shri Piyush Kalra, learned counsel appearing on behalf of the appellant/petitioner has submitted that as per clause 12 of the policy of Hindustan Petroleum Corporation Limited, preference is to be given to the applicants offering the suitable land. There was no reason to terminate the agency. Lease deed was executed in favour of Hindustan Petroleum Corporation Limited for a period of 30 days on the understanding that allotment of the outlet would be made on priority basis. The outlet should have been allotted to the petitioner. The ad hoc or temporary arrangement is not provided in the policy. It was special arrangement entered into with the petitioner. Considering the provisions of long term lease deed, action of terminating the ad hoc dealership could not be said to be sustainable. Consequently, the impugned order passed by the learned Single Judge deserves to be quashed.

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5. Shri Harish Dixit, learned counsel appearing on behalf of the respondents has submitted that the policy provided for preference to be given to the applicants offering the suitable land. The provision in the policy does not oust the process of regular selection. Advertisement has been made, in fact, duly selected incumbent has been appointed as dealer. It is apparent from the arrangement entered into with the petitioner that it was stopgap arrangement till the selection of regular incumbent after due process of selection. Petitioner was not the lessor. His brothers had leased out the land. Thus, it could not be said that the petitioner was having any right to continue the ad hoc arrangement, which was resorted to without following any kind of process of selection. In the matter of distribution of public largesse, due selection has to be made as per the policy. Even otherwise, no right is reserved by the lessor in the lease deed that the outlet was to be allotted to them without following the due process.
6. Firstly, we consider policy. Shri Piyush Kalara, learned counsel for the appellant/petitioner has placed reliance on Clause 12 of the guidelines for selection of the retail outlet, which is quoted below :-

**12. Preference for applicants offering suitable land :**

Availability of suitable land for setting up of retail outlets at the advertised location is the essence of the dealership. Wherever it has been indicated in the advertisement that land is also required at the advertised location, the applicants who readily have suitable site available for setting up of Retail Outlet or have a firm commitment from the land owner for purchase/lease of site, considering the location of the land from the point of view of suitability from technical and commercial angle and rates acceptable to HPCL, applicants willing to transfer the land on ownership/long term lease to HPCL would be given preference, while awarding marks under the head "Land and infrastructure." The above is subject to considering the location of the land from the point of view of suitability from technical and commercial angle and rates acceptable to HPCL. However, the land and details offered alongwith the application alone will be considered for this purpose and the applicant will not be given the opportunity to offer any other land subsequently.

However, if an applicant, after selection, is unable to provide the land indicated in the application within a period of two months from the date of Letter of Intent (LOI), HPCL will have the right to cancel the allotment of dealership made to the applicant. The suitability of the land offered by the applicant will be decided by HPCL. However, there is no commitment from HPCL for taking the offered land from the applicant.



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In case of lease, the same will be for a period of minimum 15 years with renewal option for another 15 years at the discretion of company. However, if need arises, some outlets can be developed by HPCL as dealer owned without taking the land on lease, if specified in the advertisement."

It is apparent from the reading of Clause 12 and the other provision of the policy, allotment can not be made by passing selection process. Clause 12 itself provides that advertisement has to be issued and thereafter preference can be given while awarding marks under the head "Land and infrastructure". Giving of outlets on ad hoc/temporary basis is not contemplated to the applicants offering suitable land in Clause 12 of the guidelines for selection of retail outlet dealers. The Letter of Intent (A/2), which was issued to the petitioner on 6.5.2003 clearly provides that process of zeroing on the dealer by selection in accordance with the established policy of Hindustan Petroleum Corporation Limited was underway. In the meanwhile, with a view to avoid inconvenience to the motoring public, the petitioner was given the right to operate the said retail outlet purely on temporary basis till such time as the respondent Corporation is in a position to appoint a regular dealer. Accordingly, the petitioner was appointed as a temporary dealer purely on temporary basis without any claim for entitlement of regular dealership. Condition No. 1 to 4 of Letter of Intent (A/2) are material, which are quoted below :-

"1. Our Retail Outlet at Malanpur is currently inoperative and we are in the process of zeroing on the dealer by selection in accordance with our Corporation's establishment policy.

2. In the meanwhile, with a view to avoid inconvenience to the motoring public, we had discussions with you on 05.05.2003 at Bhopal when you consented to operate the said retail outlet purely on a temporary basis till such time we are in a position to appoint a regular dealer.

3. Accordingly, we hereby appoint you as a temporary dealer to operate the said outlet solely on temporary basis subject to termination by either party giving to the other 15 days written notice in that behalf.

4. The Retail Outlet business will be conducted by you purely on temporary basis without any claim of entitlement for regular dealership."

It is apparent from the Letter of Intent dated 6.5.2003, which has been accepted by the petitioner that the arrangement was purely temporary without any claim of entitlement for regular dealership. It was purely a stopgap and temporary arrangement till the appointment of regular dealer, for which the process

**MOHAN AUTO SUPPLY CENTRE (M/S) Vs. HIND. PETROLEUM CORP. LTD. (M/S)**

was underway as mentioned in the condition No.1 of the Letter of Intent. It is not disputed at Bar that the petitioner is feeling aggrieved with the appointment of dealer, whose appointment has not been questioned in the instant writ Petition, preferred by the petitioner. The termination of ad hoc appointment of the petitioner could not be said to be illegal or arbitrary. In the matter of distribution of the public largesse, like such outlets, the due process of selection can not be given a go-bye. Clause 12 itself contemplates that only preferential treatment has to be given to the applicant by awarding certain additional marks under the head "Land and infrastructure. In case the prayer of the petitioner is allowed, it would amount to illegality and arbitrariness in action and would be violative of concept of fairplay action, particularly in the matter of distribution of public largesse if outlet is given without selection process to an incumbent. Thus, in our opinion, the petitioner has no right to continue with the outlet, the arrangement itself was purely ad hoc. Even otherwise, the petitioner is not the owner of the land. As per the averments made in petition, land was owned by his brothers, may be that he has persuaded his brothers to execute the lease deed entered into by the lessor, there is no stipulation in the lease deed also that the outlet would be given to the lessor or to any of their relative on priority basis without undergoing due selection process prescribed under the policy. Thus, by mere execution of the lease deed for a period of 30 years, no absolute right had accrued in favour of the lessor or in favour of any person claiming on their behalf to obtain the outlet by ousting the regular selection process and other incumbents.

7. Shri Kalra, learned counsel for the appellant/petitioner has placed reliance on a decision of the Apex Court in *Poonam Kumari Vs. Jai Prakash Pandey and others* (2008) 5 SCC 325, in which the Apex Court has declined to interfere in the matter for the reasons mentioned in para 5 to 12 of the order. Certain irregularities were found in the process of regular selection, which was undergone. In the instant case, regular selection process is not under scan and that has not been assailed. Beside, that in *Poonam Kumari* (supra) before the Single Judge, the respondents were not noticed, hence the decision renders no help to the aforesaid submissions espoused by the learned counsel appearing on behalf of the appellant/petitioner. He has also referred to Single Bench decision of this Court in W.P.Nos 10657/04, 11165/05 and 11166/05, in which this court has issued a direction to consider the case of the petitioner therein. However, there was no adjudication with respect to the rights of the parties. Decision simply refers to the clause 2 of the guidelines. This is not the case set up in the instant case that location being commercial viable, the award of direct dealership should be made to the appellant/petitioner. In the instant case, from the Letter of Intent itself it is clear that it was temporary and stopgap arrangement with clear understanding that regular incumbent was to be appointed after due process of selection.

8. Considering clause 12 of the Policy, as quoted above, and also the lease

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deed coupled with the Letter of Intent, we do not find that any exclusive right has accrued in favour of the Petitioner. We do not find any error in the order passed by the learned Singe Judge dismissing the writ petition.

9. We may also place on record, that the decision of the Division Bench of this Court in Writ Appeal No.602/07 (Badri Prasad Soni and another Vs. Union of India and two others) decided alongwith the other Writ Appeals vide order dated 7.5.2007 has also been placed on record, in which the question has been elaborately considered with reference to the such lease agreement and effect of such lease agreement on the outlets to be given, and the similar submissions raised as raised by the counsel for the appellant were not accepted by the Division Bench in the aforesaid order.

10. Consequently, we do not find any merit in the Writ Appeal. Writ Appeal being devoid of merit is hereby dismissed. No costs.

*Appeal dismissed.*

I.L.R. [2009] M. P., 1903

**WRIT APPEAL**

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

12 February, 2009\*

**MANGILAL**

... Appellant

**Vs.**

**STATE OF M.P. & ors.**

... Respondents

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

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

**Cases referred :**

2005(3) MPLJ 578(FB).

**MANGILAL Vs. STATE OF M.P.**

*Piyush Mathur*, for the appellant.

*A.S. Kutumble, Addl.A.G.*, for the respondent No.1/State.

*Sunil Jain*, for the respondent No.2.

**O R D E R**

The Order of the Court was delivered by **DIPAK MISRA, J.** :—The centrirorial question that emanates for determination in this intra-court appeal preferred under Section 2 (1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 pertains to the commencement of the period of President of a Nagar Panchayat for the purpose of recall as envisaged under Section 47(1) of the M.P. Municipalities Act, 1961 [for brevity 'the Act']:

2. Shorn of unnecessary details the facts which are imperative to be unfurled are that the present appellant was elected as President of Nagar Panchayat in an election held on June 16, 2004 and the said election was notified on June 24, 2004. The first meeting of the Municipal Council was held on July 15, 2004. During the continuance of the petitioner as the President of the Nagar Panchayat, a proposal was mooted for his recall and the said application was entertained by the Collector in terms of Section 47 of the Act and was forwarded to the State Government for further appropriate action.

3. Questioning the aforesaid action of the Collector the petitioner invoked the jurisdiction of this Court under Article 226 of the Constitution of India contending, inter alia, that initiation of process under Section 47 of the Act was in contravention of the mandatory provisions of the Act and the recommendation sent by the Collector also is not in accord with the same and hence, the whole process is unsustainable.

4. It was urged before the learned Single Judge that as the first meeting of the Municipal Council was held on July 15, 2004 in terms of Section 55 of the Act, the initiation of the process to recall the President of the Council on June 26, 2006 was impermissible as the same was within the span of two years from the date of the first meeting. It was highlighted that a meeting of this nature could not have been called before expiration of two years from the date of entering into office by the petitioner and hence, action taken by the authority was sensitively susceptible warranting interference by this Court.

5. The stance of the petitioner was resisted by the learned counsel for the State propounding, inter alia, that the action of the Collector was absolutely justified inasmuch all the requirements of the mandatory provisions had been taken care of. It was canvassed that the colossal complaint that the application for recall was moved prior to expiry of two years from the date of entering into office by the President is sans substance inasmuch as the notification for electing the President was issued on June 24, 2004 and the application for recall was preferred

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on June 26, 2006 which is after expiry of two years and, therefore, no fault can be found with the action of the authorities.

6. The learned Single Judge referred to Sections 36, 55 and 47 of the Act and Article 243-U of the Constitution of India and placed reliance on the decision rendered in *State of M.P. vs. Mahendra Kumar Saraf and others*, 2005(3), MPLJ 578(FB) and came to hold that the controversy is covered by the law enunciated by the decision rendered by the Full Bench and, therefore, the writ petition was sans merit. Being of this view he treated the writ petition to be devoid of merit and dismissed the same.

7. We have heard Mr. Piyush Mathur, learned counsel for the appellant Mr. A.S. Kutumble, learned Addl. Advocate General for the respondent No. 1 and Mr. Sunil Jain, learned counsel for the respondent No.2, the State Election Commission.

8. Questioning the correctness of the order passed by the learned Single Judge Mr. Mathur, learned counsel for the appellant has raised the following submissions:

(a) If the entire scheme of the Act is studied in a closer scrutiny an elected president can enter into office only and from the date of the first meeting in terms of Section 55 of the Act and not prior to that.

(b) The Legislative intent behind the recall has not been appositely appreciated and the reliance placed on the decision in *Mahendra Kumar Saraf* (supra) without discussing the contentions in that regard makes the order sensitively susceptible.

(c) The learned Single Judge has fallen into error by not appreciating the scope and sweep of the 74th amendment of the Constitution wherein mode of electing President of Municipalities was changed and the tenure of the Council was made co-terminus with that of the elected President and councillors in terms of Articles 239-Q, 239-R and 239-U of the Constitution of India and on appreciation of the aforesaid provisions it would be quite vivid that the intendment of the Legislature is to the effect that an elected President would only enter into the office from the date of the first meeting and not from the date of notification of the election.

(d) The decision rendered in *Mahendra Kumar Saraf* (supra) requires reconsideration by a larger bench inasmuch as the said decision has not considered the effect and impact of the provisions brought by way of State Amendment Act No.11 of 1999.

(e) If the ratio of the Full Bench decision is applied the intention of the Legislature would be totally defeated inasmuch

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as fixation of two years from the date of notification of election would defeat the basic purpose of tenure which has insegregable nexus with the newly elected councillors.

(f) The reliance on Section 49 of the Act in *Mahendra Kumar Saraf* (supra) is not appropriate as there should have been a proper scrutiny of the entire scheme of the Act regard being had to the amendments to the frame of the statute and there was no need to give a narrow and constricted meaning to the provision.

(g) The reference to the concept of deemed fiction as envisaged under Section 49 of the Municipalities Act by the Full Bench runs counter to the constitutional provisions and other statutory provisions as a result of which an anomalous situation has emerged.

9. Mr. A.S. Kutumble and Mr. Sunil Jain, learned counsel appearing for the respondents supporting the order passed by the learned Single Judge contended that the controversy has been correctly put to rest in *Mahendra Kumar Saraf* (supra) and there is no warrant to refer the matter to a larger bench. It is urged by them that as the conclusion arrived at by the learned Single Judge is totally in accord with the ratio of the case of *Mahendra Kumar Saraf* (supra) the writ appeal deserves to be dismissed.

10. The seminal question as is manifest from the submission of the learned counsel for the parties how the period is required to be computed for the purpose of recall as envisaged under Section 47 of the Act. In this context it is apt to refer to Section 36 of the Act which deals with duration of the Municipality. The said provision reads as under:

**"Section 36: Duration of the Municipality,-**

(1) Every Municipality unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer.

(2) An election to constitute a Municipality shall be completed,-

(a) before the expiry of its duration specified in sub-section (1).

(b) before the expiration of a period of six months from the date of its dissolution.

Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this Section for constituting the Municipality for such period.

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(3) *A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would have continued under sub-section (1) had it not been so dissolved.*

(4) *Subject to the provisions of this Act, the term of President and every Councillor shall be coterminous with the term of the Council. "*

11. Submission of Mr. Mathur, learned counsel for the appellant is that duration of elected body is for five years from the date of conducting of the first meeting and the term of the President is co-terminus with the Chairman of the Council. It is urged by him that the said fixation of term is in consonance with the mandate of Article 243-Q, 243-R and 243-U of the Constitution of India and, therefore, has to be strictly construed. Article 243-U being relevant is reproduced below:-

**" 243-U: Duration of Municipalities, etc. -**

(1) *Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer:*

*Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.*

(2) *No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).*

(3) *An election to constitute a Municipality shall be completed,-*

(a) *before the expiry of its duration specified in clause (1);*

(b) *before the expiration of a period of six months from the date of its dissolution:*

*Provided that where the remainder of the period of which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.*

(4) *A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would have continued under clause (1) had it not been so dissolved. "*

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12. Relying on the said provision of the Constitution of India it is submitted by Mr. Mathur that the period of Municipal Council has to be five years and that is the legislative intentment of the 1961 Act which has been amended by Act No. 18 of 1997. Emphasis has been laid on the concept of co-terminus to pyramid the proposition that once the term of the President is coterminous with that of the term of the Council commencement of the term has to be from the first meeting of the Council and on that base the period of recall has to be computed from that period. In this regard it is apt to reproduce Section 43 of the Act which deals with election and term of the Vice President. The said provision as it stands today is the resultant factum of the amendment in the statute book by M.P. Act No. 17 of 1994 on 30th May, 1994 and Act No. 18 of 1994 dated 21-4-1997. It reads as under:

***"43. Election and term of Vice President,-***

*(1) The President and the elected Councillors of the Council shall, at its first meeting as referred to in sub-section (1) of Section 55 elect a Vice President from amongst the elected Councillors in the prescribed manner.*

*(2) The meeting under sub-section (1) shall be presided over by such officer as mentioned in sub-section (2) of Section 55.*

*(3) The term of the Vice President shall be coterminous with the term of the Council. "*

13. On a plain reading of the said provision it is luminescent that the President and the elected councillors have been empowered to elect a Vice-President from amongst the Councillors at its first meeting.

14. The provision of recalling of President as enshrined under Section 47 of the Act reads as follows;

***"47- Recalling of President-***

*(1) Every President of a Council shall forthwith be deemed to have vacated his office if he is recalled through a secret ballot by a majority of more than half of the total number of voters of the municipal area casting the vote in accordance with the procedure as may be prescribed.*

*Provided that no such process of recall shall be initiated unless a proposal is signed by not less than three fourth of the total number of the elected Councillors and presented to the Collector.*

*Provided further that no such process shall be initiated:-*



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(i) *within a period of two years from the date on which such President is elected and enters his office.*

(ii) *if half of the period of tenure of the President elected in a by-election has not expired.*

*Provided also that process for recall of the President shall be initiated once in his whole term.*

(2) *The Collector, after satisfying himself and verifying that the three fourth of the Councillors specified in sub-section (1) have the proposal of recall, shall send the proposal to the State Government and the State Government shall make a reference to the State Election Commission.*

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

15. We have extracted the provision in entirety to understand the purport of the same. Learned counsel for the appellant has emphatically urged that the words "whole term" used in the third proviso to Section 47(1) have to be read conjointly with the words 'coterminous' used in Section 36 as both the provisions refer to the concept of tenure. In essentiality, the proponement of Mr. Mathur is that commencement of the term cannot be marginalised for the purpose of computation of the period of two years as stipulated in the second proviso to Section 47(1) of the Act. It is noteworthy that as per the provision the process of recall cannot be initiated within a period of two years from the date of which the President is elected and enters office. In this context we may fruitfully refer to Section 45 which has been brought in the Statute book by M.P. Act No. 18 of 1997. It reads as follows:

**"45. Notification of election of President and Councillors,-**

*Every election of the President and Councillors from wards shall be notified by the State Election Commission in the official gazette. "*

16. It is worth noting that the election of the President is a direct election. The President participates in the first meeting along with councillors to elect the Vice-President. Indubitably, he is elected on the date it is notified in the official gazette by State Election Commission. It is propounded by Mr. Mathur that the President should not only be elected but must enter his office for the purpose of computation of recall under section 47 of the Act. There can be no doubt that they have to be read in conjunction. The words 'enters his office' have also been used in Section 49(1) of the Act. Section 49 deals with penalty for refusal to handover charge by outgoing office bearers. Sub-Section (1) of the said provisions reads as follows:

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"49(1). The President and the Vice-President shall be deemed to have entered their respective offices from the date of their election and the outgoing President, as the case may be, to handover the required papers and property forthwith. "

17. The Full Bench in *Mahendra Kumar Saraf* (supra) has held thus:-

"31. The first point relating to section 49(1) has to be examined in the light of the provisions of section 45 of the Act which provides that every election of the President shall be notified by the State Election Commission in the official Gazette. Section 49(1) creates the deeming fiction that President shall be deemed to have entered his office from the date of his election. The provisions of section 45 do clearly indicate that the election shall become final with the notification in Official Gazette. That exactly should be the commencement of the term of the President which is further made clear by the specific provision of Section 49(1).

32. No doubt, Section 49 bears the title "Penalty for refusal to handover charge by outgoing office bearers " but that heading should not mislead us in interpreting the provisions of section 49 because it is settled law that the title of a section may not be a guiding factor for interpreting that section.

33. The placement of sub-section (1) which creates the deeming fiction before sub-section (2) of Section 49 which provides for handing over of charge forthwith gives a clear indication of the scheme and the intention of the legislature in this respect. Had the intention of the Legislature been otherwise, then sub-section (2) of section 49 should have been the opening part of section 49 and thereafter, it could well have been added that for the purpose of taking and handing over charge the President shall be deemed to have entered his office from the date of his election. This being not the case here, it cannot be said that sub-section (1) of section 49 is only surplusage of sub-section (2). On the contrary, what is very much clear from the aforesaid placement of sub-sections (1) and (2) is that for the purpose of the Act, the entering into office of the President shall be deemed from the date of its election which invariably, shall be the date of notification of election as contemplated by section 45 of the Act. Any other interpretation to sub-section (1) would definitely amount to

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*an interference in the scheme which the Legislature intended to provide thereby rendering the effect of sub-section (1) of Section 49 totally meaningless.*

34. *In fact, no rider is there in sub-section (1) of section 49 so as to make it applicable only for the purpose of sub-section (2). Had sub-Section (1) been a proviso to sub-section (2), then definitely the interpretation could have been taken that the deeming fiction is for limited purpose. Therefore, the argument to the contrary cannot be accepted."*

Thereafter, the Full Bench proceeded to state as follows:-

39. *In the background of the aforesaid connotations of words "terminus" and "co-terminus" it flows that usually words "terminus" implies the terminal or end point or finishing point and when used with prefix "co", it should mean to imply two things or objects having the same end, same finishing point or same terminating point. Therefore, in the context in which word "co-terminus" has been used in section 36(4) it has to be given the meaning that the term of the President shall end with the term of the Council, meaning thereby the moment the term of the Municipal Council comes to an end, the term of the President shall also come to an end irrespective of the fact whether or not the office bearer has completed five years in office. In the case of bye-election to the post of President the term of the office of the President elected in bye-election may be shortened and in that case it can never be co-terminus, if we interpret the word "co-terminus" in the sense of commencement and termination, with the term of the Council because in that eventuality the term of the Council shall commence with the first meeting of the election shall commence afresh and not from the date of the first meeting.*

40. *It is quite understandable from the provision of section 36(1) of the Municipalities Act that the term of the Municipality unless sooner dissolved, shall be five years from the date of its first meeting. Here it is noteworthy that the Municipalities Act has been amended by Amending Act No. 18 of 1997. Before the amendment the President of the Municipality was to be elected as per provisions of section 55 by the Councillors in the first meeting of the Municipal Council. A corollary of this would have been that the term of the President could not have commenced prior to the first*

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*meeting of the Council because the President itself was to be elected in the first meeting. However, after the amendment the position is completely changed. Now, the President has to be elected directly by the people and not by the elected Councillors. This very clearly implies that the election of the President which was previously to be made in the first meeting of the Council now has nothing to do with the first meeting because it stands already concluded prior to the first meeting. Therefore, the term of the President shall have to commence from the date of election as notified under section 45 of the Act and not from the date of first meeting. Thus, after the amendment it cannot be said that because of the provisions of section 36(4) of the Municipalities Act the term of the President of the municipality shall commence from the first meeting of the Council."*

18. The learned counsel would submit that the concept of deemed to have entered into the office from the date of first election as engrafted under Section 49 of the Act should have been ignored regard being had to the concept of tenure and conceptual eventuality of tenure. The aforesaid submission in our considered opinion really does not deserve acceptance because Section 49 has a sacrosanct purpose. It avoids any kind of cavil between the elected president and the outgoing president who had been occupying the office. That apart, when there are two provisions in the statute book and the Legislature was aware of the provisions it would be in- apposite to treat the deeming provision as enshrined under Section 49 to be surplus. It has a purpose to serve. The submission that commencement of term of the Municipal Council and the concept of co-terminus have to have insegregable nexus with the computation of the period of recall cannot be accepted. We are of the considered opinion, the view expressed by the Full Bench does not require reconsideration and accordingly, we repel the submission of Mr. Mathur, learned counsel for the appellant.

19. Consequently, the writ appeal, being sans substratum, stands dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

*Appeal dismissed.*

**LALITA JHARIA (Ku.) Vs. STATE OF M.P.**

I.L.R. [2009] M. P., 1913

**WRIT APPEAL***Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta*

16 March, 2009\*

**LALITA JHARIA (Ku.) & anr.**

... Appellants

Vs.

**STATE OF M.P. & ors.**

... Respondents

**Hostel Rules, 1966-67, Rule 17 - Expulsion from Hostel - Natural Justice - Appellants were expelled from hostel - Collector was directed to pass fresh order - Collector after hearing appellants passed fresh orders of expulsion - Held - Elaborate enquiry is not necessitous - Mere non-recording of independent opinion that if appellants stay in hostel, it will be objectionable from the point of discipline or harmful effect to other students of hostel will not vitiate order - Appeal dismissed.** (Para 7)

छात्रावास नियम, 1966-67, नियम 17 - छात्रावास से निष्कासन - नैसर्गिक न्याय - अपीलार्थियों को छात्रावास से निष्कासित किया गया - कलेक्टर को नया आदेश पारित करने का निदेश दिया गया - कलेक्टर ने अपीलार्थियों को सुनने के बाद निष्कासन के नये आदेश पारित किये - अभिनिर्धारित - विस्तृत जाँच आवश्यक नहीं है - केवल इस स्वतंत्र राय का अभिलिखित न किया जाना कि यदि अपीलार्थी छात्रावास में रहे, तो यह अनुशासन के बिन्दु से आपत्तिजनक होगा या छात्रावास के अन्य छात्रों पर हानिकारक प्रभाव पड़ेगा, आदेश को दूषित नहीं करेगा - अपील खारिज।

*A.K. Jain, for the appellants.**Kumaresh Pathak, Dy.A.G., for the respondents.***ORDER**

The Order of the Court was delivered by **DIPAK MISRA, J.** :-in this intra-court appeal preferred under Section 2 (1) of the M.P. Uchha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam 2005, the legal acceptability and sustainability of the order dated 19.12.2008 passed by the learned single Judge in W.P.No.11406 of 2008 is called in question.

2. The facts which are imperative to be stated are that the appellants are prosecuting their studies in Management and BHMSW courses respectively. They were residing in the Scheduled Tribe Girls Hostel, Wright Town, Jabalpur since 2005. They had a clean record and in fact were intolerant of some activities going on in the hostel which compelled them to submit a complaint to the authorities on which no action was taken. After expiry of one month, the second respondent, the Additional Commissioner, Tribal Development, Jabalpur passed an order on 24.8.2008 expelling the appellants from the hostel. The said order mentioned that it was passed on the basis of the directions issued by the Upper Collector and on

**LALITA JHARIA (Ku.) Vs. STATE OF M.P.**

the basis of certain statements made by the inmates of the hostel. After receipt of the order, the appellants submitted a representation to the Warden of the Hostel on 5.9.2008 and prayed for an enquiry to be made on the allegation made by the appellants. On the suggestion of the authorities, a fresh representation was made but to no avail.

3. As set forth, when the appellants came back to the hostel, they found that their room had been locked and on request being made, they were allowed to remain in the hostel till 12.9.2008. On 12.9.2008, as pleaded, their luggage was thrown out and they were directed to leave the hostel forthwith. Being dissatisfied with the aforesaid order, the appellants invoked the extra-ordinary jurisdiction of this Court under Art.226 of the Constitution forming the subject matter of W.P.No.11406 of 2008. During the pendency of the writ petition, the learned single Judge by an order dated 26.9.2008 directed the Collector, Jabalpur to pass fresh order after hearing the petitioners and the respondent No.3, the Warden of the Hostel. After the said direction was issued, the Collector, Jabalpur passed a fresh order and expressed the view that the decision to expel the students was correct.

4. It was urged before the learned single Judge that the order of expulsion has been passed without giving an opportunity to the affected parties inasmuch as they were not afforded opportunity to cross-examine the inmates who had given statements against the appellants. It was also put forth that the statements of the appellants were not recorded and the copy of the inspection report was not supplied and hence the action was vitiated being violative of the principles of natural justice. It was also contended that the Collector has not passed the order keeping in view the Hostel Rules, 1966-67 (for short 'the Rules'). The aforesaid stand put forth by the learned counsel for the writ petitioners was resisted by the learned counsel for the respondents contending inter-alia that the petitioners had admitted the act of their indiscipline and the order passed by the Collector in pursuance of the interim order has not been challenged. It was the stand of the respondents that the principles of natural justice had been adequately followed.

5. The learned single Judge took note of the fact that there are previous complaints against the appellants and they had admitted the same and tendered apology and assured that they would not repeat the said act but despite the said assurance, there had been complaints against them. He referred to Rule 17(4) of the Rules, which lays down that expulsion can be directed when the presence of the student in the hostel is objectionable from the point of discipline or harmful effect to the other students of the hostel. The learned single Judge has expressed the view that elaborate enquiry was not imperative and the principles of natural justice have been complied with after interim order of this Court. Being of this view, the learned single Judge dismissed the writ petition.

6. Mr. Jain, learned counsel for the appellants, has raised two fold contentions, namely, there had been violation of the principles of natural justice and that the

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Collector while passing the order on the basis of interim direction of this Court has not applied his mind. In support of the first contention, the learned counsel submitted that under the Rules, the principles of natural justice have not been done away with and hence, it was obligatory to hold a full-fledged enquiry. To appreciate the said submission, we have perused the Rules. Rule 17, on being translated into English, reads as under:

*"17. Expulsion from Hostel - The right to expel any student from the hostel will be that of the Hostel Samiti or District Collector, if-*

*(1) If the student after being admitted in the hostel has not obtained admission in a local educational institution within a period of one month.*

*(2) On an enquiry, it is found that he has furnished wrong information relating to Scheduled Tribes or Scheduled Castes, or for any other reason, his admission in the hostel is contrary to the Admission Rules.*

*(3) He is not attending the school regularly, or is not residing in the hostel.*

*(4) His presence in the hostel is objectionable from the point of discipline or harmful effect to other students of the hostel.*

7. After the remand, as is manifest from Annexure A6, on 3.10.2008, the Collector has passed fresh order. On scrutiny of the same, it transpires that the Collector has heard the appellants. The learned single Judge has dealt with this facet in para 11 of the order dated 19.12.2008, which we think it apposite to produce:

*"11. The objection relating to violation of the principle of natural justice also loses relevance since this Court by order dated 26.9.2008 directed the Collector to consider the petitioners' grievance and pass fresh order after hearing the petitioners and the respondent No. 3. Thereafter, the matter was taken up by the Collector. The order sheet of the Collector dated 1.10.2008 indicates that the Collector had heard the petitioners in the open court and recorded their statements. He had also heard the Superintendent of the hostel Smt. Anusuiya Patel. He had considered the enquiry/inspection report dated 26.7.2008 and also heard Smt. Shivani Gupta who had conducted the inspection on 26.7.2008 in the presence of all. He had directed the Superintendent of the hostel to produce the girl students of the hostel who had made*

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*complaints against the petitioners and accordingly those girl students had appeared before the Collector on 3.10.2008. The statements of some of them were recorded and they were heard in the presence of all. The Collector after hearing all concerned persons including the petitioners in the open court and analyzing the documents, facts and arguments independently reached to the conclusion that the expulsion of the petitioners is correct and since the petitioners were expelled by the order of the Assistant Commissioner, Tribal Development dated 26.8.2008, therefore, he maintained the order of expulsion. The proceedings taken up before the Collector in pursuance to the direction of this Court indicate that even assuming that there was some lacuna in the process followed at the time of passing of the order dated 26.8.2008 the same was cured when the Collector considered the matter on the direction of this Court and passed the order dated 3.10.2008."*

In our considered opinion, in a case of this nature, elaborate enquiry is not necessitous. A categorical finding has been reached after affording opportunity of hearing to the petitioners that the order of expulsion is correct. The submission of Mr. Jain is that the Collector has not expressed his independent opinion that if the appellants stay in the hostel, it will be objectionable from the point of discipline or harmful effect to other students of the hostel. Mere non-recording of the same, we are inclined to think, will not vitiate the order. It is the real essence of the order to be seen, not the form of it. The substance must govern the field. The submission of Mr. Jain that the appellants should have been allowed to cross-examine the complainants does not impress us. As we have already held that in a case of this nature, elaborate enquiry like any other types of proceedings is not warranted, a summary enquiry would meet the ends of justice and satisfy the compliance of the principles of natural justice.

8. In view of our aforesaid analysis, we perceive no merit in this writ appeal and accordingly, the same stands dismissed, without any order as to costs.

*Appeal dismissed.*



GUDDU @ AMIT SAHU Vs. STATE OF M.P.

I.L.R. [2009] M. P., 1917

WRIT PETITION

Before Mr. Justice Sanjay Yadav

4 December, 2008\*

GUDDU @ AMIT SAHU

... Petitioner

Vs.

STATE OF M.P. &amp; ors.

... Respondents

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

(Paras 4 &amp; 6)

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

**Cases referred :**

W.P. No.11639/2006 decided on 28.09.2006, 2005(4) MPLJ 521.

Sanjay Patel, for the petitioner.

Alok Pathak, for the respondents/State.

**ORDER**

**SANJAY YADAV, J. :-**The extent and expanse of principle of natural justice implicit in Section 8 of the M.P. Rajya Suraksha Adhiniyam (Act of 1991) (referred to as Adhiniyam) has been raked up for consideration in the present writ petition filed against the order of externment passed by the District Magistrate Sagar on 19.3.2008 and the order dated 3.6.2008 passed in Appeal, affirming the order of externment.

## GUDDU @ AMIT SAHU Vs. STATE OF M.P.

2. The facts not in dispute are that, the petitioner was subjected to a show cause notice under section 8 of the Adhiniyam which was on the basis of the report furnished by the Superintendent of Police Sagar, reporting therein about existence of 14 cases under Section 147, 148, 149, 294, 323, 324, 341, 347, 427, 506, 34 IPC and apprehending that the stay of the petitioner within District Sagar and the adjoining district will not be congenial to the public peace and safety of persons' property. Consequent thereof, proceedings were initiated. The petitioner appeared either personally or through counsel, when on 14.2.2008 the matter was posted for 25.2.2008. However, the authorities after preponing and without informing the petitioner of the preponed date examined the independent witnesses on 15.2.2008 and thereafter went on to take final decision of externment.
3. Criticising the aforesaid action of the respondent, it is urged on behalf of the petitioner that, the action of respondent is de hors the protection granted under Section 8 which ensures a right of hearing which imbibes within its fold a right to cross-examine the witnesses which forms the basis to arrive at a finding that the stay of the petitioner would not be in larger public interest.
4. Intercepting the submissions put forth by the petitioner, it is urged, on behalf of the respondent State, that the action cannot be found fault with because cross-examination being not contemplated under Section 8 of the Adhiniyam the same cannot be claimed as a matter of right. Furthermore, it is urged that it is in order to protect the life and property of the independent witnesses that they are examined in camera and no right to cross examine is given to the person against whom the proceedings under Adhiniyam initiated. The learned counsel for the State places reliance on the Single Bench Judgment of this Court, viz, *Biknu Basor V. State of M.P. & others*: W.P.No. 11639/2006 dated 28.9.2006 and *Sanjay @ Oondar Vs. State of M.P.*: (2005) 4 MPLJ 521.
5. In *Sanjay @ Oondar* (supra) it was held in paragraphs 5, 6 and 7:  
"5. After having heard learned counsel for parties at length and going through the material available on record, in the considered opinion of this Court, there is no merit and substance in the writ petition. Perusal of section 5 of the Act reveals that statements of witnesses can be recorded in-camera proceedings if in the opinion of the D.M. those witnesses are unwilling to come forward to give evidence in public against the petitioner. Obviously giving evidence in public means giving evidence in the open Court of Law. In the present case the D.M on this account, cannot be scrutinized by this Court as an appellate Court.
6. So far as right to cross-examine witnesses is concerned, in the context of provisions of the Act, the right of hearing cannot be stretched to cross-examine witnesses otherwise the very

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purpose of the Act to provide security and maintenance of public order, would be defeated. The Act is directed against the anti social and criminal elements in society who have placed themselves beyond the pale of rule of law.

7. In view of the above, it cannot be said that right of hearing would include right of cross-examining of the witnesses who were examined in camera before passing the order of removal. The right of movement enshrined in Art.(19)(1) (d) is subject to the reasonable restriction and is not absolute. The law in this regard is very well settled."

Whereas, in the case of *Biknu Basor* (supra), it was observed in:

"21. The M.P.(Rajya) Suraksha Adhiniyam, 1990, has been enacted with the following preamble -"An Act provided for the security of the State, maintenance of public order and certain other matter connected therewith". Thus, there could be no doubt that the Act has been made in the interest of the general public and to protect them against dangers and bad characters whose presence in the locality may jeopardise and cause disturbance to peace and safety of the citizens. The restrictions imposed by this law upon the right of free movements are reasonable being within the purview of Clause (5) of Article 19 of the Constitution of India which empowers a State to legislate in such matters. While passing the order of externment under the said Act, the satisfaction primarily has to be of an authority passing the order. The satisfaction recorded by the authority must be objective and must be based on the material on record. The Supreme Court of India in the case of *State of NCT of Delhi and another Vs. Sanjeev alias Bittoo* [(2005) 5 SCC 181] has held that while passing an order of externment, it is true that some material must exist but what is required is not an elaborate decision akin to a judgment. On the contrary, the order directing externment should show existence of some material warranting an order of externment. It is not the sufficiency of material but the existence of material which is the *sine qua non*. I do not further comment on the sufficiency of material in the present case because that may prejudice the Appellate proceedings in either way.

22. As regards the contention of Shri Sheel Nagu, learned counsel for the petitioner, that the petitioner ought to have been permitted to cross-examine Sub Divisional Magistrate, Kotma, it may be seen from various sub-sections of Section 8 of the

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M.P.(Rajya) Suraksha Adhiniyam, that the District Magistrate was obliged to inform a person in writing of the changed nature of the material allegation against him and give him a reasonable opportunity of tendering an explanation regarding them. No right of cross-examination has been given to the petitioner. Under subsection (2) of Section 8 of the said Act, a right has been given to the petitioner to make an application for the examination of any witness produced by him. This provision also does not confer a right on the petitioner to cross examine on the basis of the material before the District Magistrate. The Hon'ble Supreme Court of India in the case of *A.K Roy Vs. Union of India* : (AIR 1982 SC 710) while dealing a matter under the National Security Act, has held that:

"99. We do not suggest that the principles of natural justice, vague and variable as they may be, are not worthy of preservation. As observed by Lord Reid in *Ridge V. Baldwin*, (1964) AC 40, 64-65, the view that "natural justice is so vague as to be practically meaningless" is tainted by "the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist". But the importance of the realisation that the rules of natural justice are not rigid norms of unchanging content consists in the fact that the ambit of those rules must vary according to the context, and they have to be tailored to suit the nature of the proceeding in relation to which the particular right is claimed as a component of natural justice. Judged by this test, it seems to us difficult to hold that that a detenu can claim the right of cross-examination in the proceeding before the Advisory Board. First and foremost, cross-examination of whom? The principle that witnesses must be confronted and offered for cross-examination applied generally to proceedings in which witnesses are examined or documents are adduced in evidence in order to prove a point. Cross examination then becomes a powerful weapon for showing the untruthfulness of that evidence. In proceedings before the Advisory Board, the question for consideration of the Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for the detention of the person concerned. the detention, it must be remembered is based not on facts proved either by applying the test of preponderance of probabilities or of reasonable doubt. The detention is based on the subjective

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satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects. The proceedings of the Advisory Board has therefore to be structured differently from the proceeding of judicial or quasi-judicial tribunals, before which there is a lis to adjudicate upon.

100. Apart from this consideration, it is a matter of common experience that in cases of preventive detention, witnesses are either unwilling to come forward or the sources of information of the detaining authority cannot be disclosed without detriment to public interest. Indeed, the disclosure of the identity of the informant may abort the very process of preventive detention because, no one will be willing to come forward to give information of any prejudicial activity if his identity is going to be disclosed, which may have to be done under the stress of cross-examination. It is, therefore, difficult in the very nature of things, to give to the detenu the full panoply of rights, which an accused is entitled to have in order to disprove the charges against him. That is the importance of the statement that the concept of what is just and reasonable is flexible in its scope and calls for such procedural protections as the particular situation demands. Just as there can be an effective hearing without legal representation even so, there can be an effective hearing without the right of cross examination. The nature of the inquiry involved in the proceeding in relation to which these rights are claimed determines whether these rights must be given as components of natural justice.

Thus, in the absence of any specific enabling provision, it cannot be said that the principle of natural justice has been violated for want of opportunity to the petitioner to cross examine Sub Divisional Magistrate, Kotma.

6. The learned counsel for the petitioner was at loss to persuade this Court to take a view different than as taken in the aforesaid two cases, holding therein that a noticee under the Adhiniyam was no right to cross-examination. Therefore, it is held that there is no illegality in the action of the respondent in relying upon the evidence of witnesses examined ex-parte and not allowed to be cross examined.

7. In result, petition fails and is hereby dismissed. No costs.

*Petition dismissed.*

## RAKESH SINGARE Vs. STATE OF M.P.

I.L.R. [2009] M. P., 1922

## WRIT PETITION

Before Mr. Justice Prakash Shrivastava

5 January, 2009\*

RAKESH SINGARE

Vs.

STATE OF M.P. &amp; ors.

... Petitioner

... Respondents

A. Words and Phrases - *Premium and Rent* - When interest of lessor in immovable property is parted for the price, the price paid is premium - Where periodical payments are made for continuous enjoyment of benefits under the lease are in nature of rent.

(Para 9)

क. शब्द और वाक्यांश - प्रीमियम और किराया - जब स्थावर सम्पत्ति में पट्टाकर्ता का हित मूल्य के लिए अलग किया जाता है तब दिया गया मूल्य प्रीमियम है - जहाँ पट्टे के अधीन लाभों के निरंतर उपयोग के लिए कालिक संदाय किया जाता है तो उसकी प्रकृति किराये की होती है।

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

(Para 13)

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

## Cases referred :

AIR 1965 SC 1871, AIR 1943 PC 153, AIR 1957 SC 729, AIR 1961 SC 7329, AIR 1977 All 79 (FB), AIR 1970 Madras 288.

Umesh Trivedi, for the petitioner.

P.N. Dubey, Dy.A.G., for the respondents.

## ORDER

Prakash Shrivastava, J. :- This writ petition is directed against the circular dated 17.5.2005 issued from the office of the Registrar providing for calculation of stamp duty on the mining lease by auction sale and the order dated 5.7.2006.

**RAKESH SINGARE Vs. STATE OF M. P.**

passed by the incharge officer (Mining Branch) Collectorate, Balaghat cancelling the mining lease for not getting the agreement registered and for not depositing the instalments.

2. The brief facts are that the sand quarry in village Gaykhuri, Tahsil and District Balaghat in Khasra No. 152/1, area 7.80 acres was auctioned in favour of the petitioner. The agreement in the prescribed Form 18 under rule 37(1) of the M.P. Mining and Mineral Rules, 1961 was executed for grant of quarry lease in favour of the petitioner for the period of 2 years from 1.4.2005 to 31.3.2007 on payment of Rs.5,04,000/- as contract amount and also payment of Rs.12,600/- as advance money and Rs.63,000/- as security. The case of the petitioner is that he was asked to submit Non Judicial Stamp papers of Rs.20,140/- for lease agreement which he deposited on 26.3.2005 with the respondents 2 & 3. On 31.3.2005 he deposited the security amount of Rs.75,600/- and thereafter he again deposited Rs.63,000/-. The lease deed dated 6.8.2005 (Annexure-P/1) was drafted and signed. Thereafter on 7.12.2005 a show cause notice was issued to the petitioner alleging violation of the conditions of agreement on the ground that the petitioner did not get the lease deed registered and did not pay the instalments of 1.7.2005 and 1.10.2005 and also did not file the monthly return. The petitioner submitted the reply that he was ready to get the agreement registered for one year for which he had submitted the stamps but he was being asked to get the agreement registered for two years for which he was not agreeable. Another show cause notice dated 16.3.2006 was served upon the petitioner to get the lease deed registered within a week and produce the registration receipt failing which the sanction of the mining would be cancelled and the mine will be reauctioned. Petitioner filed reply dated 22.3.2006. There was a dispute as to which Article of Stamp Act will be attracted in the matter for payment of stamp duty. The respondents passed the order dated 5.7.2006 cancelling the lease deed on the ground that the petitioner did not get the lease deed registered and did not pay the instalment. Aggrieved with this, the petitioner has filed the present writ petition.

3. Learned counsel appearing for the petitioner submitted since under the lease, the rent was fixed and no premium was payable, therefore, he had deposited the stamp papers as required by Article 35(a)(ii) of the Indian Stamp Act. He further submitted that since the respondents did not act upon the lease deed and did not supply the royalty book, therefore, he could not pay the instalment.

4. Learned counsel appearing for the respondents submitted that under the lease deed premium was payable by the petitioner, therefore, Article 35(a)(ii) will not be attracted and he would be required to pay the stamp duty at the prescribed rate of 8% in terms of the circular of the Registrar dated 17.5.2005. He further submitted that by the impugned order dated 5.7.2006 the lease of the petitioner has been cancelled, therefore, proper remedy for him is to file an appeal under Rule 13-A of the M.P. Mining and Mineral Rules, 1961.

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5. The objection relating to availability of alternate remedy needs to be considered first. In the present matter, not only the order dated 5.7.2006 against which the appeal is provided in rule-13-A is under challenge but the circular of the Registrar Stamps dated 17.5.2005 is also under challenge. The issue whether contract amount payable is premium or rent is also involved. Therefore, it would not be proper to dismiss the writ petition on the ground of availability of alternate remedy.

6. Now the question that arises for consideration is as to whether the amount of Rs.5,04,000/- payable by the petitioner as contract amount under the lease was in the nature of premium or rent. The applicability of Article 35(a)(ii) of the Stamp Act will depend upon the answer to this question.

7. Section 105 of the Transfer of Property Act defines "lease" and also "premium" and "rent". When the interest of the lessor in immovable property is parted with for a price, the price paid is "premium". Such a payment can be made in installments also. As against this, periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of "rent". Section 105 of the Transfer of Property Act provides as under:-

105. "Lease" defined.- A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

"Lessor", "lessee", "premium", and "rent" defined.-The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

8. Supreme Court in the matter, of *Commissioner of Income-Tax, Assam vs. The Panbari Tea Co, Ltd*, reported in AIR 1965 SC 1871 has considered the distinction between the premium and the rent and after referring to AIR 1943 PC 153, AIR 1957 SC 729 and AIR 1961 SC 732 has held that:-

3. The distinction between premium and rent was brought out by the Judicial Committee in *Kamakshya Narain Singh v. Commr. of Income-tax, B. and O.*, (1943) 11 ITR 513 at p. 519 : (AIR 1943 PC 153 at p. 156) thus :

"It (salami) is a single payment made for the acquisition of the right of the lessees to enjoy the benefits granted to them by the lease. That general right may properly be regarded as a capital asset, and the money paid to purchase it may properly be held to be a payment on capital account. But the royalties are on a different footing."



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It is true that in that case the leases were granted for 999 years; but, though it was one of the circumstances, it was not a decisive factor in the Judicial Committee coming to the conclusion that the salami paid under the leases was a capital asset. This Court in *Member for the Board of Agriculture Income-tax, Assam v. Sindhurani Chaudhurani*, (1957) 32 ITR 169: ((S) AIR 1957 SC 729) defined "salami" as follows:

"The indicia of salami are (1) its single nonrecurring character and (2) payment prior to the creation of the tenancy. It is the consideration paid by the tenant for being let into possession and can be neither rent nor revenue but is a capital receipt in the hands of the landlord." It is true that in that case the payment was paid in a single sum, but that was not a conclusive test, for salami can be paid in a single payment or by instalments. The real test is whether the said amount paid in a lump sum or in instalments is the consideration paid by the tenant for being let into possession. This Court again in *Chintamani Saran Nath Sah Deo v. Commr. of Income-tax, Bihar and Orissa*, 1961-41 ITR 506 at p. 510 : (AIR 1961 SC 732 at p. 735) considered all the relevant decisions on the subject in the context of licences granted to the assessee to prospect for bauxite in some cases for 6 months and in others for a year or two and observed :

"The definition of salami was a general one, in that it was a consideration paid by a tenant for being let into possession for the purpose of creating a new tenancy.

Applying that test this Court held in that case that under the said licences there was a grant, of right to a portion of the capital of the licensor in the shape of a general right to the capital asset.

(1) In view of these three decisions it is not necessary to multiply citations.

5. Under S. 105 of the Transfer of Property Act, a lease of immovable property is a transfer of a right to enjoy the property made for a certain time, express or implied or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing

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to be so rendered is called the rent. The section, therefore, brings out the distinction between a price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital income and the latter a revenue receipt. There may be circumstances where the parties may camouflage the real nature of the transaction by using clever phraseology. In some cases, the so-called premium is in fact advance rent and in others rent is deferred price. It is not the form but the substance of the transaction that matters. The nomenclature used may not be decisive or conclusive but it helps the Court, having regard to the other circumstances, to ascertain the intention of the parties.

9. Thus when the interest of the lessor in immovable property is parted for the price, the price paid is premium but the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent.

10. Full Bench of the Allahabad High Court in the matter of *Gajey Pal Singh and another vs. The Board of Revenue, U.P. at Allahabad* reported in AIR 1977 Allahabad 79 (FB), has considered the same and has held: -

13. In view of the pronouncement of the Supreme Court, the legal position is quite clear. When the interest of the lessor is parted with for a price, the price paid is premium and the periodical payments for continuous enjoyment of the benefits under the lease are in the nature of rent.

16. If the lease is for a premium and not for rent, the applicability of Article 35(a)(ii) is completely ousted. Now the question is whether the case would be governed by Article 35(b) or (c); (c) contemplates a case where the lease is granted for a fine or premium, or for money advanced in addition to rent reserved. In the instant case, there is no reservation of rent. In view of our finding that the lease in the instant case was not for rent, but for premium and unless there is a premium in addition to rent, Article 35(c) would not be attracted the only alternative now left is of the applicability of section 35(b). The conditions of Article 35(b) are fully satisfied in this case. The lease in the instant case was granted for a premium or for money advance, and there being no reservation of rent, this Article would be fully applicable in the instant case.

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Full Bench of the Madras High Court has also considered the distinction between the premium and rent in the matter of *Chief Controlling Revenue Authority, Madras, Referring Authority vs. S.M. Abdul Jammal and another* reported in AIR 1970 Madras 288 in paragraph 3 by holding that: -

".....The price paid or promised, or money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions would both form part of the consideration for the lease, but the distinction between a premium and a rent, in the context, lies in the fact that premium is one paid in consideration of the conveyance implied in the lease and is quantified in lump, whether it is paid outright or by instalments over a period or promised to be paid at a certain time. But, a rent while it is also in consideration of a lease, is in lieu of the enjoyment which the lessee has and particularly as consideration therefor. The further feature of rent is, it is payable as and when it accrues unlike a premium the liability for which arises at the time the contract is entered into."

11. Referring to the Judgment of the Full Bench of Allahabad High Court in the matter of *Gajey Pal Singh and another* (supra) Registrar Stamps, Madhya Pradesh issued the circular stating that the amount received as consideration for lease given on the basis of the auction sale as premium whether received in lump sum or in instalment, therefore, on such lease stamp duty will be payable at the rate of 8% of premium.

12. So far as the correctness of circular dated 17.5.2005 (Annexure-P/7) is concerned, it is found that the said circular has been issued by the Registrar Stamps on the basis of the view taken by different High Courts and there is no illegality in the circular and accordingly the challenge to that circular is rejected.

13. Now the nature of amount of Rs.5,04,000/- payable by the petitioner under the lease is to be ascertained in the light of the aforesaid legal principles which have been settled by the different High Courts. Under the lease deed dated 6th August, 2005 amount of Rs.5,04,000/- was payable as contract amount which the petitioner had agreed to pay at the rate of Rs.2,52,000/- per year and which was payable in eight instalments by the petitioner as prescribed in paragraph 5 of the lease deed. The petitioner was granted the right to extract 8400 cubic meter of sand in lieu of the payment of fixed auction amount of Rs. 5,04,000. The aforesaid amount payable by the petitioner is a premium and not a rent since on payment of the amount of Rs.5,04,000/- the lessor is parting right to extract fixed quantity of numeral for a fixed period of time and on expiry of that fixed period transfer of right also comes to an end. It is not a periodical payment for enjoyment of the benefits under the lease though it is payable in instalments, therefore, it can not be

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held to be rent. The amount has been mentioned in lump sum though payable in instalments. Premium can also be payable in installments in consideration of the conveyance implied in the lease and it is quantified in lump sum though may not be payable outright. Therefore, the respondents rightly demanded from the petitioner to pay the stamp duty for the registration of the lease deed (Annexure-P/1) as per the provisions of the law in accordance with the impugned circular and the argument of the petitioner that the stamp duty is payable under Article 35(a)(ii) which is the provisions relating to the lease where by such lease, rent is fixed and no premium is paid or delivered can not be accepted.

14. Since the petitioner did not get the lease registered and did not pay the instalments, therefore, no error has been committed by the respondents in cancelling the lease of the petitioner by order dated 5.7.2006.

15. In view of the aforesaid, I find no merit in the writ petition and the writ petition is accordingly dismissed. No order as to costs.

*Petition dismissed.*

I.L.R. [2009] M. P., 1928

**WRIT PETITION**

*Before Mr. Justice Arun Mishra & Mr. Justice Sanjay Yadav*

20 January, 2009\*

M.P. URJA VIKAS NIGAM LTD.

... Petitioner

Vs:

SANTOSH KUMAR DUBEY

... Respondent

**A. Industrial Disputes Act (14 of 1947), Sections 2(oo) & 25-F - Retrenchment - Employees worked for more than 240 days continuously and that too continuously for more than nine years - Services terminated without complying with the provisions of the Act - Employer alleged that it was a contractual appointment and contract was extended from time to time and on the conclusion of the project, it cannot be said to be a case of retrenchment - Held - For a long period of ten years the services were taken which goes to show that need was continuous - Work was not of temporary duration - It has not been established that project has come to an end - Thus, it amounted to unfair labour practice, to retrench the services of employees - Employees were entitled for protection of Sec. 25-F of Act.** (Para 9)

क. औद्योगिक विवाद अधिनियम (1947 का 14). धाराएँ 2(ओओ) व 25-एफ - छंटनी - कर्मचारियों ने निरंतर 240 दिनों से अधिक और निरंतर नौ वर्षों से भी अधिक कार्य किया - सेवाएँ अधिनियम के उपबंधों का अनुपालन किये बिना समाप्त की गई - नियोक्ता ने अभिकथित किया कि यह एक संविदात्मक नियुक्ति थी और संविदा समय-समय पर बढ़ायी गई और

परियोजना की समाप्ति पर इसे छंटनी का मामला नहीं कहा जा सकता - अभिनिर्धारित - दस वर्ष की लम्बी कालावधि के लिए सेवाएँ ली गई जिससे दर्शित होता है कि आवश्यकता निरंतर थी - कार्य अस्थायी अवधि का नहीं था - यह साबित नहीं किया गया कि परियोजना समाप्त होने वाली है - इसलिए यह कर्मचारियों की सेवाओं की छंटनी करने के लिए अनुचित श्रम-व्यवहार की कोटि में आता है - कर्मचारी अधिनियम की धारा 25-एफ के संरक्षण के हकदार थे।

**B. Back wages -** *No averment in the application filed u/s 31(3) of MPIR Act and no issue was framed by Labour Court that employees were not gainfully employed else where - Held - Mere bald statement of the employees cannot be accepted - Labour Court and Industrial Court have exercised the discretion not to award the back wages due to aforesaid lacuna - In the facts and circumstances, back wages have been rightly declined by the Labour Court.* (Para 12)

खा. पिछला वेतन - म.प्र. औद्योगिक संबंध अधिनियम की धारा 31(3) के अधीन पेश आवेदन में कोई प्रकथन नहीं और श्रम न्यायालय द्वारा कोई विवादक विरचित नहीं किया गया कि कर्मचारियों को अर्जक रूप से अन्यत्र नियोजित नहीं किया गया - अभिनिर्धारित - कर्मचारियों का केवल सादा कथन स्वीकार नहीं किया जा सकता - श्रम न्यायालय और औद्योगिक न्यायालय ने उपर्युक्त कमी के कारण पिछला वेतन अधिनिर्णीत न करके विवेकाधिकार का प्रयोग किया - तथ्यों और परिस्थितियों में श्रम न्यायालय द्वारा पिछला वेतन उचित रूप से अस्वीकार किया गया।

#### Cases referred :

2003(2) MPLJ 529, 2003(2) MPLJ 122, (2007) 9 SCC 748, 2007 MPLSR 76(SC), (2004) 8 SCC 246, (2006) 1 SCC 121, (2006) 1 SCC 253, (2007) 2 SCC 428.

*S. Paul with Akash Chaudhary, for the employer.*

*P.C. Chandak with Rajesh Soni & Uttam Maheshwari, for the employees.*

#### ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :- In the instant writ petitions, the facts are common. Common question is involved for consideration hence the writ petitions are being decided by the common order.

2. Other facts are similar except the period and the post held by the employee. The employee preferred an application under Section 31(3) of MPIR Act. It was averred that he was initially appointed as Helper on 23.2.1991 in the integrated Rural Energy Programme. Rakesh Kumar Gautam was initially appointed as Helper on 5.2.90, Subodh Kumar Jain was initially appointed as Helper on 15.12.97; Laxminarayan was initially appointed as Junior Assistant on 27.9.91, Lekhran was initially appointed as Helper on 1.4.91, Deepak Singh was initially appointed as Junior Assistant on 1.2.96 and Rajendra Kotha was initially appointed as Mechanic on 11.11.92. All the employees continuously worked up to 31.10.2000. The employee in WP No.6479/08(s) (*M.P. Urja Vikas Nigam Ltd. vs. Santosh*

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*Kumar Dubey*) continuously worked with effect from 23.2.1991 to 31.10.2000 for a period of more than nine years, thereafter his services were terminated by the employer M.P. Urja Vikas Nigam Ltd. without compliance of provisions of Industrial Disputes Act, 1947 (for short "ID Act"). It was further submitted by the employee in his application that he was initially employed on 23.2.1991 on fixed pay, but was issued a contract agreement for a period of 12 months after six months of actual appointment. Yearly contract used to be renewed till 31.3.2000, thereafter no contract in writing was executed. Employee continued in the employment till the date of his removal that is 31.10.2000. He has completed more than 240 days services, he has rendered continuous services as required under Section 25-B of ID Act. He has acquired status of permanent employee under the Standard Standing Order, provisions of sections 25-F of ID Act were not complied with, thus, the action of termination of his services was per se illegal and void.

3. In the reply filed by M.P. Urja Vikas Nigam Ltd. it was contended that Company was not an industry, continuous service of 240 days was not rendered in a preceding year, there was a contract, thus, provisions of section 2(oo), 25-F and 29-N of ID Act were not applicable. M.P. Urja Vikas Nigam Ltd. has its own rules, regulations and bye laws for recruitment and taking disciplinary actions. The removal was due to non-renewal of the contract. The project has come to an end, thus, there was no violation of the provisions of ID Act.

4. The Labour Court has directed the reinstatement of the employee, however, without back wages, the order has been affirmed by the Industrial Court. The appeals preferred by the employer as well as employees have been dismissed. Employer has assailed order of reinstatement whereas employees have prayed for grant of back wages before the Industrial Court. Dissatisfied by the orders passed by the Labour Court and Industrial Court, the instant writ petitions have been preferred by the employer as well as by the employees.

5. Shri S. Paul, learned counsel appearing with Shri Akash Chaudhary for employer has submitted that it was a case of purely contractual employment, renewal was made year to year, project has come to an end, thus, it could not be said to be a case of retrenchment. Even otherwise, M.P. Urja Vikas Nigam Ltd. has own rules, regulations and bye laws for recruitment and taking disciplinary actions, appointment was not as per rules and regulations, appointment was illegal and void, consequently, the provisions of retrenchment contained in section 2(oo) of ID Act would not be applicable in the instant case. Learned counsel has relied upon various decisions to be referred later.

6. Shri P.C. Chandak, learned counsel appearing with Shri Rajesh Soni and Shri Uttam Maheshwari, for employees have supported the order with respect to reinstatement passed by the Labour Court and Industrial Court. He has submitted

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that it was not a case of a project which came to an end, it has not been proved by adducing evidence by employer, continuous service for 9-10 years was rendered by the employees, thus, employees were entitled to protection of 25-F of ID Act; retrenchment could not have been made, services were required. They have also prayed for grant of back wages as each of the employee has stated that he was not gainfully employed after his removal from the services.

7. First question for consideration is whether the services of the employees were continuous service or not, in other words whether the services were contractual and it was on a project which came to an end.

8. It is not in dispute that for 9-10 years continuous service has been rendered and there was extension year to year and last extension was up to 31.3.2000, thereafter there was no extension of the services, each of the employee has rendered the services up to 31.10.2000 when they were removed unceremoniously without any written notice and payment of retrenchment compensation.

9. In *S.M. Nilajkar and others vs. Telecom District Manager, Karnataka* 2003 (2) MPLJ 529 the Apex Court has considered the concept of "retrenchment" and laid down that the legislature is suggestive of the intent to assign the term "retrenchment" meaning wider than what it is understood to have in common parlance. There are certain exceptions carved out. The termination of service of a workman so long as it is attributable to the act of the employer would fall within the meaning of "retrenchment" de hors the reason for termination. To be excepted from within the meaning of "retrenchment" the termination of service must fall within one of the four excepted categories. The Apex Court has laid down thus :-

"12. "Retrenchment" in its ordinary connotation is discharge of labour as surplus though the business or work itself is continued. It is well settled by a catena of decisions that labour laws being beneficial pieces of legislation are to be interpreted in favour of the beneficiaries in case of doubt or where it is possible to take two views of a provision. It is also well settled that Parliament has employed the expression "the termination by the employer of the service of a workman for any reason whatsoever" while defining the term "retrenchment", which is suggestive of the legislative intent to assign the term "retrenchment" a meaning wider than what it is understood to have in common parlance. There are four exceptions carved out of the artificially extended meaning of the term "retrenchment", and therefore, termination of service of a workman so long as it is attributable to the act of the employer would fall within the meaning of "retrenchment" de hors the reason for termination. To be excepted from within the meaning of "retrenchment" the termination of service must fall within one of the four excepted categories. A termination

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of service which does not fall within categories (a),(b),(bb) and (c) would fall within the meaning of "retrenchment".

13. The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of sub-clause (bb) subject to the following conditions being satisfied :-

(i) that the workman was employed in a project or scheme of temporary duration;

(ii) the employment was on a contract, and not as a daily wager simpliciter, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project;

(iii) the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of the contract; and

(iv) the workman ought to have been apprised or made aware of the abovesaid terms by the employer at the commencement of employment.

14. The engagement of a workman as a daily wager does not by itself amount to putting the workman on notice that he was being engaged in a scheme or project which was to last only for a particular length of time or upto the occurrence of some event, and therefore, the workman ought to know that his employment was short-lived. The contract of employment consciously entered into by the workman with the employer would result in a notice to the workman on the date of the commencement of the employment itself that his employment was short-lived and as per the terms of the contract the same was liable to termination on the expiry of the contract and the scheme or project coming to an end. The workman may not therefore complain that by the act of the employer his employment was coming to an abrupt termination. To exclude the termination of a scheme or project employee from the definition of retrenchment it is for the employer to prove the abovesaid ingredients so as to attract the applicability of sub-clause (bb) abovesaid. In the case at hand, the respondent employer has failed in alleging and proving the ingredients of sub-clause (bb), as stated hereinabove. All that has been proved is that the appellants were engaged as casual workers or daily-wagers in a project. For want of proof attracting applicability of sub-clause (bb), it has to be held that the termination of the services of the appellants amounted to retrenchment."



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It is apparent from the aforesaid dictum that to exclude the termination of a scheme or project employee from the definition of retrenchment, it is for the employer to prove the ingredients so as to attract the applicability of sub-clause (bb). The employer has miserably failed in the instant case to prove that project has come to an end, no evidence has been adduced in that regard is not in dispute. The concurrent finding recorded by the Labour Court and Industrial Court is that requirement continues and scheme was not of temporary duration. As the test laid down to bring the case in excepted category of retrenchment has not been established, there is no escape from the conclusion that continuous service was rendered by the employees and they were entitled for the protection of section 25-F of ID Act. Their case did not fall in the excepted category of section 2(oo) of ID Act.

In *National Thermal Power Corporation vs. K.K. Shrivastava and others* 2003(2)MPLJ 122, services of the employees were taken on contract basis with effect from 18.1.91 to 15.2.94. This Court observed that when veil is lifted it becomes clear that the object of the appellant was to deprive the respondent of the benefit available under the Act of 1947 by keeping the employee on contractual basis, it was also observed that work was not for temporary duration. Termination without notice would amount to unfair labour practice.

In the instant case it is apparent that for a long period of ten years the services were taken which goes to show that need was continuous. Employment was not for temporary duration, work was not of temporary duration, it has not been established that project has come to an end; thus, it amounted to unfair labour practice in the instant case; to retrench the services of employees, employees were entitled for protection of Section 25-F of ID Act. Thus, we find that without compliance of provisions of Section 25-F of the ID Act, retrenchment made was illegal and void.

10. Shri Paul, learned counsel appearing for employer has relied upon decision of the Apex Court in *M.P. Administration vs. Tribhuban* (2007) 9 SCC 748 in which the Apex Court has noted in case section 25-F of ID Act has not been complied with, compensation is also awardable not automatic reinstatement. Change in view of the Apex Court in this regard has been highlighted. Relief which is to be granted to a daily-wager with respect to back wages has a different concept than it is to be applied in the case of a permanent employee. At one point of time reinstatement with full back wages used to be automatically granted, there is change in the said trend found in the decisions of the Apex Court. In the instant case, the decision does not espouse the cause of the employment as we are not inclined to grant the back wages in the instant cases and as the employee has worked for ten years and work has not come to an end, we do not consider it appropriate to award the compensation. It was not a case of loss of confidence also, thus, in our opinion, reinstatement which has been ordered by the Labour

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Court, affirmed by the Industrial Court is proper in the facts and circumstances of the instant case.

11. Counsel has also relied upon decision of Apex Court in *Rajasthan Tourism Development Corporation Ltd. and another vs. Intejam Ali Zafri* 2007 MPLSR 76 (SC) in which the Apex Court has laid down that provision of section 25-F of ID Act is not attracted if workman had not worked for 240 days in one calendar year, he had worked for about 227 days in four years period, thus, section 25-F of ID Act was held not to be applicable. Hence, it was ordered that no reinstatement with back wages could be ordered. In the instant case it is not in dispute that continuous service has been rendered without any break for more than nine years. It is also not in dispute that services have been rendered in each of the preceding year for more than 240 days, consequently, compliance of section 25-F of ID Act was necessary.

Counsel has also referred to the decision of Apex Court in *M.P. Electricity Board vs. Hariram* (2004) 8 SCC 246 where the employee was taken in service for the purpose of digging pits for erecting electric poles on a project work which came to an end. On the basis of material on record, the Apex Court has held that employment was on job required basis and was not for continuous service required by the Board. Therefore, the employees could not claim either permanency or regularization since there was no such permanent post on which they could stake their claim. In the instant case, relief of regularization has not been granted by the Labour Court or Industrial Court, that has been declined. However, work was apparently continuous one, it was not a project work. Decision of Apex Court in *Punjab State Electricity Board vs. Darbara Singh* (2006) 1 SCC 121 has also been pressed into service in which the employment was for a specific period. It was conditional and clearly indicated that on appointment of regular employee, his engagement would come to an end, it was held that case was under excepted category of section 2(oo) of ID Act. Section 25-F of ID Act would not be applicable, reinstatement directed was quashed. But the facts are otherwise in the instant case. There was continuous requirement of work, work was taken for ten years, case was not in the excepted category enumerated under section 2(oo) of ID Act, thus, compliance of section 25-F was necessary. Other decisions relied upon in *Kishore Chandra Samal vs. Orissa State Cashew Development Corpn. Ltd., Dhenkanal* (2006) 1 SCC 253 in which the employee was engaged for various spells for fixed period from July, 1982 to August, 1986. It was again a case falling within the exception on facts, consequently section 25-F of ID Act was held not to be applicable. For the aforesaid reasons, decision has no application.

Reliance has also been placed on decision of Apex Court in *Punjab State Electricity Board and another vs. Sudesh Kumar Puri* (2007) 2 SCC 428 in which services were taken of Meter Readers by State Electricity Board on contract

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basis for specific period, payment was made per meter reading at a fixed rate, services were dispensed with without following provisions of section 25-F of ID Act. It was held that case was covered by section 2(oo) (bb) of ID Act, the employees were not entitled for reinstatement or back wages. The facts are different in the instant case.

12. With respect to back wages employees have come up in petition, there is no averment made by them in the application filed under Section 31(3) of MPID Act before the Labour Court that they were not gainfully employed else where, no prayer for framing of any issue was made before the Labour Court, no issue with respect to gainful employment else where was framed by the Labour Court, consequently, mere bald statement of the employees cannot be accepted that they were not gainfully employed else where, it was incumbent upon them to aver and thereafter to prove the fact, otherwise also, in the facts and circumstances of the case, the Labour Court and Industrial Court have exercised the discretion not to award the back wages due to aforesaid lacuna and, in the facts and circumstances of the case, back wages have been rightly declined by the Labour Court and Industrial Court.

13. Resultantly, we dismiss the petitions filed by the employees and employer. The orders passed by the Labour Court and Industrial Court are hereby affirmed. We leave the parties to bear their own costs as incurred of the petitions.

*Petition dismissed.*

I.L.R. [2009] M. P., 1935

**WRIT PETITION**

*Before Mr. Justice Sanjay Yadav*

28 January, 2009\*

**SALEEM MANSOORI & ors.**

... Petitioners

**Vs.**

**MUNICIPAL CORPORATION & ors.**

... Respondents

**Municipal Corporation Act, M.P. (23 of 1956), Sections 134 & 141 - Recovery of Property Tax - Shops in possession of tenants - Corporation put lock to ensure recovery of Property Tax - Held - Recovery of Property Tax, if it is to be effected on an occupier who happens to be a tenant which can only be made by attachment of rent due in respect of the said property - Corporation cannot recover tax by putting lock over the property in occupation of a tenant.** (Para 6)

नगर पालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 134 व 141 - सम्पत्ति कर की वसूली - दुकानें किरायेदारों के कब्जे में - निगम ने सम्पत्ति कर की वसूली

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सुनिश्चित करने के लिए ताला लगाया – अभिनिर्धारित – सम्पत्ति कर की वसूली, यदि यह अधिमोगी से की जानी है जो किरायेदार है जो केवल उस सम्पत्ति के सम्बन्ध में देय किराये की कुर्की द्वारा हो सकती है – निगम किरायेदार के अधिभोग की सम्पत्ति पर ताला लगाकर कर वसूल नहीं कर सकती।

*Arvind Chouksey*, for the petitioners.

*Anshuman Singh*, for the respondent Nos.1 & 2.

**ORDER**

**SANJAY YADAV, J. :-** The petitioners are the occupants of shops situated in Chitranganj Ward at Raddi Chowki, Jabalpur as tenants. The shops are owned by respondent No. 3, who owes the liability to pay property tax to the respondent Municipal Corporation, Jabalpur which is not paid by him since 1997-98 to 2006-07 which has accumulated to Rs.53,263/-. The respondent Corporation in order to recover the said amount and in exercise of its power under the M.P. Municipal Corporation Act, 1956, (hereinafter shall be referred as Act of 1956) issued a notice on 10.3.2008, Annexure P/1 indicating therein that the shops would be attached and a lock would be put to ensure recovery of the property tax due thereon. In pursuance thereof, the shops were locked on 15.3.2008 and given in Supradnama to respondent No. 3 on 15.3.2008, Annexure R-1/5. The locks were, however, directed to be opened by interim order dated 8.4.2008 passed by this Court.

2. The contention of the learned counsel for the petitioner is that it is beyond the powers of the respondent Corporation to effect recovery of dues towards property tax by putting lock on a shop wherein the petitioners are in occupation as tenants. Reliance is placed on the provisions contained under Section 134 and Section 141 of the Act of 1956. It is urged that Section 134 though empowers the Municipal Corporation to recover tax by one or more of the processes stipulated therein, i.e., by presenting a bill; by serving a written notice of demand; by distraint and sale of movable property of the person concerned; by attachment and sale of his immovable property; in the case of octroi and toll, by the attachment and sale of goods and vehicles; in the case of property tax, by the attachment of rent due in respect of the property or by filing a suit. It is contended that the property tax, if it is to be recovered from an occupant who happens to be a tenant can be recovered only by attaching the rent due in respect of the property and by no other mode and certainly not by putting a lock over the property/shops occupied by the petitioners as tenant. It is further contended that the foremost liability to pay the property tax is of the owner under Section 141 (1) of the Act of 1956 and though sub section (2) of Section 141 empowers the authorities of the respondent Corporation to recover the property tax charged and levied on the owner may also be recovered from any occupier of the land or building under the circumstances, but the same has to be in accordance with process as it prescribed under Section 134 of the Act of 1956. It is averred that since the petitioners are

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tenants in occupation, the only recourse with the respondent Municipal Corporation to recover the amount due towards property tax by attaching the rent due in respect of said property and not by putting lock over the said property. It is accordingly contended that the action initiated by the respondent Corporation is de hors the powers vested on them under the Act of 1956.

3. The respondent Corporation on its turn, however, supports the action initiated to recover the property tax charged and levied on the property belonging to respondent No. 3 and it is contended that the property tax is a tax that the Municipal Corporation is empowered to impose under Section 132 (1) (a) of the Act of 1956. Section 134 of the Act provides for different processes, resort can be had one for recovery of the property tax. Sub section (2) of Section 141 empowers the Municipal Corporation to recover the property tax from any occupier of the land or building. It is further contended that Section 147 provides that if a person is dissatisfied with the valuation of property tax, he may prefer an objection to the Commissioner and the Commissioner shall deal with the objection under Section 148. Section 149 of the Act provides for filing of an appeal to the District Court in case a dispute arises as to the liability of any land or building to assessment or the principle of assessment for the amount of tax assessed. The learned counsel for the respondents, therefore, contends that the action as taken by authorities of Municipal Corporation cannot be found fault with, the same being in accordance with the provisions of Act of 1956.

4. Having given thoughtful consideration to the submissions put forth by respective counsel, the issue which crops up for consideration is whether it is within the power of the Municipal Corporation and its authorities to realise the arrears towards property tax from an occupier who happens to be a tenant by fixing a lock on the said premises.

5. For proper appreciation of the aforesaid issue worth it will be to note the relevant provisions as contained in the Act of 1956. Regarding imposition of the property tax and its realization, Part IV Chapter XI of the Act of 1956 deals with taxation. Section 135 provides for imposition of property tax stipulating therein:

**"135. Imposition of property tax.-** (1) Notwithstanding anything contained in this Act, the tax under clause (a) of sub-section (1) of Section 132 shall be charged, levied and paid, at the rate not less than six percent and not more than ten percent of the annual letting value, as may be determined by the Corporation for each financial year:

Provided that if the Corporation fails to determine the rate of the property tax by 31st March the rate as prevailing during the previous financial year shall be deemed to be the rate for current financial year."

Section 134 makes a provision regarding recovery of Municipal Tax by one

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or more of the processes stipulated therein, viz., by presenting a bill; by serving a written notice of demand; by distraint and sale of movable property of the person concerned; by attachment and sale of his immovable property, in the case of octroi and toll, by the attachment and sale of goods and vehicles; in the case of property tax, by the attachment of rent due in respect of the property or by filing a suit. Section 141 of the Act of 1956 provides that the property tax charged and levied upon any land or building under Section 135, shall be paid primarily by the owner thereof. Sub section (2) of Section 141, however, empowers the Municipal Corporation to recover even from an occupier. It stipulates that any person so employed shall have power, at all reasonable times and after giving due notice, and on production, if so required of authorization in that behalf from the Commissioner, to enter on, survey and value any land or building within the City which the Commissioner may direct him to survey and value.

6. A close perusal of the aforesaid provisions reveals that, it is within the power of the Municipal corporation, to recover the property tax charged and levied on the owner even from the occupier of said premises in the manner and to the extent as is provided in the Act. Whereas, Section 134 (6) stipulates that in case of property tax, by the attachment of rent due in respect of the property. A conjoint reading of Section 141 (2) and Section 134 (6) reveals that the recovery of property tax, if it is to be effected on an occupier who happens to be tenant which can only be by attachment rent due in respect of the said property. Learned counsel for the respondent Corporation has failed to show any provision which empowers the Municipal Corporation to effect recovery by putting a lock over the property in occupation of a tenant to effect recovery of property tax.

7. Having thus considered, this Court is of the opinion that the action taken by the respondent Municipal Corporation by putting a lock on shops in occupation of the petitioner as a tenant for the purpose of recovery of property tax is without any authority. The said action of respondents is hereby quashed. It will be open for the respondents to effect recovery of property tax, if they so intend, from the petitioner tenants, by attaching the rent due in respect of the said property.

8. In the result the petition is allowed to the extent above. However, no costs.

*Petition allowed.*

**ARUN SINGH BHADOURIYA Vs. STATE OF M.P.**

I.L.R. [2009] M. P., 1939

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

30 January, 2009\*

**ARUN SINGH BHADOURIYA**

.... Petitioner

Vs.

**STATE OF M.P. & ors.**

... Respondents

**Service Law - Lower Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994, Rule 7, Panchayat Samvida Shala Shikshak (Recruitment and Conditions of Contract) Rules, M.P. 2005, Rules 10, 12, 12(a) & 12(h) - Age relaxation - Petitioner working as Samvida Shala Shikshak Class-II in the Government School - He applied for the post of Civil Judge claiming relaxation of 3 years on the ground that he is a Government Servant - Held - Appointing authority of the petitioner is Janpad Panchayat and thus he is not a Government Servant and cannot be granted age relaxation.** (Paras 4 to 6)

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

**Cases referred :**

AIR 2006SC 1165.

*Rajendra Tiwari with Udayan Tiwari, for the petitioner.**V. Awasthy, G.A., for the respondent Nos.1 & 2.**None, for the other respondents.***ORDER**

The Order of the Court was delivered by A.K. PATNAIK, C. J. :- The petitioner is working as Samvida Shala Shikshak Class II in the Government School, Sada (Goram), Block Mehgaon, District Bhind. He applied pursuant to an advertisement issued by the Madhya Pradesh Public Service Commission on 26.2.2007 inviting applications for 240 posts of Civil Judge (Entry Level) in the Lower Judicial Services. He was allowed by the M.P. Public Service Commission to take the preliminary examination on 15.5.2007, and after being successful, he was allowed to take final examination conducted by the M.P. Public Service Commission on 5.8.2007. Since he was successful in the final examination, he expected that he

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will be called for interview by the M.P. Public Service Commission but he was not called for interview. He came to learn subsequently that he was not called for interview because he had completed the upper age limit of 35 years as on 1.1.2008 and was, thus, not eligible for recruitment to the post of Civil Judge (Entry Level). Aggrieved, the petitioner has filed this writ petition under Article 226 of the Constitution of India.

2. Mr. Rajendra Tiwari learned senior counsel appearing for the petitioner, submitted that the petitioner was a Government servant and under the second proviso to Rule 7 of the Madhya Pradesh Lower Judicial Service (Recruitment and Conditions of Service) Rules, 1994, the upper age limit of a candidate who is a Government servant was relaxable upto 38 years for direct recruitment to the post of Civil Judge (Entry Level).

3. Rule 7 of the Madhya Pradesh Lower Judicial Service (Recruitment and Conditions of Service) Rules, 1994, under which the petitioner claimed exemption, is quoted herein below :

**"R.7. Eligibility.:-** No person shall be eligible for appointment by direct recruitment to posts in category (i) of rule 3(1) unless :—

(a) he is a citizen of India;

(b) he has attained the age of 21 years and not completed the age of 35 years on the 1st day of January of the next following year in which application for appointment are invited :

Provided that the upper age limit shall be relaxable upto a maximum of three years, if a candidate belongs to Scheduled Castes, Scheduled Tribes or Other Backward Classes :

Provided further that the upper age limit of a candidate who is a Government servant, (whether permanent or temporary) shall be relaxable upto 38 years:

Provided further that the upper age limit of a candidate shall be relaxable by appropriate number of years, if on recruitment takes place for one year or more, to the Madhya Pradesh Lower Judicial Service.

(c) he possesses a degree in law of any recognized University;

(d) he has good character and is of sound health and free from any bodily defect which renders him unfit for such appointment."

It will be clear from the second proviso to Rule 7 of the Madhya Pradesh Lower Judicial Service (Recruitment & Conditions of Service) Rules, 1994, that the upper age limit of a candidate who is a Government servant (whether permanent or temporary) is only relaxable upto 38 years.

4. The petitioner was appointed under the Madhya Pradesh Panchayat Samvida Shala Shikshak (Recruitment & Conditions of Contract) Rules, 2005 (for short the 2005 Rules') as Samvida Shala Shikshak by the Janpad Panchayat, Mehgaon, District.



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Bhind. On perusal of the 2005 Rules, we find that a candidate on being selected for appointment as Samvida Shala Shikshak is employed on a contract for a maximum period of 3 years for a particular school under Rule 12, under the Zila Panchayat and Janpad Panchayat as the case may be. Hence, the employing authority of the petitioner is not the State Government but the Janpad Panchayat and the tenure of employee is governed by the contract of appointment. In Rule 10 of the 2005 Rules, it is stipulated that a Samvida Shala Shikshak shall be under the discretionary and administrative control of Zila Panchayat and Janpad Panchayat, as the case may be and the disciplinary authority of the petitioner is also the Janpad Panchayat. In Rule 12(a) of the 2005 Rules, it is provided that a person employed under the Rules shall work under the administrative control of the Janpad Panchayat through its Chief Executive Officer and other officers as prescribed. Thus, the controlling authority of the petitioner is the Chief Executive Officer of the Janpad Panchayat. In Rule 12(h) of the 2005 Rules, it is also stipulated that the person employed under this rule shall be governed by the Madhya Pradesh Panchayat Services (Conduct) Rules, 1998, unlike a Government servant to whom the Madhya Pradesh Civil Services (Conduct) Rules, 1965 are applicable. Hence, the petitioner cannot be held to be a Government servant.

5. A similar question arose for decision in *Union Public Service Commission Vs. Girish Jayantilal Vaghela & others* (AIR 2006 SC 1165). Girish Jayantilal Vaghela was appointed as Drugs Inspector on short term contract basis on a fixed salary for a period of six months from the date of joining or till the date he was selected by the Union Public Service Commission and appointed on a regular basis, whichever was earlier. His appointment was renewed after every six months with short breaks and it continued for over five years. The Union Public Service Commission issued an advertisement for making regular selection on the post of Drugs Inspector and the upper age limit of the candidate was fixed 30 years which was relaxable for Government servants upto five years in accordance with the instructions and orders issued by the Central Government. The Supreme Court held that since Girish Jayantilal Vaghela was working on short term contract basis, he was not a Government servant and was not eligible for any relaxation in the upper age limit. As the petitioner was employed on a contract basis under the Zila Panchayat and he was under the administrative and disciplinary control of the Zila Panchayat, he was not a Government servant.

6. Since the petitioner is not a Government servant, he cannot claim the relaxation of the upper age limit of 38 years. Admittedly, the petitioner had crossed the age of 35 years on the 1st day of January 2008. Hence he was not eligible for appointment by direct recruitment to the post of Civil Judge, (Entry Level). The writ petition has no merit and is accordingly dismissed.

*Petition dismissed.*

**JANKIPRASAD GARG Vs. STATE OF M.P.**

I.L.R. [2009] M. P., 1942

**WRIT PETITION***Before Mr. Justice R.S. Jha*

5 February, 2009\*

**JANKI PRASAD GARG**

Vs.

**STATE OF M.P. & ors.**

... Petitioner

... Respondents

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

(Paras 6 &amp; 7)

**क. सेवा विधि - आकस्मिक या दैनिक मजदूरी कर्मचारी - कोई आकस्मिक या दैनिक मजदूरी कर्मचारी वेतनमान में वेतन का हकदार नहीं है बल्कि राज्य सरकार द्वारा विहित न्यूनतम मजदूरी प्राप्त करने का हकदार है - याची, एक अर्द्धकुशल दैनिक मजदूर न्यूनतम वेतनमान और दैनिक भत्ता कुल 4055/- रुपये पाने का हकदार नहीं है बल्कि अर्द्धकुशल श्रमिक के लिए कलेक्टर द्वारा विहित न्यूनतम मजदूरी अर्थात् 2438/- रुपये का हकदार था।**

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

(Paras 5 to 7)

**ख. सेवा विधि - रिट याचिका 3838/05(एस) (ददी लाल का मामला) में उच्च न्यायालय के विनिश्चय के प्रकाश में पूर्ववर्ती रिट याचिका में यह आदेशित किया गया कि याची अर्द्धकुशल दैनिक मजदूर निम्नतम श्रेणी पर वेतन का हकदार है - किन्तु तत्पश्चात् ददी लाल का मामला उच्च न्यायालय की खण्ड न्यायपीठ द्वारा रिट अपील 491/07 में उलट दिया गया - खण्ड न्यायपीठ ने अभिनिर्धारित किया कि मान में न्यूनतम वेतन दिया जाना उच्चतम न्यायालय के उमा देवी [(2006) 4 एससीसी 1] के मामले में निर्णय के प्रतिकूल है - न्यूनतम मान का दावा करने वाली पश्चात्पूर्ती रिट याचिका खारिज।**

**Cases referred :**

(1996) 11 SCC 77, (1997) 11 SCC 363, (2003) 6 SCC 123, (2003) 1 SCC 250, (2006) 9 SCC 321.

S.K. Garg, for the petitioner.

Rahul Jain, G.A., for the respondents.

## JANKIPRASAD GARG Vs. STATE OF M.P.

## O R D E R

R. S. JHA, J. :-The petitioner has filed this petition claiming the following reliefs:

- (i) This Hon'ble Court may kindly be pleased to direct the respondents to pay the salary at Rs.4055/- per month to the petitioner as was being paid prior to 2006 in place of Rs.2438/-.
- (ii) The respondents be also directed to pay the arrears of salary which has been deducted from the salary of the petitioner with interest.
- (iii) The respondents be also directed to pay salary with retrospective effect and other benefits.
- (iv) This Hon'ble Court be further pleased to pass any such other orders as this Hon'ble Court may deem fit under the circumstances of the case.

2. It is submitted by the learned counsel for the petitioner that the petitioner who was working in the Water Resources Department as Semi Skilled daily wager, on a previous occasion, had approached this Court by filing WP(s) No.152/04 which was disposed of with a direction to the respondents to consider his case for regularization. As nothing was done by the respondents, the petitioner filed WP No.2573/06(s) and this petition was also disposed of by order dated 4-8-2006 relying upon the order passed by this Court in WP No.3838/05(s) (*Daddi Lal Yadav v. State of M.P. and others*) in the following terms:

“ In W.P. No.3838/05(s) (*Daddi Lal Yadav v. State of M.P. and others*) and other writ petitions as per common order dated 3-8-2006, on due consideration of the decisions of the Apex Court in *Secretary, State of Karnataka and others v. Umadevi and others*-2006 AIR SCW 1991 – (2006) 4 SCC 1, *State of Punjab and others v. Devinder Singh and others* (1998) 9 SCC 595, *State of Punjab v. Talwinder Singh and others* (2003) 11 SCC 776 and decision of Division Bench of this Court in *State of M.P. and others v. Pqdam Chand and others* 2006(2) MPLJ 397 for the reasons stated in the common order, this Court has held that -

1. The petitioners who are appointed before 31.12.1988 or after 13-12-1988 are not entitled for regularization of their services.
2. The petitioners who have been appointed prior to 31-12-1988 are to be given the salary at the lowest grade of the employees of their cadre in the concerned department within six months.
3. The petitioners shall be given all relaxation for the period they have rendered the services as and when the vacancies are advertised.

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4. The respondents also to consider whether the benefit of additional marks to be given to the petitioners for the experience which they possess while filling up of the vacancies as per the rules.

5. The petitioners, as prayed are free to approach the Labour Court for the purpose of classification in case they are covered under the relevant Industrial Law as may be applicable.

6. The respondents to initiate process for regular recruitment as directed in *Secretary, State of Karnataka and others v. Umadevi and others* 2006 AIR SCW 1991.

7. The respondents to consider the direction issued by the Apex Court in paragraph 44 of the decision in *Secretary, State of Karnataka and others v. Umadevi and others* 2006 AIR SCW 1991.

This petition being similar is disposed of in terms of the said order. No cost. "

3. It is submitted by the learned counsel for the petitioner that in spite of the aforesaid direction, the respondents/ authorities instead of paying him minimum the scale along with the daily allowance totaling a sum of Rs.4055/- as indicated in Annexure P-4, have now started paying the petitioner Rs.2438/- which is the minimum wage prescribed for a semi skilled daily wager. The contention of the learned counsel for the petitioner is that the aforesaid act of the respondents is contrary to law as the petitioner in view of the order passed by this Court in the previous petitions filed by him is entitled to the pay Rs.4055/- and the amount being paid to him cannot be reduced to Rs.2438/- per month which is the rate prescribed for a semiskilled daily wager specifically in view of the order passed by this Court on 4-8-2006 in WP No.2576/06(s) which was disposed of in the light of the order passed in the case of *Daddi Lal Yadav v. State of M.P.*

4. Per contra, the learned Government Advocate, appearing on behalf of the respondents, submits that the petitioner is not entitled to the relief sought by him and is entitled to be paid only on the rate prescribed by the Collector for semi skilled labour. It is submitted that subsequent to the decision of this Court in W.P. No.3838/05(s) (*Daddi Lal Yadav v. State of M.P. and others*), the Indore Bench of this Court, relying upon the aforesaid judgment, had passed further directions including direction for regularization and grant of minimum pay in the corresponding scale for the post or cadre in which they were working in the case of *Rakesh s/o Parashuram Yadav and others v. State of M.P. and others* 2007(1) MPLJ 133, in the following terms in para 22:

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"i) The daily wages employees, engaged even prior to 31-12-1988 in the State of M.P., are not entitled for their regularization in the light of the policy dated 9-1-1990 or on the basis of plea of discrimination or otherwise, except who falls within purview of direction of para (ii) below.

ii) The daily wages employees, who were appointed, irregularly (not illegally) prior to 31-12-1988 on a sanctioned vacant post possessing qualification/eligibility and have continuously worked without intervention of the Court are entitled for their consideration of regularisation in view of discussion made hereinabove by adopting one time measure. The State Government or the instrumentalities of the State shall take recourse for such employees within a period of six months from today in the light of the observations made in para 53 in the case of *Umadevi* (supra).

iii) For remaining other employees who are working on daily wages, and are not covered by the direction of para (ii) hereinabove, the Government is directed to initiate the process of regular selection and recruitment, on the available vacant post as directed by the Supreme Court in the case of *Umadevi* (supra).

iv) As and when vacancies are filled up by the Government by regular process of selection such daily wages employees, be benefited by the age relaxation to the period to which they have rendered their services, while facing regular process of selection for recruitment by them.

v) The respondents should also carve out the measure to grant them additional marks/preference in the process of selection, by virtue of their experience of work on the post, while filling up the vacancies in accordance with the provisions of rules.

vi) Petitions filed by petitioners, challenging the order of cancellation of regularisation, are allowed and the orders of cancellation of regularisation are hereby quashed.

vii) Petitioners given minimum, pay in the corresponding scale to the post or cadre in which they are working in the concerned department, from the date of passing of this order. Such benefit be extended to them within a period of six months.

viii) Petitioners who want to seek the relief of classification by approaching the Labour Court, are free to take such recourse if they are covered under the provisions of the Industrial Laws or Labour Laws.

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ix) All these writ petitions are disposed of with the above directions."

It is submitted that subsequently, the aforesaid judgment in the case of *Rakesh v. State of M.P.* (supra) which had affirmed the directions issued by this Court in the case of *Daddi Lal Yadav* (supra) with additional directions in para 22, has been specifically overruled by an order passed by a Division Bench of this Court in WA No.491/07 (*M.P. Urja Vikas Nigam Limited and others v. Radra Prasad Mishra*) decided on 2-5-2007 and, therefore, the relief sought by the petitioner deserves to be rejected.

5. I have heard the learned counsel for the parties at length. From a perusal of the order passed by this Court in the case of *Daddi Lal Yadav* (supra) which has also been passed in the petitioner's case as well as the directions issued by this Court in paragraph 22 in the case of *Rakesh* (supra) in juxta position with the order passed by a Division Bench of this Court in case of *Urja Vikas Nigam*, it is apparent that the Division Bench of this Court has categorically stated that the judgment in the case of *Rakesh* (supra) does not lay down a correct law and has held that any direction for the grant of relaxation of age while filling up vacancies, direction for filling up all vacancies, conferral of benefits by granting additional marks, giving preference in the process of selection, for granting minimum pay in the corresponding pay scale are all contrary to the judgments of the Supreme Court in the following terms in paragraph 38:-

"38. In our considered view directions for grant or relaxation of age filing up, grant of direction to fill up the vacancies as a mandate, conferral of benefit for carving out measures to grant them additional marks, preference in the process of selection, grant of minimum pay in the corresponding scale, are contrary to judgments of the Supreme Court which have been cited hereinabove. In our humble view the said decisions have been misread and that is why the aforesaid general directions have been issued. Hence, we conclude and hold the decision rendered in the case of *Rakesh* (supra) does not lay down the law correctly in that regard. At this juncture we would also like to clarify another aspect i.e. the direction in paragraph 53 of *Uma Devi* (supra) only pertained to irregular appointments in addition to qualifiers provided therein."

6. I am in respectful agreement and also bound by the judgment of the Division Bench rendered in the case of *Urja Vikas Nigam* (supra) wherein it has been held that the relief of grant of minimum pay in the corresponding scale is contrary to the judgment of the Supreme Court. Apart from the judgment relied upon by the Division Bench in the case of *Urja Vikas Nigam* (supra), the Supreme Court

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in the case of *State of Haryana v. Jasmer Singh* (1996) 11 SCC 77, *Chief Superintendent, Government Livestock Farm Hissar v. Ramesh Kumar* (1997) 11 SCC 363, *State of Haryana v. Tilak Raj* (2003) 6 SCC 123, *State of Orissa v. Balaram Sahu* (2003) 1 SCC 250, *State of Haryana v. Charanjit Singh* (2006) 9 SCC 321 has also held that the casual or daily wage employee is not entitled to pay in the pay-scale but is entitled to receive the minimum wages as prescribed by the State Government.

7. As the judgment in the case of *Rakesh* (supra) which had specifically relied upon the judgment in the case of *Daddilal* (supra), has been declared to be no longer good law by a Division Bench of this Court in the case of *Urja Vikas Nigam* (supra), the relief sought by the petitioner based on the judgment in the case of *Daddilal* (supra) for grant of minimum in the scale along with the daily allowance i.e. a sum of Rs.4055/-, cannot be granted as the petitioner is entitled to receive only minimum wages at the rate prescribed by the Collector for semi skilled labour as revised from time to time.

8. In the circumstances, the petition filed by the petitioner is dismissed in view of the law laid down in the case of *M.P. Urja Vikas Nigam Limited* (supra). 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., 1947

**WRIT PETITION**

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

11 February, 2009\*

**SIYABAI THAKUR (SMT.)**

Petitioner

Vs.

**M.P. STATE ELECTRICITY BOARD & ors.**

Respondents

Electricity Act (36 of 2003), Sections 37 & 42, Municipalities Act, M.P. 1961, Section 5 - Supply of electricity to Bheraghat - By order, State Government directed different schedules for supply of electricity for urban and rural areas - Notification u/s 14 of Electricity Act provides that smaller urban area or transitioned area specified u/s 5 of Municipalities Act is not a rural area for the purpose of Electricity Act - Bheraghat being transitional area u/s 5 of Municipalities Act notified as Nagar Panchayat - Bheraghat has to be treated as urban area and has to be supplied electricity subject to regulations in urban areas - Petition allowed. (Paras 5 to 9)

विद्युत अधिनियम (2003 का 36), धाराएँ 37 व 42, नगरपालिका अधिनियम, म.प्र. 1961, धारा 5 - भेड़ाघाट को विद्युत प्रदाय - राज्य सरकार ने आदेश द्वारा नगरीय और

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ग्रामीण क्षेत्रों के लिए विद्युत प्रदाय के लिए भिन्न-भिन्न समय सारणियों का निदेश दिया - विद्युत अधिनियम की धारा 14 के अन्तर्गत अधिसूचना उपबंधित करती है कि नगरपालिका अधिनियम की धारा 5 के अन्तर्गत विनिर्दिष्ट अतिलघु नगरीय क्षेत्र या संक्रमित क्षेत्र विद्युत अधिनियम के प्रयोजन के लिए ग्रामीण क्षेत्र नहीं है - भेड़ाघाट नगरपालिका अधिनियम की धारा 5 के अधीन संक्रमणकालीन क्षेत्र होने से नगर पंचायत के रूप में अधिसूचित किया गया - भेड़ाघाट को नगरीय क्षेत्र माना जाए और नगरीय क्षेत्र अनुसार विनियमों के अध्वधीन विद्युत प्रदाय की जाए - याचिका मंजूर।

*Rajesh Maindiretta*, for the petitioner.

*Shishir Dixit*, for the respondent Nos. 1 to 4.

*Samdarshi Tiwari, G.A.*, for the respondent Nos. 5 & 6.

**ORDER**

The petitioner is the President of Bheraghat Nagar Panchayat in district Jabalpur in the State of Madhya Pradesh and she has filed this writ petition as a Public Interest Litigation. She has stated that Bheraghat has been constituted as a Nagar Panchayat by a notification dated 27.5.1995 issued by the State Government under Section 5(2) of the Madhya Pradesh Municipalities Act, 1961 (for short 'the Municipalities Act'), with the villages of Bheraghat, Choukital, Bhadpura, Dalpatpur, Lamhetaghat and Gopalpur. She has stated that Bheraghat is a place for attraction to the tourists and the Bheraghat Nagar Panchayat is providing all facilities to the tourists in the area but power supply to the Bheraghat Nagar Panchayat area has been restricted by the respondents No.1 to 4. The petitioner has, therefore, prayed for a writ of mandamus or other direction to the respondents No.1 to 4 to supply electricity to the Bheraghat Nagar Panchayat area in the same proportion as is being supplied to Jabalpur City and to treat the Bheraghat Nagar Panchayat as a semi-urban area and not a rural area.

2. Mr. Rajesh Maindiretta learned counsel appearing for the petitioner submitted that by a notification dated 27.5.1995 Bheraghat has been constituted as a Nagar Panchayat and it will be clear from the language of Section 5 of the Municipalities Act under which Bheraghat has been constituted as a Nagar Panchayat that a Nagar Panchayat is an area in transition from a rural area to an urban area. He further submitted that by a subsequent notification dated 25.3.2006 issued by the State Government under Section 14 of the Electricity Act, 2003 (for short 'the Electricity Act'), the State Government has declared that all such area as rural area for the purpose of the Electricity Act other than larger urban area constituted under Section 7 of the Madhya Pradesh Municipal Corporation Act, 1956 and smaller urban area or transitional area constituted under Section 5 of the Municipalities Act and special area under Section 64 of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973. He submitted that it is, thus, clear that the Bheraghat Nagar Panchayat area is not a rural area and is entitled to supply of electricity in the same proportion in which the electricity is being supplied to urban areas.



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3. Mr. Shishir Dixit, learned counsel appearing for the respondents No. 1 to 4 on the other hand, submitted relying on the return filed by the respondents No. 1 to 4 that the Bheraghat Nagar Panchayat comes under the distribution licensee M.P. Poorva Kshetra Vidyut Vitran Company Ltd., Jabalpur and is a rural area. He further submitted that on account of deficiency of power as per the power cut schedule, electricity is being supplied to this rural area in accordance with the norms fixed by the Madhya Pradesh State Electricity Board. He further submitted that for the tourist activities in Bheraghat, however, electricity supply is being maintained as per the schedule applicable to the district headquarters.

4. Mr. Samdharshi Tiwari, learned Government Advocate relying on the return filed by the respondents No. 5 and 6, submitted that in exercise of power under Section 37 of the Electricity Act, the State Government has by order dated 16.10.2007 directed the M.P. Load Despatch Centre to maintain smooth and stable electricity supply in the State in the manner indicated in the order dated 16.10.2007 and the order dated 16.10.2007 has provided different schedules for electricity regulation in urban areas and rural areas and the distribution companies are to comply with a direction in the order dated 16.10.2007.

5. We have considered the submissions of the learned counsel for the parties and we find that Section 42(1) of the Electricity Act provides that it shall be the duty of a distribution licensee to develop and maintain an efficient coordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in the Electricity Act. There is, thus, a statutory duty cast on the distribution licensee to supply electricity in its area in accordance with the provisions contained in the Electricity Act. Section 37 of the Electricity Act, however, empowers the appropriate Government to issue directions to the Regional Load Despatch Centres or the State Load Despatch Centres, as the case may be, to take such measures as may be necessary for maintaining smooth and stable transmission and supply of electricity to any region or State. Hence a distribution licensee while discharging its statutory duty under Section 42(1) of the Electricity Act has to supply electricity in accordance with the directions of the appropriate Government to the State Load Despatch Centres.

6. In exercise of power under Section 37 of the Electricity Act, the State Government has issued the order dated 16.10.2007 regulating supply of electricity in Rabi season in view of difference of increasing demand of electricity and its availability and in the order dated 16.10.2007 the State Government has provided different schedules for urban areas and rural areas. In the order dated 16.10.2007, supply of electricity in urban areas is sought to be regulated to provide for load shedding during different hours in divisional headquarters, district headquarters and tehsil headquarters separately, but supply of electricity in rural areas is sought to be regulated by fixing hours of electricity supply for different months separately.

**SIYABAITHAKUR (SMT.) V. M.P. STATE ELECTRICITY BOARD**

The question, therefore, to be decided in this writ petition is whether the Bheraghat Nagar Panchayat is to be treated as a rural area or as an urban area for the purpose of regulation of supply of electricity in the order dated 16.10.2007.

7. In the order dated 16.10.2007 "urban area" and "rural area" have not been defined. Section 14 of the Electricity Act is titled "grant of licence" and provides that the appropriate Commission may, on an application made to it under section 15, grant a licence to any person - (a) to transmit electricity as a transmission licensee; or (b) to distribute electricity as a distribution licensee; or (c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence. One of the provisos in Section 14 of the Electricity Act states that where a person intends to generate and distribute electricity in a "rural area" to be notified by the State Government, such person shall not require any licence for such generation and distribution of electricity, but he shall comply with the measures which may be specified by the authority under Section 53. It is under this proviso to Section 14 that following notification dated 25.3.2006 (Annexure P/15) has been issued by the State Government :

*"No.2010.F.13-05.XIII.2006, --In exercise of the powers conferred by Section 14 of the Electricity Act, 2003 (No.36 of 2003), the State Government declares all such area as rural area for the purposes of the said Act, provided that the Governor, in exercise of the powers conferred under Section 7 of the Madhya Pradesh Municipal Corporation Act, 1956 (No.23 of 1956) has not specified such area as Larger urban area or under Section 5 of the Madhya Pradesh Municipalities Act, 1961 (No.37 of 1961) has not specified such area as smaller urban area or Transitional area and the State Government in exercise of its powers conferred under Section 64 of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (No.23 of 1973) has not designated such area as special area."*

The language of the aforesaid notification dated 25.3.2006 makes it abundantly clear that a smaller urban area or a transitional area specified under Section 5 of the Municipalities Act is not a rural area for the purpose of the Electricity Act.

8. We may now look into the provision of Section 5 of the Municipalities Act. which is quoted herein below :

**"S.5 Constitution of Municipal Councils and Nagar Panchayats. - (1) There shall be constituted, -**

- (a) a Municipal Council for a smaller urban area; and
- (b) a Nagar Panchayat for a transitional area, that is to say, an area in transition from a rural area to an urban area :

**SIYABATHAKUR (SMT.) Vs. M.P. STATE ELECTRICITY BOARD**

*Provided that a Municipal Council or a Nagar Panchayat, as the case may be, may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment or a group of such establishments in that area and such other factors as he may deem fit, by public notification specify to be an industrial township:*

*Provided further that when an area is notified to be a transitional area, the Gram Panchayat having jurisdiction over such area shall continue to function until a duly elected Nagar Panchayat is constituted under this Act.*

*(2) In this section, 'a smaller urban area' or 'a transitional area' means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors, as he may deem fit, specify, by public notification for the purposes of this Act."*

Sub section (1) of Section 5 of the Municipalities Act, thus, contemplates constitution of Municipal Council for a smaller urban area and Nagar Panchayat for a transitional area that is to say, an area in transition from a rural area to an urban area. Sub-section (2) of Section 5 of the Municipalities Act states that smaller urban area or transitional area means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors, as he may deem fit, specify by public notification for the purpose of the Municipalities Act.

9. All the different aspects mentioned in Section 5 of the Municipalities Act must have been taken into consideration by the Governor before the Bheraghat Nagar Panchayat was constituted as transitional area under sub-section (2) of Section 5 of the Municipalities Act by notification dated 27.5.1995. We have, therefore, no doubt in our mind that the Bheraghat Nagar Panchayat has to be treated not as a rural area but as an urban area and has to be supplied electricity subject to the regulations in the urban areas made in the order dated 16.10.2007 of the State Government issued under Section 37 of the Electricity Act. The M.P. Poorv Kshetra Vidyut Vitaran Company Ltd. as a distribution licensee has to perform its statutory duty under Section 42 of the Electricity Act to supply electricity to the Bheraghat Nagar Panchayat subject to restrictions contained in the order dated 16.10.2007 of the State Government under Section 37 of the

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Electricity Act relating to supply of electricity in the urban areas.

10. We accordingly direct the respondents No.1 to 4 to ensure supply of electricity to the Bheraghat Nagar Panchayat area treating the same as urban area in accordance with the order issued by the State Government under Section 37 of the Electricity Act from time to time. The writ petition is allowed. No order as to costs.

*Petition allowed.*

I.L.R. [2009] M. P., 1952

**WRIT PETITION**

*Before Mr. Justice R.S. Garg and Mr. Justice U.C. Maheshwari*

26 February, 2009\*

**BRIDGE AND ROOF INFRASTRUCTURES (M/S)**

... Petitioner

**Vs.**

**UNION OF INDIA & ors.**

... Respondents

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

(Paras 12, 15, 16, 17)

संविधान, अनुच्छेद 226 - संविदा - संविदा के पर्यवसान के बाद कारण बताओ सूचना पत्र जारी किये बिना या हरजाने के संबंध में या संविदा निरस्त किये जाने के लिए जो कारण था, उसकी कोई जाँच किये बिना रेलवे ने मांग का सूचना पत्र जारी किया - अभिनिर्धारित - मामला आर्बीट्रेटर को संदर्भित नहीं और न ही किसी सक्षम और अधिकृत व्यक्ति ने कभी विवाद का विनिश्चय किया - प्रत्यर्था रेलवे को उनकी एक तरफा गणना के अनुसार रुपया वसूल करने का अधिकार नहीं - राशि रोकने का आदेश अपास्त - याचिका निराकृत।

**Cases referred:**

W.P. No.640/1998, 2006(2) MPHT 216, AIR 1987 SC 1359

*Sanjay Agrawal*, for the petitioner.

*Indira Nair with Sharad Punj*, for the respondents.

**ORDER (ORAL)**

The Order of the Court was delivered by R.S. GARG, J. :- This order shall dispose of W.P. No.4227/2006 (*M/s. Bridge and Roof Infrastructures Vs. Union of India and others*) and W.P.7881/2007 (*M/s. Bridge and Roof Infrastructures Vs. Union of India and others*).

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2. Shorn of unnecessary details the question in dispute can be summarized in the nutshell to say that whether the recovery notices issued by the respondent in one of the cases whether in relation to quantified damages or unquantified damages are valid and are in accordance with law or not and whether cancellation of the contract was valid.

3. Undisputedly the petitioner had entered into certain agreements with the respondents for repair of certain railway bridges. It appears that after sometime the petitioner, as alleged by the respondents abandoned the work and refused to restart the work or take up the work again. Taking into consideration the alleged conduct of the petitioner/contractor the respondents cancelled the contract, engaged some debitible agency and proceeded to get the work finished at the expenses of the petitioner/contractor. After completion of the work the Union of India/Railways finding that they had to undergo extra expenses issued demand notice and circulated the same to all other stations of the Railways that an amount of Rs.16,95,919.00 be not paid to the petitioner/contractor.

4. Being aggrieved by termination of the contract the petitioner has filed W.P. No.4227/2006 and against issuance of the demand and the restraint order has filed W.P. No.7881/2007.

5. After notices the respondents have appeared before us and have filed their separate returns in each of the matter. It is submitted by the respondents that as the petitioner for the reasons best known to him had abandoned the work, the respondents were absolutely justified in cancelling the agreement/contract. It is also submitted that as the work was got done through the debitible agency and as the respondents had to undergo additional expenses to the tune of Rs.16,95,919/- they are entitled to recover that amount from the petitioner. It is submitted by the respondents that the petitioner did not go to the arbitration, therefore, the respondents are entitled to recover the money.

6. Shri Agrawal, learned counsel for the petitioner placing his strong reliance upon a single Bench judgment of this Court in W.P. No.640/1998 (*M/s. Thakurdas Narang and Sons Vs. State of M.P. and 3 others*) decided on 13.4.1999 which was later on followed by another single Bench in the matter of *M/s. F.A. Construction, Mumbai Vs. Narmada Valley Development Department and another* reported in 2006(2) MPHT 216 submitted that the respondents are not entitled to recover the money without adjudication of the dispute and seeking an award from the arbitrator. It is submitted that clause 64 of the agreement would clearly provide that any party aggrieved of the dispute has to refer the matter to the arbitrator. It is also submitted by him that the respondents were absolutely unjustified in cancelling the contract and issuing demand notes and the mandates without making any enquiry or without getting the matter adjudicated that who was the defaulter.

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7. Smt. Indira Nair, learned Senior Counsel and Shri Rajneesh Gupta, learned counsel for the respondents, however submitted that in accordance with Clause 63 of the agreement if the petitioner was aggrieved by cancellation of the contract or by a demand that he was required to refer the matter under clause 63 to the Railways or under Clause 64 (1)(i) to the Arbitrator. It is also submitted by them that the petitioner who was obliged to approach the Arbitrator having not approached the Arbitrator is not entitled to any reliefs.

8. For proper appreciation of the dispute clause 63 and clause 64 of the alleged agreement are required to be seen. The clauses read as under :

**63. Matters finally determined by the Railway :-** All disputes and difference of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract shall be referred by the Contractor to the Railway and the Railway shall within 120 days after receipt of the Contractor's representation make and notify decision on all matters for which provision has been made in clauses 8(a), 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2) and 62(1) (b) of General Conditions of the contract or in any clause of the special conditions of the contract shall be deemed as 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause and not referred to arbitration.

**64(1)(i) – Demand for Arbitration :-**

In the event of any dispute or difference between the parties here to as to the construction or operation of this contract, or the respective rights and liabilities of the parties or any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the 'excepted matters' referred to in clause 63 of these conditions, the Contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that then dispute or difference be referred to arbitration.

(ii) – The demand for arbitration shall specify the matters which are in question or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute(s) or difference(s) in respect of which the demand has been made,

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together with counterclaims or set or shall be referred to arbitration and other matters shall not be included in the reference.

(ii)(a) – The arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the railway.

(b) – the claimant shall submit his claim stating that the facts supporting the claims along with all relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

(c) – The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.

(iii). - No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal; having due regard to the delay in making it.

(iv). – If the Contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.”

9. A perusal of clause 63 of the agreement would make it clear that for resolution of the dispute and differences in connection with the contract during the progress of the work or after its completion or before or after determination of the contract the Contractor shall be obliged to refer the same to the Railway and the Railway shall within 120 days of the receipt of the representation make or notify a decision on all matters. Clause 63 though uses the word ‘refers’ but in fact it is an enabling provision. Clause 63 would only mean that the contractor is required to make a representation to the higher authorities to pass a final order on the dispute. Clause 64(1)(i) relates to demand for arbitration. Though it is submitted that Clause 64(1)(i) has not been observed by the petitioner but from a perusal of the said clause it would clearly appear that in the event of any dispute or the respective right and liability of the parties on any matter in question, dispute or difference on any account etc. or if the Railway fails to make a decision within 120 days then in any such case or except in any of the “excepted matters” referred in clause 63 of the condition, the Contractor after 120 days but within 180 days of presenting his final claim shall demand in writing that the dispute or

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difference be referred to arbitration. A perusal of clause 63 and clause 64 would make it clear that clause 63 is a departmental action on a representation or application by the contractor in relation to all disputes and differences of any kind whatsoever arising out or in connection of the contract whether during the progress of the work or after its completion etc. Clause 64(1) provides that in case of the differences between the parties the contractor may approach the Railways for appointment of an Arbitrator, he can also approach the Railways with a submission that the matter be referred to the arbitration because decision on his representation submitted under Clause 63 has not been made within 120 days:

10. In each of the case if the contractor is aggrieved then he has to make a representation to the Railway authorities or make a representation to them to refer the matter to the arbitration. If contractor is not aggrieved by any action taken by the Railway authorities then he is not required either to take an action under Clause 63 or make an application to the Railways under Clause 64 for appointment of the Arbitrator.

11. In the present case the petitioner is aggrieved by cancellation of the contract. If that be so then under clause 64(1) he has to make an application for making a reference to the arbitrator. In W.P. No.4227/2006, we refuse to interfere because the petitioner can approach the appropriate authority for appointment of an Arbitrator.

12. So far as issuance of demand notice and the mandate issued by the Railway authorities are concerned, undisputedly the matter was not referred by the Railway authorities to the Arbitrator nor any competent and authorized person has ever adjudicated upon the dispute between the parties. It appears that the respondents assumed the role of an Arbitrator in their own matter. After cancelling the contract they started the work through the debitable agency and after holding that the petitioner committed lapses by abandoning the work they started assessing the losses and damages and therefore issued an order to all other agencies of Railways not to make the payment to the tune of Rs.16,95,919.00 etc. Undisputedly again, the respondents before issuing the demand notice or the mandate to the other agency did not issue any show cause notice to the petitioner nor had made any enquiry into the damages or into the cause which led to cancellation of the contract or abandonment of the work. If such enquiry is not made then obviously the respondents would not be entitled to recover the money on their lopsided calculations.

13. In the matter of *M/s. Thakurdas Narang and Sons Vs. State of M.P. and 3 others* (W.P. No.640/1998 decided on 13.4.1999) a single Judge (one of us) placing reliance upon the judgment of the Apex Court in the matter of *State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli* (AIR 1987 SC 1359) observed as under :

17. From the judgment of the Supreme Court, it would



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clearly appear that interest of justice and equity require that where a party to the contract disputes committing of any breach of conditions, the adjudication should be by an independent person or body and not by the other party to the contract.

18. On face of this judgment, Shri Seth, learned counsel for respondents now submits that in the matter of State of Karnataka, Supreme Court was considering a case of recovery of damages, while present is a case of recovery of excess expenses suffered by the State. In his submission, in a case where the State has to recover the damages, it may not be permitted to enter into the field of making the decision, but in a case where the State has suffered extra expenses because of the breach committed by the contractor/petitioner, the State certainly is entitled to recover the amount which was paid by the State to the debitable agency through which or under whose hands the work was got executed. In the opinion of this Court, the argument is not sustainable. The question for consideration simply is that who committed the breach. Unless it is decided that the petitioner committed the breach, the State would not be entitled to recover the amount spent in excess of the original contract amount. Everything would depend upon a finding as to who committed the breach. Should the task be given to a party to the contract, that is, the State and its officers, or should it be submitted to a third agency, arbiter, Court or Tribunal. If the task is handed over to the State Government, then it would certainly run contrary to the age old saying audi-alterm-partem. The principles of natural justice clearly provide that neither one should be condemned unheard nor a party should be a judge or Arbiter in his own case or cause. If the State is given the authority to decide that who committed the breach, then possibility of a prejudice and bias cannot be ruled out. However, fair the authority is, it would always offend the principles "that justice should not only be done but it should appear to have been done". If the State decides that who committed the breach, then this would again run contrary to the judgment of the Supreme Court in the matter of State of Karnataka. While appreciating clause 12 of the agreement of the said matter, the Supreme Court observed that on a plain reading of the words it would be clear that right of the second party to assess damages would arise only if the breach of conditions was admitted or if no issue was made of it. The Supreme Court further observed that even if the clause 12 afforded scope for being construed as empowering the officer of the State

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to decide upon the question of breach as well as assess the quantum of damages that adjudication by the officer regarding the breach of the contract cannot be sustained under law because a party to the agreement cannot be an arbiter in his own cause and case. In the present case, the State is simply relying upon the actions of the Executive Engineer. According to them, the rescission of the contract was in accordance with law and as the State had to pay extra expenses, the State was entitled to recover the money. Unfortunately the actions of the State do not take into consideration as to who has to decide that who committed the breach of the terms. In the present case, the State certainly can recover the money provided a third party decides that because of the breach committed by the petitioner the State had to suffer extra expenses. Though the agreement does not give any power, right or authority to the State or its agency to decide the question of breach, but even assuming the State had such a power, then too, it could not decide the question as to who committed the breach nor would it be entitled to assess the quantum of extra expenses because in such a situation, State would be acting as an arbiter or a Judge in its own cause.

19. Undisputedly, the question of the breach of the contract has not been decided by any competent authority, arbitrator, Court or Tribunal and unless such a decision is given by such an authority, the State would not be entitled to recover the money, I must hasten to say that if a private party is required to approach the Court or Tribunal for establishment of his claim, then the State, though Almighty, must seek a proper decision on the dispute and should not decide its own case, take the authority in its own hands and proceed to recover the money through its own agency."

14. The said observations made by the learned single Judge in the case of *M/s. Thakurdas Narang and Sons Vs. State of M.P. and 3 others* (supra) were followed by another single Judge in the matter of *M/s. F.A. Construction Mumbai Vs. Narmada Valley Development Department and another* (supra) and it was finally observed that so far as the question of recovery of damages were concerned the same could not be put into implementation without proper adjudication.

15. As in this matter undisputedly there had been no adjudication in relation to losses suffered by the Railways the respondents cannot be allowed to recover the money as per their own calculations.

16. If advised the respondents may also approach the competent arbitrator or

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make a representation to the competent authority for appointment of the arbitrator. So long as this dispute is not decided by the Arbitrator, the respondents would not be entitled to recover the money from the petitioner.

17. In view of the above the directions issued in letter dated 6.6.2007 to recover the amount of Rs.16,95,919.00 and further directions to the concerned General Manager (Works) of different stations and department of the Railways asking to withhold the amount of Rs.16,95,919.00 are quashed.

18. Both the petitions are accordingly disposed of. There shall be no order as to costs.

*Petition disposed of.*

I.L.R. [2009] M. P., 1959

**WRIT PETITION**

*Before Mr. Justice Shantanu Kemkar*

9 March, 2009\*

NILU (SMT.) & ors.

... Petitioners

Vs.

M.P. STATE ELECTRICITY BOARD & ors.

... Respondents

**A. Service Law - Departmental Enquiry - Enquiry Officer after recording of evidence found employee to be not guilty of any charge - Disciplinary authority on the basis of final finding recorded by the Board holding employee to be guilty of charge, issued show cause notice - Held - Since show cause notice issued was containing final decision taken by the Board holding employee guilty - An opportunity of hearing should have been provided to employee so that there may still be some room left for convincing the Disciplinary Authority that findings recorded by the enquiry officer were just and proper - Findings of Board and Disciplinary Authority are perverse - Impugned order imposing penalty quashed - Petition allowed. (Para 12)**

क. सेवा विधि - विभागीय जाँच - जाँच अधिकारी ने साक्ष्य अभिलिखित करने के बाद कर्मचारी को किसी भी आरोप का दोषी नहीं पाया - अनुशासनिक प्राधिकारी ने बोर्ड द्वारा अभिलिखित अंतिम निष्कर्ष के आधार पर कर्मचारी को आरोप का दोषी ठहराया, कारण बताओ सूचना पत्र जारी किया - अभिनिर्धारित - चूंकि जारी कारण बताओ सूचना पत्र में बोर्ड द्वारा कर्मचारी को दोषी ठहराते हुए लिया गया अंतिम निर्णय अन्तर्विष्ट था - कर्मचारी को सुनवाई का एक अवसर दिया जाना चाहिए था ताकि अनुशासनिक प्राधिकारी को विश्वास दिलाने की कोई गुंजाइश बची रह सकती कि जाँच अधिकारी द्वारा अभिलिखित निष्कर्ष न्यायसंगत और उचित थे - बोर्ड और अनुशासनिक प्राधिकारी के निष्कर्ष विपर्यस्त - शास्ति अधिरोपित करने वाला आक्षेपित आदेश अभिखण्डित - याचिका मंजूर।

**B. Constitution, Article 226 - Departmental Enquiry - Findings of**

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*Disciplinary Authority are perverse and not supported by evidence on record - It would be open for the High Court to interfere in the said findings - Petition allowed.*

(Para 14)

ख. संविधान, अनुच्छेद 226 - विभागीय जाँच - अनुशासनिक प्राधिकारी के निष्कर्ष विपर्यस्त और अभिलेख पर उपलब्ध साक्ष्य से समर्थित नहीं - उच्च न्यायालय ऐसे निष्कर्षों में हस्तक्षेप कर सकता है - याचिका मंजूर।

**Cases referred :**

(1999) 1 SCC 759, AIR 1999 SC 3734, AIR 1999 SC 677, (1998) 7 SCC 84.

*A.K. Sethi with Rahul Sethi, for the petitioners.*

*P.B.S. Nair, for the respondents.*

**ORDER**

**SHANTANU KEMKAR, J. :-**Original petitioner Manohar Sukhija was working on the post of Superintending Engineer (Civil) in the respondent No.1, M.P.State Electricity Board {for short the Board}. He was retired voluntarily w.e.f. 30.9.2002 vide order dated 30.9.2002 (Annexure P-1). In the said order it was made clear that he is being voluntarily retired from service without any prejudice to the outcome of the Departmental Enquiry pending /contemplated against him.

2. Prior to the aforesaid order of voluntary retirement of the original petitioner a charge-sheet was issued to him on 17.9.1992 (Annexure P-2) levelling 2 charges against him. The first charge was that when he was posted at Sarni he called in is office Lady Peon namely Smt. Sumitra Patil who was working in the office of Executive Engineer of the respondent Board and misbehaved with her in as much as he caught hold of her hand. The other charge was that he sent a false affidavit in the name of said Smt. Sumitra Patil Peon so as to close the departmental proceedings initiated against him. The said affidavit on enquiry was found to be not sworn by the said Smt. Sumitra Patil.

3. The original petitioner submitted his reply (Annexure P-3) to the said charge-sheet and denied the charges levelled against him. He stated that the said Smt. Sumitra Patil constructed unauthorized Hutment which was removed on the basis of the decision of the Board and the material used in the said unauthorized construction viz. G.I. Sheets were seized. She was insisting for the return of the said G.I. Sheets from him and on not getting any favourable order, she with the connivance of the others falsely implicated him by levelling baseless allegations.

4. The aforesaid reply was not found to be satisfactory and as such the enquiry officer held a Departmental Enquiry against the original petitioner. The Enquiry Officer after recording the evidence led in the enquiry vide his enquiry report dated 8.1.2004 (Annexure P-9) exonerated the petitioner holding the original petitioner to be not guilty of any of the charge.

5. After receipt of the enquiry report the Disciplinary Authority disagreeing

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with the finding of Enquiry Officer recorded the finding of guilt against the original petitioner in respect of charge No.1 and issued a notice to the original petitioner on 15.5.2004 (Annexure-P-10) to show cause that on the basis of the finding of guilt recorded against him in respect of charge No.1 why a penalty of withholding of his pension to the extent of 10% for 2 years be not finally imposed upon him.

6. The aforesaid show cause notice was replied by the original petitioner vide his reply dated 7.6.2004 (Annexure P-11). After the receipt of the said reply the Disciplinary Authority vide order dated 14.9.2004 (Annexure P-13) imposed upon the original petitioner penalty of withholding of 10% of his pension for 2 years. Aggrieved the original petitioner has filed this petition. During the pendency of the petition the original petitioner has died and his legal representatives were substituted in his place as petitioners.

7. The contention of the Shri A.K.Sethi, learned Senior counsel for the petitioners is that the enquiry officer having held the original petitioner to be not guilty, the Disciplinary Authority if was not in the agreement with the finding of the enquiry officer in respect of charge No.1 was required to have communicated the original petitioner the tentative reason for disagreeing with the finding of the enquiry officer in regard to Charge No.1. However, instead the disciplinary authority recorded a final finding holding the petitioner guilty of the charge No.1 and issued notice to show cause against the proposed penalty of withholding of 10% pension for 2 years. He placing reliance on the judgment of the Supreme Court in the case of *[Punjab National Bank Vs. Kunj Behari Mishra]* AIR 1998 SC 2713 argued that the original petitioner was required to have given an opportunity of hearing by issuing a show cause notice so as to persuade the Disciplinary Authority to accept a favourable conclusion of the Enquiry Officer. He referring to the show cause notice and the impugned order of Disciplinary Authority argued that the issuance of the show cause notice was not in respect of tentative finding of guilt recorded by the Disciplinary Authority and the note of disagreement to the findings recorded by the Enquiry Officer in respect of charge No.1 but it was in truth and in reality was a show cause notice in respect of the proposed penalty after recording a final findings of guilt against the original petitioner. Attacking the impugned order (Annexure-13) the learned Senior counsel argued that though the original petitioner had replied to the said show cause notice (Annexure-10) by raising various pleas but the pleas raised in the reply (Annexure-11) to the show cause notice were not considered by the Disciplinary Authority and the Disciplinary Authority reiterated the finding already recorded by it in the said show cause notice and mechanically passed the impugned order of penalty.

8. In reply Shri P.B.S.Nair, learned counsel for the respondents has argued that the Disciplinary Authority was having right to disagree with the findings of the Enquiry Officer and give his own conclusion. The disciplinary authority on finding the charge No.1 to be proved in the Departmental Enquiry held against the

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petitioner, issued a show cause notice to him and after consideration of his reply and giving him a personal hearing passed the impugned order which cannot be interfered into in this petition under Article 226 of the Constitution of India. He argued that the nature of the charges which were levelled against the original petitioner were serious in nature and relating to sexual harassment of female employee at work place, in the circumstances, he argued that this Court should not interfere into with the impugned order of penalty awarded to the original petitioner. He also argued that having regard to the great sensitivity of the charges the original petitioner is not entitled for any mercy or sympathy. In support he placed reliance on the judgment of the Supreme Court in the case of *Apparel Export Promotion Council Vs. A. K. Chopra* (1999) 1 SCC 759.

9. Having heard the learned counsel for the parties and going through the annexures, I find that both the charges levelled against the original petitioner were found to be not proved by the Enquiry Officer. On close scrutiny of the show cause notice (Annexure P-10), it is revealed that the disciplinary authority issued the said notice on the basis of final findings recorded by the Board holding the original petitioner to be guilty of Charge No.1 by observing thus :

“और यह कि, जांच अधिकारी द्वारा प्रस्तुत जांच प्रतिवेदन एवं जांच निष्कर्ष का मंडल द्वारा सूक्ष्मता पूर्वक परीक्षण एवं गंभीरता पूर्वक विचार-किया गया एवं यह पाया गया कि जांच अधिकारी द्वारा प्रस्तुत जांच निष्कर्ष तथ्यों पर आधारित नहीं है, एवं जांच निष्कर्ष में विषमता है, अतः मंडल द्वारा आरोपों के संदर्भ में प्रस्तुत साक्ष्य एवं दस्तावेजों के आधार पर निष्कर्ष निकाला गया है । मंडल द्वारा निकाला गया निष्कर्ष निम्नानुसार है :-

“जांच अधि. ने अपने प्रतिवेदन में आरोप क. एक प्रमाणित नहीं होना दर्शाया है, परंतु साथ ही जांच प्रतिवेदन में श्रीमती सुमित्रा पाटिल के कथन का अंश, “शिकायत में जिस घटना का बयान है, इसके अतिरिक्त अश्लील हरकत करने या गंदी बातें करने के संबंध में कोई अन्य अवसरों पर मेरे साथ श्री एम. एल. सुखीजा द्वारा घटना नहीं हुई है” उद्धृत किया है । इससे यह प्रमाणित होता है कि आरोप कमांक-1 सिद्ध होता है ।”

अतः प्रकरण कि समस्त परिस्थितियों पर विचारोपरांत मंडल द्वारा जांच अधिकारी के आरोप कमांक-1 के संदर्भ में निकाले गये निष्कर्ष से असहमत होते हुये म. प्र. सिविल सेवा ( वर्गीकरण, नियंत्रण एवं अपील ) नियम 1966 के नियम 15 (2) के प्रावधान के तहत उपरोक्तानुसार निष्कर्ष निकाला गया है एवं उक्त सिद्ध पाये गये आरोप के लिये आप पर देय पेंशन की 10 (दस प्रतिशत) राशि दो वर्षों के लिये वापस लिये जाने के शास्ति अधिरोपित किये जाने का निर्णय प्रावाधिक रूप से लिया गया है । साथ ही मंडल द्वारा इस बावद आपको बचाव का एक और मौका प्रदत्त किये जाने का निर्णय लिया गया है ।

अतः सूचना पत्र की प्राप्ति के पन्द्रह दिनों के भीतर कारण बतावें, कि क्यों

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न उपरोक्तानुसार सिद्ध पाये गये आरोप के लिये उपर उल्लेखित शास्ति आप पर अन्वितः अधिरोपित कर दी जावे । यदि निर्धारित समयावधि में कोई उत्तर प्राप्त नहीं होता है तो यह मान लिया जावेगा कि आपके पास तत्संबंध में कोई उत्तर नहीं है और न ही आपको इस संबंध में कुछ प्रस्तुत करना है एवं तदनुसार अग्रिम कार्यवाही, जो उचित प्रतीत हो, की जावेगी । कृपया नोट करें ।"

(emphasis supplied)

10. Thus, it is clear that after recording the aforesaid findings of guilt by the Board the disciplinary authority vide notice (Annexure P-10) called upon the petitioner to show cause as to why the provisional decision of imposing the penalty to withhold his pension for 2 years to the extent of 10% be not made final. Thereafter, without going into the grounds raised by the original petitioner in his reply (Annexure P-11) to the said show cause notice the Disciplinary Authority rejected the petitioner's representation vide impugned order Annexure P-13 and imposed upon him the penalty of withholding of 10% pension for 2 years. A close scrutiny of this order Annexure P-13 further establishes that the Disciplinary Authority on the basis of final finding of guilt already recorded by the Board in its show cause notice, imposed the aforesaid penalty on the original petitioner.

11. In the case of *Yoginath D. Bagde Vs. State of Maharashtra* (AIR 1999 SC 3734) in some what identical situation where the Disciplinary Authority considered the report of the Enquiry Officer holding the charges against him were not proved and disagreed with the findings of enquiry officer after holding the charges against the appellant to be proved tentatively decided to withhold the penalty of dismissal of service, the Supreme Court disapproved the action by observing thus in Paragraph No.36, 37 and 39 :-

"Along with the show-cause notice, a copy of the findings recorded by the Enquiry Officer as also the reasons recorded by the Disciplinary Committee for disagreeing with those findings were communicated to the appellant but it was immaterial as he was required to show-cause only against the punishment proposed by the Disciplinary Committee which had already taken a final decision that the charges against the appellant were proved. It was not indicated to him that the Disciplinary Committee had come only to a "tentative" decision and that he could show cause against that too. It was for this reason that the reply submitted by the appellant failed to find favour with the Disciplinary Committee.

Since the Disciplinary Committee did not give any opportunity of hearing to the appellant before taking a final decision in the matter relating to findings on the two charges framed against him, the principles of natural justice, as laid down by a Three-Judge Bench of this Court in *Punjab National Bank V. Kunj Behari*

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*Mishra* (1998) 7 SCC 84 : AIR 1998 SC 2713 : (1998 AIR SCW 2762 : 1998 Lab IC 3012: 1998 All LJ 2009), referred to above, were violated.

The contention apparently appears to be sound but a little attention would reveal that it sounds like the reverberations from an empty vessel. What is ignored by the learned counsel is that a final decision with regard to the charges levelled against the appellant had already been taken by the Disciplinary Committee without providing any opportunity of hearing to him. After having taken that decision, the members of the Disciplinary Committee merely issued a notice to the appellant to show-cause against the major punishment of dismissal mentioned in Rule 5 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979. This procedure was contrary to the law laid down by this Court in the case of *Punjab National Bank* (1998 AIR SCW 2762 : AIR 1998 SC 2713:1998 Lab IC 302 : 1998 All LJ 2009 ) (supra) in which it had been categorically provided, following earlier decisions, that if the Disciplinary Authority does not agree with the findings of the Enquiry Officer that the charges are not proved, it has to provide, at that stage, an opportunity of hearing to the delinquent so that there may still be some room left for convincing the Disciplinary Authority that the findings already recorded by the Enquiry Officer were just and proper. Post-decisional opportunity of hearing, though available in certain cases, will be of no avail, at least, in the circumstances of the present case."

12. On examination of the facts of the present case in the light of law laid down by the Supreme Court in the case of *Punjab National Bank Vs. Kunj Behari Mishra* (supra) and in the case of *Yoginath D. Bagde Vs. State of Maharashtra* (supra), I find that the show cause notice issued to the original petitioner was containing a final decision already taken by the respondent Board holding the petitioner guilty of Charge No. 1. After taking such decision and recording definite finding of guilt by the Board the Disciplinary Authority merely issued a notice to the original petitioner to show cause against the proposed punishment. In the circumstances, there was no room left for the original petitioner to convince the Board or to the Disciplinary Authority that the findings which have already been recorded by the Enquiry Officer in his favour were just and proper. Moreover the reasons on the basis of which the Board had disagreed with the findings of the exoneration of the original petitioner recorded by the Enquiry Officer are also cryptic. The findings on the charges levelled against the petitioner were thoroughly inquired into by the Enquiry Officer and after close scrutiny of the evidence recorded by it, the original petitioner was exonerated from both the charges. However, the Board without adverting the evidence on record only by picking a



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stray sentence from the statement of Smt. Sumitra Patil disagreed with the exhaustive finding recorded by the Enquiry Officer holding the original petitioner not guilty. The approach of the Board in recording the finding of guilt by picking only a stray sentence from the statement of the complainant without further adverting to the evidence recorded by the enquiry officer cannot be sustained. Thereafter when the original petitioner submitted a detailed reply to the said show cause notice the disciplinary authority rejected the pleas taken by the original petitioner by only reiterating the findings "recorded by the Board. Thus the finding of guilty recorded by the Board and the Disciplinary Authority are based on no evidence and are perverse.

13. Having regard to the aforesaid, I am of the view that the actions of the respondent Board and the Disciplinary Authority are contrary to the law laid down by the Supreme Court in the case of *Punjab National Bank Vs. Kunj Behari Mishra* (supra) and *Yoginath D. Bagde Vs. State of Maharashtra* (supra).

14. The contention of the learned counsel for the respondents that this Court cannot reappraise the evidence which has already been scrutinized by the disciplinary authority, in this petition under Article 226 of the Constitution of India is of no consequence for the simple reason that it is well settled that if the findings are perverse and are not supported by evidence on record to the extent that no reasonable person would have reached; it would be open for the High Court to interfere into the same [See *Kuldip Singh Vs. Commissioner of Police* AIR 1999 SC 677]. The judgment of the Supreme Court in the case of *Apparel Export Promotion Council Vs. A.K. Chopra* (supra) relied by the respondents has no application to the facts of the case; even otherwise, the discrepancies and illegalities noticed in the present case are neither insignificant nor technical but are violative of the principles of natural justice as held in the case of *Yoginath D. Bagde Vs. State of Maharashtra* (supra).

15. In view of the aforesaid, the impugned order of penalty deserves to be and is hereby quashed. Accordingly, the respondents are directed to release the consequential benefits flowing from the quashment of the impugned order to the petitioners.

*Petition allowed.*

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I.L.R. [2009] M. P., 1966

**WRIT PETITION***Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta*

16 March, 2009\*

**GORI SHANKAR**

... Petitioner

Vs.

**STATE OF M.P. & ors.**

... Respondents

**A. Prisoners' Release on Probation Act, M.P. (16 of 1954), Section 9, Prisoners' Release on Probation Rules, M.P. 1964, Rule 4 - Eligibility for release - Constitutional validity of notification dated 24.03.2008 making 14 years of actual imprisonment for becoming eligible for release challenged - Rule 4 not ultra vires to Section 433-A of Cr.P.C. or any of the provisions of the Act.** (Para 23)

क. बंदियों का परीक्षा पर छोड़ा जाना अधिनियम, म.प्र. (1954 का 16), धारा 9, बंदियों का परीक्षा पर छोड़ा जाना नियम, म.प्र. 1964, नियम 4 - छोड़े जाने के लिए पात्रता - छोड़े जाने के लिए पात्र होने के लिए वास्तविक कारावास को 14 वर्ष करने वाली अधिसूचना तारीख 24.03.2008 की संवैधानिक विधिमान्यता को चुनौती दी गई - नियम 4 द.प्र.सं. की धारा 433-ए या अधिनियम के किसी उपबंध के अधिकारातीत नहीं।

**B. Prisoners' Release on Probation Rules, M.P. 1964, Rule 4 - Eligibility for release - Judgment passed in State of Haryana Vs. Mahender Singh and others [(2008 CrLJ 444(SC))] has no application as Supreme Court was dealing with validity of policy decision vis-à-vis rules.** (Para 24)

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

**Cases referred :**

AIR 1976 SC 1532, AIR 1980 SC 2147, (1990) 2 SCC 701, AIR 1990 SC 1396, AIR 1983 SC 855, (2001) 3 SCC 750, 2008 CrLJ 444 (SC), 1990 MPLJ 683, JT 2009(1) SC 535.

*D.D. Bhargava & Mahendra Pateriya, for the petitioner.  
Deepak Awasthy, G.A., for the respondents.*

**ORDER**

The Order of the Court was delivered by **DIPAK MISRA, J.** :- In this batch of writ petitions, the constitutional validity of the notification dated 24.3.2008 by which Rule 4 of the M.P. Prisoners Release on Probation Rules, 1964 (hereinafter referred to as 'the Rules') framed under Section

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9 of the M.P. Prisoners Release on Probation Act, 1954 (for brevity 'the Act') has been amended is called in question. For the sake of clarity and convenience, it is thought apt to adumbrate the facts in W.P.No.13593/2008.

2. Bereft of unnecessary details, the factual matrix, as has been unfurled, is that the petitioner has been convicted under Section 302 of the Indian Penal Code (for brevity 'the IPC') and sentenced to rigorous imprisonment for life by judgment dated 05.6.1994 in Sessions Trial No.138/90 by the Additional Sessions Judge, Ratlam which has been affirmed by this Court in Criminal Appeal No.567/1994. After completion of 5 years of imprisonment, the petitioner submitted an application duly signed by his guardians under the Rules seeking the benefit of probation under the Rules. But the State Government by order dated 08.8.2008 intimated him that his application shall be considered on completion of actual sentence of 14 years. It is contended that though the petitioner has completed 10 years of incarceration, yet the application has not been considered singularly on the ground that there has been an amendment in Rule 4 which, according to the respondents, disentitles him for consideration. It is averred that the amendment to Rule 4 violates Section 433-A of the Code of Criminal Procedure (for short 'the Code') and the intrinsic conceptuality of the Rules itself. On this foundation, a prayer has been made for quashment of the declaration of the said amendment as unconstitutional and to issue a command to the respondents to consider his case and pass an order of release on licence under the relevant Rules.

3. A counter-affidavit has been filed by the answering respondents contending, inter alia, that the Rules have been framed under the provisions of the 1954 Act and Rule 4 postulates the eligibility for release. While the said Rule was in force, Section 433-A of the Code came into force on 18.12.1978 which lays down certain restrictions on powers of remission or commutation in certain cases and keeping in view the provisions contained in Sections 432, 433 and 433-A and also keeping in view the decision rendered in *Maruram vs. Union of India*, AIR 1980 SC 2147, the Rules have been amended. It is put forth that earlier the Rule had become unworkable and deserved suitable modifications and hence, it has been amended. It is set forth that the amendment does not violate or runs counter to Section 433-A of the Code. On the contrary, it is asserted that the same is in consonance with Section 433-A of the Code.

4. We have heard Mr.D.D.Bhargava and Mr.Mahendra Pateriya, learned counsel for the petitioners, and Mr.Deepak Awasthy, learned Government Advocate for the respondents.

5. To appreciate the rival submissions raised at the Bar, it is apropos to refer to the provisions contained in the 1954 Act. Section 2 of the 1954 Act deals with the powers of the Government to release by licence on conditions imposed by it. The said provision reads as under:-

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*"2. Power of Government to release by licence on conditions imposed by it.- Notwithstanding anything contained in section 401 of the Code of Criminal Procedure, 1898 where a person is confined in a prison under a sentence of imprisonment, and it appears to the Government from his antecedents and his conduct in the prison that he is likely to abstain from crime and lead a peaceable life, if he is released from prison, the Government may by licence permit him to be released on condition that he be placed under the supervision or authority of a Government Officer or of a person professing the same religion as the prisoner or such institution or society as may be recognized by the Government for the purpose, provided such other person, institution or society is willing to take charge of him.*

*Explanation.- The expression "Sentence of imprisonment" in this section shall include imprisonment in default of payment of fine and imprisonment for failure to furnish security under Chapter 8 of the Code of Criminal Procedure."*

6. Section 3 of the Act provides for the period for which licence is to be in force. Section 4 stipulates that the period of release is to be reckoned as imprisonment for computing the period of sentence served. Section 6 empowers the State Government to revoke the licence. Section 8 deals with the power of the Government to remit sentence. Section 9 confers power on the State Government to make Rules which are to be in consistent with the Act. Section 9 being relevant for the present purpose is reproduced below:-

*"9. Power to make rules.- The Government may make rules consistent with this Act:-*

*(1) for the form and conditions of licence on which prisoners may be released;*

*(2) for the appointment of Government Officer, the recognition of Institution, Societies and persons referred to in section 2;*

*(3) for defining the powers and duties of Government Officers, Institutions, or persons, under whose authority or supervision conditionally released prisoners may be kept;*

*(4) for defining the classes of offenders who may be conditionally released, and the periods of imprisonment after which they may be so released;*

*(5) for prescribing the manner in which an order of*

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*revocation of a licence shall be served on the person whose licence is revoked;*

*(6) for delegation of all or any of its powers to any officer or person authorized in this behalf;*

*(7) generally for carrying into effect all the purposes of this Act."*

7. In exercise of powers conferred by Section 9 of the 1954, Act the State Government has framed the 1964 Rules. Rule 3 deals with the classes of prisoners not to be released. Rule 4 deals with the eligibility for release. The said Rule 4 reads as under:-

*"4. Eligibility for release.- Save the prisoners specified in Rule 3 any other prisoners who has served one third of his sentence of imprisonment or a total period of five years with remissions, whichever is less, may be released by the Government on licence."*

8. Rule 5 of the Rules deals with the computation of sentence for the purpose of the Rules. The said rule is as under:-

*"5. Computation of sentence.- For the purposes of these Rules, the following principles shall be observed in computing the period of sentence of imprisonment, namely:-*

*(a) When a prisoner has been sentenced to several terms of imprisonment for several offences and the sentences of imprisonment have been ordered to run concurrently, the longest single sentence which the prisoner is undergoing shall be deemed to be the term of his imprisonment.*

*(b) When a prisoner has been sentenced to several terms of imprisonment for several offences and the sentences of imprisonment have been ordered to run consecutively, the total period which the prisoner has to undergo shall be deemed to be the term of his imprisonment;*

*(c) Remission already earned by the prisoner shall be counted as imprisonment served by him; and*

*(d) Sentence of transportation for life or of imprisonment for life shall be reckoned as twenty years.*

*Explanation.- The expression "sentence of imprisonment" in these Rules shall include imprisonment in default of the payment of fine and imprisonment for failure to furnish security under Chapter VIII of the Code of Criminal Procedure, 1898."*

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9. The other Rules pertain to the procedure for licence, information to the prisoners and guardian, duty of the guardian, processing of revocation, warrant of commitment and remission of sentence. The amendment which has been brought into the Rule 4 by notification dated 24.3.2008 is as follows:-

*"Provided that in case of such prisoners who have been sentenced for the life imprisonment, under Section 302 & 305 of the Indian Penal Code, 1860 (No.45 of 1860) or under the provisions of other penal laws in which death sentence is also one of the punishments subject to the conditions that such prisoners are not barred for such consideration under the provisions of such laws, will be considered for premature release from the prison. The eligibility for release shall be after undergoing the sentence of 14 years of actual imprisonment without remission of his sentence.*

*Provided further that all other prisoners, undergoing the sentence of life imprisonment, will be considered for premature release only after they have undergone at least 10 years of imprisonment with remission and after the completion of 07 years of actual imprisonment without remission in sentence.*

*Provided also that nothing in the above provisos shall apply to the prisoners whose cases are being sent to the Hon'ble Governor for consideration under Article 161 of the Constitution of India, on special reasons for humanitarian grounds."*

10. The submissions of the learned counsel for the petitioners is that the amendment brought into the Rule contravenes Sections 432, 433 and 433-A of the Code. Section 432 deals with suspension, remission and commutation of sentences. Section 433 empowers the appropriate Government to commute the sentence. The said provision reads as under:-

*"433. Power to commute sentence.—The appropriate Government may, without the consent of the person sentenced, commute—*

*(a) a sentence of death, for any other punishment provided by the Indian Penal Code, 1860 (45 of 1860)*

*(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;*

*(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced or for fine;*

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(d) *a sentence of simple imprisonment for fine."*

11. Section 433-A of the Code on which immense emphasis has been laid by both the sides deal with the restrictions on powers on remission or commutation in certain cases. The said provision is extracted below:-

**"433-A. Restriction on powers of remission or commutation in certain cases.-**

*Notwithstanding anything contained in s.432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under s.433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."*

12. In this regard, we may refer with profit to the decision in *State of Madhya Pradesh vs. Ratan Singh and others*, AIR 1976 SC 1532, wherein it has been held as under:

*"A sentence for life would enure till the lifetime of the accused as it is not possible to fix a particular period of the prisoner's death so any remissions given under the Rules could not be regarded as a substitute for a sentence of sentence for life. The Rules framed under the Prisons Act or under the Jail Manual do not affect the total period which the prisoner has to suffer but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the rules. The question of remission of the entire sentence or a part of it lies within the exclusive domain of the appropriate Government under Section 401 of the Code of Criminal Procedure and neither Section 57 of the Penal Code nor any Rules or local Acts can stultify the effect of the sentence of life imprisonment given by the Court under penal Code. The prisoner cannot be released automatically on the expiry of 20 years."*

*(Quoted from the placitum)*

13. The constitutional validity of Section 433-A of the Code came to be challenged in *Maru Ram, Bhiwana Ram etc. vs. Union of India*, AIR 1980 SC-2147. In the said case, the Constitution Bench culled out the conclusions in paragraph 72 of the judgment. The conclusions which are relevant for our present purpose are reproduced below:

*"(1) We repulse all the thrusts on the vires of Section 433A. May be, penologically the prolonged term prescribed by the*

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*Section is supererogative. If we had our druthers we would have negated the need for a fourteen-year gestation for reformation. But ours is to construe, not construct, to decode, not to make a code.*

*(2) We affirm the current supremacy of Section 433A over the Remission Rules and short-sentencing statutes made by the various States*

xx xx xx

*(6) We follow Godse's case (AIR 1961 SC 600) (supra) to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned the prisoner can claim release only if the remaining sentence is remitted by Government.*

xx xx xx xx

*(10) Although the remission rules or short-sentencing provisions proprio vigore may not apply as against Section 433A, they will override Section 433A if the Government, Central or State, guides itself by the self-same rules or schemes in the exercise of its constitutional power. We regard it as fair that until fresh rules are made in keeping with experience gathered, current social conditions and accepted penological thinking - a desirable step, in our view - the present remission and release schemes may usefully be taken as guidelines under Articles 72/161 and orders for release passed. We cannot fault the Government, if in some intractably savage delinquents. Section 433A is itself treated as a guideline for exercise of Articles 72/161. These observations of ours are recommendatory to avoid a hiatus, but it is for Government, Central or State, to decide whether and why the current Remission Rules should not survive until replaced by a more wholesome scheme.*

*(11) The U. P. Prisoners' Release on Probation Act, 1938, enabling limited enlargement under licence will be effective as legislatively sanctioned imprisonment of a loose and liberal type and such licensed enlargement will be reckoned for the purpose of the 14-year duration. Similar other statutes and rules will enjoy similar efficacy.*

*(12) In our view, penal humanitarianism and rehabilitative desideratum warrant liberal paroles, subject to security safeguards, and other humanizing strategies for inmates so*



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*that the dignity and worth of the human person are not desecrated by making mass jails anthropoid zoos. Human rights awareness must infuse institutional reform and search for alternatives.*

xx xx xx xx

*(14) Section 433A does not forbid parole or other release within the 14 years span. So to interpret the Section as to intensify inner tension and intermissions of freedom is to do violence to language and liberty."*

14. In *State of Haryana and another vs. Ramdiya*, (1990) 2 SCC 701, the Apex Court has expressed the view that convicts whose death sentences were commuted to life imprisonment prior to December, 1978 when Section 433-A of the Code was introduced would be entitled to consideration for release by the Government as per rules and executive instructions prevailing and minimum of 14 years actual imprisonment under Section 433-A would not operate against them. Be it noted, their Lordships were considering paragraph 516-B of the Punjab Jail Manual.

15. In *State of Punjab and others vs. Joginder Singh and others*, AIR 1990 SC 1396, their Lordships referred to the decision rendered in *Maru Ram* (supra) and expressed the view as under:

*"7. ...The Court refused to read down Section 433A to give overriding effect to the Remission Rules of the State. It categorically ruled that Remission Rules and like provisions stand excluded so far as 'lifers' punished for capital offences are concerned. Remissions by way of reward or otherwise cannot cut down the sentence awarded by the Court except under Section 432 of the Code or in exercise of constitutional power under Article 72 / 161 of the Constitution. Remission cannot detract from the quantum and quality of the judicial sentence except to the extent permitted by Section 432 of the Code, subject of course to Section 433A, or where the clemency power under the Constitution is invoked. But while exercising the Constitutional power under Article 72/161, the President or the Governor, as the case may be, must act on the advice of the Council of Ministers. The power under Articles 72 and 161 of the Constitution is absolute and cannot be fettered by any statutory provision such as Sections 432, 433 and 433A of the Code. This power cannot be altered, modified or interfered with in any manner whatsoever by any statutory provisions or Prison Rules."*

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16. Thereafter, their Lordships referred to paragraph 516-B of the Punjab Jail Manual which requires that the case of every convict sentenced to imprisonment for life or imprisonment aggregating to more than 14 years and who has undergone a period of detention in jail amounting together with remission to 14 years shall be submitted to the State Government for orders. Their Lordships referred to the instructions issued in 1971 and the instructions issued in 1976 which were introduced to ensure remission schemes. In the said case, their Lordships opined that the amendment brought in the year 1976 would entitle a convict to seek remission who must have spent at least 8 ½ years of incarceration before release.

17. At this juncture, we may note that in *Naib Singh vs. State of Punjab and others*, AIR 1983 SC 855, it has been held that a sentence of imprisonment for life is nothing but rigorous imprisonment for life and a convict cannot be released forthwith after expiry of 14 years.

18. In *Zahid Hussein and others vs. State of W.B. and another*, (2001) 3 SCC 750, it has been held that unless sentence of life imprisonment awarded to a convict is commuted by Government, he has to undergo imprisonment till the end of his life.

19. If the aforesaid authorities are appositely appreciated, it is clear as crystal that the remission rules or short sentencing provisions would not be curtailed by Section 433-A of the Code by the time of its introduction and would govern the release unless fresh rules are made in keeping with the experience gathered, current social conditions and accepted penological thinking. Their Lordships have held that it is the government which has to decide whether and why the current Remission Rules should not survive until replaced by a more wholesome scheme. Be it noted, the Apex Court has ruled that Section 433-A does not prohibit parole or other release within 14 years of span. The submission of the learned counsel for the petitioners is that the interpretation placed by the Apex Court on Section 433-A clearly lays down that it does not ostracize the concept of remission or a prior release and the stand of the State that the amendment to Rule 4 to bring it in consonance with Section 433-A does not stand to reason and, therefore, deserves to be declared as ultra vires. It is also their submission that the amended Rule 4 contravenes the scheme of the Act and hence, it should be treated as unconstitutional. As far as Section 433-A of the Code is concerned, as has been held by the Apex Court, does not forbid prior release. However, there is no scintilla of doubt that the same has to be permitted under the Act or the Rules. In this context, we may refer with profit to the decision rendered in *State of Haryana v. Mahender Singh and others*, 2008 Cr.L.J. 444 (SC) wherein it has been held as under:-

“32. A right to be considered for remission, keeping in view the constitutional safe-guards of a convict under Articles

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*20 and 21 of the Constitution of India, must be held to be a legal one. Such a legal right emanates from not only the Prisons Act but also from the Rules framed thereunder. Although no convict can be said to have any constitutional right for obtaining remission in his sentence, he in view of the policy-decision itself must be held to have a right to be considered therefore. Whether by reason of a statutory rule or otherwise if a policy-decision has been laid down, the persons who come within the purview thereof are entitled to be treated equally. State of Mysore and another v. H. Srinivasmurthy (1976) 1 SCC 817."*

20. From the aforesaid enunciation of law, there can be no iota of doubt that a decision can be taken by the appropriate Government as regards the release. In the case at hand, there is a piece of legislation i.e. the 1954 Act. It empowers the State Government to release on licence on conditions imposed. That is the purport of Section 2 of the Act. Sub-section (4) of Section 9 enables the State Government to make rules for defining the classes of offenders who may be conditionally released and the period of imprisonment after which they may be so released. Rule 3 of the 1964 Rules prescribes the classes of prisoners not to be released. There is total prohibition in respect of persons convicted for the offences punishable as mentioned under the said Rule. Rule 4 deals with the eligibility for release in respect of prisoners who are not in the net of sub-rule (4). Rule (4) of the Rules initially provided that save the prisoners specified in Rule 3, any other prisoner who has served one third of his sentence of imprisonment or a total period of five years with remission, which ever is less, may be released by the government on licence. A Division Bench of this Court in *Babu Pahalwan vs. State of Madhya Pradesh and another*, 1990 MPLJ 683, while dealing with the concept of period of reckoning of period of 14 years duration in the context of the provisions of the 1954 Act and the 1964 Rules framed thereunder, has held as under:-

*"12. Having discussed the ambit and scope of section 433-A, we now address ourselves to have a glance over the provisions contained in Prison Rules 358 and 359 as well as on Section 2 of 1954 Act reproduced in paragraph No.7 above and 1964 Rules to find out whether the said provisions or any of them fall within the mischief of mandatory rule of 14 years as an essential condition for the release from prison. A critical look and close examination of Prison Rule 358(1) would reveal that a prisoner becomes eligible for consideration by the State Government for his release subject to police supervision or other suitable conditions after he has completed 14 years of imprisonment, inclusive of all remissions earned by him, having*

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regard to the character of his crime, his conduct in prison and the probability of his reverting to criminal habits or instigating others to commit the crime; after he is so released. The release contemplated by Prison Rule 359(1) is thus a release subject to Police surveillance or subject to other suitable conditions. Similarly, under sub-rule 12(a) of Prison Rule 359, the State Government after full recommendation of the case of a prisoner, may release him prematurely with or without conditions on being satisfied that his conduct in the Jail has been good. Thus here again the release under Prison Rule 359 may be made either with or without conditions.

13. Now turning to the provisions of M.P. Prisoners' Release on Probation Act, 1954, it may be seen that Section 2 of the said Act contemplates only release of a prisoner by licence, if it appears to the Government from his antecedent and his conduct in the prison that he is likely to abstain from crime and lead a peaceable life, if he is released from prison, then the Government may permit his release by licence, on condition that he would be placed under the supervision or authority of a Government Officer or a person, institution or a society mentioned therein. Section 9(1) of the Act provides that the Government may make rules consistent with the Act for the terms and conditions of licence on which prisoners may be released. Consequently, statutory rule known as M.P. Prisoners Release on Probation Rules, 1964 were framed. Rule 6 of these Rules contains the procedure for routing the application of the prisoner for his release on licence in a prescribed form which has to be filled by the prisoner concerned and his proposed guardian. Rule 7 prescribes the form in which release on licence is granted. The form so prescribed contains various conditions on breach of which the licence so granted may be revoked by the Government under Rule 10 with a direction for his recommitment to the prison to serve rest of the sentence. Rule 9 prescribes the duty of the guardian of the prisoner released on licence to see that the conditions of the licence are fulfilled. It is also the duty of the guardian to look after the conduct and welfare of the licencee and generally to act in Loco Parentis and if he finds the conduct of the licensee to be bad, it shall be his duty to report the fact to the District Magistrate concerned. From the above discussion and examination of the relevant provisions

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*of 1954 Act and the Rules framed thereunder, it is now abundantly clear that a prisoner released on licence under 1954 Act and the Rules, framed thereunder is not set at liberty with absolute freedom but he is released on licence subject to various conditions and on breach of any of those conditions his release on licence may be revoked, he may be again taken into custody and recommitted to prison to serve out his remaining sentence. In other words, the prisoner so released on licence, in a sense remains under the deemed custody. There is thus a clear distinction in the two releases, that is to say, absolutely release with full freedom, and a release on licence and with certain conditions."*

21: On a reading of the aforesaid decision, it becomes vivid that the Division Bench had analyzed the scheme of the Act and the Rules and found that there was no provision which falls within the mischief of the mandatory rule of 14-years as an essential condition for the release from prison and, therefore, directions were issued in the said case. The said decision was not dealing with the constitutional validity of the Rules. In the cases at hand, the conditions have been prescribed. An exception has been carved out by the provisos added to Rule 4. The submission of the learned Government Advocate is that regard being had to the sweeping criminal activities and the rate of heinous offences, mercenary killings and the path paved by some who have taken the killings to be profession and political murders, the rules have been amended. In this context, we may note with profit how a Division Bench of this Court in W.P.No.1618/2006 had observed the abuse of the provisions. The Division Bench in the aforesaid case has expressed thus:-

*"We are, therefore, of the opinion that all the cases where probationers have been released and where appeals are pending or on mere completion of 5 years or 6 years should be reviewed again. Board is directed to review all the cases and shall also decide the application of the petitioner in the light of the directions given above. Order rejecting the application of the petitioner passed by the Board is quashed with a direction to the Board to reconsider the case in the light of judgment in the case of Arvind Yadav v. Ramesh Kumar and others and State of M.P. vs. Bhola (supra) and earlier order passed. As petitioner has remained in jail for more than 13 years, Board is directed to reconsider the case of the petitioner within a period of two months from today."*

22: The Division Bench had also observed that where prayer for bail has been rejected, the convicts have been released on licence.

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23. In view of our aforesaid analysis, we do not find the Rule to be ultra vires the Section 433-A of the Code or any of the provisions of the Act according it is declared as intra-vires.

24. The next limb of submission of Mr. Bhargava and Mr. Pateriya, learned counsel, is that the cases of the petitioners should have been considered under the old rules as the amended provisions rule cannot be made applicable to them. To bolster the said submission, they have commended us to the decisions rendered in *Mahendra Singh* (supra) and *State of Haryana v. Bhup Singh and others*, JT 2009 (1) SC 535. To appreciate the said submission, we have carefully perused both the decisions. It is perceivable that the decision in *Bhup Singh* (supra) is based on *Mahendra Singh*. In the case of *Mahendra Singh* (supra), their Lordships were dealing with the validity of the policy decision vis a vis Prison Rules and in that context, held that the Rules would prevail keeping in view that the right to ask for remission of sentence by a life convict would be under the law as was prevailing on the date on which the judgment of conviction and sentence was passed. In the case at hand, the Rules have been amended. Needless to emphasize, they are statutory in nature. They have been framed in exercise of powers vested under Section 9 of the 1954 Act. They are not executive instructions. In view of the aforesaid, the decisions rendered in *Mahendra Singh* (supra) and *Bhup Singh* (supra) are distinguishable.

25. In view of our foregoing analysis, we perceive no merit in this batch of writ petitions and accordingly it is dismissed without any order as to costs.

*Petition dismissed.*

I.L.R. [2009] M. P., 1978

**WRIT PETITION**

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

16 March, 2009\*

POORAN SINGH

Vs.

STATE OF M.P. & ors.

... Petitioner

... Respondents

**Constitution, Article 21 - Illegal detention - Compensation - Petitioner convicted u/s 18 of N.D.P.S. Act and sentenced to 10 years R.I. - Period of sentence reduced to 5 years in appeal - Copy of judgment sent to jail authorities as well as to Court - However, petitioner was released after completion of 10 years of sentence - Held - Defence of sovereign immunity is not available where fundamental right under Article 21 is violated - State directed to pay compensation of Rs.3 lacs.** (Paras 12 & 13)

संविधान, अनुच्छेद 21 - अवैध निरोध - प्रतिकर - याची को स्वापक औषधि और

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मनःप्रभावी पदार्थ अधिनियम की धारा 18 के अधीन दोषसिद्ध किया गया और 10 वर्ष के सश्रम कारावास से दण्डित किया — अपील में दण्डादेश की अवधि घटाकर 5 वर्ष कर दी गई — निर्णय की प्रतिलिपि जेल प्राधिकारियों और साथ ही साथ न्यायालय को भेजी गयी — तथापि, याची को 10 वर्ष का दण्डादेश पूर्ण करने के बाद ही छोड़ा गया — अभिनिर्धारित — जहाँ अनुच्छेद 21 के अन्तर्गत मूलमूल अधिकार का उल्लंघन हो वहाँ प्रभुतासम्पन्न उन्मुक्ति की प्रतिरक्षा उपलब्ध नहीं होती है — राज्य को 3 लाख रुपये प्रतिकर संदाय करने का निदेश दिया।

**Cases referred :**

(1978) 2 All ER 670, AIR 1993 SC 1960, (2004) 6 SCC 213, AIR 1983 SC 1086, AIR 1986 SC 494.

*Pooran Singh*, petitioner in person.

*P.K. Kaurav*, Amicus Curiae.

*Vijay Shukla*, Dy.A.G., for the respondent/State.

**ORDER**

The Order of the Court was delivered by **ANIL SINGH, J.** :-By this letter, which has been registered as Writ Petition, the petitioner has prayed for a direction against the State Government to pay him compensation for his illegal detention of almost five years in jail.

2. Since the petitioner was not assisted by any lawyer, we thought it proper to appoint Shri P. K. Kaurav as Amicus Curiae who willingly agreed to provide all possible legal assistance in the matter.

3. The facts in short are these. The petitioner is a villager. He lives in village Shrinagin-umaria in District Narsinghpur. His trouble started from 25.5.2000 when the police of Narsinghpur police station searched him at Itwara market on information that he was involved in drug peddling. During search the police recovered 150 grams of opium from his possession. He was, therefore, arrested on that day itself and after investigation put to trial in the Court of Special Judge, Narsinghpur, vide Special Case No. 6/2000. The Special Judge by his judgment dated 15.9.2000 held the petitioner guilty of the offence under section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced him to ten years rigorous imprisonment along with an additional sentence of fine of Rs.1,00,000/-. The petitioner challenged his conviction and sentence by filing Criminal Appeal No.2478/2000 before this Court. A learned Single Judge upheld the conviction of petitioner vide judgment dated 30.10.2003 but reduced the sentence of imprisonment to three years and five months. He also reduced the sentence of fine to Rs.500/-or, in default of payment of fine, to undergo one month imprisonment.

4. On 7.11.2003 a copy of the judgment of this Court delivered in the criminal appeal of petitioner along with a certificate was sent to the Court of Special Judge under section 388 of the Code of Criminal Procedure for information and further action. The record of the Special Judge which we summoned reveals that

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both these documents were received by the Reader of that Court on 11.11.2003 and on 10.12.2003 the presenting clerk sent the record to the Record Room of District Court. Further, as per the record of criminal appeal, on 11.11.2003 a similar copy of the judgment and certificate were also sent by the High Court to the Superintendent, District Jail, Narsinghpur, for information.

5. Thus, in the normal course, even if the petitioner did not deposit the fine, he ought to have been released from jail in the month of November 2003. But he was not so released. Neither the modified warrant, as required under Rule 315 of the Criminal Courts Rules and Orders, was issued by the Special Court for his release nor the jail authorities approached the Special Court in this regard. The petitioner was finally released after almost five years of illegal detention on 30.8.2008 when his brother Kamal filed an application in the Special Court pursuant to which modified warrant was issued. The petitioner, shattered by his prolonged illegal detention for no fault of his, has therefore approached this Court for being compensated by the State Government on the ground of violation of his fundamental right guaranteed under Article 21 of the Constitution of India.

6. The respondents, who are essentially the jail authorities, in their return have denied any negligence on their part in releasing the petitioner from jail before 30.8.2008. According to them neither any intimation regarding the judgment passed in criminal appeal by this Court was received in jail nor any modified release warrant was issued by the Special Court earlier to 30.8.2008 and, therefore, the petitioner could not be released. The respondents have also stated in the return that the petitioner, after his conviction was transferred to the Central Jail, Sagar, on 17.9.2000 as Narsinghpur jail at that time was only a sub-jail and in the year 2008 when the sub-jail was upgraded as District Jail, he was again retransferred to Narsinghpur jail on 17.5.2008. In the return the respondents have, however, not denied that the petitioner was a victim of illegal detention for almost five years in prison.

7. There is, thus, no dispute in this case nor there is any doubt that the petitioner was detained illegally in prison for almost five years after his sentence was reduced in criminal appeal by this Court. By which officer or the employee of State this damage was done to him is a matter of enquiry which we will order hereinafter. But the fact remains he was incarcerated in jail for no fault of his by the State Government or by its officers while acting in the course of employment. The question, therefore, which calls for our consideration is what relief the petitioner can be granted in this petition.

8. The liability of the State to pay compensation for deprivation of the fundamental right of life and personal liberty is a new liability in public law created by the Constitution and not vicarious liability or a liability in tort. For this reason, this new liability is not hedged in by the limitations, including the doctrine of sovereign



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immunity, which ordinarily apply to State's liability in tort. This view is strongly supported by the decision of the Privy Council in *Maharaj v. Attorney-General of Trinidad and Tobago*-(1978) 2 All ER 670. Section 1 of the Constitution of Trinidad and Tobago recognizes amongst other "the right of the individual of life, liberty, security of person and the right not to be deprived thereof except by due process of law". Any person alleging contravention of this right and other human rights and freedoms recognized under sections 1 and 2 can apply under section 6 for redress to the High Court which is empowered to issue appropriate orders, writs and directions for enforcement or securing the protection of provisions of the aforesaid sections. The appellant in the case was a barrister and was committed to seven days imprisonment by a judge of the High Court which committal was set aside by the Privy Council in appeal on the ground that particulars of the specific nature of the contempt were not told to the appellant and the judge had thereby failed to observe a fundamental rule of natural justice. The appellant had in the meantime applied for redress under section 6 on the ground that he was deprived of his liberty without due process of law. This application was dismissed by the High Court, but appellant again came up in appeal, to the Privy Council. The Privy Council held that section 6 of the Constitution impliedly allowed the High Court to award compensation as that may be the only practicable form of redress in some cases. The Privy Council also held that as the appellant's committal was in violation of the rules of natural justice, he was deprived of his liberty without due process of law in contravention of section 1 of the Constitution and was entitled to claim compensation from the State under section 6 thereof. In meeting the argument that a judge cannot be made personally liable for anything done or purporting to be done in the exercise or purported exercise of his judicial functions, LORD DIPLOCK speaking for the majority observed: "The claim for redress under section 6(1) for what has been done by a judge is a claim against the State for what has been done in the exercise of judicial power of the State. This is not vicarious liability: it is liability of the State itself. It is not a liability in tort at all: it is a liability in public law of the State, not of the judge, which has been created by sections 6(1) and (2) of the Constitution." As to the measure of compensation LORD DIPLOCK said: "The claim is not a claim in private law for damages for the tort of false imprisonment under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration."

9. The above view was accepted by the Supreme Court in *Nilabati Behra v. State of Orissa* AIR 1993 SC 1960. In that case the petitioner's son died as a result of injuries inflicted on him while he was in police custody. A letter sent by

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the petitioner to the Supreme Court was treated as a petition under Article 32 of the Constitution. The Supreme Court directed the State of Orissa to pay Rs. 1,50,000 as compensation to the petitioner. In directing so J. S. Verma, J. observed: "Award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies." Verma, J. further explained that the State's plea of sovereign immunity for tortuous acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. Concurring with Verma, J. Dr. A. S. Anand, J. in the same case observed: "The purpose of the public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights - This court and the High Court being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 32 of the Constitution of India are established to have been flagrantly infringed by calling upon the state to repair the damage done by its officers to the fundamental rights of the citizens, notwithstanding the right of the citizen to the remedy by way of a suit or criminal proceedings. The state of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law through appropriate proceedings." Dr. Anand, J. also observed: "There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his rights to life."

10. The case of *Nilbati Behra* (Supra) was followed in *D. K. Basu v. State of West Bengal* AIR 1997 SC 610 which lays down general principles relating to custodial death cases. The judgment in this case was delivered by Dr. Anand, J., who reviewed the earlier authorities. It was reiterated that the relief of compensation against the state based "on the principles of strict liability" under the public law is one to which the defence of sovereign immunity does not apply and that this relief is in addition to the traditional remedies and the compensation awarded in a given case is adjusted against any amount awarded to the claimant by way of damages in civil suit. It was also held that in the assessment of compensation under Article 32 or 226 "the emphasis has to be on the compensatory

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and not on the punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal court in which the offender is prosecuted, which the state in law is duty bound to do.

11. Although the cases of Nilbati Behra and D. K. Basu discussed above which laid the basis for the concept of public law wrong, related to violation of Article 21, the observations in them are general that violation of fundamental rights will be public law wrong redressable under Article 226 and 32. A three judge bench of the Supreme Court, however, in *Hindustan Papers Corporation v. Ananta Bhattacharjee* (2004) 6 SCC 213 has held that "the public law remedy for the purpose of grant of compensation can be resorted to only when the fundamental right of a citizen under Article 21 is violated and not otherwise". The court further said that "it is not every violation of the provisions of the constitution or a statute which would enable the court to direct grant of compensation."

12. Earlier also, in the case of *Rudul Shah v. State of Bihar* AIR 1983 SC 1086 which arose on a petition under Article 32 of the Constitution complaining prolonged detention of the petitioner even after his acquittal, the Supreme Court directed the State to pay Rs.30,000 as interim measure without precluding the petitioner from bringing a suit to recover further damages. The court while overruling the objection that the petitioner should be left entirely to the remedy of a suit and no damages or compensation should be allowed even as an interim measure observed: "The petitioner can be relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But where the court has already found, as in the present case, that the petitioner's prolonged detention in prison after his acquittal was wholly unjustified and illegal, there can be no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit." Similarly, in *Bhim Singh v. State of J & K* AIR 1986 SC 494, which was again a case under Article 32 of the Constitution, the Supreme Court directed the State of Jammu and Kashmir to pay Rs.50,000 as compensation to the petitioner who was an M.L.A. and was illegally arrested and detained to prevent him from attending the assembly session.

13. A survey of the cases referred above goes to show that it is now well settled that the defence of sovereign immunity is not available when the State or its officers, acting in the course of employment, infringe a person's fundamental right of life and personal liberty as guaranteed by Article 21 of the Constitution and the State can be directed in a writ jurisdiction under Articles 32 and 226 to repair the damage done to the victim by paying appropriate compensation. We, therefore, having regard to the fact that petitioner was kept under illegal detention for almost five years in prison, direct the State Government to pay him compensation of rupees three lac within two months from today.

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We have awarded this amount as compensation feeling that the amount is just and proper. While doing so, as held by the Supreme Court in the case of *D. K. Basu* (Supra), we have not taken into account the punitive element as the objective is to apply balm to the wounds of petitioner and not to punish the transgressor. We, however, make it clear that if the petitioner feels dissatisfied with the amount awarded, he will be at liberty to resort to traditional remedies and the compensation awarded in the present case will be adjusted against any amount awarded to him by way of damages in civil suit.

14. In order to prevent similar victimization of prisoners by the jail authorities and the courts, we direct the State Government to hold an enquiry into the matter and take necessary action against the erring officers, if any. We also direct the Registrar (Vigilance) of this Court to immediately hold an enquiry and submit a report within a month to the Registrar General as to why the modified warrant was not issued from the Court of Special Judge, Narsinghpur, after passing of the judgment in the criminal appeal of petitioner and if any person is found responsible for the lapse suitable action permissible under law be taken against him.

15. Before parting, we wish to acknowledge the assistance rendered by Shri P. K. Kaurav as he put all the relevant considerations before us. We also acknowledge the valuable assistance we received from the discussion on the topic of Public Law Wrongs in the Law of Torts (25th edition) edited by Justice G.P. Singh.

16. In the result, with our directions made in paragraphs 13 and 14 of the order, the petition is allowed. No order as to costs.

*Petition allowed.*

I.L.R. [2009] M. P., 1984

**WRIT PETITION**

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

17 March, 2009\*

**SHRINATH CARAMICS (M/S)**

**Vs.**

**COMMISSIONER INCOME TAX-II, INDORE**

... Petitioner

... Respondent

**A. Income Tax Act (43 of 1961), Sections 271(1)(c), 246(1)(L) & 273A - Penalty - Alternative remedy of appeal - Against the order of penalty, petitioner has alternative remedy of filing appeal but has also remedy of filing application u/s 273A.** (Para 6)

क. आयकर अधिनियम (1961 का 43), धाराएँ 271(1)(सी), 246(1)(एल) व 273ए - शास्ति - अपील का वैकल्पिक उपचार - शास्ति के आदेश के विरुद्ध याची को अपील पेश करने का वैकल्पिक उपचार है किन्तु धारा 273ए के अधीन आवेदन पेश करने का उपचार भी है।

**SHRINATH CARAMICS (M/S) Vs. COMMISSIONER INCOME TAX-II, INDORE**

**B. Income Tax Act (43 of 1961), Sections 271(1)(c) & 273A - Waiver of penalty - Survey of business premises of petitioner was carried out on 06.10.1995 - Petitioner filed revised returns of income for assessment years 1992-93, 1993-94 and 1994-95 - Penalty was imposed as revised returns were filed after survey and they were not voluntary - Held - Revision of return was for the assessment years 1992-93, 1993-94 and 1994-95 and not for the assessment year 1995-96 - Order passed by Commissioner suffers from non-application of mind - Matter remanded back to reconsider application u/s 273A and pass fresh orders. (Para 6)**

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

**Cases referred :**

1984 (147) ITR 09, 2000 (244) ITR 374, 2002 (255) ITR 93, W.P. No.5131/2005(S) *Ramakant Choudhary Vs. District & Sessions Judge, Guna and another.*

*Satish Chandra Bagadia with Ajay Bagadia, for the petitioner.*

*R.L. Jain with Veena Mandlik, for the respondent.*

**ORDER**

The Order of the Court was delivered by A.K. PATNAIK, C. J. :- This writ petition has been filed by the petitioner under Article 226/227 of the Constitution challenging the order passed by the Commissioner of Income Tax-II, Indore rejecting the application of the petitioner for waiver of the penalty under Section 273A of the Income Tax Act, 1961 (for short, 'the Act').

2. The relevant facts briefly are that the petitioner is a registered partnership firm carrying on the business of trading in sanitary goods. There was a survey of the business premises of the petitioner under Section 133A of the Act on 6.10.1994 and pursuant to survey, the petitioner filed revised returns of income for the assessment years 1992-93, 1993-94 and 1994-95. Thereafter the petitioner also filed a return for the assessment year 1995-96 on 31.10.1995 declaring an income of Rs.3,96,130. The Assessing Officer made an addition of Rs.1,40,690/- under the head of unaccounted income from sales outside the books in the assessment order dated 31.3.1998 and initiated penalty proceedings under Section 271(1)(c) of the Act for concealment of income and thereafter imposed penalty of Rs.56,360/-

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by order dated 25.9.1998. The petitioner, thereafter filed an application under Section 273A of the Act before the Commissioner of Income Tax for waiver of the penalty but by impugned order dated 17.09.2002, the Commissioner of Income Tax rejected the application after holding that the returns of income of the petitioner have been upwardly revised by the assessee only after survey and special audit and, hence, the revised return filed by the petitioner can not be said to be voluntary and in good faith and since the requirement of Section 273A of the Act for waiver of penalty have not been met, the application was liable to be rejected. Aggrieved, the petitioner has filed this petition under Article 226/227 of the Constitution of India.

3. Mr. Satish Chandra Bagadia, Senior counsel appearing for the petitioner submitted that for the assessment year 1995-96, the petitioner has not filed any revised return for the assessment years 1992-93; 93-94; 94-95 the petitioner had filed revised returns on the survey of the business premises of the petitioner on 6.10.95 and the Commissioner of Income Tax has erroneously held that the petitioner had revised its return for the assessment year 1995-96 only after survey of special audit report and hence, the return was not voluntary and in good faith and did not satisfy the requirements under Section. 273A of the Act. He further submitted that in the impugned order, the Commissioner of Income Tax has recorded the submissions of the Assessing Officer in its report dated 18.12.98 for the assessment year 1995-96 and from the said report of the Assessing Officer, it is clear that the Assessing Officer has taken a view that the return has been filed voluntarily and the disclosure has been made by the petitioner in good faith and the disclosure was full and true. He submitted that the Commissioner of Income Tax had not taken these relevant facts into consideration and proceeded on an erroneous assumption that the petitioner had filed a revised return for the assessment year 1995-96 on the basis of survey and special audit which took place on 6.10.94.

4. Mr. Bagadia, cited the decision of Karnataka High Court in *Mrs. P. V. Athanimath vs. Commissioner of Wealth Tax*, 1984(147) ITR 09 in which a learned Single Judge of the High Court has quashed the order passed by the Commissioner of Income tax rejecting the application for reduction or waiver of penalty on the ground that he had failed to exercise judicial discretion vested in it by taking into account relevant considerations. He also cited the decision of a single Judge of the Madras High Court in *K.M. Radha Krishna Chettiar and Company vs. Commissioner of Income-tax and another*, [2000 (244) I.T.R. 374 in which a learned single Judge of the High Court found that the Commissioner of Income Tax had not applied his mind and not recorded any finding as to the compliance or otherwise of the conditions imposed under Section 273A of the Act and he had not assigned any reason whatsoever for refusing the relief sought for by the petitioner under Section 273A while exercising his discretion and held that the order passed by the Commissioner was not valid and was liable to be quashed.

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He submitted that considering the aforesaid authorities, this is a fit case in which High Court exercises its discretion under Article 226/227 of the Constitution should quash the impugned order and remand the matter to the Commissioner of Income Tax for fresh consideration in accordance with the provisions of Section 273A of the Act.

5. Mr. R.L. Jain, Senior counsel appearing for the respondent-department, on the other hand, submitted that an alternative remedy of an appeal was available to the petitioner against the order of penalty under Section 246(1) of the Act. He further submitted that a reading of the application of the petitioner would go to show that the petitioner had taken a stand in the application that pursuant to survey under Section 133A of the Act conducted at its business premises the returns were voluntarily revised in good faith making full and true disclosure of income and it is perhaps for this reason that the Commissioner of Income Tax had come to the conclusion in the impugned order that returns of income have been upwardly revised by the assessee only after survey and special audit, and the filing of revised return cannot be said to be voluntary and in good faith and hence, requirement laid down in Section 273A of the Act for waiver of the penalty have not been met. He cited the decision of Calcutta High Court in *Satish Kapoor v/s Commissioner of Income Tax and others* (2002) (255) ITR 93 in which a learned single judge of the High Court after having found that the petitioner in that case had a right to prefer an appeal from the order passed by the authorities held that the petitioner has no right to file the writ petition and the remedy is to prefer an appeal before the appropriate forum and not by way of this writ petition.

6. We have considered the submissions of learned counsel for the parties and we are unable to accept the submission of Mr. Jain that we should not entertain this petition under Article 226/227 of the Constitution of India because a remedy of appeal was available to the petitioner. Against the order of penalty imposed under Section 271(l)(c) of the Act if it is true the petitioner had remedy of appeal under Section 246(1)(L) of the Act but he also had a remedy of an application under Section 273A of the Act under which the Commissioner has a discretion whether on his own notion or otherwise to reduce or waive the amount of penalty imposed on a person under clause (3) of sub-section I of Section 273A of the Act, if he was satisfied that prior to the detection by the Assessing Officer, of the concealment of particulars of income or of the inaccuracy of particulars furnished in respect of such income, the assessee voluntarily and in good faith, made full and true disclosure of such particulars. This application under Section 273A of the Act was also ordinary statutory remedy which was available to the petitioner and the petitioner availed this statutory remedy but the Commissioner rejected the application of the petitioner on the ground that the petitioner had revised return only after survey and special audit and hence the revision of the return could not be said to be voluntary or in good faith. Since the petitioner had not filed any

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revised return for the assessment year 1995-96 in respect of which the application under Section 273A of the Act was filed, the rejection of the application on the ground that the petitioner had revised returns only after survey and special audit and had thus not disclosed his income voluntarily and in good faith was not legally justified. It is true that in certain paragraphs of the application filed by the petitioner under Section 273A of the Act the petitioner had stated that it had revised its returns after survey under Section 123A of the Act conducted in the business premises of the petitioner but revision of return by the petitioner was for the assessment years 1992-93, 1993-94, and 1994-95 and not for the assessment year 1995-96. The order passed by the Commissioner, therefore suffers from non-application of mind and a grave error.

7. Since there was no appeal available under the Act against impugned order passed by the Commissioner of Income Tax under Section 273A of the Act, we quash the impugned order and remand the matter to the Commissioner of Income tax, to reconsider the application of the petitioner under Section 273A of the Act and pass fresh orders in accordance with law.

*Order accordingly.*

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**I.L.R. [2009] M. P., 1988**  
**WRIT PETITION**

*Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh*  
 29 April, 2009\*

**SHAILU MANGAL**

... Petitioner

**Vs.**

**STATE OF M.P. & ors.**

... Respondents

**Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2008, Rule 1.2(d) - In service candidate - Discrimination - Medical Officers / Assistant Surgeons working under Employees State Insurance Directorate of State of M.P. denied benefit of quota allocated to in-service candidates as they are not working in the department of Public Health and Family Welfare - Held - Nature of work and duties of two categories are same - Doctors of both categories need to be given opportunity to upgrade their qualifications and skills - Classification is discriminatory and violative of Article 14 - Writ Petition allowed.** (Paras 6 to 8)

चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2008, नियम 1.2(डी) - सेवाकालीन अभ्यर्थी - विभेद - म.प्र. राज्य के कर्मचारी राज्य बीमा संचालनालय के अधीन कार्यरत चिकित्सा अधिकारियों/सहायक सर्जनों ने सेवाकालीन अभ्यर्थियों को आबंटित कोटे के लाभ से इंकार किया क्योंकि वे लोक स्वास्थ्य एवं परिवार कल्याण विभाग में कार्यरत नहीं हैं - अभिनिर्धारित - दो श्रेणियों के कार्य और कर्तव्यों की प्रकृति समान है - दोनों श्रेणियों



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के चिकित्सकों को उनकी अर्हताओं और कौशल को उन्नत करने का अवसर देने की आवश्यकता है वर्गीकरण विभेदकारी और अनुच्छेद 14 के उल्लंघनकारी है - रिट याचिका मंजूर।

**Cases referred :**

AIR 1958 SC 538, (2003) 7 SCC 83, (2002) 1 SCC 428.

*Aditya Sanghi*, for the petitioner.

*Samdarshree Tiwari, G.A.*, for the respondents Nos.1 & 2.

*Indira Nair*, for the respondent No.3.

**ORDER**

The Order of the Court was delivered by A.K. PATNAIK, C. J. :- This case relates to admission to the seats allocated for in-service candidates in the medical postgraduate courses in the Medical Colleges under the Government of Madhya Pradesh.

2. In exercise of powers conferred by Section 10 of the Madhya Pradesh Chikitsa Shiksha Sanstha Niyantṛan Adhiniyam, 1973, the State Government has made the rules relating to admission to Post Graduate Medical (MD and MS) courses and Post graduate Diploma and Dental (MDS) courses in the Medical and Dental Colleges in the State of Madhya Pradesh, under the State Government called the Madhya Pradesh Medical and Dental Post Graduate Course Entrance Examination Rules, 2008 (for short "the Rules 2008"). In the Rules 2008, 20% of the total seats in Post Graduate Medical Degree and Diploma courses have been allocated for in-service candidates and for these seats only in-service candidates could apply and on the basis of their position in merit list separately prepared in-service candidates were to be called for counselling and given admission in a Post Graduate Medical Courses in one of the colleges under the Government of Madhya Pradesh. The petitioner who is working in the Employees State Insurance (ESI) Directorate as an Assistant Surgeon applied as an in-service candidate and took the entrance examination and stood 11th in the merit list of general category in-service candidates and was called for counselling held during 27.5.2008 to 31.5.2008 but was refused admission on the ground that Rule 1.2(d) of the Rules 2008 defines an in-service candidate to mean a Medical Officer of the Public Health and Family Welfare Department, who is serving under the Government of Madhya Pradesh on regular or contract basis, but the petitioner was working as an Assistant Surgeon in the ESI Directorate and was not working in the Public Health and Family Welfare Department of the Government of Madhya Pradesh. Aggrieved, the petitioner has filed this writ petition under Article 226 of the Constitution for declaring the definition of 'in-service candidate' in Rule 1.2(d) of the Rules 2008 as discriminatory and violative of Article 14 of the Constitution.

3. Mr. Aditya Sanghi learned counsel for the petitioner submitted that in *Ram Krishna Dalmia Vs. Justice Tendolkar* (AIR 1958 SC 538), the Supreme Court has laid down the principles to be borne in mind by the Court in determining

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the validity of statute on ground of violation of Article 14 and has held that Article 14 forbids class legislation but does not forbid reasonable classification for the purpose of legislation. He submitted that the Supreme Court has further held in *Ram Krishna Dalmia* (supra) that to pass the test of permissible classification two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. He submitted that the Assistant Surgeons working in the ESI department and the Medical Officers of the Public Health and Family Welfare Department of the Government of Madhya Pradesh perform the same duties and functions and therefore cannot be grouped into two different classes for the purpose of giving opportunities for admission to Post Graduate Medical Courses in the Medical Colleges under the Government Madhya Pradesh. He further submitted that the classification of Assistant Surgeons working in ESI Department and Medical Officers of the Public Health and Family Welfare Department into two different classes and giving the benefit of in-service candidate only to Medical Officers of the Public Health and Family Welfare Department does not satisfy the twin tests of reasonable classification laid down by the Supreme Court in *Ram Krishna Dalmia* (supra). He cited an unreported decision in *State of M.P. & another Vs. Dr. A.K. Singhal*, in which the Supreme Court has taken a view that the Assistant Surgeons working in Public Health and Family Welfare Department and the ESI Department carry on similar and identical duties and the Government must act fairly and impartially to all its employees and give them equal opportunities otherwise the classification would be unreasonable and violative of Article 14 of the Constitution. He submitted that the definition of 'in-service candidate' in rule 1.2(d) of the Rules, 2008 is, therefore, discriminatory and violative of Article 14 of the Constitution.

4. Mr. Samdarshee Tiwari, learned Government Advocate, appearing for the respondents No. 1 and 2, on the other hand relying on the additional return filed on behalf of the respondents No. 1 and 2, submitted that quota of 20% of the seats of Post Graduate Courses in MD/MS/Diploma has been carved out for in-service candidates who are serving substantially with the Government of M.P. on regular or on contract basis. He submitted that Medical Officers/Assistant Surgeons appointed in the department of Public Health and Family Welfare perform duties in the entire State of Madhya Pradesh in District Hospitals, Community Health Centres and Primary Health Centres situated in rural and tribal areas and thereby provide medical facilities to each and every citizen in the State of Madhya Pradesh. He submitted that the Medical Officers working in different District Hospitals, Community Health Centres and Primary Health Centres need to be upgraded by postgraduate studies so that better medical facilities to the citizens

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are provided. He further submitted that the Medical Officers in the department of Public Health and Family Welfare cannot compete in open competition for the seats in the medical postgraduate courses and for this reason 20% quota of seats in the medical postgraduate courses is allocated to in-service candidates such as the Medical Officers/Assistant Surgeons working in the department of Public Health and Family Welfare. He submitted that grouping of these Medical Officers working in the department of Public Health and Family Welfare into a separate class for the purpose of providing them the benefit of this quota allocated to in-service candidates is thus a classification having rational nexus with the object of the rules. He submitted that the definition of in-service candidate in the Rules 2008 therefore satisfies the test of reasonable classification and is not violative of Article 14 of the Constitution. He relied on paragraph 21 of the judgment reported in the *State of Madhya Pradesh & others Vs. Gopal D. Tirthani & others* (2003) 7 SCC 83, in which the Supreme Court has held that there was nothing wrong in the State Government setting apart a definite percentage of educational seats at postgraduation level consisting of degree and diploma courses exclusively for in-service candidates. He also relied on the observations of the Supreme Court in the aforesaid decision that in-service candidates on attaining higher academic achievements would be available to be posted in rural areas by the State Government. He submitted that the petitioner who is an Assistant Surgeon in ESI department of the Government of Madhya Pradesh is required to work only, in ESI Hospitals located in bigger cities in the State of Madhya Pradesh and is not liable to be posted in rural areas and therefore can compete for the open seats and she was not entitled to compete for the in-service seats. He submitted that the definition of 'in-service candidate' in the Rules 2008 is, therefore, not discriminatory and not violative of Article 14 of the Constitution.

5. We have considered the submissions of Mr. Sanghi and Mr. Tiwari and we find that the real object of the Rules 2008 in allocating 20% seats in the post-graduate medical courses to in-service candidates is to enable such candidates who are not in a position to compete for open seats because of the nature of their duties get an opportunity to secure admission in the medical post graduate courses and upgrade their qualifications, knowledge and skills for better service to the people of the State. This will be clear from the following observations in paragraph 31 of the judgment of the Supreme Court in *AIIM Students' Union Vs. AIIMS & others* (2002) 1 SCC 428:

" The candidates in both the categories were medical graduates. Some of them had done graduation some time in the past and were either picked up in the government service or had sought for joining government service because, may be, they could not get a seat in postgraduation and thereby continue their studies because of shortage of seats in higher

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*level of studies. On account of their having remained occupied with their service obligations, they because detached or distanced from theoretical studies and therefore could not have done so well as to effectively compete with fresh medical graduates at the PG entrance examination. Permitting in-service candidates to do post graduation by opening a separate channel for admittance would enable their continuance in government service after postgraduation which would enrich health services of the nation. Candidates in open category having qualified in postgraduation may not necessarily feel attracted to public services. Providing two sources of entry at the postgraduation level in a certain proportion between in-service candidates and other candidates thus achieves the laudable object of making available better doctors both in public sector and as private practitioners. The object sought to be achieved is to benefit two segments of the same society by enriching both at the end and not so much as to provide protection and encouragement to one at the entry level. "*

6. Thus, the object of allocating 20% of the seats in postgraduate medical courses in the State of Madhya Pradesh in the rules 2008 for in-service candidates is to ensure that in-service candidates who on account of service obligations have remained detached from theoretical studies and cannot effectively compete with fresh medical graduates in the postgraduate entrance examination, have a separate channel of admission and the competition is confined to such in-service candidates and in the process they attain higher qualification of postgraduation and are able to provide better service to the people. It has been admitted in paragraph 4 of the additional return filed on behalf of the respondents No.1 and 2 that Medical Officers/Assistant Surgeons belonging to the Directorate of Employees State Insurance Services (ESI) with the Labour Department of the State Government are at par with the Medical Officers/Assistant Surgeons working in the department of Public Health and Family Welfare as far as the nature of work is concerned. The nature of duties of Medical Officers/Assistant Surgeons, working in the ESI hospitals of the Government of Madhya Pradesh are like those of the Medical Officers of the Public Health and Family Welfare Department and they are also out of touch from the theoretical studies and are not in a position to compete with fresh medical graduates. Such Medical Officers/Assistant Surgeons working in the ESI Department therefore fall into the same group as the Medical Officers/Assistant Surgeons appointed in the department of Public Health and Family Welfare and are entitled to the same opportunities which the Medical Officer/Assistant Surgeons in the department of Public Health and Family Welfare enjoy for admission to the quota of 20% seats allotted for in-service candidates.

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7 The only reason given in paragraph 4 of the additional return for treating such Medical Officers/Assistant Surgeons belonging to the ESI Directorate differently from the Medical Officers/Assistant Surgeons of the department of Public Health and Family Welfare is that the Medical Officers/Assistant Surgeons of the ESI Directorate are posted in big towns and cities and are not required to serve in semi-urban, rural or tribal areas whereas the Medical Officers/Assistant Surgeons serving in the department of Public Health and Family Welfare are liable to be posted in such semi urban, rural or tribal areas. It is, however, not disputed that the Medical Officers/Assistant Surgeons belonging to the department of Public Health and Family Welfare are also posted in big towns and metropolitan cities in the State of Madhya Pradesh and yet such Medical Officers/Assistant Surgeons of the department of Public Health and Family Welfare posted in big town and metropolitan cities in the State of Madhya Pradesh also fall within the definition of in-service candidate' under the Rules 2008 and are entitled to compete for admission to the 20% quota of the postgraduate medical seats allocated for in-service candidates. That apart, we find from the Rules 2008 that for in-service candidates, 50 marks have been allotted for services rendered in rural/tribal areas. The object of this provision may be to encourage the Medical Officers/Assistant Surgeons of the department of Public Health and Welfare to work in rural and tribal areas after their MBBS, but the object of allocating 20% of postgraduate medical seats in colleges under the Government of Madhya Pradesh is not encouraging medical officers to work in rural and tribal areas.

8. In *State of Madhya Pradesh & others Vs. Gopal D. Tirthani & others* (supra), the questions of law for decision before the Court inter alia were whether it is permissible to hold and conduct separate entrance examinations for in-service and open category candidates and whether weightage can be given for the length of service in the rural/tribal areas and the Supreme Court answered both these questions in affirmative. In the aforesaid case, the Supreme Court was not called upon to decide who amongst the Medical Officers/Assistant Surgeons working under the Government of Madhya Pradesh could be treated as in-service candidates for the purpose of admission into the quota allotted for in-service candidates in the postgraduate medical courses. On the other hand, in an unreported decision in *State of M.P. & another Vs. Dr. A.K. Singhal*, the Supreme Court has taken a view that the Assistant Surgeons working in the department of Public Health and Family Welfare and in the ESI Department carry on similar and identical duties and the Government must act fairly and impartially to all its employees and give them equal opportunities, otherwise the classification would be unreasonable and violative of Article 14 of the Constitution.

9. We are thus of the considered opinion that the Medical Officers/ Assistant Surgeons working under the ESI Directorate in different hospitals in the State of Madhya Pradesh like the Medical Officers/Assistant Surgeons working in the

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department of Public Health and Family Welfare, on account of the nature of their service obligations are out of touch with theoretical studies and are not in a position to compete in open competition with fresh medical graduates for postgraduate seats in medical courses and have to be grouped together into one class and given equal opportunity to compete for seats allotted to in-service candidates and that exclusion of such Medical Officers/Assistant Surgeons working in the Directorate of ESI from the definition of in-service candidate in the Rules 2008 is discriminatory and violative of Article 14 of the Constitution.

10. In the result, we allow this writ petition and direct that the petitioner who has secured 11th position among the general category candidates as in-service candidate in the postgraduate entrance examination held in 2008 and was deprived of admission to a postgraduate seat, will be allowed to participate in counselling for a postgraduate seat for the year 2009-2010 and given admission within the intake capacity of the medical colleges under the Government of Madhya Pradesh. No order as to costs.

*Petition allowed.*

I.L.R. [2009] M. P., 1994

**WRIT PETITION**

*Before Mr. Justice R.S. Jha*

4 May, 2009\*

RAMDIN & ors.

Vs.

STATE OF M.P. & ors.

... Petitioners

... Respondents

**A. Land Acquisition Act (1 of 1894), Sections 4 & 6 - Delay and laches - Notifications issued on 08.08.2006 and 06.08.2007 - Petitions filed in the year 2008 & 2009 - Petitioners were aware of the notifications - They had participated in the acquisition proceedings - Most of the compensation has been disbursed - Out of 3289 acres of acquired land, only 25 acres of land belong to petitioners - Rest of the owners have accepted the acquisition - Petition suffers from delay and laches - Petition dismissed. (Para 26)**

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

**B. Land Acquisition Act (1 of 1894), Section 4 - Mention of locality - Mentioning of the name of village in which the land is situated is sufficient indication of locality. (Para 28)**

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ख. भूमि अर्जन अधिनियम (1894 का 1), धारा 4 — परिक्षेत्र का उल्लेख — गाँव के नाम का उल्लेख करना जिसमें भूमि स्थित है परिक्षेत्र का पर्याप्त निर्देश/उपदर्शन है।

**C. Land Acquisition Act (1 of 1894), Section 6 - Public purpose -** *Petitioners were aware of the fact that land is being acquired for the purposes of setting up Sasan Ultra Mega Power Project through respondent Company - Agreement has also been executed by Company which is also published - No prejudice caused to petitioners if notifications u/s 4 & 6 did not mention specifically that acquisition was being undertaken for a named Company but stated that it was for a public purpose of Electricity Generation and its residential colony.* (Para 29)

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

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

(Paras 36 & 37)

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

**Cases referred :**

AIR 1971 SC 306, AIR 1985 SC 1622, (1992) 2 SCC 168, AIR 1975 SC 915, AIR 1965 SC 427, AIR 1994 MP 34, 2007 AIR SCW 6692, (1980) 2 SCC 83, (1996) 11 SCC 501, (1997) 2 SCC 627, (2003) 4 SCC 485, (2008) 4 SCC 695, AIR 1975 SC 2190, (2000) 2 SCC 48, 2002(3) MPLJ 378, AIR 1993 SC 852, AIR 1974 SC 2077, AIR 1999 SC 3822, (1996) 1 SC 250, (2006) 11 SCC 464, (2009) 1 SCC 297, AIR 1960 SC 1203, AIR 2003 SC 3140, 2009(1) MPHT 162, 2008(4) MPLJ 536, 1973 JIJ 163, AIR 1976 MP 76, (1993) 4 SCC 255, AIR 1980 SC 318, AIR 1965 SC 646, (1998) 4 SCC 387, (1996) 5 SCC 460, (1995) 4 SCC 683, (2007) 8 SCC 449, AIR 1974 SC 2077.

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*R.K. Samaiya & Rajesh Dubey*, for the petitioners.

*V.K. Shukla, Dy.A.G.*, for the respondent Nos. 1 to 3.

*Alok Aradhe with Shri Alok Hoonka*, for the respondent Nos. 4 & 5.

**ORDER**

**R.S. JHA, J. :-** This order shall govern the disposal of W.P Nos. 13957/2008 and W.P No. 3304/2009 as the relief sought by the petitioners in both these petitions are identical.

2. The petitioners, who are all resident of village Siddhikhurd, Tehsil Singroli, District Sidhi, have challenged the notifications dated 8.8.2006 issued under section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act'); 10.8.2007 issued under section 6 of the Act; and 23.6.2008 issued under section 17(1)(3) of the Act.

3. The case of the petitioners, before this Court, is that the respondent authorities, with a view to set up the Sasan Ultra Mega Power Project, have issued the aforesaid notifications wherein, apart from the land of other villages, 427.08 hectares of land of village Siddhikhurd is sought to be acquired including about 25 acres of land belonging to the petitioners.

4. It is submitted by the learned counsel for the petitioners that the impugned notifications are contrary to law and deserve to be quashed as the notification under section 4 of the Act dated 8.8.2006 does not specify the locality in which the land is situated as is required by law and as has been laid down by the Supreme Court in the case of *Narendrajit Singh vs. The State of U.P and others*, AIR 1971 SC 306; *The Collector (Distt. Magistrate), Allahabad and Another vs. Raja Ram Jaiswal*, AIR 1985 SC 1622; *Madhya Pradesh Housing Board vs. Mohd. Shafi and Others*, (1992) 2 SCC 168; and *Ramchandra Keshav Adke (Dead) by Lrs. Vs. Govind Joti Chavare and Others*, AIR 1975 SC 915. It is further submitted that in view of the vagueness of the notifications issued under section 4 of the Act, none of the petitioners had any knowledge about the acquisition proceedings or the proceedings taken up under section 5A of the Act, as a result of which the acquisition proceedings proceeded without giving any opportunity of hearing to the petitioners. It is further submitted that the notifications under section 4 & 6 of the Act are contrary to law inasmuch as the notifications mention that the acquisition of land is sought for the public purpose of setting up the Sasan Ultra Mega Power Project whereas the acquisition was in fact sought to be made for and on behalf of respondent no. 6 Company and, therefore, it was mandatory upon the respondents to mention in the notifications that the acquisition was for a company and for this proposition the learned counsel for the petitioner has relied upon the judgments of the Supreme Court in the case of *Shyam Behari and Others vs. The State of Madhya Pradesh and Others*, AIR 1965 SC 427; *Chaitram Verma and Others vs. Land Acquisition Officer, Raipur and Others*,



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AIR 1994 MP 74; and *Devinder Singh and Others vs. State of Punjab and Others*, 2007 AIR SCW 6692. The petitioners have also assailed the acquisition proceedings on the ground that the respondent authorities, by ignoring the National Policy and the State Policy for giving an appropriate rehabilitation package to oustees of the said project, have only agreed to make available the benefits under the 1992 rehabilitation package whereas the respondent Company is bound to give benefits as per the 2007 rehabilitation package and in such circumstances it is submitted that in the alternative if this Court be inclined to uphold the impugned notifications, the respondent company be directed to give benefit to the persons whose land is acquired as per the 2007 rehabilitation package or a better package and not in accordance with the 1992 rehabilitation package/policy.

5. It is also submitted by the learned counsel for the petitioners that the notification under section 17(1)(3) of the Act deserves to be quashed as proceedings under section 5A of the Act had already been taken up by the respondents and subsequent thereto Section 9 proceedings were also taken up and completed and, therefore, the notification under section 17 of the Act deserves to be quashed. It is also contended by the learned counsel for the petitioners that the respondents have failed to comply and follow the procedure prescribed by Rules 3, 4 & 6 of the Land Acquisition Company Rules, 1963 which are mandatory in nature and, therefore, the entire acquisition proceedings deserve to be quashed as has been held by the Supreme Court in the case of *Devinder Singh and Others* (supra). It is also contended by the learned counsel for the petitioners that as the land sought to be acquired by the impugned notifications was for the company, the respondent authorities were bound to comply with Part-VII of the Act but the respondent authorities have failed to do so and, therefore, the impugned acquisition proceedings taken up pursuant to the notification deserves to be quashed.

6. The respondent State has filed a return and submitted that the contention of the petitioners in respect of the impugned notifications are misconceived inasmuch as the notification under Section 4 of the Act, did give adequate indication as to the locality of the land sought to be acquired; that due opportunity of hearing and raising objections as required by Section 5A of the Act were given to the concerned and effected persons including the petitioners; that the notification under section 6 of the Act does not suffer from any infirmity or illegality; that the challenge to the notification under Section 17 of the Act is misconceived as the State has not given effect to or implemented the said notification; that the petitions deserve to be dismissed as final award in the acquisition proceedings have already been passed by the acquisition officer on 19.12.2008; and that the oustees shall be given benefit as per the prevailing rehabilitation package.

7. The learned Senior Counsel for respondent nos. 4 & 5 while reiterating the stand of the respondent State has further submitted that respondent no. 6 Sasan Power Limited is in fact a Government owned subsidiary company of the Power

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Financial Corporation Limited which is a Government of India undertaking under section 3(cc) of the Act and, therefore, the contention of the petitioners regarding strict compliance of Part-VII of the Act are misplaced and misconceived.

8. The respondents have, apart from the above, raised preliminary objections as to the maintainability of the petitions on the ground of delay and laches and stated that the petitioners, who had full knowledge about the notification issued under sections 4 & 6 of the Act and the proceedings taken up by the respondents, chose to file these petitions after the hearing in the present case was concluded and the case was closed for passing of the award and, therefore, the petitions are delayed and deserve to be dismissed. The respondents have relied upon the judgments of the Supreme Court rendered in the case of *Pt. Girdharan Prasad Missir and Another vs. State of Bihar and Another*, (1980) 2 SCC 83; *Municipal Corporation of Greater Bombay vs. Industrial Development Investment Co. Pvt. Ltd. and others*, (1996) 11 SCC 501; *C. Padma and Others vs. Dy. Secretary to the Govt. of T.N and Others*, (1997) 2 SCC 627; *Tej Kaur and Others vs. State of Punjab and Others*, (2003) 4 SCC 485; *Swaika Properties (P) Ltd. and another vs. State of Rajasthan and Others*, (2008) 4 SCC 695; *State of Mysore and Others vs. V. K. Kangan and Others*, AIR 1975 SC 2190; *Municipal Council, Ahmednagar and Another vs. Shah Hyder Beig and Others*, (2000) 2 SCC 48; *Rambharose and Others vs. State of M.P. and Others*, 2002 (3) MPLJ 378; *The Ramjas Foundation and Others vs. Union of India and Others*, AIR 1993 SC 852; *Aflatoon and Others vs. Lt. Governor of Delhi and Others*, AIR 1974 SC 2077; *Delhi Administration vs. Gurdip Singh-Uban and Others*, AIR 1999 SC 3822; *State of T.N. and Others vs. L. Krishnan and Others*, (1996) 1 SCC 250; *U. P. Jal Nigam and Another vs. Jaswant Singh and Another*, (2006) 11 SCC 464; *Virender Chaudhary vs. Bharat Petroleum Corporation and Others*, (2009) 1 SCC 297; *Babu Barkya Thakur vs. State of Bombay*, AIR 1960 SC 1203; and *Praubha Nema and others vs. State of M.P. and others*, AIR 2003 SC 3140 in support of the aforesaid submissions. The learned Senior Counsel for respondent nos.4 & 5 has also specifically stated that they have come up with a rehabilitation resettlement package which has been elaborated by them in paras 25 to 28 of the return that is much more beneficial than the rehabilitation package of 2007 and they are going to implement the same in letter and spirit. In the alternative it is also stated that they undertake to extend the benefit of the 2007 rehabilitation package instead of 2002 rehabilitation package, if the petitioners opt for the 2007 rehabilitation package instead of the rehabilitation package prepared by the respondent Company.

9. The respondents have also relied upon the judgments in the case of *Executive Engineer, M.P. Housing Board and Others vs. Shri Kant Mishra and Others*, 2009 (1) MPHT 162 and *Gomti Bai Tamrakar and Others vs. State of M.P. and Others*, 2008 (4) MPLJ 536 to contend that notification under Section 4 of

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the Act is valid and has placed reliance on the judgments in the case of *Christian Fellowship (Hospital), Rajnandgaon, Durg vs. State of M.P. and Others*, 1973 J.L.J. 163; *Hajari vs. The State of M.P. Bhopal and others*, AIR 1976 MP 76 (Full Bench); *Shyam Nandan Prasad and Others vs. State of Bihar and Others*, (1993) 4 SCC 255; *Madhusudan Chhotelal Patel and another vs. Special Land Acquisition Officer and Others*, AIR 1980 SC 318; *State of West Bengal and Others vs. P. N. Talukdar and others*, AIR 1965 SC 646; *Larsen and Toubro Ltd. vs. State of Gujarat and Others*, (1998) 4 SCC 387; and *Rajendra Singh vs. State of M.P. and others*, (1996) 5 SCC 460 to contend that the procedure of the Company Rules as followed by the respondents is in accordance with law. The respondents have also relied upon the judgments of the Supreme Court in the case of *State of Maharashtra vs. Digambar*, (1995) 4 SCC 683 and *Prestige Lights Ltd. vs. State Bank of India*, (2007) 8 SCC 449 to contend that the petitioners have suppressed material facts regarding their participation in the Section 5A inquiry proceedings pursuant to the notification issued under Section 4 of the Act and that they have deliberately stated that there is no delay in filing the petitions and have also wrongly stated that they came to know about the acquisition proceedings only when the Section 6 notification was issued though they have participated in the Section 5A proceedings and in such circumstances the petitions deserve to be dismissed.

10. I have heard the learned counsel appearing for the parties at length and have also perused the record produced by the respondent State. From a perusal of the documents and the averments in the petitions as well as the record it is clear that the Government of India, Ministry of Power took a decision to increase the existing power-generating capacity in the country by one lakh M.W and for this purpose in the first phase took up establishment of 5 Ultra Mega Power Projects in the country having a generating capacity of 4000 MW each and one of the Ultra Mega Power Project was sought to be set up at Sasan, District Sidhi in Madhya Pradesh. Apparently the initial survey, site identification and selection was done by the Government of India. On 16.1.2006 the Government of India, Ministry of Power informed the Power Finance Corporation that the President of India has conveyed his approval for formation of Five SPV (shell company) for the purposes of undertaking and setting up of the Ultra Mega Power Project and also stated that the Companies would be incorporated as 100% subsidiary of Power Finance Corporation and would be a Limited Company under the Companies Act, 1956 with a total share capital of Rs.5 Lac each. One of the company so set up was the Sasan Ultra Mega Power Project Limited which has been impleaded as respondent no.6.

11. On 3.2.2006 the Secretary, Ministry of Power, Government of India, requested the State Government to accelerate the process of acquisition of land and also requested for initiating land acquisition proceedings by issuance of

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notification under section 4 & 6 of the Act, for which, part payment would be made by respondent no.6. The respondent no.6 and its officers filed applications seeking acquisition of 3500 hectares of land for setting up the Ultra Mega Power Project at Siddhikhurd on 8.3.2006, 27.3.2006, 3.4.2006 and 12.4.2006 as is evident from the letter dated 21.4.2006 issued by the Director, Power Finance Corporation which is available in the record produced by the respondent State. Pursuant thereto, Collector Sidhi took up steps to identify the lands that had been initially selected by the Government of India and also made certain queries from Power Finance Corporation regarding the status of the Company and other related issues. In response the Power Finance Corporation Ltd., by its letter dated 28.3.2006, informed the Collector that Sasan Ultra Mega Power Project Limited, respondent no.6, is a wholly owned subsidiary company of the Power Finance Corporation, a Government of India Undertaking and it had equity holding only of the Government of India and also informed the Collector that Sasan Ultra Mega Power Project Limited was in fact set up to initiate the acquisition proceedings and at present is working on behalf of the developers which would later on be selected through tariff bidding process who would employ 2000-3000 persons when the project would become operational. In furtherance of the aforesaid the Government of M.P sought a report from the Collector Sidhi in respect of the applications filed by respondent no.6 Company.

12. A proposal pursuant to the aforesaid applications was forwarded by the Collector, District Sidhi on 15.4.2006 stating therein that proceedings and inquiry pursuant to Section 38A to 44 of the Land Acquisition Company Rules 1963, were being undertaken. In para-16 of this report, a copy of which has been filed by the State as Annexure R-5, it was stated that the total land proposed to be acquired for this project was 1389.70 hectares out of which 917.03 hectares was private land while 472.67 hectares was government land. It was also stated that 586.51 hectares of land of village Siddhikhurd with which the present petitions are concerned was proposed to be acquired which included 396.58 hectares of private land. The report submitted by the Collector also indicates that the total estimated cost of the land would be Rs.91,21,98,768.00 out of which Rs.58,16,58,294.00 would be the estimated compensation required to be paid for private land and Rs.33,05,40,474.00 the amount of compensation required to be paid in respect of government land. The report also stated that looking to the large number of private land owners involved it would not be possible to undertake individual negotiation and in this respect the committee constituted under Rule 3 was requested to take an appropriate decision. The terms and conditions under which the land would be given to the Company was also proposed by the Collector in his report dated 15.4.2006.

13. The report submitted by the Collector on 15.4.2006 was approved by the Committee constituted under Rule 3 of the Land Acquisition Company Rules 1963,

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on 26.4.2006. Thereafter a notification under Section 4 of the Act was published on 8.8.2006 proposing to acquire 427.08 hectares of land of village Siddhikhurd, 43.56 hectares of land of village Jhanjitola, 294.09 hectare of land of village Harhava, 76.27 hectare of land of village Tivera, 119.42 hectare of land of village Siddhikala in Tehsil Singrouli District Sidhi for the purposes of electricity generation and township development. The empowered officer was specified as the Chief Executive Officer Sasan Ultra Mega Power Project for public hearing of the objections under section 5A of the Act.

14. From a perusal of the record it is apparent that petitioner nos.4 & 5 Krishnaram and Man Prasad participated in the Section 5A proceedings by filing objections and that combined objections raised by the villagers of the concerned village were heard by the concerned authority. It is also apparent that the villagers raised objections regarding the rehabilitation package to be given to them by the Company. After hearing all the objections which took place on 23.9.2006 a notification under Section 6 of the Act was published on 6.8.2007 giving details of 382.16 hectares of land of village Siddhikhurd which was sought to be acquired for the public purpose of electricity generation and township construction. From the record it is also apparent that prior to Section 6 notification, after obtaining consent of the State Government, an agreement was entered into with respondent no.6 on 12.7.2007 and was published in the Gazette on 20.7.2007, copy of which has been filed by the petitioners as Annexure P-3. Notices to all the petitioners under Section 9 of the Act were issued on 11.7.2008 for hearing of their objections on 7.8.2008. Order sheets that establish the presence of the petitioners during these proceedings have been filed by the respondent State as Annexure R-14. The proceedings were closed after hearing the petitioners for passing of the award on 7.8.2008. Draft award was published on 15.12.2008 and the final award was passed on 19.12.2008.

15. It is also apparent from the record that the aforesaid Ultra Mega Power Project is sought to be set up on 3289 acres of land in the aforementioned five villages and that an assured supply of 1500 MW out of the total production would be made to the State of M.P. It has also been brought on record that all the acquisition proceedings including the passing of the award are completed and only the 11 petitioners who own about 25 acres of land have filed the present petitions assailing the notifications while acquisition proceedings in respect of the remaining land have gone through and have not been assailed.

16. The respondent/State has also filed a data to indicate that pursuant to the award passed by the Land Acquisition Officer, a total amount of Rs.28,83,12,944.00 have already been disbursed by way of compensation out of a total sum of Rs.40,16,99,244.00 and about 1129 cheques out of a total 1512 cheques have been handed over to the claimants. It is also pointed out that the total award of compensation in respect of village Siddhikhurd is of Rs.29,97,32,041.00 out of

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which Rs.23,03,43,249.00 have already been disbursed and paid to the claimants. It is informed by the learned counsel for the petitioners that though the cheques towards payment of compensation in accordance with the award passed by the acquisition officer have also been prepared and were handed over to the petitioners, they have not accepted the same and it is further stated that the petitioners have also not challenged the award dated 19.12.2008 passed by the land acquisition officer in accordance with law.

17. From the aforesaid undisputed facts and circumstances, it is clear that the land acquisition proceedings have been taken up pursuant to and because of the decision of the Government of India to increase the electricity generation in the country by one lakh M.W's and in furtherance thereof the Ultra Mega Power Project is being set up at Sasan through the respondent no.6 Company which is a fully owned subsidiary of the Power Finance Corporation, a Government of India Undertaking and is having 100% equity holding by the Government of India; that the initial site selection and procedure, etc. were chalked out in several meetings held between the Secretary, Ministry of Power, Government of India, the Chief Secretary, Principal Secretaries and other Officers of the State of M.P.; that the petitioners were aware of the land acquisition proceedings which were initiated by issuance of notification under Section 4 of the Act on 8.8.2006; that they were aware of the hearing on objections conducted by the authorities under section 5A of the Act and some of them also filed objections and participated in the proceedings; that they were also aware of the fact that the acquisition was for a Company as is evident from the proceedings of the public hearing which are available in the record produced by the respondent/State and the fact that they had full knowledge about the agreement executed by the company which was published on 20.7.2007 a copy of which has been filed by the petitioners themselves; that the petitioners were also aware of the Section 6 notification dated 6.8.2007 as they had themselves participated in the inquiry held under Section 5A on the objections; that the respondent no.6, which was a 100% subsidiary of the Power Finance Corporation, a Government of India Undertaking and for whom the acquisition proceedings, on the insistence of the Ministry of Power, Government of India, were taken up was taken over by a private company by a process of bidding, after the issuance of the notification under Section 6 of the Act and, therefore, the non-mentioning of the name of the selected developer in the Section 6 notification was not possible at that time; that the petitioners were duly noticed when proceedings under section 9 of the Act were taken up by the authorities and participated in the same by appearing before the land acquisition officer when the case was closed after hearing them for passing of the award, inspite of which they filed the petitions before this Court only on 17.11.2008 after a lapse of about two years from the date of the Section 4 notification and 15 months after the date of issuance of the Section 6 notification. It is also clear that

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the petitioners participated in the proceedings before the land acquisition officer and filed the petitions only after the case was closed for passing of the final award in their presence on 16.11.2008, just a month before the passing of the final award. It is also apparent that after passing of the award possession of bulk of the land, after paying compensation to the villagers of village Siddhikhurd, has been taken over and that the petitioners have refused to accept the compensation and are continuing in possession of 25 acres of land out of a total of 3289 acres of land only in view of the interim orders passed by this Court.

18. In the light of the aforesaid facts, it is necessary to decide the objection regarding delay and laches and on that ground, the maintainability of the petition, as a preliminary issue.

19. In the case of *Delhi Administration* (supra) the Supreme Court while dismissing the petition on the ground of delay and laches has held that owners or persons interested who have not filed objections under section 5A of the Act cannot be allowed to contend that the Section 4 notification is bad; that the section 5A inquiry was bad or; that the consequent Section 6 declaration must be struck down in the following terms in para-7:-

“7. In connection with owners or persons interested who have not filed objections under S. 5A, in principle, it must be accepted that they had no objection to S. 4 notification operating in respect of their property. On the other hand, in respect of those who filed objections they might have locus standi to contend that S. 5A inquiry was not conducted properly, we, therefore, agree in principle with the view of the three Judge Bench in *Abhey Ram's case* (1997 AIR SCW 2513 : AIR 1997 SC 2564) that those who have not filed objections under S. 5A, could not be allowed to contend that the S. 5A inquiry was bad and that consequently S. 6 declaration must be struck down and that then the S. 4 notification would lapse. If, therefore, no objections were filed by the respondents, logically the S. 6 declaration must be deemed to be in force so far as they are concerned.”

20. Similar view has been taken by the Supreme Court in the case of *State of T.N.* (supra) in para-40 wherein delayed challenge to notification under section 4 has also been repelled in the following terms:-

“40. There is yet another and a very strong factor militating against the writ petitioners. Not only did they fail to file objections in the enquiries held under Section 5-A, they also failed to act soon after the declarations under Sections 6 were made. As stated above, the declarations under Sections 6 were made in the year 1978 and the present writ petitions were filed only sometime in

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the year 1982-83 when the awards were about to be passed. It has been pointed out in *Aflatoon* (supra) that laches of this nature are fatal. Having held that the public purpose specified in the notification concerned therein is not vague, Mathew, J. made the following observations:

"Assuming for the moment that the public purpose was not sufficiently specified in the notification, did the appellants make a grievance of it at the appropriate time? If the appellants had really been prejudiced by the non-specification of the public purpose for which the plots in which they were interested were needed, they should have taken steps to have the notification quashed on that ground within a reasonable time. They did not move in the matter even after the declaration under Section 6 was published in 1966. They approached the High Court with their writ petitions only in 1970 when the notices under Section 9 were issued to them.

\* \* \* \* \*

"Nor do we think that the petitioners in the writ petitions should be allowed to raise this plea in view of their conduct in not challenging the validity of the notification even after the publication of the declaration under Section 6 in 1966. Of the two writ petitions, one is filed by one of the appellants. There was apparently no reason why the writ petitioners should have waited till 1972 to come to this Court for challenging the validity of the notification issued in 1959 on the ground that the particulars of the public purpose were not specified. A valid notification under Section 4 is a *sine qua non* for initiation of proceedings for acquisition of property. To have sat on the fence and allowed the Government to complete the acquisition proceedings on the basis that the notification under Section 4 and the declaration under Section 6 were valid and then to attack the notification on grounds which were available to them at the time when the notification was published would be putting a premium on dilatory tactics. The writ petitions are liable to be dismissed on the ground of laches and delay on the part of the petitioners (See *Trilokchand Motichand v. H. B. Munshi*, (1969) 1 SCC 110; and *Rabindranath Bose v. Union of India*, (1970) 1 SCC 84.)

From the counter-affidavit filed on behalf of the Government, it is clear that the Government have allotted a large portion of the land after the acquisition proceedings were finalized to co-operative housing societies. To quash the notification at this stage would disturb the rights of third parties who are not before the Court."



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21. In the case of *State of Mysore* (supra) in para-16 it has been held that delayed challenge to a notification under section 4 after participating in Section 5A proceedings were not permissible after unreasonable lapse of time, in the following terms:-

“16. The notification under Section 4 was published on 13-4-1967. Objections were filed by the respondent under Section 5-A of the Act. The Deputy Commissioner submitted his report to the Government. The Government overruled the objections. The notification under Section 6 was published in the gazette on 19-10-1968. The Writ Petition challenging the validity of the notifications was filed some time in July or August, 1969. We do not think that the respondent was entitled to challenge the validity of the notification under Section 4 of the Act as the writ petition challenging the notification was filed after an unreasonable lapse of time. If public notice as required by Section 4 of the Act was not given and that would per se vitiate the notification under Section 4, the appellant should have challenged its validity within a reasonable time of the publication of the notification. The respondent knew of the notification and filed objection under S. 5-A of the Act. In these circumstances we see no reason to accept the submission of counsel. We also see no substance in the argument of the counsel that the report drawn up under Section 5-A(2) was not sent to the Government within the time prescribed and therefore the proceedings were invalid. We have directed a fresh inquiry by the Deputy Commissioner (Collector) under Section 5-A and therefore the Deputy Commissioner will in any event have to send a fresh report to the Government.”

22. The same view has been taken by the Supreme Court in the case of *Municipal Council, Ahmednagar* (supra) and in the case of *The Ramjas Foundation* (supra) in para-14 in the following terms:-

“14. It is an admitted fact that notification under Section 4 of the Act was issued as early as 1959 and all the notifications under Section 6 of the Act in relation to the land of the appellants in Sadhurakhurd were issued in 1968 and 1969. The challenge to the acquisition proceedings was mainly based on the ground that in the notification dated 13-11-1959 issued under Section 4 of the Act the lands of wakf property were excluded and the lands of the appellants being also used for educational and charitable purposes the same were also liable to be excluded. At a later stage a ground was also taken that if wakf property in the aforesaid notification under Section 4 of the Act meant only wakf properties

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of the Mohammedans, then such notification was discriminatory and violative under Art. 14 of the Constitution as there was no reasonable ground to discriminate such properties of Hindus or non-Muslims also meant for charitable purposes. So far as the notifications under Section 6 of the Act are concerned the same were attacked on the ground that no opportunity of personal hearing was given to hear the objections filed under Section 5-A of the Act. Thus it is abundantly clear that the challenge was in respect of notifications under Sections 4 and 6 of the Act alone and though in the prayer clause relief has been sought to quash the notification under Sections 9 and 10 of the Act also which were issued in 1972 but no ground whatsoever has been pleaded in the writ petition nor raised before us as to how the notifications under Sections 9 and 10 had any concern for explaining the delay in respect of the challenge to notifications under Sections 4 and 6 of the Act. It is worthwhile to note that according to the appellants own showing the notices under Sections 9 and 10 issued to the appellants in 1972 were in respect of the land being Khasra No. 1040/353 which related to 12 bighas and 8 biswas only. The challenge on the other hand in the writ petition is in respect of notifications under Sections 4 and 6 covering the entire land measuring about 730 bighas situate in village Sadhurakhurd. We find no justification at all in explaining the delay on the ground that no award has been passed nor the appellants have been dispossessed so far. This cannot be an explanation for not challenging the notifications under Sections 4 and 6 of the Act and in the present case the appellants had themselves sought stay from this Court as early as 15-11-1978 for not making and declaring the award and not to dispossess the appellants. Thus we find no justification at all for the delay in not challenging the notification issued under Section 4 on 13-11-1959 till 1973. Even notifications under Section 6 of the Act were issued in 1968 and 1969 but not challenged till 1973. As already mentioned above in *Aflatoon's case* (AIR 1974 SC 2077) (*supra*) a Constitution Bench of this Court has clearly held that even after the declaration under Section 6 of the Act published in 1966, the appellants had approached with their writ petitions in 1970 when the notices under Section 9 were issued to them the writ petitions were liable to be dismissed on the grounds of laches and delay. Mr. Tarkunde, learned senior counsel made strenuous effort to distinguish the aforesaid case on the ground that in the aforesaid case the Court was influenced with the fact that the petitioners

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had sat on the fence and allowed the Government to complete (emphasis added) the acquisition proceedings. Much emphasis has been laid on the word 'to complete' the acquisition proceedings. We find no force in this submission as the facts narrated in the above case clearly show that the petitioners in those cases had filed writ petitions in the High Court in 1970 and in the Supreme Court in 1972 after the issuance of notices under Sections 4, 6 and 9 of the Act. The use of the word 'complete' was not of much significance and the main reasoning of the case was that grounds to attack the notification under Sections 4 and 6 of the Act were available at the time of publication of such notifications. In the facts and circumstances of the case before us the appellants were also sitting on the fence and did not take any steps of challenging the notifications under Sections 4 and 6 of the Act till 1973 though the grounds now sought to be urged were available to the appellants as soon as such notifications were issued. Thus viewing the matter from any angle we are clearly of the view that the writ petition was also liable to be dismissed on the ground of laches and delay on the part of the appellants apart from other grounds already dealt by us. In the face of the aforesaid view taken by us, it is not necessary at all to go on other questions raised in the case. We decline to express any opinion on any questions of law raised in the appeal."

23. In the case of *Aflatoon and Others*, AIR 1974 SC 2077, a Constitution Bench of the Supreme Court has held that a petition filed by the persons after publication of the Section 6 notification on issuance of notices under section 9 of the Act, are liable to be dismissed, except in exceptional circumstances, on the ground of delay and laches. Similar view has also been taken by the Supreme Court in the case of *Municipal Corporation of Greater Bombay* (supra).

24. In the case of *Larsen and Toubro Ltd.* (supra) the Supreme Court has held in para-21 as follows:-

"21. This Court has repeatedly held that writ petition challenging the notification issued under Sections 4 and 6 of the Act is liable to be dismissed on the ground of delay and laches if challenge is not made within a reasonable time. This Court has said that the petitioner cannot sit on the fence and allow the State to complete the acquisition proceedings on the basis that notification under Section 4 and the declaration under Section 6 were valid and then to attack the notifications on the grounds which were available to him at the time when these were published as otherwise it would be putting a premium on dilatory tactics. Writ petition (SCA 5149 of 1989) is thus barred by laches as well."

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25. In the case of *Swaika Properties (P) Ltd.* (supra) taking into consideration the earlier judgments on the question of delay and laches, the Supreme Court has held as under in paras 16 to 19:-

"16. This Court has repeatedly held that a writ petition challenging the notification for acquisition of land, if filed after the possession having been taken, is not maintainable. In *Municipal Corpn. of Greater Bombay v. Industrial Development Investment Co. (P) Ltd.*, where K. Ramaswamy, J, speaking for a Bench consisting of His Lordship and S. B. Majmudar, J. held:-

"29. It is thus well-settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have become final, the Court should be loath to quash the notifications. The High Court has, no doubt, discretionary powers under Article 226 of the Constitution to quash the notification under Section 4(1) and declaration under Section 6. But it should be exercised taking all relevant factors into pragmatic consideration. When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Article 226. The fact that no third-party rights were created in the case is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

In the concurring judgment, S. B. Majmudar, J. held as under: (*Industrial Development Investment case*, SCC pp.522-23, para 35)

"35. ....Such a belated writ petition, therefore, was rightly rejected by the learned Single Judge on the ground of gross delay and laches. The respondent-writ petitioners can be said to have waived their objections to the acquisition on the ground of extinction of public purpose by their own inaction, lethargy and indolent conduct. The Division Bench of the High Court had taken the view that because of their inaction no vested rights of third parties are created. That finding is obviously incorrect for the simple reason that because of the indolent conduct of the writ petitioners land got acquired, award was passed, compensation was handed over to various claimants including the landlord. Reference applications came to be filed for larger compensation by claimants including writ petitioners themselves. The acquired land got vested

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in the State Government and the Municipal Corporation free from all encumbrances as enjoined by Section 16 of the Land Acquisition Act. Thus right to get more compensation got vested in diverse claimants by passing of the award, as well as vested right was created in favour of the Bombay Municipal Corporation by virtue of the vesting of the land in the State Government for being handed over to the Corporation. All these events could not be wished away by observing that no third-party rights were created by them. The writ petition came to be filed after all these events had taken place. Such a writ petition was clearly stillborn due to gross delay and laches."

17. Similarly, in *State of Rajasthan v. D. R. Laxmi*, (1996) 6 SCC 445, following the decision of this Court in *Municipal Corpn. Of Greater Bombay*, it was held: (*D.R.Laxmi case*, SCC p.452, para 9)

"9. ...When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Article 226. The fact that no third-party rights were created in the case, is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

18. To the similar effect is the judgment of this Court in *Municipal Council, Ahmednagar v. Shah Hyder Beig*, (2000) 2 SCC 48 wherein this Court, following the decision of this Court in *C. Padma v. Dy. Secy. to the Govt. of T.N.* (1997) 2 SCC 627 held : (*Shah Hyder case*, SCCp.55, para 17)

"17. In any event, after the award is passed no writ petition can be filed challenging the acquisition notice or against any proceeding thereunder. This has been the consistent view taken by this Court and in one of the recent cases (*C. Padma v. Dy. Secy. To the Govt. of T.N.*)....."

19. In the present case also, the writ petition having been filed after taking over the possession and the award having become final, the same deserves to be dismissed on the ground of delay and laches. Accordingly, the orders of the learned Single Judge and that of the Division Bench are affirmed to the extent of dismissal of the writ petition and the special appeal without going into the merits thereof. This appeal also deserves to be dismissed without going into the merits of the case and is dismissed as such. No costs."

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26. In the instant case as stated above, the petitioners were aware of the notification under Section 4 and 6 of the Act and that is how some of them have filed objections under section 5A of the Act before the competent authority and the villagers also participated in the public hearing on the objections. It is also clear from the record that they were aware of the fact that the acquisition was for a Company and the fact that the company had executed an agreement as required by law on 12.7.2007 which was published on 20.7.2007, therefore, during the hearing under Section 5A of the Act, they sought implementation of the 2007 rehabilitation package and also insisted on giving employment to one member of the family whose land was acquired. In fact none of the objections raised by them in the petitions were raised before the authorities at any point of time. As the petitioners had participated in the Section 5A proceedings, they were also aware of issuance of notices under Section 6 of the Act. In addition, the respondent authorities issued individual notices to all the petitioners and others when proceedings under section 9 of the Act were taken up and the petitioners pursuant to the aforesaid notices, participated in the proceedings under section 9 of the Act and were present before the Land Acquisition Officer when the matter was closed for passing of the award on 7.8.2008, but they did not raise any objections and chose to wait till all these proceedings were over before approaching this Court by assailing the notification under sections 4 & 6 dated 8.8.2006 and 6.8.2007 respectively by filing the present petitions on 17.11.2008 and 20.3.2009. It is also apparent from a perusal of the record that the final award granting compensation has been passed by the authorities on 19.12.2008 and that most of the compensation in respect of the land of village Siddhikhurd, except that of the petitioners and some others, has already been disbursed and possession of the land has been taken over. It is also apparent that out of a total of 3289 acres of land of thousands of land owners, which has been acquired, petitions have been filed only by the 11 petitioners who hold about 25 acres of land while the rest have accepted the same. It is also apparent that the petitioners though aware of passing of the final award have not challenged the same in accordance with law. In such circumstances, in view of the law laid down by the Supreme Court, I am of the considered opinion that the petitions filed by the petitioners suffer from delay and laches and deserve to be dismissed on this count alone.

27. In view of the aforesaid finding the petitions are dismissed on the ground of delay and laches. However, without prejudice to the aforesaid conclusion certain other issues raised by the petitioners are also being addressed for the sake of completeness. The petitioners have challenged the notification under section 4 of the Act on the ground that a specific and particular locality as required by the provisions of law, has not been stated or specified in the notification and, therefore, the notification being ab initio void, deserves to be quashed.

28. From a perusal of the notification it is apparent that the notification mentions

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the names of the villages, the Tehsil and the District. In the case of *Christian Fellowship (Hospital)* (supra) which was a case referred to a third Judge of this Court on a difference of opinion having arisen between two Judges of the Division Bench, the majority held that mention of a village was sufficient indication of the locality and in such cases it could not be stated that the notification under section 4 as vague in the following terms in paras 4 to 8:-

“4. Nevertheless, question still remains whether it is the duty of the Government to specify the locality where the land is situate as stated in *Iftikhar Ahmed's case*. That it is so, is apparent from the plain meaning of the section as also the underlined portions from the decision of their Lordships of the Supreme Court in Vishnu Prasad's case. That brings me to a consideration of the questions referred. The first and third questions are simply two different ways of expressing the same problem viz., the meaning of the word “locality” occurring in section 4(1) of the Act. In framing the questions referred, the learned Judges have assumed that a village is not a “locality” within the meaning of the section. But I beg to differ with them. The word “locality” has not been defined in the Act. The general rule of construction is that, where the words in a statute are plain, their literal and simple meaning is to be adopted unless the context requires otherwise. Now, the word “locality” has an indefinite meaning, but its indefiniteness has certain well recognized limits. In human laws, neither the world nor the greater portion of it is spoken of as a locality [See Words and Phrases, West Publishing Co., Permanent Edition, Vol.25-A, pp 176 to 179]. The legal meaning of the word as given in Shorter Oxford English Dictionary, 2nd edition, Vol. 1, p.1158 is “Limitation to a country, district or place-Blackstone”. So also, in Black's Law Dictionary, 4th Edition, p.1088, that meaning is given as “In a definite region, in any part of space, geographical position”. In common parlance, the word “locality” means “neighbourhood, vicinity and environment”. In its ordinary dictionary meaning, the word “locality” denotes “place, position, district.”

5. Of its different shades of meaning, the word “locality” in section 4(1) of the Act must be interpreted in its narrower sense, having regard to the context in which it appears. It relates to a definite area, the whereabouts of which are capable of being ascertained and known.

6. That the mention of a village as “locality” in a notification under section 4(1) is a sufficient compliance of the requirements of the section, has consistently been the view of the authorities

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charged with the duty of administering it. The statutory form of a notification under that section, as prescribed in Form I bears this out. So also, in FGH Anderson's Manual of Land Acquisition, which is a work of some importance, the learned compiler states:-

"The notification under section 4 may describe the locality in which land is likely to be needed *in the most general terms, but if it is described by enumeration of villages (settlement numbers), the list of villages (Settlement No.S.) should be complete in order that difficulty may not arise.*"

XX XX XX XX

"Under section 4(1) of the Land Acquisition Act the Collector has to give public notice of the substance of the notification published in the Gazette, at convenient places in the locality in which the land is situate. Attention is also invited to para 3 (ii) of the G.R No.LAQ 2555 G, dated 10th January 1956. Individual notices are not specifically prescribed in the Act but they are issued as a matter of practice and in order to ensure that all (concerned) individuals are informed."

While a departmental instruction cannot over-ride the true meaning or construction underlying a statutory provision, but an executive instruction can be accepted as an admissible aid to its proper interpretation, it has prevailed from a long time without any challenge and without being modified by Courts of law [See *Baleshwar Bagarti v. Bhagirathi Dass* ILR 35 Cal.701., *Kanhaiyalal v. Municipal Committee Mungeli*, 1960 J.L.J 337, and *The State of Mysore v. M. H. Ballery*, AIR 1965 SC 863. In Bellary's case, their Lordships of the Supreme Court used a Government circular for construing a Service rule framed under the Constitution.

7. This construction of mine is in no way affected by Instruction No.9 issued by the State Government, laying down the manner in which the Government has to be moved for issuing a notification under section 4(1). It reads:-

"Instruction No.9:- On receipt of an application made under paragraph 2 the Deputy Commissioner shall (if the land is to be taken up permanently) forward it, together with the sketch and estimate referred to in paragraph 4 and with a draft notification in Form I for applications under section 4 to the Secretary to Government (Revenue Department). *In forwarding the draft notification, the Deputy Commissioner shall add to the details supplied by the application any further particulars which he may deem necessary for the better identification of the land.*



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In all cases, except when land is required for a railway company it must be stated whether budget provision exists and, if not, how the cost of acquisition can be met.”

The portion underlined requiring the Deputy Commissioner to forward such further particulars as he may deem necessary for the better identification of the land, is only for the purpose of enabling the Government to be satisfied as regards the existence of a public purpose. The requirements of Instructions No.9 do not envisage that the Government in issuing the notification under section 4(1), ought to change the statutory form of a notification as prescribed under the Act.

8.I think, the decision in *Iftikhar Ahmed's case* (supra) insofar as it deals with this aspect, is still good law. In that case, Shrivastava, J., speaking for the Court, had observed :-

“It is true that at the stage when a notification under section 4 of the Act is issued, the Government is not in a position to say definitely which particular piece of land is proposed to be taken. A survey to determine the land most suitable for the purpose and to fix its boundaries has to be undertaken. *All the same, the locality, in which the land to be acquired is, has to be given. The 'locality' should be reasonably a small one to show the whereabouts of the land.*”

If the locality is a reasonably small one, like that of a village, the naming of such village as a ‘locality’ is a sufficient compliance of section 4(1). But this does not necessarily imply that the naming of a city like Bhopal, would amount to a specification of a locality within the meaning of the section. It all, therefore, depends on the nature of the locality where the land is situate in each particular case. The answer to the first question, therefore, must be that village is “locality” within the meaning of section 4(1) of the Act, having regard to the smallness of the area involved. The naming of a village as a locality in a notification issued under that section, therefore, does not render it invalid in any manner.”

The same view has been taken by a Full Bench of this Court in the case of *Hajari* (supra) in paras-13 and 14 which reads as under:-

“13. One of the objects of the notification made under Section 4(1) is to notify the inhabitants of the locality that they are likely to be affected by the proposed acquisition so that they may file objections, if any. This being one of the objects, the word ‘locality’ must be construed to mean an area which is sufficiently small and compact so that naming it amounts to a notice to all inhabitants of that area. Since the locality is required to be named for identifying

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the area covered by it, it should be the smallest area which has acquired a name by which it is known already at the time of notification. Ordinarily, villages in India are quite small so that naming of a village as locality would be sufficient. However, in recent times some villages have grown considerably so that the area within a big village may have been divided to create smaller units therein such as Tolas or Mohallas. In a given case, it may be possible to show that naming the village alone does not amount to naming the locality in view of the largeness of the village and in that context a smaller area such as a Tola or Mohalla within the village has to be treated as locality. That, however, would be a question of fact in each case.

14. The result is that ordinarily naming the village would amount to specifying the locality unless it is shown in a particular case that the village specified is much too large to be treated as a locality, there being smaller units within that village and having a name, which can be more appropriately called a locality. This would, therefore, be a question of fact in each case and where a village is specified in the notification under Section 4(1), it would be presumed to be valid unless the person challenging the validity shows that in fact the village named does not amount to specifying the locality on the facts and in the circumstances of that case. We are, therefore, in agreement with the conclusion reached on this point by A. P. Sen, J in *Christian Fellowship (Hospital), Rajnandgaon v. State of M.P.* (1975 MPLJ 18). We would, however, add thereto what has been said herein by us: We find that substantially the same view has also been taken in *Nagar Mahapalika, Varanasi v. Durga Shankar* (AIR 1975 All 99) (DB)."

In view of the law laid down in the aforesaid judgments, it is clear that mentioning of the village in which the land is situated is sufficient indication of the locality as required by Section 4 of the Act and, therefore, the contention of the petitioners in respect of the notification under section 4 of the Act also deserves to be rejected.

29. As far as the contention of the learned counsel for the petitioner regarding the Section 6 notification is concerned, it is clear from a perusal of the record that the petitioners from the very beginning were well aware of the fact that the acquisition proceedings were being taken up for the purposes of setting up the Sasan Ultra Mega Power Project through the respondent no.6 company and as required by Part VII of the Act an agreement had also been executed which was published on 20.7.2007 and that their only concern from the very beginning was implementation of the rehabilitation package and employment to one member of

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the family by the respondent no.6, as is apparent from the objections raised by them during the public hearing of the objections under section 5A of the Act held on 23.9.2006. It is also apparent from a perusal of the record that the entire process was undertaken and initiated in view of and in furtherance of the decision of the Govt. of India to increase the power generating capacity in the country by one lakh MW and to set up an Ultra Mega Power Project at Singrouli through the respondent no.6, the Sasan Power Ltd. as a 100% subsidiary of the Power Finance Corporation an undertaking having 100% equity holding by the Govt. of India. From the report of the Collector and the information submitted by the Power Finance Corporation on 28.3.2006 it is also clear that the respondent authorities had been informed by the Government of India that ultimately Sasan Power Limited would be taken over by the developer who would thereafter implement the entire project and, therefore, initially though the proceedings were initiated at the behest of the Government of India through the Power Finance corporation and the respondent no.6 Company, subsequently the respondent no.6 was taken over by the process of bidding by a developer on 7.8.2007 after the publication of the Section 6 notification, as is evident from Annexure P-10 which has been filed by the petitioners alongwith the petition and for the aforesaid reasons the respondent authorities from the very beginning, took up proceedings in accordance with Sections 38, 40 and 41 of Part-VII of the Act, entered into an agreement with respondent no.6 Company after obtaining consent and duly published the agreement as required by the provisions of law. It is also evident that out of a total of more than 1000 persons effected by the acquisition proceedings and a total of 3289 acres of land acquired, only the 11 petitioners have filed the present petitions who are in possession of about 25 acres of land and, therefore, as far as the public at large including the petitioners is concerned, it was well aware of the fact that the proceedings for acquisition had been undertaken by the respondents for the purpose of establishing the Sasan Ultra Mega Power Project on the behest of a Company and they also took up objections being fully aware of this fact and, therefore, it cannot be said that any prejudice was caused to the petitioners on account of the fact that Sections 4 & 6 notification did not specifically mention that the acquisition was being undertaken for a named Company but stated that it was for a public purpose of Electricity Generation and its residential colony.

30. In somewhat similar circumstances, the Supreme Court in the case of *P. N. Talukdar* (supra) after duly considering the decision of the constitution Bench rendered in the case of *Shyam Behari* (supra) has held that a notification that has been duly interpreted by the public to understand its true import does not call for any interference by the Court. At this stage it is also pertinent to note that in view of the provisions of Section 165(1) of the Electricity Act, 2003, setting up a Power generating unit amounts to an undertaking 'work' that is useful to the public under section 40 (1)(b) and 41(5) of the Act.

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31. In the case of *Praubha Nema* (supra) it has been held that where the activities sought to be undertaken was apparently in furtherance of public purpose and where the public had the knowledge about the activity sought to be undertaken as well as the fact that the proceedings for acquisition were being taken up for the purposes of private company, vagueness in the notification could not render it void or contrary to law specifically when no prejudice was caused upon the petitioners, in the following terms in paras 33 to 38.

"33. We are of the view that none of the factors pointed out by the learned counsel for the appellants make any dent on the orientation towards public purpose nor do they establish that the acquisition was resorted to by the Government to achieve oblique ends. The speed at which the proposal was pursued should be appreciated rather than condemning it, though the over-zealousness on the part of authorities concerned to short-circuit the procedure has turned out to be counter-productive. True, the tardy progress of acquisition would have sent wrong signals to the prospective investors, as contended by the learned Advocate-General. However, due attention should have been given to the legal formalities such as holding of enquiry, specification of public purpose in clear terms and giving sufficient indication of State meeting the cost of acquisition wholly or in part. At the same time, we cannot read mala fides in between the lines; in fact, no personal malice or ulterior motives have been attributed to the Chief Minister or to any other official. The material placed before us do not lead to the necessary or even reasonable conclusion that the Government machinery identified itself with the private interests of the company, forsaking public interest. Public purpose does not cease to be so merely because the acquisition facilitates the setting up of industry by a private enterprise and benefits it to that extent. Nor the existence or otherwise of public purpose be judged by the lead and initiative taken by the entrepreneurs desirous of setting up the industry and the measure of co-ordination between them and various State agencies. The fact that despite the unwillingness expressed by AKI Ltd., to go ahead with the project, the Government is still interested in acquisition is yet another pointer that the acquisition was motivated by public purpose.

Whether notifications should be struck down on the ground of vagueness of public purpose.

34. The vagueness of notified public purpose is the next ground of attack against the notifications issued under Ss. 4(1) and 6. According to the learned counsel for the appellant, the expression "establishment of diamond park" is vague and unintelligible and, therefore, deprives the landholders and the general public of the valuable right to object to the acquisition on relevant grounds. It is further contended that the elaboration of the public purpose in the notice of enquiry issued under S. 5-A by the Land Acquisition Officer

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does not cure the vital defect in the Notification under S. 4(1) which is an essential pre-requisite for all further action under the Act. Hence it is contended that the Notification under S. 4 together with the subsequent proceedings become null and void. The sheet-anchor of this argument rests on the decision of this court in *Madhya Pradesh Housing Board v. Md. Shafi* ((1992) 2 SCC 168). There, the public purpose was described as 'residential' without even giving definite indication of the exact location of the lands sought to be acquired. What is more, in the declaration under S. 6(1), the public purpose was stated differently as 'housing scheme of Housing Board.' This Court, inter alia, held that the impugned Notification was vitiated on account of being vague. The Court observed:

"Apart from the defect in the impugned notification, as noticed above, we find that even the "public purpose" which has been mentioned in the schedule to the notification as 'residential' is hopelessly vague and conveys no idea about the purpose of acquisition rendering the notification as invalid in law. There is no indication as to what type of residential accommodation was proposed or for whom or any other details. The State cannot acquire the land of a citizen for building some residence for another, unless the same is in 'public interest' or for the benefit of the 'public' or an identifiable section thereof. In the absence of the details about the alleged 'public purpose' for which the land was sought to be acquired, no one could comprehend as to why the land was being acquired and, therefore, was prevented from taking any further steps in the matter."

The Court relied on the observation in *Munshi Singh v. Union of India* ((1973) 1 SCR page 973) to the effect that the public purpose "needs to be particularised" to satisfy the requirements of law.

35. We do not think that the ratio of the decision in M. P. Housing Board's case would come to the rescue of the appellants. Though the State Government could have discreetly avoided to use sophisticated industrial jargon, we do not think that the specified public purpose is so vague and indefinite that the public will not be in a position to understand its nature and purpose. That such terminology has gained currency is evident from the fact that the same expression was used in the Industrial Policy document. It may not be out of place to mention that in the recent times, the terminology such as Industrial Park, Information Technology Park is widely in circulation. Moreover, against the column 'authorised officer under S. 4(2)' (close to the column 'public purpose'), the designation of Manager, District Industries Centre, Indore is specified. This is a pointer to the fact that the land was being acquired for industrial purpose. We are, therefore, of the view that in the instant case, the alleged vagueness is not of such a degree as to defy sense and understanding.

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36. In *Aflatoon v. Lt. Governor of Delhi* (1975) 4 SCC page 285) the public purpose mentioned in the Notification under S. 4 was "planned development of Delhi." The challenge on the ground of vagueness of the Notification was repelled on several grounds. The approach of the Court and the crucial consideration to be kept in view in dealing with this question was highlighted by Mathew, J. speaking for the Constitution Bench in the following words:

"..... According to the Section (Section 4), therefore, it is only necessary to state in the Notification that the land is needed for a public purpose. The wording of S. 5-A would make it further clear that all that is necessary to be specified in a notification under S. 4 is that the land is needed for a public purpose. One reason for specification of the particular public purpose in the notification is to enable the person whose land is sought to be acquired to file objection under S. 5-A. Unless a person is told about the specific purpose of the acquisition, it may not be possible for him to file a meaningful objection against the acquisition under S. 5-A. ....

We think that the question whether the purpose specified in a notification under S. 4 is sufficient to enable an objection to be filed under S. 5-A would depend upon the facts and circumstances of each case."

Absence of prejudice was highlighted in paragraph 10 thus :

"That apart, the appellants did not contend before the High Court that as the particulars of the public purpose were not specified in the notification issued under S. 4, they were prejudiced in that they could not effectively exercise their right under S. 5-A."

37. On the facts of the case, it is not possible to draw the conclusion that the appellants have suffered any prejudice or handicap on account of the alleged vagueness in the description of public purpose. First of all, the appellants did not, in the pleadings before the High Court, point out as to how the alleged ambiguity of vagueness had resulted in prejudice in the sense that they could not effectively object to the acquisition. On the other hand, the appellants filed detailed objections before the Land Acquisition Officer covering each and every aspect. The objections and representations filed from time to time would unequivocally indicate that they were fully aware of the exact purpose of acquisition. Raising the bogey of vagueness in public purpose is evidently a result of afterthought. Moreover, by virtue of what is stated in the notices issued by the Land Acquisition Officer under S. 5-A of the Act, no one could possibly have any doubt about the exact purpose of acquisition.

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True, it is not open to the Land Acquisition Officer to alter or expand the scope of public purpose as it is within the exclusive domain of the Government. But the Land Acquisition Officer by elaborating and making explicit what is really implicit in the Notification under S. 4(1), had only dispelled the possible doubts in this regard so that no one will be handicapped in filing objections. It is in that light the step taken by the Land Acquisition Officer has to be viewed. We cannot countenance the contention that in doing so, the Land Acquisition Officer out-stepped his jurisdiction.

38. When no prejudice has been demonstrated nor could be reasonably inferred, it would be unjust and inappropriate to strike down the Notification under S. 4(1) on the basis of a nebulous plea, in exercise of writ jurisdiction under Art. 226. Even assuming that there is some ambiguity in particularising the public purpose and the possibility of doubt cannot be ruled out, the constitutional Courts in exercise of jurisdiction under Art. 226 or 136 should not, as a matter of course, deal a lethal blow to the entire proceedings based on the theoretical or hypothetical grievance of the petitioner. It would be sound exercise of discretion to intervene when a real and substantial grievance is made out, the non-redressal of which would cause prejudice and injustice to the aggrieved party. Vagueness of the public purpose, especially, in a matter like this where it is possible to take two views, is not something which affects the jurisdiction and it would, therefore, be proper to bear in mind the considerations of prejudice and injustice."

32. In the instant case also the Section 4 notification clearly mentioned the Chief Executive Officer, Sasan Ultra Mega Power Project as the authority before whom objections were to be filed giving sufficient indication that the acquisition was for a company. That apart, the petitioners were also well aware of the exact purpose of acquisition as well as of the fact that the acquisition was for a Company, namely, respondent no.6 and, therefore, no prejudice was caused or has been demonstrated to have been caused to the petitioners. It is also established by the respondents that the requirements of Part VII of the Act and the procedure prescribed therein has been meticulously followed. In view of the aforesaid facts and the law laid down by the Supreme Court in the aforesaid judgments, the challenge to the Section 6 notifications also fails and is hereby rejected. From a perusal of the aforesaid it is also clear that the judgments relied upon by the petitioners do not render any assistance to them in view of the facts of the present case. It is pertinent to note that in view of the undertaking given by the respondents regarding payment of compensation at market rate and rehabilitation, which shall be subsequently dealt with in detail, the objections regarding non-compliance of the Rules of 1963 are also rejected as misconceived.

33. As far as challenge to Section 17 notification is concerned, in view of the categorical statement made by the learned Dy. Advocate General appearing for

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the State that the respondent authorities did not implement or enforce the said notification, the issue has become academic and has not been pressed by the learned counsel for the petitioners.

34. It is contended by the learned counsel for the petitioner that the respondent authorities and company is required to implement the 2007 rehabilitation package which provides for giving job to one individual from each family whose land is acquired apart from giving other benefits, but the respondent Company has only agreed to implement the 2002 rehabilitation package which is less beneficial to the petitioners and other persons whose land is acquired for the purpose of establishing the Sasan Ultra Mega Power Project.

35. In response it is submitted by the learned Senior Counsel for respondent nos.4, 5 & 6 that they undertake to implement the 2007 rehabilitation package if the petitioners insist or they would implement the more beneficial package formulated by them which has been elucidated by them in paras 25 to 28 of the return in the following terms:-

"25. That it is submitted that while finalizing the rehabilitation and resettlement package the Sasan Power Limited has held several consultations and meetings with district authorities, local villagers and expert organizers like Tata Energy and Research Institute whose Chairman Dr. Pachauri was awarded the Nobel prize. Subsequently Sasan Power Limited and Collector Singrauli have come up with a novel rehabilitation and resettlement package for displaced families. The package addresses both the immediate issues likely to be faced by displaced families and their long term sustenance and income security and provides several additional benefits over the Madhya Pradesh Rehabilitation and Resettlement Policy 2002 and National Rehabilitation and Resettlement Policy 2007.

26. Sasan Power Limited is developing an Rehabilitation and Resettlement village complete with all basic facilities like school, health care centre, market place, religious places, roads, drinking water, sanitation and electrification, etc. Residential plots of 5400 sq. feet size within the Rehabilitation and Resettlement village will be provided to displaced families free of cost. To minimize inconvenience, houses will be constructed with all basic amenities such as toilet, kitchen, verandah, smokeless chulha, etc.

The principal features of SPL's R&R package are as follows:

i. All major sons/unmarried daughters/brothers considered as separate family units for compensation purposes (In NRRP 2007, all persons residing in same house considered as one family).

ii. Land compensation is given as per current market rate instead of rate as on Section 4 notification date (In NRRP 2007, land compensation at rate as on Section 4 notification date).



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iii. A large 5400 sq.ft plot and a fully constructed house for each family (In NRRP 2007, smaller 2691 sq.ft plot & house for only BPL families) or money in lieu of the same at the option of the affected family.

iv. Free medical checkup facilities in the R&R colony health center (No such provision in NRRP 2007).

v. Free education in R&R colony school (No such provision in NRRP 2007).

vi. Education stipend to school going children (No such provision in NRRP 2007).

vii. Scholarships to meritorious students for higher education (No such provision in NRRP 2007).

viii. Pension of Rs.1,000 per month to each old people (60 years and older) (In NRRP 2007, pension of Rs.500 per month).

ix. Reservation of shops in township for affected families.

x. Rehabilitation, Transportation & Sustenance allowance as per MP R&R Policy as per current rates.

xi. Priority in jobs and training for skills up-gradation.

27. That, total expenditure Sasan Power Limited Rehabilitation and Resettlement package is estimated to be about Rs.131 crores compared to Rs.46 crores under NRRP 2007. SPL's R&R package offers almost three times the compensation offered under NRRP 2007.

28. That it is submitted that the benefits which are being offered by the answering respondents under the rehabilitation and resettlement package are more advantageous than that of the Madhya Pradesh Rehabilitation and Resettlement Policy 2002 and National Rehabilitation and Resettlement Policy 2007. For the facility of reference the benefits which are sought to be conferred by the answering respondents and by the Madhya Pradesh Rehabilitation and Resettlement Policy 2002 and the National Rehabilitation and Resettlement Policy 2007 are reproduced in the form of a chart.

| Particulars                  | SPL Offer<br>(Rs. Cr) | National Policy 2007<br>(Rs. Cr) |
|------------------------------|-----------------------|----------------------------------|
| Extra compensation for land  | 10.83                 | -                                |
| R&R colony construction cost | 14.49                 | 14.49 (*)                        |
| Transport Assistance         | 0.31                  | 2.58                             |

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|                    |                     |                   |
|--------------------|---------------------|-------------------|
| R&R Allowance      | 87.42               | 23.99             |
| Education stipend  | 7.23                | -                 |
| Pension            | 11.12               | 5.33              |
| Total Compensation | 131.39<br>(say 131) | 46.39<br>(say 46) |

(\*) for comparison, assumed to be same as SPL offer, though under NRRP 2007, houses to be provide only to BPL families.”

36. In view of the undertaking given by the learned Senior Counsel appearing for respondent nos.4 to 6 and the facts on record, I am of the considered opinion that those parts of the 2007 rehabilitation package and those parts of the rehabilitation package prepared by the respondent company that are most beneficial to the persons whose land is acquired must be implemented and complied with by respondent nos.4 to 6 Company and the State. It is submitted by the learned Senior Counsel appearing for respondent nos.4 to 6 on instructions that the respondent Company shall provide employment to one member of the family on the basis of their skill and eligibility and in case no member of the family possesses the skill or knowledge required for the job, the company would make available the required training which is necessary for the job concerned and shall thereafter employ the persons in the company. It is also apparent from the package proposed by respondent nos.4 to 6 that the Company has provided a more advantageous benefit by giving a 5400 sq.ft. plot with a constructed house thereon to each oustees and has also undertaken to pay compensation to an oustee on the basis of the current market rate and not on the basis of the price of the land as on the date of publication of the Section 4 notification. There are other clauses also of the rehabilitation package proposed by the company which are more advantageous than the corresponding clauses in the 2007 rehabilitation package. At the same time there are certain other clauses of the 2007 rehabilitation package which are more advantageous.

37. In the circumstances, we directed that the Collector, Singrouli shall examine the 2007 Rehabilitation Package and the Rehabilitation Package prepared by the respondent nos.4 to 6 and shall thereafter carve out the best possible rehabilitation package therefrom by selecting the clauses that are more beneficial to the persons whose land is acquired and supervise and ensure its implementation. It is also made clear that the Collector shall calculate and ensure that apart from the award passed in the acquisition proceedings and in accordance with the undertaking given by the respondent nos.4 & 6, the persons concerned shall be paid compensation at the current market rate over and above and apart from the compensation awarded in the acquisition proceedings. The amount so calculated shall be paid and disbursed to the concerned persons within three months from

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today. It is also made clear that if by way of any judgment of this Court or decision of the State a more beneficial policy is directed to be implemented, the same shall be adopted and implemented by the respondents over and above and apart from the aforesaid observation made by this Court. It is also directed that the respondent company shall comply with all the requirements in respect of pollution control and environmental protection including water conservation and compensatory forestation etc. prior to undertaking implementation of the project. The aforesaid steps as directed should be undertaken expeditiously by the authorities of the State as well as the company before starting the project.

38. In the result, while the petitions as far as it relates to the challenge to the land acquisition proceedings are dismissed on the ground of delay and laches, it is disposed of with the observation as aforesaid in respect of the rehabilitation of the persons whose land has been acquired on account of the implementation of the Sasan Ultra Mega Power Project and the directions relating to the environmental aspects. In the peculiar facts and circumstances of the case there shall be no order as to the costs.

A copy of this order be retained in the connected petition W.P No.3304/2009.

*Petition dismissed.*

I.L.R. [2009] M. P., 2023

**WRIT PETITION**

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

5 May, 2009\*

**MUKUND LAL & anr.**

... Petitioners

**Vs.**

**GHANSHYAM & ors.**

... Respondents

**Civil Procedure Code (5 of 1908), Order 8 Rule 6-A - Counterclaim**  
*- Counterclaim is maintainable by defendants against the claim of plaintiff not inter se defendants - However if justice demands, it can be treated as cross suit and it would be open to a Court to convert or treat the counterclaim as a plaint in a cross suit.* (Paras 6 & 7)

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

**Cases referred :**

2002(I) MPWN 31, AIR 2000 NOC 23 (Patna), AIR 1964 SC 11, AIR 1989 MP 322, 1996(I) MPWN 19, 1956 J&K 38.

\*W.P. No.5535/2007 (Jabalpur)

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*M.L. Jaiswal with Manoj Kushwaha, for the petitioners.*

*Avinash Jargar, for the respondent Nos. 1 to 4, 6, 7, 10 & 14.*

**ORDER**

The Order of the Court was delivered by **ARUN MISHRA, J.** :- The defendants no.1 and 2, Mukundlal & Bhagwan Charan have filed the instant writ petition aggrieved by order dated 12.4.2007 by which the counter claim filed by defendants no.3 to 11 has been allowed.

2. In the plaint the plaintiff-respondents no.1 & 2 have prayed that the disputed property is joint Hindu family property of plaintiffs & defendants no.1 to 11. The plaintiffs are also having title and possession. Prayer has been made to declare the sale-deed executed by defendants no.1 & 2, in favour of defendants no.15 & 16 to be illegal & void as against the plaintiffs. Further prayer has been made to declare the order dated 24.9.2005 passed by the Collector, District Chhatarpur to be ineffective. Counter claim has been filed by defendants no.3 to 11 for declaring the sale-deed to be illegal and void as against their interest which has been executed by defendants no.1 & 2 in favour of defendants no.15 & 16.

3. The trial court vide order dated 12.4.2007 has overruled the objections raised by defendants no.1 & 2 that counter claim could not be said to be maintainable inter se the defendants. The trial court has observed that considering the nature of the suit defendants no.3 to 11 have the right to protect their interest. It has been considered appropriate to try the counter claim along with the suit in the facts of the instant case. Aggrieved thereby the instant writ petition has been preferred by defendants no.1 & 2.

4. Shri M.L. Jaiswal, learned senior counsel appearing on behalf of petitioners, has submitted that from bare reading of provision of order 8, rule 6-A of CPC it is apparent that counter claim is maintainable by a defendant as against plaintiff not against defendant, thus, counter claim could not have been entertained at the instance of defendants no.3 to 11 as against defendants no.1 & 2 and 15 & 16. He has placed reliance upon the decision of this Court in *Udhavdas Tyagi v. Srimurti Radhakrishna Mandir, Dehrihat*, 2002(1) MPWN Note No.31 and decision of High Court of Patna in *Hem Narain Thakur v. Deo Kant Mishra and others*, AIR 2000 NOC 23 (Patna) = 2000 AIHC 945.

5. Shri Avinash Jargar, learned counsel for respondent-defendants no.1 to 4, 6, 7, 10 & 14, has submitted that even if counter claim filed by defendants no.3 to 11 as against defendants no.1, 2 and 15 & 16 is not maintainable, as per the expression used under order 8, rule 6-A of CPC it could have been treated and tried as cross suit and decided along with the instant suit as precisely same relief has been prayed by plaintiffs for declaring the sale-deed to be void. Additional grounds have been raised by defendants no.3 to 11, thus, prayer has been made to treat the counter claim as a cross suit and to decide the same along with the

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instant suit. In order to adopt aforesaid recourse he has relied upon the decision of the Apex Court in *Laxmidas Dayabhai Kabrawala v. Nanabhai Chunilal Kabrawala and others*, AIR 1964 SC 11, decisions of this Court in *Kartar Singh and others v. Kanhai Singh and others*, AIR 1989 MP 322 and in *Bhamri Bai v. Ram Bai*, 1996(1) MPWN Note No.19.

6. We have heard the learned counsel for the parties at length. In order to appreciate whether counter claim interse defendants is maintainable, we have to consider the provision of order 8 Rule 6-A of the CPC. The provision read thus :

**"6-A Counter claim by defendant -**

(1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not:

Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

- (2) Such counter claim shall have the same effect as a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.
- (3) The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the Court.
- (4) The counter claim shall be treated as a plaint and governed by the rules applicable to plaints."

It is apparent from the bare reading of aforesaid provision that counter claim is maintainable by defendants against the claim of the plaintiff not interse defendants. Same is the view taken by this Court in *Udhavdas Tyagi v. Srimurti Radhakrishna Mandir, Dehrihat* (supra) and by High Court of Patna in *Hem Narain Thakur v. Deo Kant Mishra and others* (supra). We have no hesitation to hold that counter claim filed by defendants no.3 to 11 as against defendants no.1 & 2, 15 & 16 could not be said to be maintainable under order 8, rule 6-A of CPC.

7. Now we examine the submission made by Shri Avinash Jargar, learned counsel appearing on behalf of respondents, that in the facts of the instant case as the relief prayed by defendants no.3 to 11 as against defendants no.1 and 2 & defendants no.15 & 16 is similar, as claimed by plaintiffs in the suit, plaintiffs have claimed one of the relief that the sale-deed dated 6.12.2004 be declared illegal &

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void to the extent of their interest, same is precisely the prayer made by defendants no.3 to 11 against defendants no.1,2, 15 and 16, the defendants no.3 to 11 want the sale-deed should also be declared void to the extent of their interest. The factual matrix which is required to be considered is going to be more or less the same, in case counter claim is ordered to be treated as cross suit. In appropriate cases such a direction can be issued, has been settled by the Apex Court in *Laxmidas Dayabhai Kabrawala v. Nanabhai Chunilal Kabrawala and others* (supra). The Apex Court has laid down thus :

"11. The question has therefore to be considered on principle as to whether there is anything in law - statutory or otherwise - which precludes a Court from treating a counter claim as a plaint in a cross suit. We are unable to see any. No doubt, the Civil Procedure Code prescribes the contents of a plaint and it might very well be that a counter claim which is to be treated as a cross suit might not conform to all these requirements but this by itself is not sufficient to deny to the Court the power and the jurisdiction to read and construe the pleadings in a reasonable manner. If, for instance, what is really a plaint in a cross suit is made part of a Written Statement either by being made an annexure to it or as part and parcel thereof, though described as a counter claim, there could be no legal objection to the Court treating the same as a plaint and granting such relief to the defendant as would have been open if the pleading had taken the form of a plaint. Mr. Desai had to concede that in such a case the Court was not prevented from separating the Written Statement proper from what was described as a counter claim and treating the later as a cross suit. If so much is conceded it would then become merely a matter of degree as to whether the counter claim contains all the necessary requisites sufficient to be treated as a plaint making a claim for the relief sought and if it did it would seem proper to hold that it would be open to a Court to convert or treat the counter claim as a plaint in a cross suit. To hold otherwise would be to erect what in substance is a mere defect in the form of pleading into an instrument for denying what justice manifestly demands. We need only add that it was not suggested that there was anything in O. VIII, R.6 or in any other provision of the Code which laid an embargo on a Court adopting such a course."

The Apex Court has laid down that even counter claim is not maintainable if justice manifestly demands it can be treated as cross suit and it would be open to a Court to convert or treat the counter claim as a plaint in a cross suit. There is no embargo in order 8, rule 6-A of CPC to adopt the aforesaid course. A Single

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Bench of this Court in *Kartar Singh and others v. Kanhai Singh and others* (supra) has also held that the provisions of sub rules 6A and 6G inserted in O.8, CPC in 1977 regarding 'counter claim' were not available to defendant 15 but his claim had to be still tried otherwise in accordance with law. The written statement could have been treated as a plaint in cross suit but the Court should have permitted the plaintiff as also the contesting defendants an opportunity to present their written statements to that claim as envisaged under Rules 1 and 9 of O.8. In *Bhamri Bai v. Ram Bai* (supra) also similar view was taken by this Court relying upon the decision of Supreme Court in *Laxmidas Dayabhai Kabrawala v. Nanabhai Chunilal Kabrawala and others* (supra) and also the decision of High Court of Jammu & Kashmir in *Ghulam v. Ghulam Ahmad and others*, 1956 J & K 38.

8. In the facts & circumstances of the case, we deem it appropriate to direct trial court to register the counter claim as a cross suit and to try it along with instant suit. The plaintiffs and other defendants except defendants no.3 to 11 shall be permitted by the trial court to file the written statement. The cross suit to be tried and decided along with the suit in question (C.S. No.33-A/06). The impugned order permitting the defendants no.3 to 11 to file counter claim as against defendants no.1,2 & 15 and 16 is set aside and instead it is ordered that it be treated as cross suit & decided along with C.S. No.33-A/06. Both the suits shall be consolidated and tried together.

9. Writ petition stands allowed in terms of the aforesaid order. No costs.

*Petition allowed.*

I.L.R. [2009] M. P., 2027

**WRIT PETITION**

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

8 May, 2009\*

**GODREJ BEVERAGES & FOODS LIMITED**

... Petitioner

**Vs.**

**RAMASHANKAR YADAV**

... Respondent

**A. Industrial Relations Act, M.P. (27 of 1960), Entry 16 - Engineering Industry - Food Processing Industry - Engineering cannot be confined to be an industry which produces plants and machinery - Food processing is also a process of engineering and industry is covered within entry 16.** (Paras 12 & 13)

क. औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), प्रविष्टि 16 - इंजीनियरिंग उद्योग - खाद्य प्रसंस्करण उद्योग - इंजीनियरिंग को उस उद्योग तक सीमित नहीं किया जा सकता जो संयंत्र और मशीनरी का उत्पादन करता है - खाद्य प्रसंस्करण भी इंजीनियरिंग की एक प्रक्रिया है और उद्योग प्रविष्टि 16 के अन्तर्गत आता है।

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**B. Interpretation of Statutes - Word should be construed so as to best attain the purposes of statute.** (Para 17)

ख. कानूनों का निर्वचन - शब्द का ऐसा अर्थ लगाया जाना चाहिए ताकि कानून का सर्वोत्तम प्रयोजन प्राप्त किया जाए।

**C. Industrial Relations Act, M.P. (27 of 1960), Entry 16, Industries (Development and Regulation) Act, 1951, Schedule - Food processing industry separately defined in entry 27 of the Act of 1951 - Entries of the Act of 1951 cannot be relevant for interpreting entries of the Act of 1960 - Act of 1951 cannot control the expression engineering which finds place in entry 16 of the Act of 1960.** (Para 20)

ग. औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), प्रविष्टि 16, उद्योग (विकास और विनियमन) अधिनियम, 1951, अनुसूची - खाद्य प्रसंस्करण उद्योग को 1951 के अधिनियम की प्रविष्टि 27 में पृथक से परिभाषित किया गया है - 1960 के अधिनियम की प्रविष्टियों का निर्वचन करने के लिए 1951 के अधिनियम की प्रविष्टियाँ सुसंगत नहीं हो सकती हैं - 1951 का अधिनियम शब्द इंजीनियरिंग को नियंत्रित नहीं कर सकता जो 1960 के अधिनियम की प्रविष्टि 16 में दिया है।

**Cases referred :**

1993 MPLJ 159, 2005 MPLSR 511, AIR 1953 SC 58, AIR 1960 SC 610, 1966 MPLJ 601, 1968 MPLJ 95, 1979 JIJ 515, AIR 1963 SC 1873.

*Ajay Mishra with Deepti Sohane*, for the petitioner.

*R.K. Tiwari*, for the respondent in W.P. No.16615/2006(S).

**ORDER**

The Order of the Court was delivered by **ARUN MISHRA, J.** :- The question which arises for consideration in the bunch of writ petitions is whether the food processing industry falls within the ambit of entry "engineering industry" as provided in entry 16 of Schedule of M.P. Industrial Relations Act, 1960 (hereinafter referred to as the Act).

2. Respondent employees have filed applications under the Act, they were appointed in the petitioner industry, their services were ultimately terminated vide order dated 25.11.1992. It was submitted that their services were illegally retrenched without compliance of Section 25-F of the Industrial Disputes Act. Notice of lay-off was illegal, there was no reason to resort to the lay off. The employer wanted to obtain work from the contractor as such lay off was resorted to.

3. A preliminary objection was raised on behalf of the industry that the provision of the Act of 1960 was not applicable to it, it could not be termed to be engineering industry, it was involved in the food processing.

4. The Labour Court found that more than 100 employees were working in the industry, however, the Labour Court came to the conclusion that the petitioner



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could not be termed to be engineering industry covered within the entry 16 in the schedule of the Act, hence the provisions of the M.P. I.R. Act, could not be said to be applicable. The applications preferred, were dismissed. Dissatisfied thereby the employees preferred appeals before the Industrial Court, appeals have been allowed by the Industrial Court vide order dated 23.8.2006. Petitioner industry has been held to be covered in the ambit of engineering industry by the Industrial Court and the Industrial Court has remitted the case to the Labour Court for decision on merits of the case. Dissatisfied thereby the instant writ petitions have been preferred.

5. Shri Ajay Mishra, learned Sr. Counsel appearing with Ms. Deepti Sohane, for petitioner has submitted that the decision rendered by the Industrial Court is illegal. The production made by the industry is material, the process is performed with the help of fruit pulp. No engineering product is produced. The total process could not be termed to be covered with the entry 16 of the schedule of the Act. The food processing industry has been defined in Industries (Development and Regulation) Act, 1951. The counsel has submitted that the petitioner industry could not be said to be included within the ambit of entry 16. Counsel has further submitted, that petitioner industry is engaged in production of fruit juice based drinks using fruit pulp, sugar and permissible colours etc. Food product industries are governed by the provisions of the Fruit Products Order 1995 made under section 3 of Essential Commodities Act, 1955. Petitioner industry holds the licence to produce food products. District Trade and Industry Center has also issued a certificate certifying the products manufactured in the factory. The petitioner has set up most modern plant in order to maintain the hygiene and purity of products. The manufacture is done through the machine with minimum human interventions. No product outcome of engineering is produced. The learned Sr. Counsel has also submitted that entry 16 cannot be construed in wider sense, he has relied on various decisions to be referred hereinafter. Merely by the fact that machines are utilized in the process of manufacture, the industry could not be said to be covered within the ambit of engineering industry.

6. Learned counsel appearing for respondent has supported the order passed by the Industrial Court. He has submitted that decisions of this Court rendered in *Bharat Chand Chaturvedi Vs. State of M.P.* 1993 MPLJ 159 and *M.P. State Seeds & Farm Development Corporation Vs. Virendra Kumar Shrivastava* 2005 MPLSR 511 have been relied upon by the Industrial Court, thus the order passed by the Industrial Court being in accordance with law, deserves to be upheld.

7. Main question for consideration is what is the scope of entry 16 in the schedule of the Act. Schedule of the Act is quoted below :

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- |                                                                                                                                                                                                                                                                             |                                                                                                                                                      |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. Omitted                                                                                                                                                                                                                                                                  | 21. Vegetable oil.                                                                                                                                   |
| 2. Iron and steel.                                                                                                                                                                                                                                                          | 22. Rubber.                                                                                                                                          |
| 3. Electrical goods.                                                                                                                                                                                                                                                        | 23. Ceramics including refractory goods, fire bricks, sanitary wares, insulators, tiles, stonewares, pipe and furnace lining bricks.                 |
| 4. Sugar and its bye products including (i) the growing of sugarcane on farms belonging to or attached to concern engaged in the manufacture of sugar; and (ii) all agricultural and industrial operations connected with the growing of sugarcane or the said manufacture. | 24. Chemical and chemical products industry.                                                                                                         |
| 5. Rice mills.                                                                                                                                                                                                                                                              | 25. Non-metallic mineral product industry.                                                                                                           |
| 6. Oil Mills.                                                                                                                                                                                                                                                               | 26. Aluminum industry.                                                                                                                               |
| 7. Potteries.                                                                                                                                                                                                                                                               | 27. Gelatin industry.                                                                                                                                |
| 8. Cement.                                                                                                                                                                                                                                                                  | 28. Leather and Tanneries, including leather products.                                                                                               |
| 9. Lime industry.                                                                                                                                                                                                                                                           | 29. Fertilisers as specified in item 18 of the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951).                 |
| 10. Electricity generation and distribution.                                                                                                                                                                                                                                | 30. Drugs and pharmaceuticals specified in item 22 of the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951).      |
| 11. Printing press.                                                                                                                                                                                                                                                         | 31. Fermentation industries as specified in item No. 26 of the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951). |
| 12. Paper and straw board.                                                                                                                                                                                                                                                  | 32. Manufacture of Dairy products and its distribution.                                                                                              |
| 13. Asbestos cement.                                                                                                                                                                                                                                                        |                                                                                                                                                      |
| 14. Shellac.                                                                                                                                                                                                                                                                |                                                                                                                                                      |
| 15. Public Motor Transport.                                                                                                                                                                                                                                                 |                                                                                                                                                      |
| 16. Engineering including manufacture of Motor Vehicle.                                                                                                                                                                                                                     |                                                                                                                                                      |
| 17. Flour Mills.                                                                                                                                                                                                                                                            |                                                                                                                                                      |
| 18. Biscuit and confectionery.                                                                                                                                                                                                                                              |                                                                                                                                                      |
| 19. Glass.                                                                                                                                                                                                                                                                  |                                                                                                                                                      |
| 20. Starch.                                                                                                                                                                                                                                                                 |                                                                                                                                                      |

In the various entries in the schedule, class of industries has been mentioned. In entry 16 it has been specifically provided that manufacture of motor vehicle is also covered within ambit of entry.

8. Learned counsel for the petitioner has submitted that expression 'engineering' applies to the industry applicable to manufacture of machines such as motor vehicles. Before going into the merits of the submission, we deem it appropriate to consider the meaning of 'engineering' as defined in New English Dictionary and Thesaurus. The word 'engineering' is defined thus :-

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**Engineering** is the art or practice of constructing and using machinery; the art and science by which natural forces and materials are utilized in structures or machines.

The art and science by which natural forces and materials are utilized in structures or machines, is covered within the expression 'engineering'.

In *Corpus Juris Secundum*, Vol. 30 Page 705, the word 'engineering' has been defined thus :-

**'ENGINEERING'** – The art and science by which the mechanical properties of matter are made useful to man in structures and machines. More specifically 'engineering' is the planning and constructing of roads, bridges, railroads, canals, aqueducts, machinery and other similar works.

**Engineering work** – Any work of construction or alteration or repair of railroad, harbor, dock, canal or sewer; any work of alteration of a railroad or of irrigation canal and laterals.

The word 'engineering' as defined in *Oxford Dictionary of English* means; the work done by, or the profession of, an engineer. Often specialized as civil, mechanical, military e.; agricultural, electric, gas hydraulic, railway, sanitary, telegraph e.p

In the *New Encyclopedia Britannica* Vol. 18 Industrial Engineering and Product Management has been divided in various sections such as engineering as profession; major fields of engineering includes military engineering functions, civil engineering, mechanical engineering, chemical engineering functions and branches of chemical engineering. Branch of chemical industry includes production of food stuffs etc. Other divisions are electrical and electronics engineering, petroleum engineering, aerospace engineering, bio engineering, nuclear engineering etc. While dealing with the branches of chemical engineering at Page 419 of the *Encyclopedia Britannica*, non traditional employment has been dealt with. Chemical engineering is development of process and the design and operation of plants in which materials undergo changes in physical or chemical state on a technical scale. Chemical engineering is as old as the process industries. Its heritage dates from the fermentation and evaporation process operated by early civilizations. Modern chemical engineering emerged with the development of large-scale, chemical-manufacturing operations in the second half of the 19th century. In the same way that a complex plant can be divided into basic unit operations, so chemical reactions involved in the process industries can be classified into certain groups, or unit processes (e.g. polymerizations, esterifications and nitrations) having common characteristics. This classification into unit processes brought rationalization to the study of process engineering. The chemical engineering functions are defined at page 419 of *encyclopedia Britannica* thus :-

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**Chemical engineering functions.** Chemical engineers are employed in the design and development of both processes and plant items. In each case, data and predictions often have to be obtained or confirmed with pilot experiments. Plant operation and control is increasingly the sphere of the chemical engineer rather than the chemist. Chemical engineering provides an ideal background for the economic evaluation of new projects and, in the plant construction sector, for marketing.

In the Encyclopedia Britannica at page 419, the branches of chemical engineering are defined thus:-

**Branches of chemical engineering.** The fundamental principles of chemical engineering underlie the operation of processes extending well beyond the boundaries of the chemical industry, and chemical engineers are employed in a range of operations outside traditional areas. Plastics, polymers, and synthetic fibres involve chemical-reaction engineering problems in their manufacture, with fluid flow and heat transfer considerations dominating their fabrication. The dyeing of a fibre is a mass-transfer problem. Pulp and paper manufacture involve considerations of fluid flow and heat transfer. While the scale and materials are different, these again are found in modern continuous production of foodstuffs. The Pharmaceuticals industry presents chemical engineering problems, the solutions of which have been essential to the availability of modern drugs. The nuclear industry makes similar demands on the chemical engineer, particularly for fuel manufacture and reprocessing. Chemical engineers are involved in many sectors of the metals processing industry, which extends from steel manufacture to separation of rare metals.

**Further applications of chemical engineering** are found in the fuel industries. In the second half of the 20th century, considerable numbers of chemical engineers have been involved in space exploration, from the design of fuel cells to the manufacture of propellants. Looking to the future, it is probable that chemical engineering will provide the solution to at least two of the world's major problems; supply of adequate fresh water in all regions through desalination of seawater and environmental control through prevention of pollution.

Pulp and paper manufacture involve considerations of fluid flow and heat transfer. While the scale and materials are different, these again are found in modern continuous production of foodstuffs. Thus production of foodstuffs involving aforesaid process is also one of the branches of chemical engineering.

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9. Food engineering is a multidisciplinary program which combines science, microbiology, and engineering education for food and related industries. Food engineering includes, but is not limited to the application of agricultural engineering and chemical engineering principles to food materials. Food engineering include companies involved in food processing, food machinery, packaging, ingredient manufacturing, instrumentation and control. Firms that design and build food processing plants; consulting firms, government agencies, pharmaceutical, and health-care firms also hire food engineers. Among its domain of knowledge and action are, research and development of new foods, biological and pharmaceutical products, development and operation of manufacturing, packaging and distributing systems for drug/food products, design and installation of food/biological/pharmaceutical production processes, design and operation of environmentally responsible waste treatment systems, marketing and technical support for manufacturing plants.

10. Computational Fluid Dynamics (CFD) concept has also been developed in food processing which involves use of CFD for gaining a qualitative and quantitative assessment of the performance of processes involving heat and mass transfer.

11. Contemporary Food Engineering, a book series published by CRC Press/Taylor & Francies, attempts to address some of the recent developments in food engineering. Advances in classical unit operations in engineering applied to food manufacturing are covered as well as such topics as progresses in the transport and storage of liquid and solid foods; heating, chilling and freezing of foods; mass transfer in foods; chemical and biochemical aspects of food engineering and the use of kinetic analysis; dehydration, thermal processing, non-thermal processing, extraction, liquid food concentration, membrane processes and applications of membranes in food processing; shelf-life, electronic indicators in inventory management, and sustainable technologies in food processing, and packaging, cleaning, and sanitation. The book aims at professional food scientists, academics researching food engineering problems. The book treats the food engineering as a part of the engineering. Food engineering research includes engineering principles in fluid dynamics and heat transfer, and applying those principles to applications in food processing and packaging.

12. The Chemical Engineering, as defined in the Wikipedia, the free encyclopedia, is the branch of engineering that deals with the application of physical science (e.g. chemistry and physics), with mathematics, to the process of converting raw materials or chemicals into more useful forms. In addition to producing useful materials, modern chemical engineering is also concerned with pioneering valuable new materials and techniques- such as nanotechnology, fuel cells and biomedical engineering. Chemical engineering largely involves the design and maintenance of chemical processes for large-scale manufacture. Chemical engineers in this

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branch are usually employed under the title of process engineer, a related term with a wider definition is chemical technology.

Thus, we cannot confine the engineering to be an industry which produces plants and machinery, as submitted by the learned senior counsel appearing on behalf of the petitioner industry.

13. In *Bharat Chand Vs. State of M.P.* (supra) has dealt with the word 'engineering' thus :-

Understanding the meaning of the word "engineering" on the basis of the dictionaries and encyclopedia, which convey its popular meaning, we have to determine whether Public Health Engineering Department of the State is covered by the entry "engineering". In this case the Industrial Court had remanded the matter to the Labour Court for holding an enquiry into the nature of industry carried on in the Public Health Engineering Department where the petitioner was employed. From the evidence led by parties, it is not disputed that amongst one of its essential functions, the department is engaged in supply of water to public. For this purpose, the department sometimes builds dams, water reservoirs, dig wells and tube-wells and lay pipe-lines for supply and distribution of water. Whether the above activities undertaken by the Public Health Engineering Department make it an engineering industry. In the opinion of learned Member of the Industrial Court, the entry read in the context of other entries of the Schedule is relatable to such industries in which some manufacturing activity is carried on, resulting into production of goods. Prima facie, the expression "engineering" cannot be restricted to convey description of such industries engaged in manufacturing of engineering goods. It is true that in construing the entry, aid can be taken from the other entries in the Schedule.

12. The learned Member of the Industrial Court in holding that the expression "engineering" would not include Public Health Engineering Department, appears to have been influenced mainly by consideration that the specification of industries or undertakings in various entries of the Schedule e.g. textile, iron and steel, electrical goods, sugar and its products, rice mills, oil mills, potteries, cement, lime and so on is with reference to the manufactured products in them and hence, the entry "engineering" has to be construed likewise.

15. The second reasoning of the learned Member of the Industrial Court is that the expression "engineering" in association

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with the words used in the said entry and other entries of the Schedule denotes industries engaged in manufacture of machines and is to be understood as "Yantra Udyog". We do not find any justification to restrict the meaning of expression "engineering" to only industries engaged in manufacture of machines. As has been explained above, on the basis of dictionary meaning of the expression "engineering", it includes all activities involving practical use of science in machines and structures. Industries engaged in civil engineering activities, such as, construction of buildings, dams, mines, bridges and other civil works prima facie seem to be covered by the expression "engineering". Public Health Engineering Department, whose essential function is to build reservoir, dams, canals, dig well for maintaining supply and distribution of water to the public, cannot be held to be excluded from the said entry "engineering".

The word 'include' has been considered in Para - 17 thus :-

17. Generally the word "include" is used in order to enlarge the meaning of words or phrases occurring in the body of the statute. In other words, the word in respect of which "includes" is used bears both its extended statutory meaning and its ordinary, popular and natural sense whenever that would be properly applicable. (See Maxwell on "The Interpretation of Statutes", Twelfth Edition at page 270). An interpretation clause, which extends the meaning of a word by use of word "includes", does not take away its ordinary meaning. "An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular and natural sense whenever that would be properly applicable, but to enable the word as used in the Act, when there is nothing in the context or the subject matter to the contrary, to be applied to something to which it would not ordinarily be applicable." Sometimes a term is defined in an interpretation clause merely *ex abundanti cautela* - that is to say, to prevent the possibility of some incident or something relating to the term escaping notice. (See Craies on 'Statutes Law, Seventh Edition, at pages 214 and 215). Thus, it would be seen that an interpretation clause, which extends the meaning of a word does not take away its ordinary meaning. The expression "including manufacture of motor vehicles" which follows the expression "engineering", does appear to be introduced by way of only abundant caution so that industries like automobile industries are not deemed to be excluded from the ambit of the expression "engineering".

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14. The Apex Court in *D.N. Banerji v. P.R. Mukherjee and others* – AIR 1953 SC 58 has laid down that industry includes within its scope what might not strictly be called trade or business. In considering the meaning of these terms, background of social structure in industrial evolution has to be taken into account. The Apex Court in *The State of Bombay and others v. The Hospital Mazdoor Sabha and others* – AIR 1960 SC 610 has laid down that words used in an inclusive definition denote extension and cannot be treated as restricted in any sense. Where the Courts are dealing with an inclusive definition it would be inappropriate to put a restrictive interpretation upon terms of wider denotation.

We are unable to accept the submission that we should restrict the meaning of engineering in the instant case to such products like motor vehicle.

15. In *M.P. State Seeds & Farm Development Corporation Vs. Virendra Kumar Shrivastava* (supra) the processing of seeds has also been held to be an engineering device covered under entry 16 “engineering”, this Court held thus :-

11. Now the “engineering” is being used in agriculture also. Agricultural engineering is a subject which is taught to the students of agricultural science. “Processing of seeds” is also an “engineering” device. The quality seeds are being produced through the art and science of engineering. There is introduction of engineering in the research and development. In seeds production the machines are being used for the development and processing of seeds and plants. A wide variety of activity is now covered by engineering, computer engineering and electronic engineering are the latest subjects. Therefore agricultural engineering by which seeds are produced, processed and developed is also an engineering device. Therefore, the Labour Court has rightly held that the activities and business of the non-applicant Corporation are covered by item No. 16 “engineering” in the above notification.

16. We have no iota of doubt from the aforesaid discussion that food processing is also a process of engineering and industry is covered within the entry 16, still we deem it appropriate to refer to the statement of A. Purushottam. He has stated that Soyabeen used to be converted into the milk in Godrej Foods, beside the pulp of mango, orange, pineapples are diluted and drinks are prepared, which are sold as commodity in the market. Tomato Ketchup is also prepared, there were 16 departments which included engineering, petraback laboratory, trepack, process, ETP water treatment, loading unloading. There were plants and several mechanical and electrical engineers work in the industry. In the process of chilling also, in one shift, 25 labours used to work and there used to be three shifts. There were various other sections in which large number of persons used to work. We also deem it appropriate to refer to the statement of A.L. Gupta, examined on



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behalf of the Management. He has stated that food drinks are manufactured in the industry. The pulp is put in the machines and then the product is packed, machines have to be operated by the technicians, they are not producing any engineering products, they just do the work of food processing for which licence has been obtained. He has admitted that Ex.D-2 to D-13 are the documents of maintenance of engineering department. There is laboratory also. There are electricians and facilities of water treatment also. 250 employees were working.

It is apparent from the above statement that food product involves engineering process.

17. Shri Ajay Mishra, learned Senior Counsel appearing for petitioner has placed reliance on a decision of this Court in *R.N. Mishra, employee of Burn and company Vs. The Works Manager, Burn and Co. Ltd., Refractory and Ceramic Works, P.O. Niwar* – 1966 MPLJ 601, in which it was held that the term “potteries”, as used in the Schedule to the notification issued on 31st December 1960 under section 1(3) of the M.P. Industrial Relations Act, does not include a “refractory” engaged in the manufacture of fire-bricks. The Act would not apply to Refractory and Ceramic Works, which is engaged in the manufacture of fire-bricks. The Labour Court will have no jurisdiction to entertain and decide an application under sections 61 (1)(A) and (C) and 80 of the Act for a declaration that the employees of the Company had gone on an illegal strike. This Court has held in Para-3 thus :-

3: The sole question that arises for determination in this case is whether the Burn and Co. Ltd. “Refractory and Ceramic Works”, Niwar, of which the respondent is the Works Manager and which is admittedly engaged only in the manufacture of fire-bricks, is an undertaking in the “Potteries” industry. The answer to the question depends on the meaning to be given to the word “potteries”, as used in the Schedule to the notification dated the 31st December 1960 issued under section 1(3) of the Act. The question of the denotation of the term ‘potteries’ has to be determined bearing in mind the settled rules regarding construction of words and terms and used in a statute, and not with reference to technical books or dictionaries alone ignoring the rules of construction. The first rule is that general statutes will prima facie be presumed to use words in their popular sense. As stated by Lord Tenterden in *Att. Gen. v. Winstaploy* (1), “the words of an Act of Parliament which are not applied to any particular science or art” are to be construed “as they are understood in common language.” In *The Fusilier* (2), Dr. Lushington said-

“One of the rules of construing statutes, and a wise rule too,

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was that they shall be *uti loquitur Vulgus*, that is, according to the common understanding and acceptance of the terms.”

As stated in ‘*Craies on Statute Law*’ (6th Edn. at p.162), “Critical refinements and subtle distinctions are to be avoided, and the obvious and popular meaning of the language should, as a general rule, be followed.” The other rule is that if an Act is one dealing with a particular trade, business or transaction, in which they are terms which everybody conversant with those matters understands to have a particular meaning, then the words used in that Act must be construed as having that particular meaning which may differ from the ordinary or popular meaning. This rule has been stated in ‘*Craies on Statute Law*’ at page 164. In ‘*Maxwell on Interpretation of Statutes*’ (11th Edn.) it has been stated at page 3 that –

“The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning.”

A reference to technical books may no doubt be made for understanding the meaning of technical terms. But in construing a statute not dealing with a particular trade or business or a technical matter, but of a general application, evidence to inform the Court as to the existence of a technical meaning of ordinary words is inadmissible (see ‘*Maxwell on Interpretation of Statutes*’ p.32). The purpose and subject-matter of a statute necessarily determine and control the meaning of the words used in it and consequently the words should be construed so as to best attain the purposes of the statute. There is also another rule that when a word is capable of being construed either in its popular sense or as a word of art, it is for those who assert that it is used in a technical and not in a popular sense to establish the fact [see *Inland Revenue Commissioner v. Gribble*(3)].

This Court has clearly laid down that the word should be construed so as to best attain the purposes of the statute. Following the aforesaid principles laid down by the Division Bench of this Court, we are of the opinion that so as to subserve the purposes of the Act. Popular meaning of engineering cannot be confined to products like motor vehicles in entry 16 of engineering. We cannot confine engineering to the production of machines. Engineering is part of various process under production of foodstuff which is well recognized part of chemical engineering. The expression ‘including manufacture of motor vehicles’ has been

added so that industry like automobile industry are not taken to be excluded from the entry engineering. Reliance has also been placed by petitioner on a decision of this Court in *Jamul Cement Works, Jamul vs. President, State Industrial Court, M.P. - 1968 MPLJ 95*, in which it was laid down that the employment of workers engaged in construction work of cement factory is not covered by term 'cement' occurring in Notification under section 6(1) of the Act. Provisions of the Act have no applicability to the employment of such workers. The factory was producing the cement, the construction work of cement factory was held to be independent work. However, in the instant case employees were involved in the primary work of food processing. This Court held that the word cement means cement manufacturing industry and activities or operations incidental to the main industry of manufacturing cement. Thus, the decision is of no help, each entry has to be considered on its own. The decision rather counters the submission made on behalf of the petitioner as employees are involved in the main operation in the instant case.

18. In *Bhopal Tanneries and Glue Works v. Bhopal Tanneries and Glue Workers Union and another - 1979 J LJ 515* a Division Bench of this Court has laid down that 'Gelatine industry' as included in the Schedule to the Notification should, therefore, be understood in a limited sense and not in a wider sense. Gelatine is principally a protein food and is edible, and in pharmacy its most important use is in the manufacture of capsules; glue on the other hand, is commonly used as an adhesive.

In the aforesaid decision, there was difference found in gelatine and glue, thus the glue was held not to be in Gelatine industry but in the instant case process involves engineering, consequently activity is covered under entry No. 16.

Counsel has also relied upon the decision of Apex Court in *The University of Delhi and another vs. Ram Nath and others - AIR 1963 SC 1873* in which it has been laid down that teachers have been excluded from I.D. Act since their exclusion indicates that education is not within its scope.

19. Shri Ajay Mishra, learned Sr. Counsel has also relied on the Fruit Products Order, 1955 issued under Essential Commodities Act, 1955. Clause 2(a) deals with the Fruit Products thus :-

(d) 'Fruit Products' mean any of the following articles, namely:

- (i) Synthetic beverages, syrups and Sharbats;
- (ii) Vinegar, whether brewed or synthetic;
- (iii) Pickles;
- (iv) Dehydrated fruits and vegetables;
- (v) Squashes, crushes, cordials, barley water, barreled juice

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and ready-to-serve beverage, fruit nectar or any other beverages containing fruit juices or fruit pulp;

- (vi) Jams, jellies and marmalades;
- (vii) Tomato products, ketchup and sauces;
- (viii) Preserves, candied and crystallized fruits and peels;
- (ix) Chutneys;
- (x) Canned and bottled fruits, juices and pulp;
- (xi) Canned and bottled vegetables;
- (xii) Frozen fruits and vegetables;
- (xiii) Sweetened aerated waters with or without fruit juice or fruit pulp;
- (xiv) Fruit cereal flakes;
- (xv) Any other unspecified items relating to fruits or vegetables.

Clause d(v) deals with the Squashes, crushes, cordials, barley water, barreled juice and ready-to-serve beverage, fruit nectar or any other beverages containing fruit juices or fruit pulp. The Fruit Products Order defines the manufacturer, control activity of such manufacture provide for licence etc.

Merely by the aforesaid definition of Fruit Products, it cannot be held that there is exclusion of the food processing industry from the purview of MPIR Act. The Fruit Product Order as well as the Act can operate simultaneously.

20. Counsel for petitioner has also relied upon the Industries (Development and Regulation) Act, 1951, in the first schedule of which different industries have been mentioned. Counsel has emphasized that food processing industry has been separately defined in entry 27. Thus taking the clue from the aforesaid act, we should hold that food processing industry is out of expression engineering. In our opinion, Industries (Development and Regulation) Act, 1951 entries cannot be relevant for interpreting the entries of the M.P. Industrial Relations Act. Industries (Development and Regulation) Act, 1951, cannot control the expression engineering which finds place in entry 16 of schedule of MPIR Act.

In view of the aforesaid discussion, we are of the opinion that, petitioner industry is covered within the ambit of the entry 16 of schedule of M.P.I.R. Act, 1960. Consequently provision of the MPIR Act are applicable to it. The Industrial Court has rightly remitted the case to Labour Court for adjudication on merits. Writ petitions are devoid of merit, deserves to be dismissed, same are hereby dismissed. No costs.

*Petition dismissed.*

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I.L.R. [2009] M. P., 2041

**APPELLATE CIVIL***Before Mr. Justice Abhay M. Naik*

6 January, 2009\*

**SHAMIM BANO**

Vs.

**RAJESH KUMAR & anr.**

... Appellant

... Respondents

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

(Paras 7 &amp; 8)

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

**Cases referred :**

(2000) 5 SCC 113, 2002(2) MPHT 259, (1991) 3 SCC 530.

*Vijay Nayak*, for the appellant.*N.K. Jain*, for the respondent No.1.*Satish Chaurasiya*, for the respondent No.2.**ORDER**

**ABHAY M. NAIK, J. :-** This appeal has been preferred against the order dated 29.11.2005, passed by the learned Motor Accidents Claims Tribunal, Betul, in Motor Accidents Claim Case No-43/2005, dismissing thereby the Claim Petition for want of jurisdiction.

2. Facts relevant for the purposes of this appeal are that deceased Shahadat Khan was a driver on truck No. MP-05-A/9611 owned by the respondent No. 1. Truck was on the return journey from Nasik to Betul on 23.9.2004 with one Sunil Korku as its cleaner. The truck was parked at one 'Dhaba' near Village Patola, Maharashtra, in the intervening night between 22/23.9.2004. Shahadat Khan was assaulted by Sunil Korku by knife. Shahadat Khan was found dead. Claimant/

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appellant submitted a Claim Petition under Section 166 of the Motor Vehicles Act for compensation on the ground that Shahadat Khan was murdered by the cleaner while sleeping in the truck. A claim for compensation was, accordingly, made. Respondents submitted their respective reply. They inter-alia stated that the claim case is not tenable under the provisions of the Motor Vehicles Act before the Claims Tribunal.

3. Preliminary issues were raised about maintainability of the Claim Petition under Section 166/140 of the Motor Vehicles Act. Learned Member of the Motor Accident Claims Tribunal, Betul, after hearing the arguments passed the impugned order on 29.11.2005, holding thereby that the death of Shahadat Khan was not caused due to accidental murder but was simplicitor murder and the Claims Tribunal has no jurisdiction to entertain the Claim Petition under the provisions of the Motor Vehicles Act. Accordingly, the Claim Petition was dismissed. Aggrieved by it, the present appeal has been preferred.

4. Shri Vijay Nayak, learned counsel appearing for the appellant placing reliance on the apex Court decision in the case of *Rita Devi Vs. New India Assurance Co. Ltd.* [(2000) 5 SCC 113] and Division Bench decision of this Court in the case of *Khairunisha and others Vs. Subhash @ Punjabi and others* [2002(2) M.P.H.T. 259], contended that the death of Shahadat Khan was caused due to the accidental murder arising from the use of the motor vehicle, therefore, the Claim Petition ought to have been decided on merits by the Claims Tribunal.

5. Shri N.K. Jain and Shri Satish Chaurasiya, learned counsel appearing for respondents submitted on the other hand that the death was resulted due to the dispute between Shahadat Khan and Sunil Korku which was independent of the use of the motor vehicle. Accordingly, it is contended that the impugned order does not warrant any interference.

6. A Claim Petition under Section 166 of the Motor Vehicles Act, 1988 may be submitted for compensation if the accident of the nature specified in sub-section (1) of Section 165 occurs. Sub-section (1) of Section 165 empowers a Claims Tribunal to decide the claim for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of use of motor vehicles. Thus, the key words are "accidents involving the death of, or bodily injury to persons arising out of use of motor vehicle." The word 'accident' has not been defined in the Motor Vehicles Act, 1988 or the Rules made thereunder. Apex Court in the case of *Shivaji Dayanu Patil and another Vs. Vatschala Uttam More* [(1991) 3 SCC 530] has observed :-

"36. This would show that as compared to the expression "caused by", the expression "arising out of" has a wider connotation. The expression "caused by" was used in Sections, 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In S. 92-A,

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Parliament, however, chose to use the expression "arising out of" which indicates that for the purpose of awarding compensation u/ S. 92-A, the causal relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be, connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression "arising out of the use of a motor vehicle" in S. 92-A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment."

In *Rita Devi's case* (supra), the apex Court has further observed:-

"10. The question, therefore, is 'can a murder be an accident in any given case? There is no doubt that 'murder', as it is understood, in the common parlance, is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a 'murder' which is not an accident and a 'murder' which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder."

7. Learned Member of the Claims Tribunal has decided the preliminary issues without recording the evidence on the point that whether the murder of Shahadat Khan could be treated as accidental murder or a simplicitor murder. He has considered certain documents containing translation of papers kept by the Police Department in relation to the said accident. Originally, the report is in Marathi language and I have got a privilege to read and understand the photocopy of original legible paper which is in Marathi language. In the later portion of the report dated 25.9.1994, it is mentioned that the truck in question came from Malegaon in the night on 22.9.1994 and was stopped at about 11:00 P.M. Before hotel Khalsa. The rope tied around the goods was loosened due to travelling and there was exchange of hot talks for tying the rope between Shahadat Khan and Sunil Korku. In the morning, the driver was awakening the accused (Sunil Korku), He is stated to have given slaps. Getting annoyed, Sunil Korku assaulted the deceased by knife which resulted into murder.

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8. Considering the aforesaid version, this cannot be necessarily said that the death of Shahadat Khan was a simplicitor murder. It was to be examined by the Claims Tribunal that whether the death of Shahadat Khan was due to accidental murder or simplicitor murder and whether it was in relation to the previous night's quarrel which arose out of the use of motor vehicle. This could have been examined only after recording the evidence. Learned member of the Claims Tribunal ought to have provided opportunity to the parties to adduce evidence in this respect. Without evidence, it could not have been determined whether the death of Shahadat Khan can be termed as accidental murder or simplicitor murder. This having not been done, the impugned order suffers from illegality. Accordingly, the same is, hereby, set aside. Matter is remitted back to the Claims Tribunal to decide it afresh after recording evidence. Issue about maintainability may be decided first or along with other issues in accordance with law, but only after recording evidence. Parties to appear before the Claims Tribunal Betul on 2.2.2009. Record be sent back immediately with copy of this order.

9. With the aforesaid directions, appeal stands disposed of accordingly.

No order as to costs.

*Appeal disposed of.*

I.L.R. [2009] M. P., 2044

APPELLATE CIVIL

Before Mr. Justice Abhay M. Naik

9 January, 2009\*

GAJRANI (SMT.)

Vs.

MANOJ JAIN

..... Appellant

..... Respondent

**Motor Vehicles Act (59 of 1988), Sections 2(28), 165 & 166 - Motor accident - Claims tribunal dismissed the claim due to absence of registration number of offending motorcycle - Held - Absence of registration on the offending vehicle does not immunize offending vehicle or driver - Claimant was hit by motorcycle driven by respondent could be well established by oral evidence - Claim petition maintainable - Appeal allowed.** (Paras 8, 10 & 11)

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

**Cases referred :**

(1991) 3 SCC 530, 1989 MPLJ 16.



## GAJRANI (SMT.) Vs MANOJ JAIN

*Prakash Kori*, for the appellant.

*None*, for the respondent though served.

## O R D E R

**ABHAY M. NAIK, J. :-** This appeal has been preferred against the dismissal of claim petition under section 166 of the M.V. Act vide award dated 21.6.2001 passed by the Member of Additional MACT, Khurai in motor accident claim case no. 26/99.

2. Case of the claimant/appellant is that she was hit by a black colour Yamaha Motor Cycle on 12.12.98 from behind which was being driven by the respondent in rash and negligent manner. It was her specific case that the registration number was not mentioned on the motor cycle at the time of accident and thereafter motor cycle was not seen with the respondent. F.I.R. was lodged on the same date, however, without making mention therein of the registration number of the offending motor cycle. The claimant could not trace out the particulars of the motor cycle, accordingly, the same were not mentioned in the claim petition which was submitted for compensation with regard to the injuries received by her in the accident.

3. Respondent denied the allegations contained in the claim petition.

4. Learned claims tribunal after recording evidence dismissed the claim petition on the ground that the claimant/appellant has failed to provide particulars of the offending motor cycle e. g. its registration number, chassis and engine number. Learned claims tribunal was of the opinion that the claim could have been established under the provisions of Torts only and not under section 166 of the M.V. Act. Accordingly vide impugned award the claim petition was dismissed. Aggrieved by the same, this appeal has been preferred.

5. Learned counsel for the claimant/appellant contended that a claim petition may be entertained on merits despite not providing registration number of the offending vehicle. Fact of accident with the motor cycle could be established by independent evidence, the moment it is found that the accident has occurred out of the use of motor vehicle. The claimant ought to have been held entitled to compensation under the provisions of M.V. Act.

6. Considered the submissions and perused the record.

7. Section 166 of the M.V. Act enables a person to submit application for compensation arising out of an accident of the nature specified in sub section (1) of section 166 of the said Act.

Sub section (1) of section 165 empowers the claims tribunal to adjudicate upon the claims for compensation in respect of accidents involving the deaths of, or bodily injury to, persons arising out of the use of motor vehicles. The word accident is not defined in the Motor Vehicles Act or rules made thereunder.

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Apex Court in the case of *Shivaji Dayanu Patil and another Vs. Vatschala Uttam More* [(1991) 3 SCC 530] has observed :-

"36. This would show that as compared to the expression "caused by", the expression "arising out of" has a wider connotation. The expression "caused by" was used in Sections. 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In S. 92-A, Parliament, however, chose to use the expression "arising out of" which indicates that for the purpose of awarding compensation u/ S. 92-A, the causal relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression "arising out of the use of a motor vehicle" in S. 92-A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment."

8. It may further be seen that motor vehicle is defined in clause 28 of section 2 as mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty five cubic centimeters.

Thus, registration of motor cycle is not contemplated in the definition of motor vehicle under the provisions of M.V. Act, 1988. Sections 165 as well as 166 of the said Act are not confined to the accidents resulting merely from the use of registered motor vehicles.

9. This court in *Bhanwarlal Vs. Sardar Kabulsingh and others* 1989 MPLJ 16 has observed that only because of confusion in the digits of vehicle number by a rustic illiterate claimant, the claim petition for compensation for the injuries arising out of the motor accident should not be thrown out unless it is held that the accident as alleged by the claimant had not taken place and there was no rashness and negligence on the part of the driver, claim petition cannot legally be dismissed as not maintainable.

10. In the present case claimant/appellant herself stated in the witness box that she was hit by motor vehicle which was being driven by the respondent at the relevant time. Since she was hit from behind and the respondent ran away with

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the motor cycle she failed to notice other details. As regards registration number it was clearly pleaded that on the offending motor vehicle, there was no number plate. Learned claims tribunal has not adverted to the statement of the claimant herself supported by PW/2 Manoj S/o Rajkumar Goraha and PW/3 Rajy alias Mayank. The fact that the claimant was hit by the motor cycle driven by the respondent could be well established by oral evidence. Absence of registration on the offending vehicle does not immunize neither the offending vehicle nor the person driving it. Learned claims tribunal, therefore, has erred in rejecting the claim petition merely on the ground that the particulars of the offending motor cycle with regard to its registration number, Chassis and engine number were not provided either in pleadings or in the evidence. On the contrary, the claimant appears to be a genuine person stating clearly in the claim petition that there was no number plate on the offending motor cycle which was thereafter not seen with the respondent.

11. Considering the aforesaid, this appeal deserves to be and is hereby allowed. It is further found that the claim petition under section 166 of M.V. Act is maintainable despite absence of particulars of registration as well as chassis and engine number. Impugned award dismissing thereby the claim petition on the ground of not providing registration number of the offending motor cycle is set aside. The claimant is further directed to decide the claim petition on merits in accordance with law. Parties to appear before the claims tribunal on 2<sup>nd</sup> of February, 2009.

12. It is made clear that the counsel for the respondent did not choose to appear and argue the case on behalf of the respondent, therefore, the claims tribunal shall have to issue notice to the respondent for the date of hearing, before proceeding with the claim on merits.

No order as to costs.

*Appeal allowed.*

I.L.R. [2009] M. P., 2047

**APPELLATE CIVIL**

*Before Mr. Justice U.C. Maheshwari*

20 February, 2009\*

**WESTERN COALFIELDS LIMITED**

**Vs.**

**PRADEEP KUMAR SONI & anr.**

... Appellant

... Respondents

**A. Civil Procedure Code. (5 of 1908), Section 100 - *Second appeal - Suit for refund of earnest money - Contract provides for forfeiture of earnest money on failure to perform work - Plaintiff himself admitted that he has***

\*S.A. No.112/1994 (Jabalpur)

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*requested for refund of earnest money on account of failure to perform work - Held - Plaintiff is not entitled for refund of earnest money in view of his admission and terms of contract - Appeal allowed - Suit dismissed.*

(Paras 18 to 20)

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

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

(Paras 10 to 12)

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

*Greeshm Jain & Dilip Parihar, for the appellant.*

*Sidharath Patel, for the respondent No.1*

*None, for the respondent No.2.*

**J U D G M E N T**

**U.C. MAHESHWARI, J. :-** The appellant - defendant no.1 has directed this appeal under Section 100 of the Code of Civil Procedure being aggrieved by the judgment and decree dated 23.11.93 passed by the Ist Additional District Judge to the Court of District Judge, Chhindwara in Civil Appeal No. 2-B/87 decreeing the suit of respondent no. 1 against it by setting aside the judgment and decree dated 14.10.1986 passed by the First Civil Judge, Class-I, Chhindwara in Civil Original Suit No. 2-B/84 whereby such suit was dismissed.

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2. The facts necessary to adjudicate this appeal in short are that the plaintiff – respondent no. 1 herein filed money suit against the appellant for recovery of Rs. 10500 in the trial court contending that he being Contractor is doing the business of transportation of the coal for the appellant subject to acceptance of his tender. In response of the NIT floated by the appellant the respondent no. 1 submitted his tender for transportation of the coal from the directed mines to the destination. He was directed to deposit Rs. 34,000 as earnest money. In this regard Rs. 34,000 was permanently deposited with the appellant on dated 5.2.1982, out of which the earnest money was deposited. As the respondent no. 1 could not fulfill the vested interest of the official of the appellant, then such official with the connivance of some other Contractor even after accepting the aforesaid tender on dated 22.3.1982 did not issue the work order to the respondent no.1. While the respondent no. 1 by spending the huge sum engaged the trucks for the aforesaid work. In the absence of the work order he suffered the loss of Rs. 50,000, on which a notice dated 22.4.1982 was given to the appellant by him. The same was replied, vide dated 4.5.1982 by the appellant stating that the appellant is ready to issue the work order if the respondent no. 1 does not proceed for any proceeding in continuation of the said notice. After receiving such reply when the respondent no. 1 contacted the official of the appellant for issuing the work order then he was directed to deposit again Rs. 10,000 as earnest money. The same was deposited by him with the bank – respondent no. 2 and such receipt dated 21.5.1985 was submitted in the office of the appellant. In spite of that no work order was issued to the respondent no. 1, on which the respondent no. 1 again gave a notice dated 4.10.1982 to the appellant and respondent no. 2 to refund the aforesaid earnest money of Rs. 10,000 but the same was not refunded on which the impugned suit for recovery of the money was filed by him.

3. In the written statement of the appellant, it is stated that in response of the NIT dated 4.1.1982 carrying out the transportation of coal from Dighinia open cost mines to the Railway Side Parasia, the plaintiff – respondent no. 1 submitted his tender on dated 6.2.1982 alongwith the receipt dated 5.2.1982 depositing Rs. 34,000 as earnest money in compliance of the terms of the tender form. On opening the aforesaid tender, vide dated 8.2.1982 due to difference of the rates such work could not be allotted to the plaintiff-respondent no.1. Subsequent to this the earnest money of Rs. 34,000 was never claimed by the plaintiff, hence the same was not refunded. Thereafter in response of the another NIT dated 20.2.1982 for transportation of the coal from Sethia open caste mines to the directed destination the plaintiff submitted his tender on dated 22.3.1982 with a prayer to deposit its earnest money Rs. 10,000/- from the aforesaid Rs. 34,000/- deposited with respect of the earnest money of said earlier tender. Accepting, such prayer the tender of the plaintiff was taken in bid and on opening the same it was accepted as per directed terms and conditions. Thereafter on dated 19.4.1982 the work order was

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issued by the appellant to respondent no.1. In compliance of the same when the work was not begun, then again by prescribing the time limit to begin the work a modified work order dated 24.4.1982 was also issued to respondent no. 1. In spite of it the work was not started within the prescribed period. It is also stated that contrary to the terms of subsequent tender, the entire sum of Rs. 34,000/- of the earnest money of said earlier tender, out of which Rs. 10,000 was adjusted in the second tender on 22 March 1982, was withdrawn in toto by the respondent no. 1. In order to rectify such mistake the respondent no. 1 again deposited Rs. 10,000/- as earnest money, vide dated 21.5.1982 and its bank receipt was submitted in the office of the appellant alongwith a covering letter stating that in compliance of the terms he deposited Rs. 10,000/- which has been withdrawn by him and also shown his incapacity to perform the directed work. Accordingly the respondent no.1 plaintiff has neither fulfilled the terms of the tender nor started the work of the contract, hence in view of such violation of the terms his aforesaid earnest money has been forfeited. In such premises prayer for dismissal of the suit is made.

4. In view of the pleadings of the parties after framing issues the evidence was recorded. On appreciation of the same, the suit of the plaintiff – respondent no. 1 was dismissed by the trial court. On filing the appeal by respondent no. 1 the same was allowed and by setting aside the decree of trial court his suit was decreed for the sum of Rs. 10,000 alongwith interest and the cost. The same is under challenge at the instance of the defendant no.1 in this appeal.

5. This appeal was admitted vide order dated 22.7.1994 on following substantial question of law:-

“Whether the finding of the lower appellate court that Ex. D-3 relates to the suit contract given to the plaintiff by the appellant is perverse by reason of the fact that it is not based upon any pleadings or evidence of the plaintiff but on the other hand is contrary to the admission of the plaintiff himself that Ex. D-3 relates to some other work order.”

6. The learned counsel of the appellant – defendant no.1 Shri Greeshm Jain after taking me with the pleadings, evidence and the exhibited documents argued that the first NIT was floated by the appellant on dated 4.1.1982. In response of it with receipt of Rs. 34,000/- dated 5.2.1982 the plaintiff submitted his tender on 6.2.1982. Due to difference of the rates such work was allotted to some other tenderer vide dated 8.2.1982 but thereafter upto 22.3.1982 the aforesaid earnest money was not taken away by the plaintiff. Meanwhile the another NIT was floated by the appellant on 20.2.1982. In response of it again respondent no. 1 submitted his tender on 22.3.1982 with a prayer that its earnest money Rs. 10,000 be adjusted from the amount of earnest money of Rs. 34,000/- deposited for earlier tender. Considering that prayer with a direction to adjust Rs. 10,000/- as earnest

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money of such second tender, was taken into the bid. On opening the same his tender was accepted for the directed work. Accordingly it is apparent that there were two different proceedings were drawn up for inviting two different tenders. In the first proceeding the tender of the plaintiff was not accepted while in the second proceeding his tender was accepted on which the work order was also issued vide dated 19.4.1982 (Ex. D/2-A). The same was modified, vide letter dated 24.4.1982 (Ex. D/1-A). In support of the arguments he also referred Ex. D-4, the terms and conditions of the tender and the contract. According to the terms if work is not carried out by the Contractor within the prescribed period or he shows his incompetency to perform the contract then in such situation appellant had a right to forfeit the earnest money. He further stated that after accepting the tender and before issuing the work order, although the earnest money of the subsequent tender Rs. 10,000 was adjusted from the sum of Rs. 34,000/- deposited as earnest money of earlier tender but the respondent no. 1 has taken away the entire sum of Rs. 34,000 on dated 16.4.1982 from the office of the appellant and the same was given by the official of the appellant due to some human error. Subsequently, to rectify the aforesaid error respondent no. 1 again deposited Rs. 10,000/- as earnest money with the bank and its receipt alongwith the letter exhibit D-3 was submitted in the office of the appellant on dated 21.5.1982. He said that according to the language of this letter the plaintiff has specifically stated that because of some reason he can not carry out the allotted work of the transportation as his engaged Dumper- Contractor has run away and also prayed to refund the earnest money. The same could not be refunded as per terms of the tender and the contract. Considering all these aspects the suit of the plaintiff was rightly dismissed by the trial court but by setting aside such decree the appellate court has decreed the suit under wrong premises. With these submissions he prayed for setting aside the decree of the appellate court by restoring the decree of the trial court by allowing this appeal.

7. In response of the aforesaid arguments appearing counsel of the respondent no. 1 said that the findings of the appellate court for decreeing the suit are based on proper appreciation of the evidence and also is in conformity with law. The same do not require any interference at this stage. He also argued that this appeal is preferred against the money decree of Rs. 10,000 with interest. In view of the bar created by Section 102 of CPC this appeal could not be entertained under Section 100 of the CPC and prayed for dismissal of the appeal.

8. With respect of the objection of Section 102 of the CPC. The appellant's counsel submitted that this appeal was admitted by framing the substantial question of law before introducing the amended provision of Section 102 and such provision is not made enforceable with retrospective effect. Therefore such objection of the other side is not sustainable.

9. Having heard, I have gone through the record and the impugned judgment.

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10. It is true that after introducing the amended provision of Section 102 of the CPC w.e.f 1.7.02 no second appeal shall lie from any decree when the subject matter of the original suit is for recovery of money not exceeding Rs. 25,000. It appears from such amended Act that such provision has not been enforced with retrospective effect. Considering the aforesaid question on earlier occasions in the matter of *Food Corporation of India and another Vs. Munnilal Singh and another* reported in AIR 2003 Madhya Pradesh 66 . The same was answered by this court as under:-

“Now the question remains whether any appeal which was pending on 1.7.2002 will be governed by the aforesaid S. 102 of the Code of Civil Procedure. Code of Civil Procedure (Amendment) Act 2002 under relevant provision is S. 16 (2), which reads as under:-

“16 (2) Notwithstanding that the provisions of this Act have come into force or repeal under sub – sec (1) has taken effect, and without prejudice to the generality of the provisions of S. 6 of the General Clauses Act 1887:-

(a) the provisions of S. 102 of the principal Act as substituted by S. 5 of this Act shall not apply to or affect any appeal which had been admitted before the commencement of S. 5; and every such appeal shall be disposed of as if S. 5 had not come into force.”

The aforesaid clause provides that the appeals which are pending on 1.7.2002 and already admitted before commencement of S. 5 (substitution of S. 102) are to be disposed of as if S. 5 has not come into force.

11. In view of the aforesaid precedent of this court, on examining the case at hand, it is apparent that this appeal was filed on dated 14.2.1994 and the same was admitted by framing the substantial questions of law on 22.7.1994 long before introducing the new provision of Section 102 of CPC.

12. Even otherwise it is settled provision of law that right to appeal is always accrued by the parties on the very date of initiation the suit, claim or the proceeding in the trial court and such right could not be taken away from the parties unless the subsequent enactment is made by the legislature, for taking away such right of the parties. Such question was answered by the Supreme Court presided over by five Judges in the matter of *Garikapati Veeraya Vs. N. Subbish Choudhary and others* reported in AIR 1957 SC 540 (V 44 C 83 July in which it was held as under :-

23. From the decisions cited above the following principle clearly emerge:



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(i) That the legal pursuit of a remedy, suit appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vetted right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

24. In the case before us the suit was instituted on April 22, 1949 and on the principle established by the decisions referred to above the right of appeal vested in the parties thereto at that date and is to be governed by the law as it prevailed on that date that is to say, on that date the parties acquired the right, if unsuccessful, to go up in appeal from the sub-court to the High Court and from the High Court to the Federal Court under the Federal Court (Enlargement of Jurisdiction) Act, 1947 read with Cl.39 of the Letters Patent and Ss.109 and 110 of the Code of Civil Procedure provided the conditions thereof were satisfied. The question for our consideration is whether that right has been taken away expressly or by necessary intendment by any subsequent enactment. That respondents to the application maintain that it has been so taken away by the provisions of our Constitution.

13. In view of the aforesaid, it is held that the bar created under Section 102 of the CPC is not applicable to the present appeal, although the valuation of this appeal is below Rs. 25,000/-. Accordingly, the appeal is held to be maintainable.

14. Coming to consider the circumstances to answer the aforesaid framed substantial question of law, it is noted that on extending the opportunity to adduce evidence the plaintiff has examined as many as two witnesses Pradeep Kumar Poddar (PW-1), plaintiff himself and Suresh S. Sirali (PW-2), the Administrative Officer of the appellant- defendant no. 1.

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15. In the deposition of Pradeep Kumar Poddar (PW-1) he categorically stated that his earlier tender deposited with the earnest money of Rs. 34,000/- was not accepted. Thereafter he submitted the second tender with a prayer to adjust the earnest money from the amount of earnest money deposited for the earlier tender. By accepting such prayer his second tender was accepted. He further said that after accepting the tender when the work order was not issued then he gave a notice, Ex. P-1 dated 22.4.1982 to the appellant. The same was replied on by the defendant no. 14th May 1982, Ex. P-2 and thereafter he deposited Rs. 10,000/- with the Union Bank of India and also proved its certificate dated 8th February 1983 (Ex. D/3) showing such deposit with the bank on dated 21st May 1982. The aforesaid deposition of the plaintiff - respondent no. 1 shows that there were two different tenders submitted by him, out of which first tender was not accepted. He accepted the existence and averments of Ex. D-4 in para 7 of his cross examination, in which the terms and conditions of the tender and contract are mentioned. As per page no.2 of Ex. D-4 subsequent tender proceeding was floated on 20.2.1982. As per terms mentioned on page no. 9 of Ex. D-4 Rs. 10,000/- as earnest money was deposited by the respondent no.1. It is undisputed fact between the parties that such earnest money of Rs. 10,000 was adjusted at the request of respondent no.1 from the sum of Rs. 34,000 deposited as earnest money of the earlier tender. In such premises, it has been revealed that there were two different NIT, one was floated in the month of January 1982 and opened on 8th February 1982 and the second tender was floated on 20th February 1982 and opened on 22.3.1982. The case of the respondent no. 1 stating that the work order was not issued to him by the defendant no. 1, does not appear to be trustworthy as in para 6 of the deposition the plaintiff himself has admitted his signature on the work order dated 19.4.1982, Ex. D-2-A and modified work order dated 24.4.1982 Ex. D-1-A. Such admission of the plaintiff - respondent no. 1 by virtue of Section 58 of the Evidence Act is binding against the plaintiff. On perusing Ex. D-2-A and Ex. D-1-A. It is apparent that same were issued by the appellant to the plaintiff - respondent no.1 as work order to carry out the work. In compliance of the such direction of work order dated 19.4.1982 (Ex.D/2-A), when the work was not started then by Ex. D-1 dated 24.4.1982 in continuation of the earlier work order with some additional direction to perform the work was given to the respondent no.1. According to Ex. D-1-A the date of commencement of the work was directed to be reckoned from the 10th day of issuance of such subsequent work order and the contract period was fixed five months therefrom.

16. It appears from deposition of Suresh S. Sirali (PW-2), that before issuing the work orders, the amount of Rs. 34,000/- deposited as earnest money for the earlier tender was taken away in toto by the respondent no. 1 from the office of the appellant, but subsequently again Rs. 10,000 was deposited by the plaintiff on dated 21.5.1982 with the bank. Such witness further stated that subsequent to

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21.5.1982 issuance of fresh work order was not necessary as such Rs. 10,000 was deposited with respect of the earnest money for the accepted subsequent tender and also to rectify the mistake by which the entire sum of Rs. 34,000/- was taken away by the respondent no. 1.

17. Pradeep Kumar (PW-1) the plaintiff in para 7 of his deposition has categorically admitted that Ex. D-3 was written by him. As per endorsement on it the same was submitted in the office of the appellant on dated 21.5.1982 by the respondent no. 1. This letter was addressed to the General Manager of the appellant with a prayer to refund the earnest money and also shown respondent no. 1 his disability in performing the allotted work in following words:-

सेवा में,

श्रीमान जनरल मैनेजर डब्ल्यू.सी.एल पेंच एरिया

विषय :- सेटीया ट्रान्सपोर्ट की अर्नेस्ट मनी हेतु,

महानुमाव

मैंने दीघावानी का टेन्डर दिया था उसमें मुझे काम नहीं मिला उस पैसे को मैंने वापस ले लिए उसी के साथ मेरा सेटीया का पैसा भी जमा था मुझे वह भी मिल गया सो मैं सेटीया की अर्नेस्ट मनी वापस कर रहा हूँ जिसका नम्बर (सी 204054).

मैं कीसी कार्य बस यहां ट्रांसपोर्ट का कार्य (डम्पर वाले के भाग जाने से) नहीं कर सकता इस कारण मेहरवानी कर मेरा मुझे अर्नेस्ट मनी वापस की जाए।

प्रदीप कुमार

18. The aforesaid letter itself shows that the plaintiff submitted his tender for Dighawali Mines but that work was not allotted to him on which he took away his earnest money deposited with respect of such earlier tender but money kept with respect of the earnest money of subsequent tender was also taken by the respondent no. 1. Thereafter he again deposited such earnest money. It shows that the plaintiff himself has bonafidely deposited the earnest money of Rs. 10,000 with respect of subsequent tender to rectify the mistake as the same was withdrawn under some mistake. The aforesaid letter further speaks that due to some reason the plaintiff can not carry out the allotted work as his Dumper Contractor had run away and also he prayed to refund his earnest money. Looking to the language of this letter the only inference can be drawn that the plaintiff - respondent no. 1 had not started the work allotted by Ex. D-1-A and D-2-A and thereafter even after depositing the earnest money again on dated 21.5.1982 he disclosed his incapacity to carry out the allotted work that is why he prayed the appellant for refunding the earnest money. According to the term no. 20 of the tender if the work is not carried out in terms and conditions of the tender and the work order then appellant has a right to forfeit the earnest money.

19. As per terms of the contract and the tender mentioned in Ex. D-4, on

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failure of the respondent no. 1 to perform the contract the appellant had a right to forfeit the deposited earnest money and in such premises the approach of the trial court appears to be just and proper by which the suit of the respondent no. 1 was dismissed but on appeal, the appellate court has committed error in decreeing the suit against the appellant on reconsideration. Such approach of the appellate court is not sustainable and liable to be set aside.

20. It is settled proposition of law that the plaintiff is bound to prove his case on his own leg. He can not get the advantage of any weakness of the defendant for getting the decree in his favour. Although in the present matter no witness has been examined on behalf of the present appellant – defendant no. 1, but merely on this ground no adverse inference could be drawn against the appellant for setting aside the finding of the appellate court holding the letter, Ex. D/3 to be related with suit transaction and not with any other transaction. In view of Section 58 of Evidence Act on taking into consideration the admission of the respondent no. 1 in his deposition with respect of Ex. D/3 the approach of the appellate court about this document do not appear to be contrary to the admission of respondent no. 1.

21. In the aforesaid premises, the framed question is answered, accordingly holding that there were two different tenders were submitted by the respondent no. 1 out of which his first tender was not accepted while the second tender of the plaintiff was accepted on 22.3.1982 and in connection of this second tender, Ex. D-3 letter was submitted by the respondent no. 1 in the office of the appellant stating that he could not carry out the allotted work, on which the earnest money of Rs. 10,000 was forfeited by the appellant as per term no. 20 of the tender mentioned at the backside of page no. 4 of Ex. D/4. In such premises, the respondent no. 1 did not have right to get refund of the earnest money of Rs. 10,000/-.

22. In view of the aforesaid, answer of the question the judgment and decree passed by the appellate court deserves to be and is hereby set aside and the judgment and decree of the trial court dismissing the suit of respondent no. 1 is hereby restored. The respondent no. 1 shall bear his own cost of this litigation and also pay the costs of the respondent no. 1 throughout. The counsel fee is quantified as per schedule. In pursuance of this judgment, the appellant shall be entitled to get refund the sum alongwith the interest at the prevalent banking rate from the date of payment till its realization from the respondent no. 1, if the same was deposited by the appellant under direction or execution of the impugned decree and withdrawn by the respondent no. 1. The decree be drawn up accordingly.

23. The appeal is allowed with aforesaid observation as indicated above.

*Appeal allowed.*

**MANISH NEMA Vs. SANDHYA NEMA**

I.L.R. [2009] M. P., 2057

**APPELLATE CIVIL***Before Mr. Justice Arun Mishra & Mr. Justice Sanjay Yadav*

22 January, 2009\*

**MANISH NEMA**

... Appellant

Vs.

**SANDHYA NEMA**

... Respondent

**Hindu Marriage Act (25 of 1955), Section 27, Civil Procedure Code, 1908, Section 151, Order 7 Rule 7 - Suit for return of Stridhan - Decree of divorce granted - Thereafter, respondent instituted suit for return of Stridhan u/s 27 of the Act & O. 7 R. 7 r/w S. 151 CPC - Submissions put forth that such powers can be exercised by the matrimonial Court and not in a proceeding subsequently initiated - Held - O. 7 R. 7 r/w S. 151 CPC permits a Court in passing a decree in favour of wife or husband as the case may be for return of the property, which may exclusively belong to either of them - There is no provision under the Act which bars the application of O. 7 R. 7 CPC - Suit maintainable - Appeal dismissed.** (Paras 11 & 12)

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

**Cases referred :**

AIR 1996 SC 227, AIR 1985 SC 628, AIR 1962 SC 527, AIR 1972 All 153, AIR 1994 Bombay 1.

*Vijay Nayak*, for the appellant.

*Hemant Shrivastava*, for the respondent.

**ORDER**

The Order of the Court was delivered by **SANJAY YADAV, J.** :- In the present appeal preferred under section 28 of the Hindu Marriage Act, 1955 the appellant seeks quashment of judgment & decree dated 24.9.2007 passed in Civil Suit No. 55/2007; whereby the trial Court allowed the application preferred under section 27 of the Act of 1955 read with Order 7 Rule

**MANISH NEMA Vs SANDHYA NEMA**

7 of the Code of Civil Procedure and section 151 of CPC preferred by the respondent/plaintiff.

2. Bonding of nuptial rights to which the appellant and respondent were knotted on 16.5.2003 got separated when the marriage was declared a nullity under section 12(1) (c) of the Act in the proceedings initiated by the respondent when a divorce decree was passed on 12.1.2005.

3. Prompted by the provisions under section 27 of the Act and Order 7 Rule 7 Code of Civil Procedure read with section 151 CPC the respondent instituted a suit in the Court of Ist Additional District Judge Narsinghpur, claiming return of gold and silver ornaments and other articles given as gifts by her parents and relatives at the time of marriage or in alternative recovery of Rs.1,36,875/- in lieu of 18.25 Tola gold ornaments, Rs.11,220/- in lieu of silver ornaments and Rs.58,569 in lieu of articles like almirah, dressing table, cooler, television set etc. The total amount for which the suit was preferred was Rs.2,06,664/-.

4. Evidence and counter evidence were led and trial Court after appreciating the same came to uphold the respondent's entitlement for the articles and one gold necklace (3 tola), four gold bangles (1 tola), one set earnings (0.25 tola), three gold finger rings (0.50), mangalsutra (1 tola) and two pairs of silver anklets (payals) (20 tola each). The suit was decreed in the terms that the appellant shall return to respondent the aforesaid ornaments and articles or in lieu thereof should pay the amount in terms of money at the market rate prevalent at the relevant time after deducting the 'batta'.

5. Appellant criticises the order on the anvil that the trial court exceeded its jurisdiction inherent under section 27. The trial court, it is urged, ought to have held the property in question to be a joint property and ought not to have entertained the petitioner under section 27 of the Act of 1955.

6. The respondent on its turn supports the impugned order and claims that the trial Court did not err in decreeing the suit in her favour, rightly holding her right there over being the Stridhan.

7. Section 27 of the Hindu Marriage Act of 1955 provides for that "In any proceeding under this Act, the Court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which, may belong jointly to both the husband and the wife".

8. Fair reading of the aforesaid provision reveals that it is applicable in respect of the property received at or about time to marriage, which may belong jointly to both husband and wife. It empowers the court while deciding the matrimonial dispute to also pass decree in respect of property which may jointly belong to both husband and wife. It provides the civil remedy to an aggrieved wife or husband as the case may be.

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9. The submissions put forth by learned counsel for the appellant that such powers can be exercised by the matrimonial Court in a matrimonial dispute and not in a proceeding subsequently initiated under section 27 under Order 7 Rule 7 of the Code of Civil Procedure read with section 151 of the CPC.

10. The submissions of the learned counsel for the appellant loses its hold in wake of judgments rendered by the Division Bench of this Court in *Nirmala Gupta V. Ravendra Kumar* : AIR 1996 SC 227. Wherein placing reliance on judgments rendered by the Supreme Court in *& Prathibha Rani V. Suraj Kumar* : AIR 1985 SC 628 and *Manohar Lal Chopra V. Rai Bahadur Rao Raja Seth Hiralal* : AIR 1962 SC 527, and the judgment rendered by the High Court of *Allahabad and Bombay Kamta Prasad V. Smt. Om Wati* : AIR 1972 All 153 & *Sangeeta Balkrishna Kadam V. Balkrishna Ramchandra Kadam* : AIR 1994 Bombay 1 it was observed that provision under section 151 read with Order 7 Rule 7 of CPC permits a court in passing a decree in favour of wife or husband as the case may be for return of the property, which may exclusively belong to either of them.

11. For the sake of completeness we note with profit paragraph 12 of the judgment referred in *Nirmala Gupta* (supra) " It may be noted that the Act is a special enactment governing the matrimonial proceedings between the parties. Section 4(1) of the Code of Civil Procedure reads as under:- "4. Savings.-(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law not in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force."

From this provisions, it is clear that the procedure prescribed by the special law will not be limited by the Code of Civil Procedure. However, the Act itself adopts the CPC so far as it is applicable in the matrimonial proceedings under the Act and, therefore, all the provisions of the CPC will be applicable to the matrimonial proceedings under the Act. Section 151 read with Order VII, Rule 7 of the Code of Civil Procedure will also be made applicable because there is no provision under the Act which bars the application of these provisions of the CPC. Order VII, Rule 7 of the Code permits the Court to grant such relief not prayed for as would be just under the circumstances of the case".

12. Having thus considered we do not find any substance in the submission put forth on behalf of the appellant that trial court acceded its jurisdiction inherent under section 27 of the Act of 1955 or that it committed any error in allowing the application for return of ornament and furniture.

13. In the result, the appeal is dismissed. Parties to bear their own costs.

*Appeal dismissed.*

**DANPATI ADDHAHAT BHANDAR V. GHANSHYAM DAS AGRAWAL**

I.L.R. [2009] M. P., 2060

APPELLATE CIVIL

Before Mr. Justice K.K. Lahoti

20 March, 2009\*

**DANPATI ADDHAHAT BHANDAR**

... Appellant

Vs.

**GHANSHYAM DAS AGRAWAL**

... Respondent

**A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f)**  
*- Bona fide requirement - Suit was filed in the year 1976 for bona fide requirement for starting wholesale business of grain - Subsequently by amendment, nature of business was shown as Khali, Chuni, Bhusa and Kirana - Held - It cannot be said that there was some mala fide on the part of plaintiff or was not entitled to change the nature of business which was initially pleaded by him - Appeal dismissed.* (Para 8)

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

**B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f)**  
*- Alternative accommodation - Plaintiff allowed his son to start business in a small shop which was unsuitable for wholesale business of plaintiff - Held - Permitting his own son to start business was a natural act of plaintiff in which no fault can be found - It is not a case that the plaintiff let out the shop to some other person.* [Para 9(ii)]

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) - वैकल्पिक स्थान - वादी ने अपने पुत्र को एक छोटी दुकान, जो वादी के थोक कारोबार के लिए अनुपयुक्त थी, में कारोबार प्रारम्भ करने की अनुमति दी - अभिनिर्धारित - अपने पुत्र को कारोबार प्रारम्भ करने के लिए अनुमति देना वादी का स्वाभाविक कृत्य था जिसमें कोई त्रुटि नहीं पायी जा सकती - यह मामला नहीं है कि वादी ने दुकान किसी अन्य व्यक्ति को किराये पर दी।

**C. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(b)**  
*- Sub-letting - Shop let out to partnership firm - 'S' inducted as partner later on - Partnership dissolved in 1986 and thereafter 'S' exclusively carrying on his business - Original partners started their own business at different places having no control over the business of 'S' - Plaintiff entitled for decree u/s 12(1)(b) of Act - Cross-objection allowed.* (Para 15)

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(बी) -



**DANPATI ADDHAHAT BHANDAR Vs GHANSHYAM DAS AGRAWAL**

उपभाडेदारी - दुकान भागीदारी फर्म को किराये पर दी गई - बाद में 'स' को भागीदार के रूप में शामिल किया गया - भागीदारी वर्ष 1986 में विघटित हो गयी और उसके बाद 'स' अनन्य रूप से अपना कारोबार चलाता रहा - मूल भागीदारों का 'स' के कारोबार पर कोई नियंत्रण न होकर उन्होंने अपना कारोबार विभिन्न स्थानों पर प्रारम्भ कर लिया - वादी अधिनियम की धारा 12(1)(बी) के अधीन डिक्री का हकदार - प्रत्याक्षेप मंजूर।

**Cases referred :**

1971 MPLJ 232, 1972 JLJ 127, 1991 MPLJ 140, AIR 1987 SC 1782, AIR 2004 SC 4289, AIR 1977 SC 2262, (2005) 8 SCC 252, (2004) 4 SCC 794, AIR 1998 SC 3214, 1971 MPLJ 232.

*A.D. Deoras with R.K. Jaiswal, for the appellant.*

*R.S. Tiwari, for the respondent.*

**J U D G M E N T**

**K.K. LAHOTI, J. :-**The defendant has filed this appeal challenging the judgment and decree dated 21.11.2001 in Civil Appeal No. 84A/2000 by 10th Additional District Judge, Jabalpur by which the suit of plaintiff/respondent for eviction under section 12(1)(f) of the M.P. Accommodation Control Act, 1961 [hereinafter referred as the Act] was decreed, by reversing the judgment and decree dated 12.5.2000 in Civil Suit No. 3A/98 by 4th Civil Judge, Class I, Jabalpur dismissing the suit of respondent.

2. This appeal was admitted on 21.3.2002 on the following substantial question of law :-

"1. Whether in the facts and circumstances of the case the findings recorded by the learned first appellate Court that the respondent is able to prove his bonafide need for non-residential purpose and that he has no other suitable accommodation for the purpose within the town of Jabalpur is perverse and arbitrary as the respondent has been changing his versions from time to time and further that he was having alternative accommodation also within the town?

3. Thereafter on notice of the appeal the respondent preferred cross-objections under Order 41 Rule 22 of the Code of Civil Procedure, 1908 [hereinafter referred as the Code] challenging the findings of the Appellate Court so far as it relates to non grant of decree of eviction under section 12(1)(b) of the Act. In this appeal on 25.11.2008, one more substantial question of law, on the basis of cross-objection preferred by the respondent, was framed which reads as under:-

" Whether the Court below has committed an error in refusing to grant a decree under Section 12(1)(b) of the M.P. Accommodation Control Act, 1961 and the finding recorded in this regard is perverse?"

**DANPATIADDHAHAT BHANDAR Vs. GHANSHYAM DAS AGRAWAL**

4. The judgment and decree passed by the appellate Court were assailed by the appellant on the following grounds :-

(i) That the plaintiff changed his stand time to time by various amendments in the plaint. Initially suit was for whole sale business of grains but in the year 1986, the plaintiff amended the plaint by changing the ground as whole sale business of Khali, Chuni, Bhusa and Kirana[oil cake, small pieces of grains, straw/husk and grocery]. Again in July 1986, plaintiff amended the plaint by pleading that he had not got shop vacated by Gopaldas Shyamsunder. On 17.2.1998, the plaintiff pleaded that the disputed premises were required by him for the aforesaid business and its godown. On 30.7.1990, the plaintiff pleaded that Gopaldas Shyamsunder had vacated the shop in which his son Satish had started his business. By these pleadings, earlier version of the plaint was changed and a new case was pleaded by the plaintiff which shows malafide on the part of the plaintiff and in absence of bonafide, the plaintiff was not entitled for decree of eviction under section 12(1)(f) of the Act. That in the same house, the plaintiff was having a godown for his storage, but the plaintiff pleaded that the said godown belongs to his father and after his death, as per the will of the father it was succeeded by his mother, from whom he took it on tenancy at the rate of Rs.1000/- per month.

(ii) That the first floor of the house was in possession of the plaintiff which could have been used for godown. Earlier a tenant namely Barar Oil Mill was in occupation of the first floor for its office and depot which now can be used by the plaintiff for his necessity.

(iii) That in Ex.D/1, the plaintiff had shown two godown in his possession so in fact there was no necessity to the plaintiff of the disputed accommodation. Apart from this, the plaintiff got vacant possession of a shop during the pendency of the suit which could be utilized by the plaintiff for his need but in place of using it, the plaintiff started shop for his son, in the name of G.K. Traders, this act by itself was sufficient to dismiss the suit. He referred the statement of P.W.-1 Buddhulal, P.W.-2 Ghanshyam in support of his contention that the plaintiff was possessing various accommodations for his alleged need. He also referred para 16 of the judgment of lower appellate Court to show that infact alternative accommodations were available to the plaintiff for his alleged need. It was submitted that in fact there was no need to

**DANPATIADDHAHATBHANDAR V. GHANSHYAMDAS AGRAWAL**

the plaintiff and the appellate Court erred in decreeing the suit of plaintiff/respondent.

5. (i) Shri R.S.Tiwari, learned counsel for plaintiff/respondent supported the judgment and decree of the appellate Court and submitted that the plaintiff was carrying on his business alongwith his brother in the tenanted premises of Municipal Corporation, Jabalpur and required the suit accommodation for starting his own business. The plaintiff had decided not to continue his business alongwith his brother and wanted to start his own business in the suit accommodation. The appellate Court after appreciating the evidence recorded a finding that the suit accommodation was required by the plaintiff for starting his business of cattle food and grocery. The disputed premises contain one shop and godown which are interconnected and are one accommodation. The defendant was carrying on his business of whole sale. It was submitted that each and every accommodation as shown in para 16 of the judgment was considered by the appellate Court and found that the aforesaid accommodations were not available to the plaintiff as an alternative accommodation.

(ii) Apart from supporting the aforesaid findings the respondent assailed the findings of the both Courts on the ground that on 1.10.1971, the suit premises were let out to the partnership firm M/s Danpati Addhahat Bhandar of which partners were Shikharchand Jain and Ravi Chand Jain but subsequently on 1.9.1972, Sunil Kumar Jain was inducted as new partner w.e.f. 19.10.71. In the year 1986 partnership was dissolved and both the partners who were partners of the firm on 1.10.1971 retired from the partnership and the disputed premises continued in possession with Sunil Kumar Jain as the proprietor of Danpati Adhahat Bhandar. Since 1986, the possession of the suit accommodation was with Sunil Kumar Jain who was not partner at the time of creation of tenancy and both the original partners had retired from the firm since 1986. So the tenant had parted with the possession of the suit premises to Sunil Kumar Jain in the capacity of proprietor of Danpati Addhahat Bhandar and it was sublet within the purview of Section 12(1)(b) of the Act for which no permission was sought by the tenant from the plaintiff. Reliance was placed to the judgment of this Court in *Trilok Singh vs. Ram Prasad and another* [1971 MPLJ 232], *Bajinath vs. State of M.P. & others* [1972 J.L.J. 127] and *Kirti Narayan Agrawal vs. Satyanarayan Rathi and others* [1991 MPLJ 140].

6. In reply to the aforesaid contention, Shri Deoras, learned senior Advocate submitted that Sunil Kumar was inducted in the partnership firm in the year 1972 w.e.f. 19.10.71, he continued as partner of the firm till 1986. In the year 1986 earlier two partners retired from the firm and the firm business continued with Sunil Kumar Jain, so it was not a case of subletting but the partnership firm was dissolved and one partner had continued with the business of firm. Reliance was placed on *Helper Girdharbhai vs. Sayed Mohamad Mirasaheb Kadri* [AIR

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1987 SC 1782] and *Mahindra Saree Emporium vs. G.V.Srinivasa Murthy* [AIR 2004 SC 4289] and submitted that both the court below rightly dismissed the suit of the plaintiff/respondent, so far as it relates to ground enumerated under section 12(1)(b) of the Act, in which no interference is needed from this Court.

7. To appreciate the rival contention of the parties, it would be appropriate if the factual position in this case may be seen.

(i) The plaintiff filed the suit on dated 26.11.1978 before the Second Civil Judge, Class I, Jabalpur for evicting the appellant from the suit accommodation which is a shop and adjoining godown shown in the map enclosed to the plaint with green colour. The suit premises were let out to the defendant on 1.10.1971 at the rate of Rs.500/- p.m. Except the suit premises remaining non residential portion of the ground floor was in possession of the other tenants. The defendant was carrying on his business from the shop shown as क,ख,ग,घ where he was having his Gaddi and remaining portion of the tenanted premises was used as godown. The plaintiff was carrying on his business in the partnership with his brother in the tenanted premises of Municipal Corporation, Jabalpur. He was not interested in continuing his business with his brother and wanted to start his own business of cattle food and grocery. The plaintiff was not having any other accommodation for his whole sale business. The plaintiff was having sufficient capital and experience for the business and for this purpose the suit accommodation was required by the plaintiff.

(ii) The suit accommodation was let out to Danpati Addhahat Bhandar through its partners Shikharchand Jain and Ravi Jain for godown of grains but these partners had closed their business of grains. Shikharchand Jain was carrying on his exclusive business of tube well drilling from Gole Bazar, Jabalpur, while Ravi Chand Jain started his business of Daal Mill at Richai. By this way the business of defendant partnership had closed and the partners of the firm without permission of the plaintiff sublet the premises to Sunil Kumar Jain in which he was carrying on his Cattle food business in the name of Danpati Addhahat Bhandar. On this ground a decree of eviction was also sought under section 12(1)(b) of the Act. Though the suit was filed on other grounds enumerated under section 12(1)(c) and (d) of the Act also but it is not necessary to refer the aforesaid grounds in this second appeal, as these are now not relevant. A notice was issued by the plaintiff on 20.8.1979 by which the tenancy was determined. The

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defendant in the reply of notice denied all the facts of the notice so the suit was filed before the trial Court on 26.11.1998.

(iii) The defendant in the written statement admitted that the tenancy was at the rate of Rs.500/- per month since 1.10.1971, except this all other grounds pleaded in the plaint were denied. At the time of entering into tenancy, Sunil Kumar was the partner of the firm. At that time the partnership was changed but after dissolution of partnership, Sunil Kumar was carrying on his business in the suit premises. Sunil Kumar's possession in the suit premises was continuing since the inception of the tenancy and he was carrying on his business, so the ground of sub tenancy was denied and explained by the defendant. The defendant also pleaded that the plaintiff was carrying on his business in three big shops of Municipal Corporation, Jabalpur. Apart from this, he possessed a big house at Nivarganj. He was having his Gaddi and go down. The ground of eviction of bonafide necessity was changed from time to time by the plaintiff. The plaintiff never did Cattle food and Kirana business. The plaintiff can also start his business in the shop occupied by the plaintiff from the Municipal Corporation, Jabalpur. Apart from this the plaintiff was having one shop and godown adjoining to the suit accommodation. During the pendency of the suit, one shop was let out by the plaintiff to a jaggery merchant.

(iv) The trial Court framed the issues and after recording evidence dismissed the suit of the plaintiff on the ground that the suit accommodation was not required by the plaintiff for his business. There was no sub-tenancy by the defendant.

(v) The appellate Court after re-appreciating the evidence found in para 9 of the judgment that on 1.10.71, Sunil Kumar was not partner of the firm, he was minor. He was not the son of Shikhar Chand Jain or Ravi Chand Jain but he was inducted as a partner vide partnership deed dated 1.9.72 w.e.f. 19.10.71. The original partners of the firm Shikhar Chand and Ravi Chand were not partners of the firm since 1986. Both the partners were carrying on their own independent business which was not the business of the firm. As the induction of a new partner in the firm cannot be treated as sub tenancy, so induction of Sunil Kumar in the partnership was not sub-tenancy and on this ground, the ground under section 12(1)(b) of the Act was not found proved.

(vi) So far as the ground under section 12(1)(f) of the Act

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is concerned, the appellate Court in para 15 of the judgment recorded the findings that the plaintiff was carrying on his business in three shops of the Corporation on tenancy. One godown in Krishi Upaj Mandi, Damoh Naka, one shop 10' x 20' in the suit premises, a common passage of 8'x50' and the first floor of the suit premises were in his possession. Apart from this the plaintiff was in possession of a godown which fell into the share of his father. The appellate Court considered all the aforesaid accommodation in para 20 of the judgment and found that in the tenanted shops of Municipal Corporation, plaintiff alongwith his brother was carrying on his business. The said accommodations were not belonging to the plaintiff. The plaintiff was entitled to start his business in the premises owned by him. The shop which was vacated by another tenant was occupied by the son of the plaintiff in which he was carrying on his business in the name of G.K. Traders. The common passage cannot be used for the business. The passage was utilized to use the staircase for the first floor. The first floor of the suit house was not a non-residential accommodation. It was never in possession of any tenant for non-residential purposes. On the aforesaid grounds the appellate Court found that the plaintiff was not possessing any suitable alternative accommodation for his whole sale business. In para 16 to 19 of the judgment, the appellate Court considered the bonafide necessity of the plaintiff for starting his business of Cattle food and grocery and found that the aforesaid bonafide necessity was proved. On the aforesaid grounds the appellate Court decreed the suit.

8. Now the first contention of the appellant in respect of various amendments in the plaint may be looked into. It is true that in the plaint, the plaintiff initially pleaded necessity to start his wholesale business of grain but subsequently nature of the business was shown as Khali, chuni, bhusa and kirana [cattle food and grocery] business. This amendment was incorporated on 10.2.1986. Thereafter though various amendments were made in the plaint but without changing the necessity as was pleaded on 10.2.1986 by the plaintiff. The suit was filed long back on 26.11.79 and if during the pendency of the suit, the plaintiff decided to start his business of cattle food and grocery, in place of grain, it cannot be said that there was some malafide on the part of the plaintiff or he was not entitled to change the nature of the business which was initially pleaded by him. A period of nearabout 30 years have elapsed since the date of filing of the suit and if during these periods, circumstances changed then the plaintiff was entitled to plead and prove such changed circumstances. After filing of the suit, if the plaintiff decided

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to start his business of cattle food and grocery and specifically pleaded this fact in the plaint and deleted earlier pleaded business of grain, no fault can be found. It is a settled law that the bonafide necessity should continue from the date of filing of the suit till the final decree is passed. In this case the plaintiff's necessity was to start his business in wholesale which was initially pleaded by the plaintiff in the plaint. Only by change of business from grain to cattle food and grocery, it cannot be said that necessity was not bonafide. The plaintiff in changed circumstances immediately amended the plaint and proved the necessity for starting his business of cattle food and grocery, the choice of plaintiff is to be given effect to and merely change of item of the business during the pendency of the suit, before commencement of the evidence, cannot be treated to be a malafide necessity of the plaintiff. In these circumstances if the appellate Court found that the necessity was bonafide, no fault is found

9. (i) So far as alternative accommodations are concerned, the plaintiff got the suit premises as per the partition deed dated 24.10.78 by which the suit premises were felt in the share of the plaintiff. By the same partition, the premises which fell into the share of father of the plaintiff were subsequently bequeathed in favour of the mother of the plaintiff, Ramwati by will dated 2.1.81. But eventually after the death of Ramwati, said premises would be succeeded by Gopaldas. The will of the father is on record as Ex.P-7[c], so in view of the will executed by the father of the plaintiff, the plaintiff was not entitled to get any right in the adjoining house. The plaintiff obtained said godown from his mother on tenancy, and in this regard the appellate Court recorded its satisfaction that the said godown was on tenancy, let out by the mother to the plaintiff. In view of the aforesaid facts, if the appellate Court found that the said godown was not of the plaintiff and cannot be treated as an alternative accommodation to the plaintiff, in the said findings no fault is found.

(ii) So far as the adjoining shop of the accommodation in which plaintiff's son Satish had started his business in the name of G.K. Traders is concerned, it was a shop of dimension of 10'x20' which was unsuitable for the wholesale business of the plaintiff. If the plaintiff in place of starting his business in a small accommodation permitted his own son Satish to start his business, who infact started his business and was carrying on his business, it was a natural act of the plaintiff in which no fault can be found and on this ground the plaintiff cannot be non-suited. It is not the case of the defendant that after getting possession of the shop from M/s Gopaldas Shyamsunder, the shop was let out to some other person but the plaintiff had permitted his son Satish to start his business. If during the pendency of the suit the plaintiff's son becomes major and started business in the said shop, no fault is found. The plaintiff was awaiting for the accommodation since last 30 years to start his business. At the time when this shop was vacated by Gopaldas, plaintiff's son was major and he started his business in the said shop,

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in which no malafide is found and the plaintiff cannot be non-suited merely on this ground. So far as the first floor of the house is concerned, it is a residential house. Apart from this, no prudent man will keep his godown on the first floor. The cattle food and grocery are the heavy articles and first floor cannot be said to be a suitable place for their storage as godown. Every time such material has to be lifted to the first floor for storage. In this case there was no evidence that earlier the said portion was utilized by any other tenant for non-residential purposes. In absence of this a residential portion of the house that too of the first floor cannot be said to be an alternative accommodation for the wholesale business of the plaintiff. So far as the shops of Municipal Corporation and one godown of Krishi Upaj Mandi, which were shown in Ex.D/1 are concerned, tenanted shop or godown cannot be said to be an alternative accommodation. While considering the bonafide necessity, the premises owned by the landlord can be taken into consideration and not rented shops. The Apex Court in *Chandra Kali Bali vs. Jagdish Singh Thakur* [AIR 1977 SC 2262] considering this aspect held that the decree of eviction can be refused only if the landlord is in occupation of his own premises and not of rented shops. In the present case, to consider the bonafide necessity of the plaintiff, rented premises from Municipal Corporation, Jabalpur, Krishi Upaj Mandi and from Ramwati Bai, mother of the plaintiff cannot be treated as an alternative accommodations. The appellate Court rightly held that the aforesaid accommodation cannot be treated as an alternative accommodation for the necessity of the plaintiff and rightly decreed the suit.

In view of the aforesaid discussions, if the appellate Court considering the entire evidence, decreed the suit of the plaintiff on the basis of such findings, no fault is found. See *Sait Nagjee Purshotham & Co. Pvt. Ltd. vs. Vimlabai Prabhulal* [2005 Vol.8 SCC 252].

10. Now the second substantial question of law which has been framed on the basis of cross-objections preferred by the respondent may be considered. In this case factual position was not in dispute that on dated 1.10.71 Sunil Kumar was not the partner of the firm M/s Danpati Adhahat Bhandar. He was subsequently inducted as a partner. He was not a close relation of the then partners Shikharchand Jain and Ravi Chand Jain. He was introduced in partnership firm on 1.9.72 for which no permission was obtained by the tenant from the landlord. Subsequently in the year 1986, partnership dissolved and original two partners Shikharchand and Ravi Chand retired from the firm and the partnership firm came to an end. Though Sunil Kumar who was subsequently inducted as a tenant, continued with the business but as a proprietor of the said firm. In view of the aforesaid factual position the legal position may be looked into. The Apex Court considered this aspect in *Parvinder Singh vs. Renu Goutam* [2004 Vol.4 SCC 794] held thus:-

"8. To defeat the provisions of law, a device is at times adopted by unscrupulous tenants and sub-tenants of bringing into existence



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a deed of partnership which gives the relationship of tenant and sub-tenant an outward appearance of partnership while in effect what has come into existence is a sub-tenancy or parting with possession camouflaged under the cloak of partnership. Merely because a tenant has entered into a partnership he cannot necessarily be held to have sublet the premises or parted with possession thereof in favour of his partners. If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or/or providing a cloak or cover to conceal the transaction not permitted by law, the Court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant."

11. In this case the documentary evidence produced by the parties may be looked into. Initially partnership deed between the partners is not on record but rent note Ex.P-6 was between the plaintiff Ghanshyam das and M/s Danpati Addhahat Bhandar, and was signed by Shikharchand, Ravi Chand as partners of the said firm. The aforesaid rent note Annexure P-6 specifically provides that the tenants shall not be entitled to create sub tenancy. This document was executed on 1.10.71. The defendant had produced the partnership dated 1.9.72 Ex.D/6 on record by which Sunil Kumar minor was introduced in the partnership firm as a partner in profit, only of 25% and the said partnership was treated to be effective from 19.10.71. Rs.10,000/- were deposited by Sunil Kumar in the partnership while the capital of Shikharchand was Rs.97,945.93p and the capital of Ravichand was Rs.28,321.38p. Thereafter the partnership was dissolved but the deed of dissolution is not on record. This dissolution took place in the year 1986 and as per the defendant, Shikharchand and Ravichand both retired from the partnership, started their own business since 1986 and the entire business in the suit accommodation was carried on by Sunil Kumar. In this regard the statement of DW-4 Shikharchand may be looked into who specifically admitted that he was receiving Rs.3000/- per month from Sunil Kumar out of which he was depositing Rs.500/- per month in the Court. See para 35 of his statement. He further admitted that in his name Rs.3000/- p.m. was debited as a salary but denied that it in fact it was rent. He had also admitted that now the proprietor of the firm was Sunil Kumar and he was not doing any work for the firm. In para 32 of his statement he stated that he was taking care of the sale tax, income tax work of

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the firm for which he was getting salary from the firm but no such document was produced that infact he was taking care of the accounts of the firm or was filing return of the firm in sales tax and income tax. DW.1 the Additional Commercial Tax Officer N.K. Verma had appeared as the witness but he had also not stated anything that after 1986, Shikhar chand had appeared on behalf of the firm in the assessment. The burden was on the defendant to prove all these facts. Sunil Kumar had appeared as DW-5 in the witness box. He stated that Shikharchand was taking care of the business and he was paid Rs.3000/-p.m. salary. In para 10 of his statement he had admitted this fact that Shikharchand had brought up him and also arranged his education. He cannot even dream to engage Shikharchand as servant. He further admitted this fact that Shikharchand was paid Rs.3000/-p.m. because he helped him and gave shop to him. He admitted that the aforesaid amount was paid to him in lieu of the shop given to him but in the accounts this amount was shown as salary because the shop belongs to him. The aforesaid facts show that after dissolution of the firm in the year 1986, Shikharchand was carrying on his own separate business but was getting Rs.3000/-p.m. from Sunil Kumar. No document showing the fact that Shikharchand was filing return of income tax or sales tax and was actively engaged in the business of the firm was filed on record. After dissolution of the firm in 1986, Shikharchand was not in the possession of the shop and entire business was taken care of by Sunil Kumar though in same name M/s Danpati Adhahat Bhandar. Once the original tenant had lost his control on the shop and handed over its possession to a third person who was not a partner at the time when the shop was let out, the act of the defendant certainly falls within the purview of sub letting the suit accommodation by parting with possession. After the original tenant had lost his control over the shop and handed over to a third person, a case of sub letting was made out. The Apex Court in *Permindar* (supra), considering the situation held that merely because the tenant had entered into a partnership, he cannot necessarily be held to sub let the premises or parted with possession to his partner. If the tenant was actively associated with the partnership and keep a control over the tenanted premises with him, may be alongwith the partners, the tenant may not be said to be parted with the possession. But if the control of the tenant accommodation has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration of creation of sub tenancy or for providing the cloak or cover to conceal a transaction is not permitted by law. The Court has not estopped from tearing the veil of partnership and finding out the real nature of transaction, entered into between the tenant and the alleged sub-tenant.

In *Mohammedkasam Huji Gulambhai vs. Bakerali Fatehali* [AIR 1998 SC 3214] in similar circumstances where the accommodation was a shop, let out to a tenant, the tenant entered into a partnership with his four sons for carrying on

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the business of sale of medicines in the suit premises and a partnership deed was executed between them. The partnership was at will and under Cl.(7) thereof, it was provided that "only the tenant-father will be the exclusive proprietor and owner of the goodwill of the business, place of the business and all other rights of the business". Subsequently a new partnership deed between two sons of the tenant was executed and in terms thereof the tenant-father and his two other sons retired from the business of the partnership. Various clauses of the new partnership deed clearly showed that after the tenant-father retired from the earlier partnership he was to have no concern, right, title or interest in the new partnership which was now carrying on business in the suit premises, though in the same name. The rent was also paid by one of the two partners of the new partnership. The landlord filed a suit for eviction on ground of sub-letting. On the ground of sub-letting, considering the aforesaid circumstances, the Apex Court held that under the new partnership it was the sons of the tenant-father who were in complete control of the suit premises and were exercising exclusive possession for the same to the exclusion of the tenant-father. That tenant-father would occasionally visit the shop premises does not advance the case that he (tenant-father) could exercise his rights over the shop premises. He had handed over the shop premises to his sons who were exercising their independent right over the same and conducting their business thereat. The tenant-father had completely divested himself of the suit premises as well as the business. The landlord was therefore entitled to a decree of eviction. The law of the Apex Court in *Mohammedkasam* (supra) is fully applicable in the present case.

13. A Single Bench of this Court in *Trilok Singh vs. Ramprasad and another* [1971 MPLJ 232] considering the similar question in which the suit premises was let out to A in which he started assembling sewing machines for sale under a trade name. He entered into partnership with T and the firm was enlisted as small scale manufacturing unit. On dissolution of partnership A retired and business was taken over by T as his proprietary concern. In a suit by landlord for ejection on the ground, inter alia, that the tenant had sub-let the accommodation to T, the latter pleaded that the privity of contract was brought about by reason of the landlord's acquiescence in the transfer of the premises on the dissolution of the partnership. The assent of the plaintiff was not established. This Court held that a partnership was regarded as a personality distinct from that of one of the partners. The transfer of leasehold right to T amounted to sub-letting of the premises without the consent of the plaintiff who was entitled to a decree for eviction.

14. The factual position in the present case is that Shikharchand was getting Rs.3000/- p.m. though by way of salary but actual control over the shop was of Sunil Kumar. After dissolution of the partnership in the year 1986, Sunil Kumar was exclusively carrying on his business and in fact was in exclusive possession of the shop. Shikharchand nowhere stated in his statement that still he was in

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possession or control of the shop in question. The defendant ought to have produced account books of shop and the deed of dissolution of partnership between the partners showing their bonafides. Apart from this as per the statement of Sunil Kumar, the shop belongs to him and he was exclusive owner of the shop. In view of the aforesaid specific statement of Sunil Kumar in para 3 and 10 of his statement, no conclusion can be arrived except that since 1986 the possession of shop was parted with to Sunil Kumar in the capacity of sole proprietor of M/s Danpati Adhahat Bhandar. The earlier partnership of Shikharchand and Ravichand as a partner of Danpati Adhahat Bhandar came to an end. They retired from the partnership firm and started their own business at different places. In these circumstances, the court below erred in not granting decree under section 12(1)(b) of the Act in favour of the respondents. The conclusions recorded by the court below, on the basis of the findings of the facts recorded by court below, are apparently erroneous and cannot be sustained under the law. The respondent was entitled for a decree under section 12(1)(b) of the Act.

15. In view of the aforesaid the substantial question of law No.1 in the appeal preferred by the appellant is decided against the appellant and substantial question of law framed on the basis of the cross objection preferred by the respondent is decided in his favour.

16. Accordingly the appeal preferred by the appellant is dismissed but the cross objection filed by the respondent is allowed and the suit of plaintiff is also decreed under section 12(1)(b) of the Act. The findings in respect of the decree of eviction under Section 12(1)(f) of the Act granted by the appellate Court is affirmed. The suit of the plaintiff is decreed under section 12(1)(b) and (f) of the Act and following decree is passed in the matter :-

(i) The plaintiff is also entitled for a decree of eviction under section 12(1)(b) of the Act.

(ii). The decree of eviction passed by the appellate Court under Section 12(1)(f) of the Act is affirmed.

While dismissing the appeal, the appellant is allowed six months time to vacate the premises on following terms :-

(a). The appellant to furnish an undertaking alongwith Sunil Kumar that the suit premises shall be vacated by them on or before 30.9.2009 peacefully without creating any hindrance or third party interest.

(b). The entire rent including arrears of rent up to date shall be deposited by the appellant within a period of 30 days from today, if already not deposited, and thereafter shall continue to deposit the amount equal to the amount of rent by way of mesne profit in the Court every month in advance on or before 10th of

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every English calendar month. Appellant to deposit the cost incurred in the court below within a period of 30 days from today.

(c). On compliance of the aforesaid conditions, the trial Court-cum-executing Court shall stay the execution of judgment and decree up to 30.9.2009, failing which the respondent shall be entitled to execute the decree forthwith.

The respondent shall be entitled for the cost of this appeal and cross objections. Counsel's fee Rs.2000/-.

*Appeal dismissed.*

I.L.R. [2009] M. P., 2073

**APPELLATE CIVIL**

*Before Mr. Justice K.K. Lahoti & Mrs. Justice Sushma Shrivastava*

2 April, 2009\*

**FATEHCHAND**

... Appellant

**Vs.**

**LAND ACQUISITION & REHABILITATION  
OFFICER & ors.**

... Respondents

**Court Fees (Madhya Pradesh Amendment) Act (6 of 2008), Schedule I Clause 1-A - Prospective in nature - Amendment Act is prospective in nature - Reference u/s 18 of Land Acquisition Act made on 05.01.2007 - Appellant liable to make payment of ad valorem court fee on appeal as was applicable on 05.01.2007 - Cannot take advantage of amendment which provided maximum court fee - Appellant directed to pay deficit court fee. (Para 11).**

न्यायालय फीस (मध्य प्रदेश संशोधन) अधिनियम (2008 का 6), अनुसूची I, खण्ड 1-ए - प्रकृति भविष्यलक्षी - संशोधन अधिनियम की प्रकृति भविष्यलक्षी है - भूमि अर्जन अधिनियम की धारा 18 के अन्तर्गत निर्देश 05.01.2007 को किया गया - अपीलार्थी अपील पर एडवेलोरेम न्यायालय फीस जो 05.01.2007 को लागू थी, अदा करने का दायी - संशोधन का लाभ नहीं ले सकता जो अधिकतम न्यायालय फीस का उपबंध करता है - अपीलार्थी को न्यायालय फीस में कमी की पूर्ति करने का निर्देश दिया गया।

**Cases referred :**

AIR 1978 SC 1607, AIR 1960 SC 980, 1980 MPLJ 801, 2000(II) MPWN 70.

*Alok Aradhe with P. Khandelwal, for the appellant.*

*Vivekanand Awasthy, G.A., for the respondent.*

**ORDER**

Office has raised an objection that the appellant is required to make payment of Court fee advalorem, while the appellant has paid fixed Court fee Rs.1,50,000/-

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claiming benefit of The Court-Fees (Madhya Pradesh Amendment) Act No.6/2008 (hereinafter referred to as 'Amendment Act' forshort).

2. Learned counsel for appellant submitted that by the Amendment Act a maximum Court fee on appeal has been fixed at Rs.1,50,000/-, as per section 3 amending schedule I clause 1-A providing maximum Court fees and the office objection that the appellant should make payment of ad-valorem Court fee is not correct. He has placed reliance to the Apex Court judgment in *Lakshmi Ammal Vs. K.M.Madhavakrishnan and others*-(AIR 1978 SC 1607) and submitted that where there is doubt in respect of payment of Court fee benefit must go to the subject. In the present case when there is a doubt in respect of payment of Court fees, the appellant is entitled for benefit of the Amendment Act. It is submitted that the office objection be repelled and the appellant be permitted to prosecute this appeal at a fixed Court fee of Rs.1,50,000/-.

3. Shri Vivekanand Awasthy, learned G.A., opposed the contention and submitted that the amendment Act is prospective in nature and is applicable in respect of the matters which are filed after coming into force of the Amendment Act w.e.f.2.4.2008. It is submitted that in absence of any specific provision in the Amendment Act making its enforcement retrospectively the appellant is not entitled to take benefit of Amendment Act. Reliance is placed to a Apex Court judgment in the case of *State of Bombay Vs. M/s Supreme General Films Exchange Ltd.* (AIR 1960 SC 980), a recent Division Bench judgment of this Court in M.A.No.2110/2008 *Smt.Supriya Kathand and others Vs. Shri Lal Singh and others* decided on 25.6.2008 and two Single Bench judgments of this Court in *Dinaji Tukaram Pawar Vs. Jiwanlal Pawar* (1980 MPLJ 801) and *Gramin Vidyut Sahkari Samiti Vs. Rajesh Kushwaha* [2000(II) MPWN Note No.70] and submitted that the contention of the appellant is without merit.

4. To appreciate the aforesaid contention the factual position in the case may be stated.

5. The lands of appellant were acquired by the respondents because of submergence in Indira Sagar Project (NSDC). The Land Acquisition Officer passed an award on 27.1.2004 by which the appellant was allowed compensation of Rs.13,62,232/-. The appellant was not satisfied with the aforesaid award sought a reference under section 18 of the Land Acquisition Act, 1894, the matter was referred to the Civil Court and was registered as L.A.Case No.1/2008 by 1st Additional District Judge, Harda. The Additional District Judge considered the reference on merits after affording both the parties to adduce evidence and found that the reference of appellant was without merit and rejected the reference. Against the aforesaid order, this appeal has been filed under section 54 of the Act claiming Rs.33,26,64,445/-. Though the appellant has valued the claim in the appeal for the aforesaid amount, but has paid Court fee of Rs.1,50,000/- claiming benefit

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of Amendment Act. The office raised an objection that the reference was filed prior to coming into force of Amendment Act so the appellant was liable to pay ad-valorem Court fee. It is this objection which is to be decided by this order.

6. The State of M.P. amended the Court Fees Act, 1870 by the Court Fees (Madhya Pradesh Amendment) Act, 2008. By section 3 of this Amendment Act, Schedule 1, Article 1-A has been substituted. To appreciate the contention firstly the statement and object of the Amendment Act may be seen, which reads thus :-

**“Statement of objects and reasons –** In order to rationalise the court fees leviable on plaint, written statement pleading a set-off or counter claim, or memorandum of appeal presented to any Civil or Revenue Court, it is decided to amend article 1-A of Schedule I to the Court-fees Act, 1870 (No.7 of 1870) in its application to the State of Madhya Pradesh.

2. At present incidences of dishonoured cheques are in abundance and there is no provision of levy of court fees in such complaints. Therefore, it is decided to levy court fees on application for complaint of an offence triable under Section 138 of the Negotiable Instruments Act, 1881 (No.26 of 1881), by suitable amendment of article 1 of Schedule II to the principal Act in its application to the State of Madhya Pradesh.

3. It is also decided to provide for levy of court fees on memorandum of appeal when presented to the High Court by the claimant for enhancement of award passed by the Motor Accident Claims Tribunal, by suitable amendment of article 11 of Schedule II to the principal Act in its application to the State of Madhya Pradesh.

4. Hence this Bill.”

From the perusal of aforesaid objects and reasons it is apparent that the legislation has decided to reduce the Court fees and restricted the maximum limit of a payment of Court fees on plaint, appeal, set off, counter claim etc., at Rs.1,50,000/-.

|                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                             |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>“1-A. Plaint, written statement pleading a set-off or counter claim, or memorandum of appeal (not otherwise provided for in this Act) presented to any Civil or Revenue Court except those mentioned in Section 3.</p> | <p>When the amount or value of the subject matter in dispute does not exceed five lacs rupees<br/>When such amount or value exceeds five lacs rupees but does not exceed ten lacs rupees.<br/>When such amount or value exceed ten lacs rupees.</p> | <p>Twelve percent subject to a minimum of one hundred rupees.<br/>Sixty thousand rupees plus seven percent on the amount or value in excess of five lacs rupees.<br/>Ninety five thousand rupees plus three percent on the amount or value in excess of</p> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**FATEHCHAND Vs. LAND ACQUISITION & REHABILITATION OFFICER**

ten lacs rupees subject to a minimum of one lac and fifty thousand rupees.

Provided that minimum fee leviable on a memorandum of appeal shall be one hundred rupees."

7. As per this amendment in a suit or in an appeal, the maximum limit of Rs.1,50,000/- has been provided, but the entire Amendment Act does not provide that this amendment shall be retrospective in nature, in absence of which it should be treated as prospective in nature.

8. The Apex Court has an occasion to consider this aspect in *Supreme General Films Exchange Ltd.* (supra). The Apex Court considering this aspect held thus :-

"Where a suit is filed prior to 1-4-1954, on which the Court-fees (Bombay Amendment) Act, 1954, levying enhanced court-fees, came into force, in the absence of provisions giving retrospective effect to the amendments, the court-fees payable on the memorandum of appeal filed after the relevant date (1-4-1954) are payable according to the law in force at the date of filing of the suit (which was prior to the relevant date) and not according to the law in force at the date of the filing of the memorandum of appeal (which was after the relevant date) : (S) AIR 1955 Bom 332, Affirmed.

It is thus clear that in a long line of decisions approved by this Court and at least in one given by this Court, it has been held that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only; it impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment.

We are, therefore, of the view that the High Court was right in the view it took, and the orders of refund of excess court fees which it passed were correct in law."

9. The Division Bench of this Court in *Smt. Supriya Kathane* (supra) recently considered this aspect, in particular this Amendment Act, held thus :

"The aforesaid view is apposite and squarely applies to the case at hand. The enhancement of the court fee, irrefragably, is an onerous condition and destroys the pre-existing right of appeal without making the amendment retrospective by express words



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or necessary intendment. Once we hold that the pre-existing right of appeal continues to exist, it is deducible by necessary implication that the old law which created the right of appeal must also exist to support the continuation of that right. The unamended provision must govern the exercise and enforcement of the right of appeal. It would be an anathema to the concept of interpretation if it is held that the amended provision, as has been couched, is applicable to appeals that would arise from claim petitions that have been initiated prior to the cut off date, i.e. 02.4.2008."

10. The learned Single Judge of this Court in *Dinaji Tukaram Pawar* considering the similar point held that the provisions of the Court Fees Act as amended in M.P. Act No. 4 of 1976 whereby suits for possession of land not assessed to land revenue were required to be valued for purposes of Court fees at 20 times the land revenue have no applicability to appeals filed after the amendment arising out of the suit filed prior to the amendment. Similar view has been reiterated by another Single Bench of this Court in *Gramin Vidyut Sahkari Samiti*.

11. So far as the judgment of Apex Court in *Lakshmi Ammal* (supra) is concerned, the Apex Court held that two things have to be made clear. Courts should be anxious to grapple with the real issues and not spend their energies on peripheral ones. Secondly, court-fee, if it seriously restricts the rights of a person to seek his remedies in courts of justice, should be strictly construed. After all access to justice is the basis of legal system. In that view, where there is a doubt, reasonable, of course, the benefit must go to him who says that the lesser court fee alone be paid. But the factual position in the present case is entirely different. The Amendment Act is prospective in nature and in absence of specific provisions in the said Amendment Act, this Amendment Act cannot be given effect retrospectively. The appellant agitated the matter before the Civil Court in a reference under section 18 of the Land Acquisition Act, the aforesaid reference was made in respect of award dated 27.1.2004 and the matter was referred to the Civil Court on 5.1.2007. The crucial date in the matter would be the date when a reference was made to civil court, because this appeal is against the order of civil court in reference case.

12. In view of aforesaid the appellant is not entitled to take benefit of Amendment Act and accordingly we find that the appellant is liable to make payment of Court fee as was applicable to the appellant on 5.1.2007 when the matter was referred to the Civil Court under section 18 of the Land Acquisition Act and accordingly appellant is directed to make payment of aforesaid Court fee.

13. At this stage learned counsel for appellant submitted that in view of the aforesaid order appellant be permitted to put a fresh valuation of the appeal and

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to make payment of Court fees ad-valorem. Considering the facts of the case, we find merit in the prayer, allow the prayer and appellant is permitted to do so by filing an appropriate application in this regard.

*Order accordingly.*

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**APPELLATE CRIMINAL**

*Before Mr. Justice S.L. Kochar & Mrs. Justice Manjusha P. Namjoshi*

12 January, 2009\*

NASIR & anr.

... Appellants

Vs.

STATE OF M.P.

... Respondent

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

(Para 6)

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

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

(Para 9)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 60 - अनुश्रुत साक्ष्य - अ.सा.-2 ने कथन किया कि उसे अ.सा.-7 द्वारा जानकारी दी गई कि मृतक अपीलार्थियों के साथ देखा गया - अ.सा.-7 ने यह कहीं भी कथित नहीं किया कि उसने अ.सा.-2 को जानकारी दी थी - अ.सा.-2 का कथन अधिनियम की धारा 60 से बाधित है।

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

(Para 11)

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ग. दण्ड संहिता (1860 का 45), धारा 302 - अतिमतः साथ-साथ देखा गया - अ.सा.-7 ने कथन किया कि उसने अपीलार्थियों को एक लड़के के साथ देखा था - उसने यह कथन नहीं किया कि उसने लड़के को पहचाना था - इस साक्षी द्वारा लड़के के शव की शिनाख्त नहीं करवाई गई - साक्षी का कथन अतिमतः साथ-साथ देखे जाने की परिस्थिति को साबित करने के लिए पर्याप्त नहीं।

**Cases referred :**

AIR 1977 SC 2274, (1973) 3 SCC 416, (2004) 10 SCC 570.

*Sanjay Sharma*, for the appellants.

*G. Desai, Dy.A.G.*, for the respondent/State.

**J U D G M E N T**

The Judgment of the Court was delivered by **S.L. KOCHAR, J.** :- The appellants/accused persons stood convicted under Sections 302 and 201 of the Indian Penal Code and each is sentenced to suffer imprisonment for life and fine of Rs. 25,000/-, in default of payment of fine to suffer additional R.I. for three years and R.I. for 5 years and fine of Rs. 5,000/-, in default of payment of fine to suffer additional R.I. for one year respectively vide judgment dated 27.01.03 passed by the learned Ist Addl. Sessions Judge, Mhow District, Indore in Sessions Trial No. 87/2002. Aggrieved by this judgment of conviction and order of sentence, the appellants have preferred this appeal.

2. According to the prosecution case on 02.09.01 in Dongargaon Police Outpost, Karim Khalifa lodged a missing report of his nephew Mustakin, aged 8 years who had left the house for viewing Foot Ball match and did not return back. On the basis of this report, in Police Station, Mhow, missing report was also recorded. On 04.01.09 in the morning at 7.30 AM the dead body of Mustakin was found in Military Water Tank. Merg intimation report Ex P/1 to this effect was recorded at the instance of witness Karim (PW-1). After preparation of inquest report Ex.P/14, Police sent the dead body for postmortem examination which was performed by PW-6 Dr Jain. The postmortem report is Ex.P/10. During the course of investigation, police recorded the statements of prosecution witnesses PW-1 Karim, PW-2 Annu and PW-3 Kanha. On the basis of the statements of these witnesses, police came to the conclusion that the deceased was lastly seen in the company of the appellants going on a scooter and after two days his dead body was found. Viscera was preserved, but no report of Forensic Science Laboratory was filed by the prosecution. Prosecution has filed the FSL report Ex.P/17 regarding presence of faecal matter in pant of deceased. The appellants were charge-sheeted for commission of offence punishable under sections 302 and 201 of the Indian Penal Code.

3. The appellants have denied the charges and the defence of appellant No. 1 Nasir was that Karim was having dispute with him as well as with his maternal grand-father in regard to money of Mosque Committee because of which he

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has been falsely implicated and a case was pending on the basis of the report lodged by the father of Nasir. The defence of appellant No. 2 Amin Kaliya was that he was falsely implicated because of friendship with Nasir. They have examined DW-1 Mohammad Hasan. Learned trial Court, after examining the prosecution and defence witnesses and hearing both the parties, convicted and sentenced the appellants as described herein-above.

4. Having heard learned counsel for the parties and after perusing the entire record, we are of the view that the conviction of the appellants is not sustainable on the basis of the evidence available on record. Conviction of the appellants is based on circumstantial evidence i.e. motive and last seen of the deceased in the company of the appellants on the basis of evidence of PW-1 Karim, PW-2 Annu, PW-3 Kanha and PW-7 Mehboob.

5. The first question for consideration by this Court is whether the prosecution has been able to establish beyond reasonable doubt the homicidal death of deceased? Prosecution has examined PW-6 Dr Anil Jain, Assistant Surgeon who conducted and issued postmortem report Ex.P/10. According to Dr Jain, deceased died because of asphyxia and possibility of asphyxia was due to drowning. The death was accidental in nature. Dr Jain proved postmortem report Ex.P/10. Dr Jain has not been declared hostile by the prosecution. He also stated in examination-in-chief about sending of femur bone and viscera for Diatoms Test, but the report of Diatoms Test from Medico Legal Expert has not been filed by the prosecution. In cross-examination, Dr Jain has deposed that he did not find any injuries on neck and if deceased would have been killed, before drowning, some kind of mark of injury and mark of resistance would have been available on his body. It is also evident from the postmortem examination report as well as the statement of Dr Jain that the dead body of deceased was almost decomposed. There is no eye-witness's account, therefore, on the basis of medical report, it is not proved positively that the deceased met a homicidal death. For conviction under section 302 of the Indian Penal Code, prosecution is required to prove the first ingredient as envisaged in section 299 of the Indian Penal Code in regard to homicidal death.

6. Learned trial Court while appreciating the evidence of Dr Jain in para 9 of the impugned judgment, has referred a passage of Modi's Jurisprudence and Toxicology available at page 289 in 22nd Edition about symptoms of death by drowning. The Supreme Court in the case of *Pyara Singh V/s State of Punjab* (AIR 1977 SC 2274, in para 7 has observed as under:-

"It is true that the High Court has relied on a number of books on medical jurisprudence to support the evidence of Dr Jatinder Singh. We feel that it was not necessary for the High Court to do so unless the books were put to the expert. Recitals

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in the books do not provide a sufficient guide to determine the truth or falsity of the testimony of an expert."

(Also see : *Masji Tato Rawool and others V/s State of Maharashtra* [1971(3) SCC 416] and *State of M.P. V/s Sanjay Rai* [2004(10) SCC 570].

In the light of above-mentioned legal position, the passage of Modi's Medical Jurisprudence could not be relied upon as the same was not put to Dr Jain to explain the same.

7. Learned trial Court has taken into consideration so many extenuating circumstances which are not available in the record and gave finding for homicidal death of deceased. In our considered view, the prosecution has failed to establish that deceased met a homicidal death.

8. Learned trial Court has placed reliance on the testimony of PW-1 Karim, uncle of deceased Mustakin. Karim has not stated any-thing in regard to enmity with the appellants, but in cross-examination para 19, he admitted that he had a quarrel with maternal grand-father of appellant No. 1 Nasir on account of dispute over mosque amount. At the same time he also stated that they were not having any kind of personal dispute or quarrel. He has denied the defence suggestion that he collected amount of donation for Mosque and there was quarrel when he was asked to submit its account. He was confronted with the Dehati Nalishi Ex.P/1 wherein the fact of taking of deceased by the appellants is not mentioned and he failed to explain this material omission which amounts to contradiction. On careful perusal of the statement of this witness, we are unable to hold that he was having any kind of such enmity because of which the appellants could have committed murder of deceased.

9. For the circumstance of 'last seen together', the learned trial Court has placed reliance on the testimony of PW-2 Annu, brother-in-law of the deceased but he was not a witness of last seen together. He deposed that he was disclosed by Mehboob (PW-7) that three persons were providing ground-nut to the deceased. Thereafter, he received information of dead body lying in the tank. Further say of this witness is that the appellants were found in a STD Booth and when he asked as to where they had telephoned, they torn the slip. In cross-examination para 5, he admitted that he disclosed his doubt on the appellants. The testimony of this witness is not for seeing the deceased lastly in the company of the appellants. The statement of this witness with regard to information given to him by PW-7 Mehboob is not admissible in evidence because Mehboob has nowhere stated that he gave information regarding taking of deceased by appellants to this witness Annu as the same is hit by the law of hear-say evidence as envisaged under section 60 of the Indian Evidence Act.

10. The next witness relied upon by the learned Court below is PW-3 Kanha who was declared hostile by the prosecution and cross-examined by the A.G.P.

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Kanha has deposed that in the evening between 6.00 and 7.00 PM the appellant Amin Kaliya and two other persons were sitting on a scooter going towards Ambedkar Garden and he could not see the faces of those two persons. In cross-examination he was confronted with his case-diary statement Ex.P/7 and he denied the contents thereof. We are unable to gather any evidence from the statement of witness Kanha regarding circumstance of last seen of the deceased in the company of appellants.

11. The last witness is PW-7 Mehboob who has testified that between 6.00 and 7.30 in the evening on a common road he had seen the appellants going with a boy on scooter. He has specifically stated that he was not knowing that boy. In para 2, he has also stated that he was threatened by the appellant Amin by showing a knife that if he would disclose this fact to any body, he would be done to death and because of fear, he did not disclose this fact to any body and in the same night he went to Ratlam because of death of son of his brother-in-law. He was interrogated by the police after three days of his arrival from Ratlam. In examination-in-chief, nowhere he has deposed that the appellants were going with the deceased Mustakin and he was able to identify the said boy. The dead body was not got identified by this witness by the police during the course of investigation to establish the fact that the deceased was seen in the company of the appellants two days prior to finding of the dead body in the water-tank. He also admitted in cross-examination that he did not disclose this fact to the police. The statement of this witness is also not sufficient to establish the circumstance of last seen of deceased before two days of finding of the dead body. In a case of circumstantial evidence, the prosecution is required to prove beyond reasonable doubt each and every circumstance against the accused forming complete chain pointing out unerringly towards the guilt of the accused excluding all reasonable hypothesis of innocence in his favour. In the instant case, the prosecution has failed to establish beyond reasonable doubt homicidal death of the deceased, motive of the appellants to commit murder and the evidence of last seen of the appellants with the deceased. The judgment and finding of the learned trial Court is based on improper appreciation of evidence as well as conjecture and surmises. Since the offence of committing murder of deceased Mustakin has not been duly established against the appellants, no question of committing the offence punishable under section 201 arises against them.

12. As a consequence of the foregoing factual and legal discussion, this appeal deserves to be and is hereby allowed. The conviction and sentence of the appellants for the offences punishable under sections 302 and 201 of the Indian Penal Code are hereby set-aside. Appellant Amin Kaliya is in jail. The trial/ Court is directed to release him forthwith if not wanted in connection with any other criminal case.

*Appeal allowed.*

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**APPELLATE CRIMINAL***Before Mr. Justice S.L. Kochar & Mrs. Justice Manjusha P. Namjoshi*

22 January, 2009\*

CHANDAN &amp; ors.

... Appellants

Vs.

STATE OF M.P.

... Respondent

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

(Paras 14 &amp; 15)

क. दण्ड संहिता (1860 का 45), धाराएँ 304-बी व 498-ए - दहेज मृत्यु-अभियुक्त की पत्नी की मृत्यु विवाह के 4½ माह के भीतर कथित रूप से फाँसी लगाकर हुई - मृतक के शरीर पर कोई बाँधने के निशान नहीं पाये गये - कोई एकीमोसिस या अस्थि-भंग नहीं पाया गया - तथापि, दहेज की माँग के कारण क्रूरता साक्ष्य से साबित हुई - अभिनिर्धारित - अभियोजन मृतक की प्राकृतिक या दुर्घटनावश हुई मृत्यु की आशंका का वर्जन करने में असफल रहा - धारा 304-बी के आवश्यक और महत्वपूर्ण घटक साबित नहीं - अभियुक्त को धारा 498-ए के अधीन दोषसिद्ध किया गया - अपील अंशतः मंजूर।

**B. Evidence Act (1 of 1872), Section 67 - Proof of signature and handwriting - Inquest report written and signed by SDOP - Neither SDOP examined before Court nor signature and handwriting proved by witnesses acquainted with his handwriting and signature - Held - Contents of that inquest report can not be looked into.**

(Paras 18 &amp; 19)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 67 - हस्ताक्षर और हस्तलेख का साक्ष्य - मृत्यु-समीक्षा रिपोर्ट एस.डी.ओ.पी. द्वारा लिखित और हस्ताक्षरित की गई - एस.डी.ओ.पी. की न तो न्यायालय के समक्ष परीक्षा करायी गई और न ही उसके हस्ताक्षर और हस्तलेख से परिचित साक्षियों द्वारा हस्ताक्षर और हस्तलेख साबित किये गये - अभिनिर्धारित - उस मृत्यु-समीक्षा रिपोर्ट की अन्तर्वस्तु की जाँच-पड़ताल नहीं की जा सकती।

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

(Paras 21 &amp; 22)

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

**Cases referred :**

AIR 2005 SC 785, (2004) 13 SCC 348, (2008) 3 SCC (Cri.) 169, AIR 2008 SC 332.

*Jaisingh with Vivek Singh*, for the appellants.

*Girish Desai, Dy.A.G.*, for the respondent/State.

**J U D G M E N T (ORAL)**

The Judgment of the Court was delivered by S.L. KOCHAR, J. :-Both the appeals are arising out of one common judgment, therefore, decided by this common judgment.

2. The appellants have challenged their conviction, by filing this appeal, under Section 304B of the IPC and sentence of imprisonment for 10 years with fine of Rs.5,000/- each, in default of payment of fine additional S.I. for two years each vide judgment passed by learned Special Sessions Judge, Mandleshwar, District West Nimad, in Sessions Trial No.376/1996 dated 21.8.1998.

3. The prosecution case in nut shell as put forth before the Trial Court is that deceased Kirtibala was married with appellant No.1 Chandan before 4½ months from the date of her death i.e. on 13.09.1996. The father of deceased had given dowry according to their custom and his capability. After some time of marriage Kirtibala was harassed because of dissatisfaction of the appellants regarding dowry. Kirtibala was being ill-treated by pointing out minor mistakes in household work and for her slightly dark complexion. Deceased disclosed these facts to her mother, father and sister-in-law (Bhabhi). PW-1 Moolchand, father of deceased had a talk on this issue with appellant No.3 Ramesh @ Rameshchandra. Rameshchandra told Moolchand that the family residing in Nandora was ready to give Maruti Car in marriage of appellant No. 1 Chandan but what you had given? Moolchand complained this issue to son-in-law appellant No. 1 Chandan and his elder brother/acquitted co-accused Vikram. Both had pacified the issue, even then deceased was being harassed by passing remark and taunt for bringing less dowry, inferior articles and her dark complexion as well as pointing out her minor mistakes. On 13.09.1996, the neighbours of appellants over heard some kind of sound regarding quarrel coming from the house of the appellants as well as cry of a woman seeking help. PW-8 Ganesh reached in the house of the appellants and opened the door by giving two kicks thereafter saw deceased Kirtibala hanging



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with ceiling fan by saree. She was brought down with the help of accused persons. Dr.S.K.Gupta and Anees Khan were called to examine deceased and on examination, they declared her dead. Dr.Gupta sent a written letter to police informing about the incident vide Ex.P/4.

4. Assistant Sub Inspector, Jasbir Singh received information from unknown person in Police Station that he heard cry from inside the house of Choudhry Vastralaya Ram Mandir and it appears that somebody had killed the member of the family. On this information, Assistant Sub Inspector Jasbir Singh, Head Constable Pratapsingh and Gopalrao reached at the house of the appellants and after returning, made entry in daily diary at 6.10 p.m. Assistant Sub Inspector Jasbir Singh saw the dead body of deceased lying on bed (*palang*) but he could not know the cause of death and he made entry in the daily diary vide Ex.P/37 and registered merg report Ex.P/40. Intimation about the death of deceased was given by acquitted co-accused Vikram to her parents PW-1 Moolchand and PW-2 Sushilabai on telephone, which was received by Deepak, the son of Moolchand (Deepak has not been examined as witness). Moolchand and his wife Sushilabai reached at the house of appellants and acquitted co-accused Vikram told them that Kirtibala committed suicide by hanging. Moolchand saw the dead body lying on bed of Kirtibala, a *Shal* and a cloth hanging with a ceiling fan. He found suspicious circumstances. Police (SDOP not examined) prepared the inquest panchnama Ex.P/2 in presence of PW-1 and PW-2 Moolchand and Sushilabai. Moolchand submitted a written application Ex.P/3 to police leveling allegation against 5 accused persons including appellants for committing murder of their daughter on account of demand of dowry. Dead body was sent for postmortem examination, which was conducted by PW-11 Dr.Dhyansingh Solanki and PW-12 Dr.M.S.Barche jointly vide Ex.P/25. No positive opinion was given for cause of death but they found that deceased died because of asphyxia and there was no sign of ligature mark of hanging. They also did not find any injury on the person of deceased which could be sufficient to cause death of deceased. Viscera of deceased was preserved and sent for examination in Forensic Science Laboratory and in the report no poison was found in viscera. The report was negative. PW-16 SHO, Dheryasheel Yevle recorded FIR on dictation by SDOP vide Ex.P/45 signed by SDOP. On completion of investigation appellants and acquitted co-accused persons were charge-sheeted for offences under Section 302, 304B and 201 of the IPC.

5. Appellants refuted the charges and pleaded their false implication. They have not examined any witness in defence. Learned Trial Court, after examining the prosecution witnesses and hearing both parties, while acquitting co-accused brother-in-law of deceased Vikram and his wife Sonam, convicted the appellants as described here-in-above. The appellants are acquitted from charges under Section 302 and 201 of the IPC against which the State has filed appeal vide Cr.A.No.1370/98.

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6. Learned counsel for the appellants has submitted that prosecution has failed to prove homicidal and suicidal death beyond all reasonable doubt, therefore, possibility of natural death of deceased Kirtibala could not be ruled out and there is no dependable evidence for practicing cruelty upon deceased by the appellants. In alternative, it is also argued that even if whole prosecution case is accepted, offence under Section 498A of the IPC would be made out against the appellants.

7. On the other hand, learned counsel for the State has supported the impugned judgment and finding arrived at by the learned Trial Court.

8. The crucial point for us to decide is whether the prosecution has proved that deceased died otherwise than in normal circumstances. The prosecution is required to rule out the possibility of a natural or accidental death so as to bring it within the purview of "the death occurring otherwise than in normal circumstances". In the instant case, for constituting offence under Section 304B the ingredients "soon before her death" is sufficiently proved by the prosecution because deceased died within 4½ months of her marriage. For deciding issue whether deceased met with death otherwise than in normal circumstances and whether cruelty was practiced soon before her death, the provision under Section 113B of the Evidence Act and illustration (a) of Section 114 of the Evidence Act are relevant. In view of both the provisions Court may presume on the basis of the circumstances that deceased met death otherwise than in normal circumstances soon before her death.

9. Supreme Court in judgment rendered in case of *Kamesh Panjiyar alias Kamlesh Panjiyar V/s. State of Bihar* AIR 2005 Supreme Court 785 observed as under:-

**Para 10:-**

In order to attract application of Section 304B IPC, the essential ingredients are as follows :-

(i) The death of a woman should be caused by burns or bodily injury or otherwise than under a normal circumstances.

(ii) Such a death should have occurred within seven years of her marriage.

(iii) She must have been subjected to cruelty or harassment by her husband or any relative of her husband.

(iv) Such cruelty or harassment should be for or in connection with demand of dowry.

(v) Such cruelty or harassment is shown to have been meted out to the woman soon before her death. Section 113B of the Evidence Act is also relevant for the case at hand. Both Section 304B of the IPC and Section 113B of the Evidence

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Act were inserted by the Dowry Prohibition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry deaths. Section 113B reads as follows :-

**"113B ; Presumption as to dowry death** -When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

**Explanation -** For the purposes of this section "dowry death" shall have the same meaning as in Section 304B of the Indian Penal Code (45 of 1860)."

The necessity for insertion of the two provisions has been amply analysed by the Law Commission of India in its 21st Report dated 10th August, 1988 on "Dowry Deaths and Law Reform". Keeping in view the impediment in the pre-existing law in securing evidence to prove dowry related deaths, legislature thought it wise to insert a provision relating to presumption of dowry death on proof of certain essentials. It is in this background presumptive Section 113B in the Evidence Act has been inserted. As per the definition of "dowry death" in Section 304B of the IPC and the wording in the presumptive Section 113B of the Evidence Act, one of the essential ingredients, amongst others, in both the provisions is that the concerned woman must have been "soon before her death" subjected to cruelty or harassment "for on in connection with the demand of dowry". Presumption under Section 113B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the Court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials;

(1) The question before the Court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304B of the IPC).

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

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(3) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death.

10. The Supreme Court has also elaborated Section 304B of the IPC and 113B of the Evidence Act in paragraph 11, is as follows:-

**Para 11:-**

A conjoint reading of Section 113B of the Evidence Act and Section 304B, IPC shows that there must be material to show that soon before her death, the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances'. The expression 'soon before' is very relevant where Section 113B of the Evidence Act and Section 304B, IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113B of the Evidence Act. The expression 'soon before her death' used in the substantive Section 304B, IPC and Section 113B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before' used in Section 114, Illustration (a) of the Evidence Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods soon after the theft, is either the thief has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term 'soon before' is left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to

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indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effects of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence.

(Also see Supreme Court judgments passed in case of *Thakkan Jha and others V/s. State of Bihar* (2004) Vol.13 SCC 348; *M. Srinivasulu V/s. State of Andhra Pradesh* (2008) Vol.3 SCC (Cri.) 169 and *Devilal V/s. State of Rajasthan* AIR 2008 SC 332.

11. In view of the aforesaid Supreme Court dicta, now we proceed to examine the prosecution evidence whether prosecution is able to rule out the possibility of a natural or accidental death so as to bring it within the purview of the death occurring otherwise than in normal circumstances.

12. The prosecution has examined PW-4 Dr.S.K.Gupta and PW-5 Dr.Anees Khan. They were called by the appellants to examine deceased. Dr. Gupta has deposed that he found the deceased lying on the bed and, one piece of cloth was hanging with ceiling fan. On examination, he found deceased dead and he sent a written letter (Ex.P/4) to the police, intimating about death of deceased. In the letter Ex.P/4, there is no mention of fact that Dr.Gupta found a piece of cloth hanging with ceiling fan.

13. PW-5 Dr. Anees Khan has deposed that he was called by the appellants through their servant to examine wife of appellant No. 1 Chandan. He reached at their house and found her lying on the bed. On examination, he found her dead. He suggested them to consult some doctor of Govt. Hospital and came back. Dr.Anees Khan has not deposed any suspicious circumstances in the room where dead body of deceased was lying on a cot. The evidence of both doctors is not helpful to the prosecution to establish that the deceased died otherwise than in normal circumstances.

14. PW-11 Dr.Dhyansingh Solanki and PW-12 Dr.M.S.Barche performed autopsy of the dead body of Kirtibala and proved postmortem report (Ex.P/25). On examination, they found passing of rigor mortis, dilated pupils and tongue was inside the mouth. There was no ligature mark and one abrasion 1 cm. x 1/2 cm. was found on mandible region. There was sign of brown staining on neck. No other injuries were found on the person of deceased. The female organs were healthy and normal. All the external orifices of the body were healthy and normal. In the opinion of Dr.Solanki, cause of death could not be detected, therefore, viscera

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was preserved. The postmortem was performed by him as well as PW-12 Dr.M.S.Barche and third doctor (not examined) Kanoongo. Sub Divisional Police Officer sent a query letter vide Ex.P/26. and Dr.Solanki answered the said query, according to him mode of death was asphyxia but there was no sign of hanging. He suggested for examination of wind pipe and trachea. There was no sign of poisoning but viscera was preserved for examination. The presence of brown staining on neck was because of abrasion on the face and this injury could be caused by hard and blunt object. He also opined that ligature mark could not occur by cloth like bed-sheet because of thickness of bed-sheet. The answer given to query Ex.P/27 was proved by this witness. He also opined in paragraph 12. of his deposition that if mouth is pressed by pillow asphyxia could occur because of suffocation and same could result into death. Death could also occur in normal circumstances. In cross-examination paragraph 19, he admitted that for the first time in Court he stated about cause of suffocation by pressing pillow on the mouth and this alone could not be the cause of death. On the basis of the evidence of both the doctors, we can not give finding that deceased died otherwise than in normal circumstances. Viscera report (FSL report) is not disclosing any abnormality and presence of poison.

15. PW-10 Dr.D.S.Badkur examined trachea and larynx and proved report Ex.P/24. According to him, he did not find any ecchymosis or fracture except postmortem sharp cuts on trachea and larynx and there was no bleeding. He did not find any kind of injury and trachea and larynx were not sufficient to know or detect cause of death. The evidence of this doctor is also not sufficient to establish that deceased died otherwise than in normal circumstance. We are satisfied on the basis of the medical evidence that prosecution has failed to ruled out natural or accidental death of deceased Kirtibala. In this view of the matter the necessary and important ingredient of Section 304B of the IPC is not established by the prosecution beyond all reasonable doubt, therefore, in our considered view the offence under Section 304B of the IPC is not proved beyond reasonable doubt against the appellants.

16. Now we proceed to examine the statement of PW-1 Moolchand and PW-2 Sushilabai as well as PW-3 Saroj, father, mother and Bhabhi (sister-in-law) respectively of the deceased. PW-1 Moolchand has stated that before 4 months of the death of Kirtibala she was married with appellant No.1 Chandan. He received telephonic message of acquitted co-accused through his son Deepak about serious condition of Kirtibala. Thereafter, he with his wife PW-2 Sushilabai reached at the house of the appellants and they were told by acquitted co-accused Vikram that Kirtibala committed suicide by hanging. After hearing this news he had giddiness and fell on the ground after regaining consciousness he saw the dead body of Kirtibala, Shal and piece of cloth hanging with ceiling fan. In his opinion, room was so small to commit suicide by hanging by the deceased and

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deceased was a literate woman could not commit suicide by hanging. He saw sign of abrasion on neck and started weeping saying that for Maruti Car his daughter was killed. He was brought to ground floor, police was already present there. In their presence SDOP took signature on Ex.P/1 Intimation for Preparation of Inquest Report and prepared Inquest Report Ex.P/2 containing his signature at "A to A" portion. He stated specifically that he was not knowing what was written on documents Ex.P/1 and P/2 in paragraph 9. The say of this witness is that the in-laws of deceased Kirtibala also gave her another name i.e. Roshan and after 15 days of marriage Kirtibala came to his house and told him that there was everything Ok but members of her in-laws family were saying that inferior quality of articles were given in dowry and since she was dark in complexion they were hoping for good articles in dowry and appellant Ramesh Chandra Choudhry and Vimla Choudhry were harassing her. Mother-in-law Vimla Choudhry was pointing mistake in her work and acquitted co-accused Sonam was supporting her. After one month this witness came to the house of the appellants. At that moment, appellant Ramesh Chandra (Biyaji/Samadhi in local parlance) sitting with other accused persons told him that the family residing in Nandora were giving car but whether he gave car to them? and he gave articles of inferior quality. On this, he annoyed and replied that there was no settlement on this count. It is also stated by this witness that he was told by his wife that deceased Kirtibala was saying that if she would not get Maruti, her in-laws will murder her. He proved written report Ex.P/3 lodged by him. He has been cross-examined in detail, but in our considered view there is sufficient material in his statement to establish that the cruelty was practiced upon deceased by the appellants because they were not satisfied with the gift articles given or dowry given without demand by father Moolchand (PW-1), to his daughter and son-in-law.

17. The statement of Moolchand is fully corroborate by statement of PW-2 Sushilabai before whom deceased complained about ill-treatment with her by the appellants on account of dissatisfaction of gift articles or dowry given to her and ill-treatment. PW-2 Sushilabai exaggerated the fact that she saw the contusions caused by iron rod (*Sariya*) on the person of deceased and injury on neck, the piece of rod and pestle (*Musli*) were lying in the room. These facts have not been stated by PW-1 Moolchand. PW-3 Saroj, sister-in-law (*Bhabhi*) also deposed about complaint by the deceased regarding ill-treatment on dissatisfaction of dowry given to deceased and hope of receiving Maruti Car in dowry. On the basis of evidence of all these three witnesses, we are fully satisfied that deceased was ill-treated for demand of dowry and dissatisfaction of the appellants by not getting Maruti Car and articles of their choice:

18. The contents of inquest report (Ex.P/2) prepared by SDOP was not proved by SDO Police and exhibit was marked on this document in the statement of PW-1 Moolchand to prove his signature but he stated specifically in paragraph 6

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that he was not knowing what was written in inquest report Ex.P/2. Signature of SDOP on inquest report Ex.P/2 was proved by PW-16 the then Station House Officer of Police Station Mengaon, but he has nowhere stated that inquest report was written or prepared by SDOP. The handwriting of inquest report was not got proved by the prosecution by any witness which is the requirement of Section 67 of the Evidence Act which reads as under :-

**Section 67 of the Evidence Act — Proof of signature and handwriting of person alleged to have signed or written document produced - If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.**

19. Mere marking of exhibit and proving signature of witness on inquest report, its contents, would not become admissible in evidence. First of all prosecution should have examined SDOP Anil Maheshwari and if he could not be examined for some valid reason/reasons, his handwriting and signature must have been proved by a witness acquainted with his handwriting and signature. PW-16 Dheryasheel in paragraph 2 proved the signature of SDOP Anil Maheshwari and at the same time in paragraph 3 he has deposed that he had no occasion to see the writing of Anil Maheshwari. In this view of the matter, contents of inquest report Ex.P/2 cannot be looked into. PW-13 Dr.Sudheer Sharma, Scientific Officer of Forensic Science Laboratory Unit, Indore has proved Ex.P/28 Spot Inspection Report and according to him, he found doubt/suspicion about death of deceased. His opinion is not sufficient to establish that deceased met with death otherwise than in normal circumstance. It is well established legal proposition that doubt/suspicion howsoever strong shall not take place of proof.

20. In view of the aforesaid discussion of legal and factual discussion, we do not agree with the finding of the Trial Court that deceased died otherwise than in normal circumstances and prosecution is able to ruled out the possibility of a natural or accidental death of the deceased, but we are satisfied that the cruelty was practiced by the appellants upon deceased because of dissatisfaction of dowry and she was having little bit black complexion.

21. In the result, this appeal is allowed in part, conviction and sentence of the appellants under Section 304B of the IPC are hereby set aside instead thereof the appellants are convicted under Section 498A of the IPC. They were not charged for this offence but it is lesser offence than 304B of the IPC, and cruelty as defined under Section 498A of the IPC is part of Section 304B, therefore, no prejudice is caused to the appellants and they were fully aware of prosecution allegation regarding demand of dowry and cruel behaviour.



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22. Under Section 464 of Cr.P.C., no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed for a particular offence, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. In the opinion of this Court, no failure of justice has in fact occasioned by non-framing of charge under Section 498A of the IPC, therefore, appellants are convicted under Section 498A of the IPC and sentenced to R.I. for 3 years and fine of Rs.5,000/- to each appellant. Out of fine amount, compensation of Rs.10,000/- be paid to PW-1 Moolchand. Appellants are on bail, they are directed to surrender before the Trial Court on 31st March 2009 for undergoing the remainder part of jail sentence and deposit the fine amount, if not deposited. On failure of the appellants to appear before the Trial Court on a given date, the learned Trial Court is directed to take suitable action against them and their surety in accordance with law, under intimation to this Court. Office is directed to send the copy of this judgment alongwith the record of the Trial Court.

22. In the light of aforesaid discussion and decision in appeal filed by the appellants, we do not find any merit in the appeal filed by the State vide Cr.A.No. 1370/98, therefore, same is hereby dismissed.

23. The office is directed to send the copy of this judgment alongwith the record to the trial Court.

24. The original judgment be placed in the record of Cr.A 1033/1998 and a copy thereof be placed in the record of Cr.A.No.1370/1998.

*Appeal partly allowed.*

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**APPELLATE CRIMINAL**

*Before Mr. Justice R.C. Mishra*

17 February, 2009\*

**KHANCHEDILAL**

**Vs.**

**STATE OF M.P.**

... Appellant

... Respondent

**A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 50 - 100 gm Ganja recovered at public place from plastic bag being carried by accused - Section 50 does not apply to search of bag carried by person searched at public place. (Para-10)**

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 50 - अभियुक्त द्वारा ले जाये जा रहे प्लास्टिक के थैले से 100 ग्राम गांजा लोक स्थल पर बरामद किया गया - धारा 50 लोक स्थल पर तलाशी में व्यक्ति द्वारा ले जाये गये थैले की तलाशी को लागू नहीं होती है।

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**B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 27 - Accused convicted u/s 20 of the Act for illegal possession of 100 gm Ganja - Appeal before High Court - Held - Accused is not bound by his pleadings - He can prove his defence even from the admission made by the prosecution witnesses - Detecting Officer admitted that accused explained the possession of contraband by saying that it was meant for his personal consumption - In the light of circumstances surrounding seizure of only 100 gm Ganja, favoured the defence that the contraband was not meant for sale or distribution - It ought to have been inferred that Ganja was possessed for personal consumption - Impugned conviction & consequent sentences set aside - Instead, appellant is convicted u/s 27 of the Act and sentence to undergo R.I. for six months - Appeal partly allowed. (Paras 15 & 16)**

खा. स्वापक औषधि और मनःप्रमावी पदार्थ अधिनियम, (1985 का 61), धारा 27 - अभियुक्त को 100 ग्राम गांजे के अवैध कब्जे के लिए अधिनियम की धारा 20 के अधीन दोषसिद्ध किया गया - उच्च न्यायालय के समक्ष अपील - अमिनिधारित - अभियुक्त अपने अभिवचनों से विवक्षित नहीं है - वह अभियोजन साक्षियों द्वारा की गई स्वीकृति से भी अपनी प्रतिरक्षा साबित कर सकता है - खोजी अधिकारी ने स्वीकार किया कि अभियुक्त ने विनिषिद्ध के कब्जे को यह कहते हुए स्पष्ट किया कि वह उसके निजी उपयोग के लिए अभिप्रेत था - केवल 100 ग्राम गांजे के अभिग्रहण के आसपास की परिस्थितियों के प्रकाश में प्रतिरक्षा का समर्थन किया कि विनिषिद्ध विक्रय या वितरण के लिए अभिप्रेत नहीं थी - यह निष्कर्ष निकाला जाना चाहिए था गांजा निजी उपयोग के लिए कब्जे में रखा गया - अक्षेपित दोषसिद्धि और पारिणामिक दण्डादेश अपास्त किये गये - इसके स्थान पर, अपीलार्थी को अधिनियम की धारा 27 के अन्तर्गत दोषसिद्ध किया गया और 6 माह का सश्रम कारावास भोगने का दण्डादेश दिया गया - अपील अंशतः मंजूर।

**Cases referred :**

AIR 1996 SC 2439, AIR 2008 SC 920, AIR 1999 SC 2378, AIR 2005 SC 2265, (2004) 3 SCC 609, 2004 CrLJ 62, AIR 1993 SC 1456, AIR 1989 SC 1966.

*None, for the appellant.*

*Ramesh Shukla, G.A., for the respondent/State.*

**J U D G M E N T**

**R.C. MISHRA, J. :-** It is one of the oldest appeals pending before this Court for decision. A bare perusal of the record would reveal that, on previous dates of hearing also, the appellant remained un-represented.

2. Having gone through the record with reference to the grounds urged in memo of appeal, I am of the view that this appeal can be heard and decided on merits in the light of principle laid down by the Apex Court in *Bani Singh vs. State of U.P.* AIR 1996 SC 2439 and reiterated in *Dharam Pal vs. State of U.P.* AIR 2008 SC 920 with the assistance of learned Dy. Govt. Advocate only,

3. The appellant stands convicted under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') and sentenced to undergo

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R.I. for 10 years and to pay a fine of Rs. 1,00,000/- and in default to suffer R.I. for 2 and half years. He was tried on the charge of being found in an illegal possession of only 100 gms. of Ganja that is cannabis/hemp within the meaning of Section 2(iii)(b) of the Act. The corresponding judgment dated 19.07.1994 passed by the Third Additional Sessions Judge, Satna in Special Case No.92/1993 is the subject matter of challenge in this appeal.

4. The prosecution case, in short, is that on 15.09.1993 at about 1.30 p.m., pursuant to credible information received, Madan Mohan Shukla (PW5) posted as ASI at P.S. Uchahara, intercepted the appellant who was coming from the side of Babupur. The bag, being carried by the appellant, was searched. It was found to contain 100 gms. of Ganja. The contraband was duly seized. A sample of 15 gms. was taken. It was forwarded to FSL, Sagar for chemical examination. Corresponding report indicated that the sample contained Ganja. After completion of the investigation, charge-sheet was put up before the Special Court.

5. The appellant pleaded false implication. He asserted that his disinclination to supply vegetables to the SHO free of cost had led to a frivolous prosecution.

6. To bring home the charge, the prosecution examined as many as 5 witnesses including Madan Mohan (PW5) and panch witnesses Mahesh (PW2) and Santosh (PW4). No evidence was adduced on behalf of the defence. Upon consideration of the entire evidence on record, the learned Special Judge, for the reasons recorded in the impugned judgment, found the appellant guilty of the offence charged with. He, therefore, convicted and sentenced him as indicated hereinabove.

7. Legality and propriety of the conviction under challenge have been assailed on the following grounds :-

(i) None of the independent witnesses had supported the prosecution case.

(ii) The statutory provisions relating to search and seizure were not complied with.

However, learned Dy. Govt. Advocate, while making reference to the incriminating pieces of evidence, has contended that the impugned conviction was fully justified.

8. ASI Madan Mohan (PW5) substantially reiterated the facts as recorded by him in the FIR (Ex.P-8). As per his statement, - on receiving the information, he inscribed the same at Serial No.482 of Roznamcha and informed Additional Superintendent of Police, Satna accordingly and proceeded along with members of police force and panch witnesses towards the Collector Tiraha where the appellant was expected to arrive. The corresponding entry of Roznamcha (Ex.P-11) was also tendered in evidence. According to him, it was only after obtaining consent of the appellant who had come to the spot from Babupur side that he had

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searched the bag being carried by the appellant in presence of panch witnesses Mahesh (PW3) and Santosh Kumar (PW4). He was emphatic in deposing that the bag was found to contain 100 gms. of Ganja wherefrom a sample of 15 gms. was taken. In the cross-examination, no material discrepancy with reference to the contents of corresponding entry of the Roznamcha (Ex.P-11), notice (Ex.P-6), consent letter (Ex.P-7) and Seizure Memo (Ex.P-3) could be elicited. Addl. S.P. R.S. Pandey (PW1) also testified that the raid was conducted under his permission only. He further asserted that the appellant along with seized contraband was also produced before him. The unchallenged testimony of constable Ramesh Kumar (PW3) related to forwarding of sample to the FSL, Sagar for chemical examination.

9. It is true that none of the panch witnesses came forward to support the evidence of the detecting officer yet, their non-corroborative evidence would not afford a ground for acquittal as the offence does not affect any private individual but the society at large. Moreover, as observed by the Apex Court in *State of Punjab vs. Baldev Singh* AIR 1999 SC 2378, the social malady of drug abuse has already acquired the dimensions of an epidemic.

10. The evidence on record clearly proves that the search and seizure of the contraband were effected only after complying with the requirements of Section 42(2) of the Act. The contention that for want of compliance with the mandatory provision of Section 50 of the Act, the search was vitiated, is not acceptable as the Ganja was allegedly recovered at a public place from a plastic bag being carried by the appellant (*State of H.P. vs. Pawan Kumar* AIR 2005 SC 2265 followed). In this case, while explaining the malefic drug abuse, the Apex Court has struck a note of caution that drug traffickers should not go scot-free on technical pleas.

11. As pointed out already, the chemical analyst's report proved that the article forwarded for examination was Ganja only. Moreover, the appellant did not discharge the onus of proof to rebut the presumption envisaged under Section 54 of the Act. In the light of overwhelming evidence on record, none of the contentions raised against legality and correctness of the impugned conviction deserve acceptance. Thus, learned trial Judge did not commit any illegality in holding that the appellant was found in an illicit possession of 100 gms. of Ganja.

12. It is relevant to note that the Supreme Court in *Basheer vs. State of Kerala* (2004) 3 SCC 609, by overruling a contrary view taken by a Division Bench of this Court in *Ramesh vs. State of M.P.* 2004 CrLJ 62, has held that the amendment introduced by the NDPS (Amendment) Act, 2001 would not be applicable to any pending appeal. As an obvious consequence, the appellant is not entitled to get benefit of the quantity based mollification of the rigour of sentencing process brought into effect by the Act of 2001.

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13. The question that arises for consideration is as to whether the learned trial Judge was right in holding that possession of the contraband in question was not intended for personal consumption ?

14. As explained in the Supreme Court in *Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji*, Goa AIR 1993 SC 1456, the burden to prove that the Ganja was to be used for his personal consumption was on the appellant. However, neither in his answer to the charge nor in the examination, under Section 313 of the Code of Criminal Procedure, the appellant raised a specific plea as to prospective use of the contraband. In such a situation, learned trial Judge, while placing reliance on the decision of the Apex Court in *Durand Didier vs. Chief Secretary, Union Territory of Goa* AIR 1989 SC 1966, proceeded to hold that Ganja seized from the possession of the appellant, though in a small quantity, was not to be meant for his personal consumption. But, the distinguishing feature was that, in *Durand Didier's case*, the appellant was found to be in possession of the narcotic drugs or substances far in excess of the respective quantity mentioned in column 3 of the table under the notification (No. 0.827 (E) dt.14-11-85 issued by Ministry of Finance Department of Revenue), that too, in many ingeniously devised places of concealment in the camera, shaving tube, torch and shoes whereas, in the case on hand, the appellant, who is a vegetable seller by profession, was found carrying only 100 gms. of Ganja in a bag.

15. Legal position is well settled on the point that the burden on an accused person to establish the plea of defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence. Further, in a criminal case, the accused is not bound by his pleadings and it is open to him to prove his defence even from the admissions made by the prosecution witnesses.

16. Adverting to the facts of the present case, it may be observed that the Detecting Officer Madan Mohan (PW5) clearly admitted that the appellant explained the possession of the contraband by saying that it was meant for his personal consumption only. Thus, the preponderance of probability, in the light of circumstances surrounding seizure of only 100 gms. of Ganja, favoured the defence that the contraband was not meant for sale or distribution. Accordingly, it ought to have been inferred that Ganja, forming 1/5th of the small quantity specified in the notification, was possessed by the appellant for his personal consumption. The question posed above, therefore, deserves to be answered in negative.

17. As an obvious consequence, the appeal is allowed in part. The impugned conviction and consequent sentences are hereby set aside. Instead, the appellant

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is convicted under Section 27 of the Act and is sentenced to undergo R.I. for six months. There is no need to impose any further fine in view of the fact that the appellant has already suffered imprisonment for a period of more than 2 years and 4 months consequent to the judgment of the Court below.

18. The appellant is on bail. His bail bonds shall stand discharged.

*Appeal partly allowed.*

I.L.R. [2009] M. P., 2098  
**APPELLATE CRIMINAL**  
*Before Mr. Justice R.C. Mishra*  
 24 February, 2009\*

**BHASKAR PRASAD**

... Appellant

**Vs.**

**STATE OF M.P.**

... Respondent

**Penal Code (45 of 1860), Section 316 - *Causing death of quick unborn child by act amounting to culpable homicide - If a person strikes a pregnant woman and thereby causes death of her quick unborn child, he would be guilty of the offence u/s 316 provided the blow was intended by him to cause woman's death or was one which he knew or had reason to believe to be likely to cause it - Appellant alleged to have given thrusts with a lathi on side of womb - Doctor had not found any injury on the dead fetus - Prosecution failed to prove essential ingredients of offence - Conviction and sentences set-aside - Appeal allowed.*** (Paras 6 to 11)

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

**Cases referred :**

AIR 1966 All 590.

S.C. Datt with G.P. Patel, for the appellant.

P. Singh, Panel Lawyer, for the respondent/State.

### **J U D G M E N T**

**R.C. MISHRA, J. :-**This appeal has been preferred against the judgment

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dated 26.09.1995 passed by Third Additional Sessions Judge, Rewa in S.T. No.124/1988, whereby the appellant was convicted under Section 316 of the IPC and sentenced to undergo R.I. for 5 years and to pay fine of Rs.2,000/-and in default to further suffer S.I. for 1 year.

2: The prosecution case, in short, may be stated as under :

(i) Ramwati (who also died subsequently) was the wife of Ramdas (PW5) and daughter-in-law of the first informant Kunware (PW4), who are residents of Village Tamra. At the relevant point of time, she was carrying a pregnancy of nearly 6 months.

(ii) On 10.11.1986 at about 8 a.m., when she had gone along with Kunne (PW7), Manwati (PW8), Baby (PW9), Kammu (PW11) and Momina picking Chana ki Bhaji (leaves of gram plants) to the field belonging to Rajendra Prasad, father of the appellant and situated nearly village Jarha, the appellant came there and assaulted Ramwati with a lathi and one of the blows given by him landed on side of her womb, resulted in death of the unborn child.

(iii) Ultimately, the fetus was delivered on 12.11.1986 at about 8 p.m. Thereafter, it was upon the report (Ex.P-2) lodged by the father-in-law Kunware (PW4) on 13.11.1986 at 9.10 a.m. that a case under Section 316 of the IPC was registered against the appellant at P.S. Gurh.

(iv) After inquest proceedings, dead body of the child was sent for post mortem. Autopsy Surgeon Dr. Santosh Kumar (PW1) opined that the fetus of nearly six months was born dead. Ramwati was also subjected to medical examination. However, Lady Doctor P. Dwivedi did not find any external injury on her body.

(v) After due investigation, charge-sheet was submitted in the Court of ACJM, Rewa, who committed the case to the Court of Session for trial.

3. The appellant denied the charge and pleaded false implication due to prevailing animosity on account of panchayat election.

4. To bring home the charge, the prosecution examined 12 witnesses in all including the eyewitnesses to the occurrence namely Kunne (PW7), Manwati (PW8), Baby (PW9) and Kammu (PW11). No evidence was adduced by the defence. On consideration of the entire evidence, the learned trial Judge, for the reasons recorded in the impugned judgment, proceeded to convict the appellant and sentenced him as indicated hereinabove.

5. Legality and propriety of the impugned conviction have been questioned primarily on the ground that there was no corroborative medical evidence to prove

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the alleged act of the appellant. However, the learned Panel Lawyer, while making reference to the incriminating pieces of evidence available on record, has contended that the conviction under challenge is well-merited.

6. Although, the evidence of Kunne (PW7), Manwati (PW8), Baby (PW9) and Kammu (PW11) named as the eyewitnesses in the FIR (Ex.P-2), was consistent on the point that on the festive occasion of Deethvan, Ramwati had also gone to the field for taking chana-bhaji yet, it suffers from serious infirmities on the nature of assault allegedly made by the appellant. According to Kunne and Manwati, the sisters-in-law of Ramwati, the appellant had given 4 guchchas (thrusts) with a lathi on Ramwati's bakha (side of womb) whereas Kammu categorically asserted that the appellant had struck a lathi blow on the womb itself. Autopsy Surgeon Dr. Santosh Kumar Pathak (PW1) clearly admitted that he had not found any injury on the dead fetus. Further, Dr. P. Dwivedi, who had the occasion to examine Ramwati on 13.11.1986 at 10.30 p.m, was not examined by the prosecution presumably in view of her negative opinion as to existence of any external injury on the person of Ramwati.

7. Thus, even though, the eyewitnesses to the incident denied the suggestion that Ramwati had fallen down, while running away along with them on arrival of the appellant in the field yet, its probability could not be ruled out in absence of corroborative medical opinion as to assault in question.

8. Section 316 punishes the offence against child in womb. If a person strikes a pregnant woman and thereby causes death of her quick unborn child, he would be guilty of the offence provided the blow was intended by him to cause woman's death or was one which he knew or had reason to believe to be likely to cause it. The illustration to section reads—

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die, but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

9. As explained in *Jabbar vs. State* AIR 1966 All 590—

Unless the act is done against the mother with an intention or with a knowledge, which brings it within the purview of Section 299, it cannot constitute an offence under this Section merely because the death of a quick unborn child has resulted from an act against the mother.

10. However, Kunware (PW4) was the only witness who had alleged that his daughter-in-law Ramkali, not able to make recovery, had died nearly 7 months



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after the abortion. But, as indicated already, there was absolutely no medical evidence to establish the alleged cause of Ramwati's death.

11. To sum up, in absence of the evidence to prove all the essential ingredients of the offence under Section 316 of the IPC, learned trial Judge completely misdirected himself in holding the appellant guilty thereof. The appeal, therefore, deserves acceptance.

12. Consequently, the appeal is allowed. The impugned conviction and consequent sentences passed against the appellant are hereby set-aside. Instead, he is acquitted of the charge. The fine amount, if deposited, be refunded to the appellant.

*Appeal allowed.*

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**I.L.R. [2009] M. P., 2101**  
**APPELLATE CRIMINAL**  
*Before Mr. Justice R.C. Mishra*  
 17 April, 2009\*

**GANESH SINGH**

**Vs.**

**STATE OF M.P.**

... Appellant

... Respondent

**A. Evidence Act (1 of 1872), Section 9 - Relevant fact - Identification in Court for first time - Police did not conduct test identification parade of assailant - Evidence as to identification of accused for first time in Court is not totally irrelevant and inadmissible - Witness who is a well qualified Doctor received number of injuries - Looking to number and situs of injuries it was not expected that she would forget faces of the assailants - Identification in Court relevant.** (Para 21)

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

**B. Penal Code (45 of 1860), Section 394 - Voluntarily causing hurt in committing robbery - Constructive liability - One accused assaulted the injured - Other two accused persons, who did not cause injury to Doctor, are constructively liable to be convicted for offence u/s 394.** (Para 23)

ख. दण्ड संहिता (1860 का 45), धारा 394 - लूट करने में स्वेच्छया उपहति कारित करना - आन्वयिक दायित्व - एक अभियुक्त ने क्षतिग्रस्त पर हमला किया - दो अन्य अभियुक्त, जिन्होंने चिकित्सक को क्षति कारित नहीं की, धारा 394 के अपराध के लिए दोषसिद्ध किये जाने के लिए आन्वयिक रूप से दायी हैं।

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**C.** Penal Code (45 of 1860), Section 397 - *Robbery with attempt to cause death or grievous hurt - Appellants guilty of attempt to commit robbery by demanding key of almirah and ornaments from injured witness - Section 397 had no application to the case where robbery was not actually completed.* (Para 27)

ग. दण्ड संहिता (1860 का 45), धारा 397 - मृत्यु या घोर उपहति कारित करने के प्रयत्न के साथ लूट - अपीलार्थी क्षतिग्रस्त साक्षी से अल्मारी की चाबी और आभूषणों की माँगकर लूट करने के प्रयत्न के दोषी - धारा 397 उस मामले में कोई प्रयोज्यनीयता नहीं रखती जहाँ वास्तविक रूप से लूट पूर्ण नहीं हुई।

**Cases referred :**

AIR 1970 SC 1321, 1991 Cr.L.J. 1583, 1993 Cr.L.J. 281, 1994 Cr.L.J. 1117, (1975) 1 SC 797.

*Surendra Singh with Manish Mishra, for the appellant.*

*S. Paliwal, G.A., for the respondent/State.*

**J U D G M E N T**

**R.C. MISHRA, J. :-**This judgment shall govern disposal of all the three appeals as, being related to the same incident, they are interlinked. For the sake of convenience, the appellants shall be referred to by their respective names.

2. Relevant particulars of the appeals and the judgments impugned therein may be tabulated as under -

| Cri. Appeal No. | Preferred by   | Convicted under Section                     | Sentenced to                                                                                                                                                                                              | Corresponding judgment |                   |          |
|-----------------|----------------|---------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|-------------------|----------|
|                 |                |                                             |                                                                                                                                                                                                           | Dated                  | Passed by         | S.T. No. |
| 1448/1994       | Ganesh Singh   | 394 read with 397 of IPC<br><br>506B of IPC | undergo R.I. for 7 years and to pay a fine of Rs.500/- and in default, to suffer R.I. for 6 months.<br><br>undergo R.I. for 1 year<br>[with the direction that the jail sentences shall run concurrently] | 15/11/94               | II ASJ, Tikamgarh | 110/93   |
| 1451/1994       | Sanjay Khare   | 394 read with 397 of IPC                    | undergo R.I. for 7 years and to pay a fine of Rs.500/- and in default, to suffer R.I. for 6 months.                                                                                                       | 15/11/94               | II ASJ, Tikamgarh | 110/93   |
| 25/1996         | Harish Pastaur | 394 read with 397 of IPC                    | undergo R.I. for 7 years and to pay a fine of Rs.500/- and in default to suffer R.I. for 6 months.                                                                                                        | 18/12/95               | II ASJ, Tikamgarh | 57/95    |

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3. The prosecution story, in short, may be narrated as under -

(i) At the relevant point of time, complainant Dr. Madhu Jain (examined as PW1 in both the trials) and hereinafter referred to as 'Madhu') was posted as Woman Assistant Surgeon in the Government Hospital at Tikamgarh. She was residing with her husband and daughter in Government Quarter, bearing No.F1 & situated in Civil Lines and Krishna Bai (examined as PW2 in both the trials) was in employ as domestic help.

(ii) On 11/10/1992, at about 9.15 p.m., Madhu, while watching Television, asked Krishna Bai, who was observing fast on the eve of Sharad Purnima, to take Kheer (a sweetened preparation of rice and milk). However, saying that she would consume the dish only after lighting up a lamp at the holy plant of Tulsi, Krishna Bai opened the door to the courtyard. As Krishna entered into the courtyard, she found all the three appellants standing there. Sanjay was carrying a knife whereas Harish and Ganesh were armed with kattas. Sanjay caught hold of her neck; caused her to fall down whereas Harish threw a shawl over her body. She raised alarm but Ganesh, while shoving a Katta against her chest, threatened to kill her.

(iii) Hearing cry of Krishna, Madhu rushed towards the courtyard but, in the transit, Sanjay fell her down near the door. After pressing her neck, Sanjay rode upon her and after putting a knife over her chest, asked her to hand over key of the almirah and ornaments. As she shouted for help, Sanjay dealt repeated blows with knife on various parts of her body. While offering resistance, she bit his left index finger. The other appellants, who were standing nearby with kattas in their hands, also gave threat to kill Madhu. However, when she declined to give the key or to inform about the jewellery, Sanjay tried to stab in her abdomen but she warded off the stroke and, in the process, sustained injury in the left palm. She also continued to raise alarms. On hearing noise outside, the appellants fled away by climbing over the wall. While running away, Ganesh also snatched nose pin from Krishna Bai.

(iv) Neighbourers including Dr. Ashok Kumar Mishra (PW7 in S.T. No.110/1993) rushed to the spot. In the meanwhile, Madhu telephonically informed Dr. Aradhana Johri (PW4 in S.T. No.110/93) about the incident. She, in turn, transmitted the information to Superintendent of Police, who deputed Ved Prakash Sharma

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(PW14 in S.T.No.110/93) to go to spot and deal with the situation.

(v) On being informed by the persons gathered around the spot that the miscreants were hiding themselves in the nearby bushes, Ved Prakash started intensive search for the offenders with the help of the members of the police force and the public. However, on being surrounded, Ganesh suddenly came out of the bushes situated behind the quarter allotted to the Executive Engineer and fired a shot through katta at Dr. A.K. Mishra, who was able to save himself. Ved Prakash Sharma also resorted to fire from his service revolver. Ganesh tried to run away but was immediately apprehended and, in the process, constable Sitaram also sustained injuries. Ganesh was severely beaten by the members of the public and Krishna's nose pin was also recovered from his possession.

(vi) Upon a report (Ex.P-1) given by Madhu herself, a case under Sections 307 and 394 read with 34 of the IPC and 25 and 27 of the Arms Act, was registered as Crime No.410/92 at Kotwali Tikamgarh. Madhu, Krishna and Ganesh were immediately taken to the hospital where Dr. Nand Kishore Chaurasiya (PW9) examined them. Another report (Ex.P-7) submitted by Dr. A.K. Mishra led to registration of a case under Section 307 of the IPC as Crime No.411/92. During investigation, Sub Inspector J.P. Verma (PW15) seized Havai Chappal and a shawl from the spot and a knife from possession of Madhu. He also recovered a katta from the bushes at the instance of Ganesh.

(vii) Sanjay could be apprehended on 12/10/1992 and at his instance, another Katta was recovered from the back side of his house situated in Nutan Vihar Colony.

4. After due investigation, showing Harish as absconding, charge-sheet was filed against all the three accused before CJM, Tikamgarh who committed the case to the Court of Session for trial.

5. In the trial numbered as S.T. No.110/93, both Ganesh and Sanjay were charged with the offences punishable under Sections 394, 397 and 307 (on two counts viz. for attempting murder of Madhu and Dr. A.K. Mishra) of the IPC and S.25 and 27 of the Arms Act. They abjured the guilt and pleaded false implication. In the examination under Section 313 of the Code of Criminal Procedure, they further pleaded that at the time of alleged incident, they were present at the nearby betel shop run by Ramesh Kumar. According to them, after taking betel, Sanjay had returned home whereas Ganesh was apprehended by police officials on mere suspicion and was brutally beaten.

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6. The prosecution sought to prove the charges against Ganesh and Sanjay by examining as many as 16 witnesses including Madhu, Krishna and Dr. A.K. Mishra whereas one Ramesh Kumar, a Panwala (beetle shop owner), whose shop was situated affront the Hospital, was called in defence.

7. On a critical appreciation of the entire evidence on record, learned trial Judge, for the reasons recorded in the judgment dated 15/11/94, came to the following conclusions as recorded in Para 39 -

(i) The appellants Ganesh, Sanjay and Harish, being armed with Katta, knife and Katta respectively, were conjointly involved in attempting to commit robbery in the house of Madhu.

(ii) Sanjay, by inflicting repeated blows with a knife, made an attempt to kill Madhu who, while saving herself, had bitten his left index finger.

(iii) Ganesh was apprehended immediately after the incident; he fired a shot through his katta at members of public, who being enraged, had beaten him.

8. However, in the operative part of the judgment, learned ASJ, for the reasons best known to him, did not record the consequent conviction pertaining to the offence under Sections 307 and 307 read with 34 of the IPC.

9. On behalf of the appellants viz. Ganesh and Sanjay, legality and propriety of the impugned convictions have been challenged on the following grounds -

(i) Non-conduction of the test identification parade for ascertaining the identity of Sanjay who, admittedly, was not previously known to Madhu.

(ii) Non-corroborative evidence of Krishna as to the robbery of her nose pin as well as the identity of the appellants.

(iii) In absence of evidence to the effect that the Katta allegedly seized from the possession of Ganesh was in a working condition, the offence under Section 397 of the IPC was not made out.

10. During pendency of their appeals preferred by Ganesh and Sanjay, co-accused Harish surrendered himself before CJM, Tikamgarh on 1/3/95. He was duly arrested and after further investigation, a supplementary charge sheet was submitted against him in the Court of Chief Judicial Magistrate, Tikamgarh, who committed the case to the Court of Session for trial.

11. Appellant Harish was charged with the offences punishable under Section 394 read with Section 397 of the IPC only. He also raised defence of false implication. To bring home the charges, the prosecution preferred to examine only

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6 witnesses including Madhu, Krishna Bai, Harinarayan, Dr. N.K. Chourasiya and J.P. Verma, who were examined in the trial of other appellants. The evidence of other witness M.L. Ahirwal (PW5) related to registration of a case upon the written report (Ex.P-1). No evidence was adduced by Harish in support of his defence. On conclusion of the trial, learned ASJ, for the reasons assigned in the judgment dated 18/12/1995, found that guilt of Harish for the offences charged with was also proved beyond a reasonable doubt. He, accordingly, convicted and sentenced him as mentioned hereinabove.

12. Legality and propriety of the convictions of Harish have been questioned inter alia on the grounds of non-conduction of the test identification parade; non-corroborative evidence of Krishna and non-recovery of Katta from his possession.

13. In response, learned Government Advocate, while making reference to the incriminating pieces of evidence on record, has submitted that the convictions were well-merited.

14. Before proceeding to appreciate the merits of the rival contentions in a proper perspective, it is necessary to first advert to the medical evidence available on record. Dr. Nand Kishore Chaurasiya (PW9) testified that in the medical examination conducted on 11.10.1992 at 10.30 p.m., he had noticed the following injuries on the persons of Madhu, Krishna and Ganesh -

**Injuries on the body of Madhu**

(i) Incised wound over dorsal surface of the 1st phalanx of the thumb of left hand 1 cm x ¼ cm x ¼ cm in the middle.

(ii) Incised wound over 1st phalanx of the index finger, left palmer surface ½ cm x 0.1 cm x 0.1 cm.

(iii) Two minute incised wounds, middle phalanx palmer surface, each ¼ cm x 0.1 cm x 0.1 cm on the left ring finger.

(iv) Two incised wounds on the little finger, left 2nd phalanx, palmer surface ¼ cm x 0.1 cm x 0.1 cm.

(v) One abrasion on distal phalanx of dorsal surface of little, right & middle finger left, each about 1½ cm x 1/2 cms, irregular area.

(vi) Two incised wounds on the dorsomedial surface of middle of left forearm 2" x 0.1 cm x skin deep.

(vii) Incised wound on middle of left cheek 1 cm x 1/2 cm x ¼ cm.

(viii) Abrasion on right side temporal region 1½" x 0.2"

(ix) Sub conjunctive haemorrhage left eye in 2 cm x 1 cm area.

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- (x) Bruise molar prominence left eye in 1" x ½" area
- (xi) Abrasion right side nose in 1/2 cm x 1/2 cm area.
- (xii) Three abrasions on left side throat, each about 1 cm x 1/4 cm.

**Injuries on the body of Krishna**

- (i) Four abrasions over dorsal surface left index finger and on dorsal surface of middle left finger and two on dorsal surface on left hand each in size 1 cm x linear
- (ii) Abrasion on right side upper part of throat size 2 cm x ½ cm
- (iii) Abrasion on left side over nose size ½ cm x ¼ cm area

**Injuries on the body of Ganesh**

- (i) Bruise on eye lid, left eye
- (ii) Bruise on lower eye lid, right eye
- (iii) Eight bruises on back, shoulder, back of chest and lumber region size 4" x 1" to 6" x 1½"
- (iv) Multiple small abrasions size 0.2 cm x 0.2 cm, 1 cm x ½ cm in outer part of both legs

15. In the opinion of Dr. Nand Kishore Chaurasiya, all the injuries found on the body of Madhu except injury nos.(v), (viii) and (xii) [above] were inflicted by hard and sharp object whereas the abovementioned three injuries and all the injuries noticed on the persons of Krishna and Ganesh were caused by hard and blunt object. In the cross-examination, the medical expert denied the suggestion that he had exaggerated the number of injuries found on the person of Madhu, who happened to be his colleague.

16. Existence of under-mentioned injuries on the body of Sanjay at 5 p.m. on 12.10.1992 was proved by Dr. R.K. Pateria (PW10) -

- (i) Two teeth mark over flexar surface of left index finger, distal phalange, wound is lacerated.

- (ii) Two teeth mark over palmer aspect of left index finger, distal phalange, pattern of the injuries is elliptical.

According to the medical expert, these injuries were caused by teeth bite within a period of 24 hours.

17. It is true that, in both the trials, Krishna Bai (PW2) neither identified any one of the appellants as the persons involved in the alleged incident nor supported the assertion as recorded in her police statement (Ex.P-4) that one of the intruders had snatched her nose pin but, her evidence duly corroborated other material

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particulars of the prosecution case. The injuries found on the body further supported her version. In such a situation, failure of Krishna Bai to identify the appellants as one of the intruders in the quarter of Madhu did not assume any significance.

18. Coming to the evidence of Madhu, it may be observed that she not only reiterated the facts as stated in the report (Ex.P-1) scribed by her immediately after the incident but also identified each one of the appellants as the persons involved therein. According to her, - hearing shrieks of Krishna Bai, as she rushed towards the courtyard, Sanjay, who was standing affront the door, carrying a knife in his hand, obstructed her way and by causing her to fall down, demanded key of Almirah and ornaments by placing leg on her chest and pressing her neck whereas other appellants, who were armed with kattas, were also pressurizing her to fulfill the demand by giving threats to kill her. She categorically stated that while offering resistance, she continued to raise alarm and in the meanwhile, was repeatedly assaulted by Sanjay with the knife. As per her statement, Sanjay even attempted to push the knife into her abdomen but she was able to thwart the move by catching hold of the instrument. The injuries as described in the report (Ex. P-9) clearly reflected that she was assaulted repeatedly by a hard and sharp weapon. Moreover, opinion of Dr. R.K. Pateriya (PW10) that the injuries found on left index finger of Sanjay were the result of teeth bite also substantiated the corresponding explanation furnished by Madhu.

19. Dr. Aradhna Johri (PW4), a colleague and next-door neighbour of Madhu, testified that she had passed on the information about the incident as given by Madhu to the Superintendent of Police, on telephone. Ved Prakash Sharma (PW14), the then Additional S.P. also corroborated the fact that he was directed by the S.P. only to immediately visit the spot and nab the miscreants. He further described as to how with the help of police force and mob gathered around the house of Madhu, Ganesh, who was concealing his presence behind the fencing on the backside of the Govt. Quarters allotted to Madhu and the Executive Engineer, could be apprehended. As per his version, when Ganesh fired a shot to scare away the persons proceeding to surround him, he also opened fire from his service revolver. This assertion was duly supported by Dr. Ashok Kumar Mishra (PW7), who further stated that after being apprehended, Ganesh was severely beaten by members of the public. The medical evidence as to the corresponding injuries and recovery of Katta from his possession were the cogent incriminating circumstances against Ganesh. Thus, identity of Ganesh as the person involved in the robbery was not only established from the sworn testimony of Madhu but was also confirmed adequately from the other evidence on record.

20. It is relevant to note that in S.T. No.57/1995, Madhu reiterated the facts as deposed by her in the previous statement recorded in S.T. No.110/1993. She duly identified Harish as the companion of Sanjay & Ganesh and further asserted that



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he was also armed with a katta. Nothing could be elicited in her cross-examination as to suggest that she was, in any way, interested in implicating Harish on absolutely false grounds or mere suspicion created by his abscondence.

21. As pointed out already, Madhu is a well-qualified doctor. Apparently, she had ample opportunity to see the uncovered faces of the appellants. Looking to the number and situs of injuries, it was not expected from her that she would forget faces of the persons who had subjected her to such a traumatic experience. It is well settled that evidence as to identification of the accused for the first time in the Court is not totally irrelevant and inadmissible. Law on the subject was explained by the Apex Court in *Budhsen vs. State of U.P.* AIR 1970 SC 1321 in the following words -

“Facts which establish the identity of an accused person are relevant under Section 9 of the Indian Evidence Act. As a general rule, the substantive evidence of a witness is a statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when, for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration.”

22. Sworn testimony of Madhu in both the trials did not suffer from any serious infirmity with reference to the substratum of prosecution based on her report only. Accordingly, in the peculiar facts and circumstances of the case, learned trial Judge did not commit any illegality in treating the evidence of Madhu as to dock identification of the appellants as worthy of credence. The defence of being present, at the relevant point of time, in front of nearby betel shop was too fragile to warrant acceptance. Moreover, Ramesh (DW1) also admitted that hearing commotion, Ganesh had run away from his shop.

23. It transpires from the evidence on record that while fleeing away, Sanjay had left his knife at the spot. No dispute was raised as to the fact, recorded in memo (Ex.P-4), that on being produced by Madhu, it was seized by the Investigating

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Officer J.P. Verma (PW15). As stated by her, upon her disinclination to hand over key of the Almirah and ornaments, the same knife was used for causing injuries to her. Nevertheless, Section 394 of the IPC covers the offence of voluntarily causing hurt of either description in attempting to commit robbery. It also embodies principle of constructive liability. Consequently, Ganesh and Harish, despite the fact that none of the injuries received by Madhu was attributable to any one of them, were liable to be convicted for the offence under the Section.

24. For these reasons, none of the contentions raised against legality and propriety of the conviction under Section 394 of the IPC deserves acceptance.

25. This brings me to the crucial question namely whether the facts and circumstances of the case attract applicability of Section 397 of the IPC that provide for minimum punishment for certain aggravated forms of robbery.

26. Shri Surendra Singh, learned Senior Counsel appearing on behalf of appellant Ganesh, has strenuously contended that merely carrying a katta that was not subjected to test fire was not sufficient to make him liable for enhanced punishment under Section 397 of the IPC. To fortify the contention, reliance has been placed on a single Bench decision of the Orissa High Court in *Piyus Ekka v. State of Orissa* 1991 CRI. L. J. 1583 and a Division Bench decision of Bombay High Court in *Babulal Jairam Maurya v. State of Maharashtra* 1993 CRI. L. J. 281. However, Shri Sharad Verma, learned counsel for appellant Harish, by making attention to decision of the Apex Court in *Sukhwinder Singh @ Jaggi v. State of Punjab* 1994 CRI. L. J. 1117, has submitted that at the most, the offence under Section 397 read with S.511 of the IPC would be made out against him.

27. The arguments are apparently misconceived in view of the fact that from the evidence on record, the appellants were found guilty of attempt to commit robbery by demanding key of the almirah and ornaments from Madhu by overawing her with deadly weapons like knife and kattas whereas Section 397 of the IPC prescribes enhanced punishment for using a deadly weapon at the time of committing robbery. As an obvious corollary, Section 397 had no application to the case where robbery was not actually completed. Even so, measure of punishment had to be regulated by Section 398 of the IPC that provides for minimum punishment of 7 years' imprisonment in a case of attempt to commit robbery when armed with deadly weapon (*Phool Kumar v. Delhi Admn.*, (1975) 1 SCC 797 referred to). In this view of the matter, the conviction of the appellants for the offence under Section 394 read with 397 deserves to be converted into one under Section 394 read with S. 398 of the IPC. But, in absence of corresponding charge, it would not be possible to uphold conviction of Ganesh of the offence of criminal intimidation punishable under Section 506-B of the IPC.

28. In the result -

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(i) the appeal (Cri. Appeal No. 1448/1994) preferred by Ganesh is allowed in part. His conviction under Section 506-B of the IPC and consequent sentences are hereby set-aside. However, his conviction under Section 394 read with 397 is converted into one under Section 394 read with 398 of the IPC and is sentenced to undergo R.I. for 7 years and to pay a fine of Rs.500/- and in default, to suffer R.I. for 6 months.

(ii) Sanjay's appeal (Cri. Appeal No. 1451/1994) is allowed in part. His conviction under Section 394 read with 397 is converted into one under Section 394 read with 398 of the IPC and is sentenced to undergo R.I. for 7 years and to pay a fine of Rs.500/- and in default, to suffer R.I. for 6 months.

(iii) the appeal presented by Harish (Cri. Appeal No. 25/1996) is allowed in part. His conviction under Section 394 read with 397 is converted into one under Section 394 read with S.398 of the IPC and is sentenced to undergo R.I. for 7 years and to pay a fine of Rs.500/- and in default, to suffer R.I. for 6 months.

29. The appellants are on bail. They are directed to surrender to their bail bonds for undergoing the remaining part of sentences.

30. Copy of the judgment be retained in the connected criminal appeals.

*Appeal partly allowed.*

I.L.R. [2009] M. P., 2111

**CRIMINAL REVISION**

*Before Mr. Justice K.S. Chauhan*

11 February, 2009\*

**REWALAL**

... Applicant

**Vs.**

**SMT. URMILA**

... Non-applicant

**Criminal Procedure Code, 1973 (2 of 1974), Section 125, Hindu Marriage Act, 1955, Section 9 - Maintenance - Wife did not join her husband in spite of decree for restitution of conjugal rights - It is on record that husband is having illicit relations with another woman - There are grounds of cruelty also - Prima facie these are just grounds to refuse wife to live with her husband - Wife entitled for maintenance - Revision dismissed.** (Para 13)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2): धारा 125, हिन्दू विवाह अधिनियम, 1955, धारा 9 - भरण-पोषण - पत्नी दाम्पत्य अधिकारों के पुनर्स्थापन की डिग्री के बावजूद अपने पति के साथ नहीं रही - अभिलेख पर यह मौजूद है कि पति के अन्य महिला से अवैध सम्बन्ध हैं

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— क्रूरता के आधार भी हैं — प्रथम दृष्ट्या ये आधार पत्नी के अपने पति के साथ रहने से इंकार करने के लिए न्यायसंगत आधार हैं — पत्नी भरण-पोषण की हकदार — पुनरीक्षण खारिज।

**Cases referred :**

2007(I) MPWN 10, 2008(1) CCSC 384 (SC), AIR 1975 SC 83.

*K.B. Bhatnagar*, for the applicant.

*C.P. Golandaz*, for the non-applicant.

**ORDER**

**K.S. CHAUHAN, J. :-** This criminal revision under Section 397/401 of the Code of Criminal Procedure read with Section 19(4) of the Family Court Act has been preferred being aggrieved by the impugned order dated 21.05.2007 passed by Family Court, Jabalpur in M.J.C.No.250/04 whereby the application filed by respondent under Section 125 of Cr.P.C. has been allowed and directing the petitioner to pay maintenance to respondent and her daughter at the rate of Rs.800/- per month to each respectively.

2. The facts of the case in brief are that respondent/applicant (herein after referred as respondent) filed an application under Section 125 of Cr.P.C. against the petitioner/non-applicant (herein after referred as petitioner) to the effect that she is the wedded wife of petitioner. Their marriage was performed on 24.04.1996. They lived happily for two years and two daughters were born out of their wedlock but later on petitioner's behavior changed. He started harassing her. On 16.01.2004 he gave her beating and drove her out of the house. Since then she is residing in her parents house alongwith her minor daughter. She has no means to maintain herself. On the contrary, petitioner is a teacher and has means to support. It was also stated that the petitioner has illicit relations with Suhagabai and, he has neglected her. Since the marital relations are still subsisting hence, she is entitled to get maintenance and also for her minor daughter.

3. The petitioner submitted the written reply in detail wherein he denied most of the averments of the petition mainly contending that respondent is voluntarily living separately. He has not subjected her to cruelty and not driven out from his house. He is ready to keep with him. He has also filed the petition under Section 9 of Hindu Marriage Act for restitution of the conjugal rights wherein the decree has been passed. In spite of she did not turn up to live with him, therefore, in such circumstances, she is not entitled to get any maintenance.

4. Both the parties adduced the evidence in support of their contention. Urmila Bai (AW-1) and Pusiya Bai (AW-2) have been examined on behalf of the respondent whereas Rewalal Sarote (NAW-1) and Ayodhya Singh (NAW-2) on behalf of petitioner. After appreciating the evidence, Family Court allowed the application filed by the respondent and directed the petitioner to pay maintenance at the rate of Rs.800/- per month to respondent and to her minor daughter each respectively. Being aggrieved by the impugned order the instant revision has been preferred on the grounds mentioned in the memo of appeal.

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5. Learned counsel for the petitioner at the very outset submitted that the petitioner has no objection in granting maintenance to minor daughter Ku. Anjali, but he has challenged the same granted to the respondent.

6. Learned counsel for the petitioner submitted that the petitioner wants to keep respondent with him but she is not residing with him in spite of the decree of restitution of conjugal rights passed by the competent court. She has deserted him without any reasonable cause. In such circumstances, she is not entitled for any maintenance. He has placed the reliance on the decision of this Court rendered in the case of *Balakram Vs. Smt. Durgabai and others* 2007 (1) MPWN 10. Learned counsel for the petitioner further submitted that there is no evidence that petitioner subjected cruelty to the respondent hence it was not proved that respondent was harassed or beaten by the petitioner. The court below has not given the finding as to what is effect of the decree passed in Hindu Marriage Act Case No.42A/04 passed by 2nd Additional District Judge, Mandla on 19.07.2006 (Ex.D-1). The learned counsel for the petitioner further submitted that the court below has committed an illegality in awarding the maintenance allowance to the respondent.

7. On the contrary, Ms. C.P. Golandaz, Advocate appearing on behalf of the respondent supported the impugned order mainly contending that respondent is living separately from petitioner on account of his misbehavior and mal-treatment. He has made baseless allegation regarding her character by alleging that she has illicit relations with Vijay. This is the mental cruelty to her. Since the petitioner is causing harassment, giving beating, therefore, she is apprehending danger in residing with him. Learned counsel for the respondent has placed the reliance on the decision of *Chaturbhuj vs. Sita Bai*, 2008 (1) CCSC 384 (SC). Learned counsel for the respondent further submitted that the court below has not committed any illegality in directing the petitioner to pay maintenance allowance to the respondent. The order being proper does not call for any interference.

8. The main point for consideration in this revision is that whether the court below has committed any illegality in allowing the application filed by the respondent under Section 125 of Cr.P.C?

9. It is not disputed that the respondent and petitioner married on 24.04.1996 and two daughters were born out of their wedlock. One is residing with petitioner and another with respondent. Their life was very peaceful up to two years but subsequently the relations became tense. According to respondent, petitioner started misbehaving and causing her Marpeet. On 16.01.2004 she was beaten and driven out of the house and since then she is residing with her parents. The evidence of Urmila Bai (AW-1) and Pusiya Bai (AW-2) has been given to the effect. On the contrary, the petitioner has denied such facts and has given the evidence that she has voluntarily left his house and living separately. The evidence

**REWALAL Vs. SMT. URMILA**

of Rewalal Sarote (NW-1) and Ayodhya Singh (NW-2) has been adduced to that effect. Thus, it is evident that petitioner and respondent both are residing separately with one minor daughter each.

10. The contention of learned counsel of the petitioner is that the petitioner has offered to live together but she has not accepted and living separately, therefore, no maintenance can be provided to her. Learned counsel has drawn my attention on the provisions contained in IIInd Proviso of Section 125(3) and also to the provisions contained in Section 125 (4) of Cr.P.C.

**IIInd proviso of Section 125(3) reads thus:-**

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

**Section 125(4) reads as follows:-**

No wife shall be entitled to receive an (allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,) from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

11. In the present case it is evident that respondent is not living with her husband. She is not ready to live with him. She has also not complied with the decree (Ex.D-2) passed in matrimonial case No.42A/04 by IIInd Additional District Judge, Mandla.

12. The contention of the learned counsel of respondent is that petitioner has mal treated her, caused her Marpeet. She was driven out of her matrimonial house on 16.01.2004. Since then he never cared her. He has never returned to take her back. He has made the false allegation that she has illicit relations with Vijay. He does not take food prepared by her. He has illicit relation with another woman Suhagabai. Her life is in danger if she lives with him. These are the grounds why she does not want to live with him. Learned counsel of respondent has drawn my attention to the explanation to Section 125(3) of Cr.P.C.

**Explanation of Section 125(3) reads thus:-**

If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

13. Since it has come on record that petitioner has illicit relation with another

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woman, hence this ground alone is sufficient to refuse to live with him. Apart from it there is ground of cruelty also. The allegations regarding her character constitute mental cruelty to her. That may be an additional ground to refuse to live with him. Prima facie these are the just grounds to refuse respondent to live with her husband.

14. No doubt petitioner has obtained ex parte decree of restitution of conjugal rights against the respondent and as per referred case *Balakram* (Supra) the wife not joining company of her husband in spite of such decree, she is not entitled for maintenance but the referred case is distinguishable on the facts of this case. Apart from it even the divorced wife is entitled to receive maintenance till she does not remarry. It is abundantly clear that marriage in between the parties is still subsisting hence she is entitled for maintenance.

15. In the case of *Chaturbhuj* (Supra) the Apex Court has held thus:-

“The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase “unable to maintain herself” in the instance case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125, Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in *Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and others*, AIR 1978 SC 1807 falls within constitutional sweep of Article 15 (3) reinforced by Article 39 of the Constitution of India, 1950 (in short the “Constitution”). It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in *Savitaben Somabhai Bhatiya v. State of Gujarat and others*, 2005 (2) Supreme 503; 2005 (1) CCSC 480”.

16. In the case of *Bhagwan Datt Vs. Smt. Kamla Devi* AIR 1975 SC 83, it was observed that the wife should be in a position to maintain standard of living, which is neither luxurious nor penurious, but what is consistent with status of a family. The expression “unable to maintain herself” does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125, Cr.P.C.

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17. From the evidence available on record it is manifestly clear that respondent is not in a position to maintain herself. On the contrary, petitioner is a teacher in govt. school and is earning salary. He has sufficient means to provide the maintenance. The awarded amount is not excessive. There is no illegality, impropriety or perversity in the impugned order hence cannot be set aside. The revision is devoid of substance and deserves to be dismissed.

18. Consequently, this revision fails and is dismissed accordingly.

*Revision dismissed.*

I.L.R. [2009] M. P., 2116

**CRIMINAL REVISION**

*Before Mr. Justice N.K. Mody*

31 July, 2008\*

**LAKHAN**

**Vs.**

**STATE OF M.P.**

... Applicant

... Non-applicant

**A. Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Sections 52 & 53 - JMFC after holding the inquiry passed the order that applicant is not juvenile - Order challenged before High Court by way of revision - Objection about maintainability - Held - Though appeal u/s 52 of the Act is maintainable - However, an aggrieved person can approach High Court direct as well by challenging the propriety of any order - Objection relating to maintainability of revision overruled. (Para 5)**

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

**B. Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Sections 52 & 53 - Criminal cases were pending against the applicant before Sessions Court - It was alleged that applicant was juvenile on the date of offence - Matter referred to Juvenile Justice Board - After inquiry Board held that the age of applicant is more than 18 years - Order challenged before High Court - Held - No opportunity was given to the applicant to cross-examine medical evidence which was adduced and also no opportunity given to adduce further evidence to prove his date of birth - Orders set-aside with certain directions. (Paras 11 & 12)**



**LAKHAN Vs. STATE OF M.P.**

खा. किशोर न्याय (बालकों की देख-रेख और संरक्षण) अधिनियम (2000 का 56), धाराएँ 52 व 53 - आवेदक के विरुद्ध सेशन न्यायालय के समक्ष दाण्डिक मामले लम्बित थे - यह अभिकथित किया गया कि आवेदक अपराध की तारीख को किशोर था - मामला किशोर न्याय बोर्ड को संदर्भित - जाँच करने के बाद बोर्ड ने अभिनिर्धारित किया कि आवेदक की आयु 18 वर्ष से अधिक है - आदेश को उच्च न्यायालय के समक्ष चुनौती - अभिनिर्धारित - आवेदक को जो चिकित्सीय साक्ष्य पेश किया गया था उसके प्रतिपरीक्षण का अवसर नहीं दिया और उसकी जन्मतिथि को सिद्ध करने के लिए भी कोई साक्ष्य पेश करने का अवसर नहीं दिया - आदेश कतिपय निदेशों के साथ अपास्त।

**C. Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Sections 2(k) & 4(2) - JMFC has passed the order that applicant is not juvenile - Order challenged - Held - As per Section 4(2) of the Act a Board consist of a Metropolitan Magistrate or a Judicial Magistrate First Class and two social workers of whom atleast one shall be a woman forming a bench and such bench shall have the powers conferred by the Cr.P.C. - Order passed by JMFC not by the Board - Order set-aside. (Paras 10 & 11)**

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

**Cases referred :**

2007(III) MPWN 37, 1990 CrLJ 2671 (SC), 2007(III) MPWN 77.

*N.S. Karada*, for the applicant.

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

**ORDER**

**N.K. Mody, J. :-** This order shall also govern the disposal of Cr. R. No. 436/08, as in both these revisions parties are one and the same and the order under challenge is also relating as to whether the petitioner is juvenile or not.

In Cr. R. No. 436/08 the order under challenge is dated 8.1.2008 passed by JMFC, Indore in the MJC No. 221/07, whereby the learned trial Court has held that the age of the petitioner is more than 18 years. IN Cr. R. No. 738/08 the order under challenge is dated 30.4.2008 passed by Juvenile Court, Indore Criminal Case No. 249/07. A copy of this order be also retained in the record of Cr. R. No. 436/08.

2. Short facts of the case are that the petitioner is an accused for an offence punishable under Sections 395 and 397 of IPC for which S.T. No. 366/07 is pending. in which the date of offence is dated 28.3.2007. Another case is pending against the petitioner is for the offence punishable under Sections 302, 394 and 397 of

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IPC, wherein the date of offence is 29.3.07 and for which S. T. No. 367/07 is pending. Third case pending against the petitioner is for the offence punishable under Sections 394 and 397 of IPC, wherein the date of offence is dated 28.3.2007, which has been registered as S. T. No. 368/07. All the aforesaid cases are pending in the Court of Sessions Judge, Indore. Before the Sessions Court it was alleged that the date of birth of petitioner is 1.3.1990, therefore, the petitioner was juvenile on the date offence. Hence it was prayed that an inquiry be made regarding the date of birth of the petitioner. Learned Sessions Judge sent the matter before the Juvenile Justice Board for holding an inquiry regarding the age of the petitioner. After holding the inquiry by the impugned order passed in both the cases, learned Court below held that the petitioner is not juvenile, against which present petitions have been filed.

3. A preliminary objection was raised by the counsel for the respondent that against the impugned order the remedy of appeal is available under Section 52 of Juvenile Justice (Care and Protection of Children) Act (hereinafter referred to as the Act), hence the revision petition itself is not maintainable.

4. Learned counsel for the petitioner submits that remedy of appeal is not available to the petitioner and even if the remedy of appeal is available, then too the petitioner can directly approach to this court under Section 53 of the Act.

5. Learned counsel submits that Section 52 of the Act lays down that a person aggrieved by an order passed by competent authority under the Act may prefer an appeal to the Court of Sessions. As per sub Section 2 of Section 52 of the Act, the appeal is prohibited if the order passed by Board or the competent authority is of acquittal in respect of the juvenile alleged to have committed an offence and any order made by a Committee in respect of a finding that a person is not a neglected juvenile. Since the case of the petitioner is not covered under the proviso, therefore, the appeal is maintainable. However, an aggrieved person can approach this Court direct as well by challenging the propriety of any order. Therefore, the objection relating to maintainability of the revision petition is overruled.

6. Learned counsel submits that no opportunity of adducing evidence was given to the petitioner. It is submitted that number of documents were filed by the petitioner to prove that as per the academic record of the petitioner his date of birth is 1.3.90. Learned counsel submits that learned Court below committed error in giving undue weightage to the medical evidence and not taking into consideration the documentary evidence regarding the date of birth submitted by the petitioner. For this contention reliance was placed on a decision of this Court in the matter of *Ummed Singh Vs. State of M.P. - 2007 (III) MPWN 37*, wherein it has been held that sometime school record and statements of parents deserve acceptance. Reliance was also placed in the matter of *Bhoop Ram Vs. State of U.P. - 1990 CR.L.J. 2671*, wherein, in a case where the school certificate was produced by

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the accused showing that the accused was below 16 years on relevant date and also there was no material throwing doubt on entries in school certificate, the Hon'ble Apex Court has held that the school certificate cannot be rejected on surmise that it is not unusual for parents to understate age of their children at time school admission. It was also held that medical certificate is based on estimate and possibility of error cannot be ruled out. Reliance was also placed on a decision in the matter of *Anuj Singh Vs. State of M.P. - 2007 (III) MPWN 77*, wherein this Court has observed that upon ossification test accused found 18 years and six months of age, it was held that test carries margin of error of two years and such error is to be taken in favour of accused, thus he is juvenile.

7. On the strength of the aforesaid arguments learned counsel for the petitioner submits that the order passed by learned Court below be set aside and the petitioner be held as juvenile.

8. Learned counsel for the respondent submits that after due appreciation of evidence on record learned Court below has found that the petitioner is not juvenile, which requires no interference.

9. From perusal of tile record it appears that the order under challenge in Cr. R. No. 436/08 is dated 8.1.2008, passed by JMFC, Indore, while from the certified copy of order dated 30.4.2008 which is under challenge in Cr. R. No. 738/08 it is not clear that who has passed that order, as the name of the Court who has passed the order is missing from the certified copy. Let a photostate copy of the order dated 30.4.2008 which is under challenge in Cr.R. No. 738/08 be sent to District Judge, Indore with a direction to call the explanation of copying section within three weeks that how such type of certified copy has been issued which does not disclose the designation of the Court who has passed the order under intimation to this Court.

10. The word "Juvenile" has been defined under Section 2 (k) of the Act, according to which the "juvenile" or "child" means a person who has not completed eighteenth year of age. Section 4 of the Act deals with the Juvenile Justice Board. As per sub Section (2) of Section 4 of the Act, "A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973, on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class and the Magistrate on the Board shall be designated as the principal Magistrate.

11. From perusal of the order dated 8.1.2008 which is under challenge in Cr. R. No. 436/08, it appears that the same is passed by JMFC, Indore and not by the Board. From perusal of the order dated 30.4.2008 passed in Cr. R. No. 738/08, it cannot be said that the order has been passed by the Board. Apart from this it

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appears that no opportunity was given to the petitioner to cross examine all the medical evidence, which was adduced before learned Court below and also no opportunity was given to the petitioner to adduce further evidence to prove his date of birth as 1.3.1990 in addition of the educational evidence.

12. In the facts and circumstances of the case, both the petitions are allowed and the impugned orders passed by learned Court below are set aside with the following directions:-

(i) That the matter shall be placed before the Juvenile Justice Board and the petitioner shall be given full opportunity to adduce evidence by examining the mother, father and brothers and sisters of the petitioner. Apart from this the petitioner shall also furnish the record of place of birth of petitioner and his brothers and sisters. Petitioner shall also be given an opportunity to cross examine the doctor who has given the medical evidence about the age of the petitioner.

(ii) After completion of the evidence, the Board shall decide the application in presence of the petitioner after observing his age by physical appearance.

(iii) Since it is being claimed that the petitioner is juvenile, therefore, if an appropriate application is filed the petitioner be permitted to be represented through counsel.

(iv) The inquiry shall be completed as early as possible within a period of six weeks so that the sessions trial which is pending should not affect adversely.

(v) State is directed to keep petitioner present before Juvenile Board on the first date of its sitting in the week commencing from 18.8.2008.

13. With the aforesaid directions both the revision petitions stands disposed of.

*Revision Petition disposed of.*

I.L.R. [2009] M. P., 2120

**MISCELLANEOUS CRIMINAL CASE**

*Before Mr. Justice N.K. Mody*

2 March, 2009\*

NAVEEN & ors.

Vs.

RAJNI

... Applicants

... Non-applicant

**Protection of Women from Domestic Violence Act (43 of 2005),  
Sections 9 & 37 - Applicants were alleged to have committed offence under**

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*the Act between 12.11.2005 to 06.06.2006 - Act come into force on 26.10.2006 - Trial Court considering the offence to be of continuous nature held the applicants guilty - Held - It is nowhere stated that the non-applicant was subjected to violence after 06.06.2006 - Act has having no retrospective effect - Applicants can not be prosecuted for the period prior to the enforcement of the Act - Criminal proceeding stands dropped. (Para 5)*

धरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 9 व 37 - आवेदकों ने कथित रूप से अधिनियम के अधीन 12.11.2005 से 06.06.2006 के मध्य अपराध किया - अधिनियम 26.10.2006 को प्रवृत्त हुआ - विचारण न्यायालय ने अपराध को निरंतर प्रकृति का होना मानकर आवेदकों को दोषी ठहराया - अभिनिर्धारित - यह कहीं भी उल्लिखित नहीं किया गया कि अनावेदक के साथ 06.06.2006 के बाद हिंसा की गई - अधिनियम कोई भूतलक्षी प्रभाव नहीं रखता है - आवेदकों को अधिनियम के प्रवर्तन की पूर्ववर्ती कालावधि के लिए अभियोजित नहीं किया जा सकता - दण्डिक कार्यवाही बंद की गई।

**Case referred :**

1991(I) MPWN SN 117.

R.S. Chandrawade, for the applicants.

J.N. Tiwari, for the non-applicant.

**ORDER**

N.K. Mody, J. :-Being aggrieved by the order dated 24/09/2008 passed by JMFC, Indore in criminal case No.02/2008 whereby the application filed by the petitioners for quashment of the proceedings initiated against the petitioners for the offence punishable under Section 9 and 37 of Protection of Women From Domestic Violence Act, 2005 (Act No.43 of 2005) (which shall be referred hereinafter as "Act of 2005"), the present petition has been filed.

2. Short facts of the case are that respondent is the wife of petitioner No. 1, while the petitioner No.2 is the father of petitioner No. 1. Petitioner No.3 is cousin brother of petitioner No. 1 and petitioner No.4 is uncle of petitioner No. 1 while petitioner No.5 is son of the petitioner No.4. A complaint was lodged by the respondent against the petitioners on 08/10/2006 for the offence punishable under Section 9 and 37 of the Act of 2005 alleging that the respondent is the wife of petitioner No. 1 whose marriage was solemnized with petitioner No. 1 on 12/11/2005. In the complaint it was alleged that respondent was subjected to violation by the petitioners between 12/11/2005 to 06/06/2006 when the respondent lived with the petitioner No. 1 in the matrimonial house. In the complaint it was alleged that the petitioners have committed the offence which is punishable under Section 9 and 37 of the Act of 2005, hence the petitioners be convicted. After taking cognizance of the offence, notices were issued to the petitioners. After making the appearance by the petitioners, an application was filed by them wherein it was prayed that the complaint filed by the respondent be dismissed as the alleged offence is between 12/11/2005 to 06/06/2006 while the Act came in force with

## NAVEEN Vs. RAJNI

effect from 26/10/2006. It was alleged that since the Act itself was not in force on the relevant date, therefore, the petitioners cannot be prosecuted. The application was opposed by the respondent. After hearing both the parties, learned trial Court dismissed the application against which the present petition has been filed.

3. Learned counsel for the petitioners argued at length and submit that the impugned order passed by learned trial Court is illegal and deserves to be set-aside. It is submitted that on the date of offence the Act was not in force. It is submitted that the Act came in force on 26/10/2006 while the total period when the alleged offence was committed was between 12/11/2005 to 06/06/2006. It is also submitted that in view of this the learned trial Court committed error in dismissing the application filed by the petitioners. Reliance is placed on a decision in the matter of *National Insurance Co. Ltd. Vs. Smt Ganga Bai* 1991 (1) MPWN SN 117 wherein while considering the impact of Section 92-A of Motor Vehicles Act this Court observed that Section 92-A is not retrospective in its operation and will not apply to pending cases. It is submitted that the petition filed by the petitioners be allowed and the proceedings initiated against the petitioners be dropped.

4. Learned counsel for the respondent submits that no illegality has been committed by learned Court below in dismissing the application filed by the petitioners. It is submitted that the offence was a continues offence which was also in existence at the time of filing of the complaint. It is submitted that in the complaint itself it is mentioned that the offence is in continuation. It is submitted that since the offence was in continuation which was being done by the petitioners even after coming in force of the Act, therefore, the application filed by the petitioners has rightly be dismissed by the learned Court below. It is submitted that the petition filed by the petitioners be dismissed.

5. From perusal of record, it appears that in the complaint respondent has alleged that marriage of the respondent was solemnized on 13/11/2005. It was further alleged in the complaint that period when the offence was committed is between 12/11/2005 to 06/06/2006. In para 4 of the proforma application which is prescribed under the Act for lodging private complaint it is further alleged that thereafter continues. In para 4 the complainant is required to mention the date, place and time of the violence and further complainant is required to mention the nature of violence which is physical, mental etc. In the complaint it is no where stated that how the respondent was subjected to violence after 06/06/2006. Since the Act of 2005 itself has come in force on 26/10/2006 which was having no retrospective affect, therefore, it is wrong to say that the petitioners can be prosecuted for the period which was prior to the enforcement of the Act.

6. After going through the complaint it cannot be said that the offence was continuing even after 06/06/2006. If that would have been the position, then, there was no need to mention that the offence was between 12/11/2005 to 06/06/2006.

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In view of this, the petition filed by the petitioners is allowed and the impugned order dated 24/09/2008 passed by learned JMFC, Indore in criminal case No.2/2008 whereby the application filed by the petitioners for quashment of the proceedings initiated against the petitioners for the offence punishable under Section 9 and 37 of Act, 2005 and the criminal proceeding pending before the learned trial Court stands dropped.

7. With the aforesaid observation, petition stands disposed of. C.C. as per rules.

*Petition disposed of.*

**I.L.R. [2009] M. P., 2123  
MISCELLANEOUS CRIMINAL CASE**

*Before Mr. Justice N.K. Mody*

5 March, 2009\*

**MAYA SPINNERS LTD. & ors.**

... Applicants

**Vs.**

**SHRI SHANKAR COTTON CORPORATION**

**THROUGH NARENDRA KUMAR & ors.**

... Non-applicants

**Negotiable Instruments Act (26 of 1881), Section 138 - Offence against the Company and its Directors - For launching a prosecution against the Directors, there must be a specific allegation in the complaint as to the part played by them in the transaction - The allegation should be clear and unambiguous as to how the Directors were incharge and responsible for the conduct of the business of the Company - Nowhere in the complaint it was mentioned who had signed the cheque and how all the Directors were incharge and responsible for the transaction - It is not sufficient to allege that all the Directors were involved in the affairs of the Company - Order of taking cognizance is quashed with the direction to pass a fresh order after hearing the applicants - Application allowed.** (Para 5)

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

**MAYA SPINNERS LTD. Vs. SHRI SHANKAR COTTON CORPORATION****Cases referred :**

(2007) 9 SCC 481, 2007(3) MPLJ 9.

*Ashish Gupta*, for the applicants.

*Sunil Jain*, for the non-applicants.

**ORDER**

N.K. Mody, J. :-Being aggrieved by the order dated 12/10/01 passed by JMFC, Sendhwa in Criminal Case No.318/07 whereby the cognizance was taken by the learned Trial Court for an offence which is punishable U/s 138 of Negotiable Instruments Act (which shall be referred hereinafter as an Act), the present petition has been filed wherein it is prayed that the impugned order and also complaint filed by the respondents be quashed.

2. Short facts of the case are that the respondents filed a private complaint U/s 138 of the Act on 31/08/01 alleging that the respondents are the partners of firm M/s Shri Shankar Cotton Corporation, Sendhwa. It was alleged that petitioner No.1 M/s Maya Spinners Limited is a company having its head office at Indore. It was alleged that petitioner Nos. 2 to 5 are the managing director and director of the company and are responsible for petitioner No.1. It was alleged that 16/08/99 petitioners purchased cotton on credit through broker Chothmal Agrawal. It was alleged that the prices of the goods was of Rs.13,31,630/-. It was alleged that a cheque of Rs.50,000/- dated 22/01/01 was issued by the petitioners towards payment of the price of cotton. It was alleged that upon presentation the cheque was not encashed and was returned to the respondents. It was further alleged that inspite of notice of demand the cheque amount was not paid hence petitioners have committed an offence which is punishable U/s 138 of the Act and U/s 420 IPC. It was prayed that after taking cognizance petitioners be punished. After recording of the statement the learned Court below took cognizance of the offence and issued notices to the petitioners, against which the present petition has been filed.

3. Mr. Ashish Gupta, learned counsel for petitioners argued at length and submits that the impugned order passed by the learned Court below whereby the cognizance has been taken against the petitioners is illegal and deserves to be quashed. It is submitted that in the complaint nothing has been stated against the petitioners except the fact that petitioner Nos. 2 to 5 are the Managing Director and Director of petitioner No.1 Company and are responsible for the company. It is submitted that on the basis of these allegations petitioner Nos. 2 to 5 could not have been prosecuted. Learned counsel placed reliance on a decision in the matter of *Saroj Kumar Poddar Vs. State* (NCT of DELHI), Reported in 2007(3) MPLJ 9 wherein Hon'ble Apex Court has held that every person connected with the company shall not fall within the ambit of the provisions. It is only those persons who were in-charge of and responsible for the conduct of business of the company



**MAYA SPINNERS LTD. Vs. SHRISHANKAR COTTON CORPORATION**

at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a Director of a company who was not in-charge of and was not responsible for the conduct of the business of a company at the relevant time, will not be liable under the provision. The liability arises from being in-charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. It is submitted that petition filed by the petitioners be allowed and the proceedings initiated against the petitioners be quashed.

4. Mr. Sunil Jain, learned counsel for respondents submits that in the complaint it has been alleged by the respondents that the petitioner No.1 is a company and petitioner Nos. 2 to 5 are doing the business in the name of petitioner No. 1 company and are responsible for the act of the company. It is submitted that the allegations made in the complaint which are duly supported by the evidence which were recorded by the learned Trial Court U/s 200 & 202 Cr.P.C. no illegality has been committed by the learned Court below in taking cognizance against the petitioners. It is submitted that petition filed by the petitioners be dismissed.

5. From perusal of the complaint it is evident that in para two of the complaint it is stated that petitioner Nos. 2 to 5 are responsible for petitioner No. 1 company. In para three of the complaint it is stated that petitioners purchased cotton and in para four it has been stated that petitioners issued a cheque of Rs.50,000/-. Copy of the cheque is enclosed herewith which has been duly signed by one of the director of the company. It is nowhere stated that the cheque has been signed by which of the petitioner. In the matter of *NK. Wahi Vs. Shekhar Singh*, Reported in (2007) 9 SCC 481 wherein Hon'ble apex Court has held that for launching a prosecution against the alleged Directors, there must be a specific allegation in the complaint as to the part played by them in the transaction. It was further observed that allegation should be clear and unambiguous as to how the Directors were in charge and responsible for the conduct of the business of the company.

6. In the facts and circumstances of the case where the allegations made in the complaint are not specific, this Court is of the view that learned Court below committed error in taking cognizance against the petitioners. In view of this petition filed by the petitioners is allowed and the impugned order whereby the cognizance was taken by the learned Trial Court is quashed with a direction to the learned Trial Court to pass a fresh order after hearing the petitioners keeping in view that the allegations relating to the offence should be clear.

7. With the aforesaid observations, petition stands disposed of.

*Petition disposed of.*

**JAGDISH Vs. STATE OF M.P.**

I.L.R. [2009] M. P., 2126

**MISCELLANEOUS CRIMINAL CASE***Before Mr. Justice N.K. Mody*

18 March, 2009\*

**JAGDISH****Vs.****STATE OF M.P. & ors.**

... Applicant

... Non-applicants

**Criminal Procedure Code, 1973 (2 of 1974), Sections 427 & 482 - Sentence on offender already sentenced for another offence - Inherent powers of the High Court - Applicant convicted in two cases u/s 8/18 of the N.D.P.S. Act and was awarded identical sentences by the trial Court which was confirmed by the High Court in appeal - Thereafter, the prayer made u/s 482 Cr.P.C. before High Court for the sentence to run concurrently - Held - High Court is competent to issue such direction in appropriate cases u/s 482 of Cr.P.C. by invoking its inherent powers at any time subsequent to the decision in a given case even if the trial Court, appellate or revisional Court has failed to exercise its discretion u/s 427(1) of Cr.P.C. (Para 5)**

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

**Cases referred :**

AIR 1988 SC 2143, 1989 MPLJ 116, 2004 CrLJ 2945, 2007 CrLJ 591, 2007(1) Crimes 50.

*Ganesh Verma*, for the applicant.

*C.R. Karnik, Dy.G.A.*, for the non-applicants.

**ORDER**

**N.K. Mody, J. :-** This is a petition U/s 427 read with Section 482 Cr.P.C. wherein the prayer is that the conviction of the petitioner in Special Case No.9/97 dated 02/04/95 and in Special Case No.16/97 dated 09/12/97 which were confirmed by this Court in Cr.A. Nos.493/97 & 176/98 vide judgment dated 15/03/04 whereby the petitioner was convicted U/s 8/18 of NDPS Act and sentenced for 10 years

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RI and fine of Rs.1,00,000/- in each, be ordered to run concurrently, the present petition has been filed.

2. Learned counsel for petitioner argued at length and submits that the petitioner is in jail w.e.f. 23/01/97 and has completed the jail sentence of more than 12 years. It is submitted that another case which was registered against the petitioner is dated 25/01/97 while petitioner was in custody w.e.f. 23/01/97. Learned counsel further submits that both the cases are one because during investigation of case it was disclosed that contraband articles has been hidden by the petitioner and upon information the articles were recovered. It is prayed that the petition filed by the petitioner be allowed.

3. Learned counsel for respondent submits that the petition itself is not maintainable as the petitioner did not make the prayer before the learned Trial Court at the time of judgment or also before this Court during the course of hearing of appeal. Learned counsel placed reliance on a decision in the matter of *MR. Kudva Vs. State of Andhra Pradesh*, Reported in 2007(1) Crimes 50. It is submitted that the petition is devoid of substance, hence be dismissed.

4. Section 427 of Cr.P.C. lays down that in a case where a person already undergoing sentence of imprisonment is sentenced on a subsequent, such imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence.

5. In the matter of *Mohd. Akhtar Hussain alias Ibrahim Ahmed Bhatti Vs. Assistant Collector of customs*, Reported in AIR 1988 SC 2143 wherein Hon'ble Apex Court has held that where the accused was caught red-handed in the first case under Gold (Control) Act and was awarded maximum sentence after pleading guilty and in the second case under the Customs Act was also awarded maximum sentence after pleading guilty which was to run consecutively, the accused was surely entitled to complain for giving the maximum sentence. It is no doubt true that the enormity of the crime committed by the accused is relevant for measuring the sentence. But the maximum sentence awarded in one case against the same accused is not irrelevant for consideration while giving the consecutive sentence in the second case although it is grave. The Court has to consider the totality of the sentences which the accused has to undergo if the sentences are to be consecutive. In the matter of *Shersingh Vs. State of M.P.*, Reported in 1989 MPLJ 116 wherein a full bench of this Court had a occasion to consider that whether a prayer U/s 427 Cr.P.C. can be exercised by this Court whiel exercising inherent jurisdiction U/s 482 Cr.P.C. and in case where accused was convicted for two distinct and separate offence and sentences passed by two different Courts it was held that High Court under exercise of its inherent jurisdiction is competent to issue such direction. It was further held that High Court has power in appropriate

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cases to entertain an application under Section 482 of the Code by invoking its inherent powers at any time subsequent to the decision in a given case even if the trial Court or the appellate or revisional Court has failed to exercise its discretion under Section 427(1) of the Code. In the matter of *Mohan Bhanudas Mohite Vs. State of Maharashtra*, Reported in 2004 Cri. L. J. 2945 wherein Bombay High Court in a case where accused was convicted and sentenced in sessions case while he was undergoing sentence, he was convicted and sentenced in another sessions Case, it was held that the order of Court to make two sentences to run concurrently is proper as the accused was convicted under NDPS Act and Section 32-A of the Act prohibits suspension, remission or commutation of sentence. In the matter of *Paramjeet Singh Vs. State of Rajasthan*, Reported in 2007 Cri. L. J. 591 wherein in a case where the accused was convicted in three different criminal cases U/s 379 IPC it was held that the ends of justice would be met in directing substantive sentences for offence U/s 379 IPC in the three Criminal Cases to run concurrently.

6. So far as the law laid down by the Hon'ble Apex Court in the matter of *MR. Kudva* (Supra) is concerned is quite distinguishable. In that case against the judgment of conviction which was maintained by the High Court Special Leave Petition before Hon'ble Apex Court which was also dismissed and thereafter the application u/s 427 Cr.P.C. was filed and in that circumstances Hon'ble Supreme Court has observed that the application filed U/s 482 read with Section 427 Cr.P.C. after dismissal of special leave petition is not maintainable. In the present case it is not the situation. No SLP has been filed, therefore, the law laid down by Hon'ble Apex Court in the matter of *MR. Kudva* (Supra) is not applicable to this case.

7. In the matter of *Mohd. Akhtar alias Ibrahim Ahmed Bhatti Vs. Assistant Collector of Customs (Prevention), Ahmadabad*, Reported in AIR 1988 SC 2143 wherein Hon'ble Apex court held as under:

The basic rule of thumb over the years has been the so called transactions rule for concurrent sentences. If a given transaction constitutes two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offence is shot the same or the facts constituting the two offences are quite different.

8. In the matter of *State of Punjab Vs. Madan Lal* passed in Cr.A. No.529/04 decided on 5th March 2009 in a case wherein the convictions were in terms of Section 138 of the Negotiable Instruments Act, 1881, the High Court noted that all the transactions related to the family of the respondent and the matter related to different cheques issued by the respondent to the complainant party. For this purpose separate complaints were filed. The High Court accordingly directed that

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the sentence imposed by learned Additional Sessions Judge and SDM Magistrate were to run concurrently was affirmed by the Hon'ble Apex Court.

9. In the present case in both the cases the petitioner has convicted for a period of 10 years with fine of Rs.1,00,000/-. In both the cases offence was U/s 8/18 of NDPS Act and in both the cases the date of offence is 23/01/97 and 25/01/97. Undisputedly petitioner was in the custody of the respondent w.e.f 23/01/97. In the facts and circumstances of the case petition filed by the petitioner is allowed and it is directed that the jail sentence awarded to the petitioner in Special Case No.9/97 and in Special Case No.16/97 shall run concurrently.

10. With the aforesaid observations, petition stands disposed of.

*Petition disposed of.*

I.L.R. [2009] M. P., 2129

**MISCELLANEOUS CRIMINAL CASE**

*Before Mr. Justice N.K. Mody*

31 March, 2009\*

PREMLAL

... Applicant

Vs.

LEELABAI & anr.

... Non-applicants

**Criminal Procedure Code, 1973 (2 of 1974), Section 125, Evidence Act, 1872, Section 112 - Non-applicant No.1 living with paramour applicant and son non-applicant No.2 has been born - Claim of maintenance by non-applicant No.2 from applicant - Held - Whether non-applicant No.2 is legitimate or illegitimate son of applicant - Presumption is that non-applicant No.2 is legitimate son of non-applicant No.1's husband - Presumption could have been rebutted by evidence that husband had no access at the time when non-applicant No.2 have been begotten - Non-applicant No.1 was living with paramour applicant is no evidence of non-access of husband - Case remanded for recording evidence of both the parties on this aspect after framing of point of determination.** (Paras 8 & 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125, साक्ष्य अधिनियम 1872, धारा 112 - अनावेदक क्रमांक 1 उपपति आवेदक के साथ निवासरत और पुत्र अनावेदक क्रमांक 2 का जन्म हुआ - अनावेदक क्रमांक 2 द्वारा आवेदक से भरण-पोषण का दावा - अभिनिर्धारित - क्या अनावेदक क्रमांक 2 आवेदक का धर्मज पुत्र है या अधर्मज - उपधारणा यह है कि अनावेदक क्रमांक 2 अनावेदक क्रमांक 1 के पति का धर्मज पुत्र है - उपधारणा का इस साक्ष्य द्वारा खण्डन किया जा सकता था कि पति की उस समय कोई पहुँच नहीं थी जब अनावेदक क्रमांक 2 का गर्भाधान किया गया - अनावेदक क्रमांक 1 उपपति आवेदक के साथ रह रही थी पति की पहुँच न होने का कोई

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साक्ष्य नहीं है – मामला अवधारण का बिन्दु विरचित करने के बाद इस पहलू पर दोनों पक्षकारों की साक्ष्य अभिलिखित किये जाने हेतु प्रतिप्रेषित किया गया।

**Cases referred :**

AIR (29) 1942 Madras 251, AIR 1960 Kerala 119.

*Manish Vijayvargiya*, for the applicant.

*V.S. Chhabra*, for the non-applicants.

**O R D E R**

N.K. Mody, J. :-Being aggrieved by the order dated 7th January 2008 passed by Ist Additional Sessions Judge, Shajapur in Cr.R. No.193/07 whereby the order dated 09/08/07 passed by Chief Judicial Magistrate, Shajapur in Criminal Case No.113/06 whereby the application filed by the respondents U/s 125 Cr.P.C. was allowed in part and the maintenance was awarded @ Rs.500/- per month to the respondent No.2 was maintained, the present petition has been filed.

2. Short facts of the case are that the respondents filed a petition U/s 125 Cr.P.C. for grant of maintenance alleging that the respondent No.1 is the wife of petitioner. It was alleged that petitioner married with respondent no.1 without disclosing the fact that he is already married to some one else. It was alleged that after the marriage respondent No.1 came to know that petitioner was already married to Gulab Bai. It was alleged that out of the wedlock respondent No.1 has delivered a son Sandeep respondent No.2 herein. It was alleged that respondent No.1 was subjected to cruelty and was compelled to leave the house. It was alleged that respondents are unable to maintained themselves, while petitioner is able to maintain them. It was prayed that petition be allowed and the maintenance @ Rs.3,000/- per month be awarded. Petition was contested on various grounds by the petitioner including on the ground that respondent No.1 is not the wife of the petitioner and respondent No.2 is not son of the petitioner. It was alleged that respondent No.1 is the wife of one Rajaram from whom respondent No.1 is having two children. It was also alleged that petitioner is married to Gulab Bai and is also having children from her. It was alleged that since the respondent No.1 is wife of Rajaram and respondent No.2 is not the son of petitioner, therefore, petition filed by the respondent be dismissed. After holding summery inquiry learned Trial Court dismissed the application filed by the respondent No.1 but allowed the application filed by respondent No.2 and awarded maintenance @ Rs.500/- per month, against which a revision petition was filed which was dismissed, hence this petition.

3. Mr.Manish Vijayvargiya, learned counsel for petitioner argued at length and submits that the impugned order passed by the learned Courts below is illegal and deserves to be set aside. It is submitted that since the respondent no.1 was married to one Rajaram and no divorce took place between them, therefore, it has to be presumed under law that the respondent No.2 is the son of respondent No.1 from her husband Rajaram. For this contention reliance is placed on Section 112 of

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Indian Evidence Act. It is submitted that in the facts and circumstances of the case the impugned order passed by the learned Courts below are illegal, incorrect and deserves to be set aside. Learned counsel placed reliance on a decision in the matter of *Mrs. Raji Bai Ammal Vs. Mohamed Nathar Sahib*, Reported in AIR (29) 1942 Madras 251 wherein Madras High Court has observed that in a petition for maintenance by a married woman against a third person as mother and guardian of minor child alleged to have been born out of illegal intimacy with that third person all admissions of paternity by that third person are irrelevant if the woman fails to prove that she and her husband had no access at the time when the child could have been begotten. Further reliance is placed on a decision in the matter of *Raghavan Pillai Vs. Gourikutty Amma*, Reported in AIR 1960 Kerala 119, wherein it was held that in an application under Section 488 by a woman against her paramour for the maintenance of their alleged child, where the husband of the woman is living and their marriage is not dissolved, the woman must prove the non-access of the husband with her during the relevant period. Further reliance is placed on a decision in the matter of *Mrs. Raji Bai Ammal Vs. Mohammed Nathar Sahib*, Reported in AIR (29) 1942 Madras 251 wherein Madras High Court has held that in a petition for maintenance by a married woman against a third person as mother and guardian of minor child alleged to have been born out of illegal intimacy with that third person all admissions of paternity by that third person are irrelevant if the woman fails to prove that she and her husband had no access at the time when the child could have been begotten.

4. On the strength of aforesaid decisions learned counsel for petitioner prays that the petition filed by the petitioner be allowed and the impugned order passed by the learned Courts below be quashed.

5. Mr. VS. Chhabra, learned counsel for respondents submit that after recording of evidence learned Courts below has come to the conclusion that the respondent No.2 is son of the petitioner which is a finding of fact and no interference can be made by this Court while exercising the jurisdiction U/s 482 Cr.P.C.. It is submitted that the petition filed by the petitioner be dismissed.

6. Section 112 of Evidence Act reads as under:-

**Birth during marriage, conclusive proof of legitimacy:-**

The facts that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that parties to the marriage had no access to each other at the time when he could have been begotten.

7. From perusal of the record it appears that while awarding the maintenance, the learned Courts below were impressed with the statement of Leelabai wherein

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she has stated that she is wedded wife of Premlal. The learned Revisional Court was further impressed with the statement of Narayan who was the son of maternal uncle of Leelabai who has supported the statement of Leelabai and the statement of Narayan who also happens to be brother-in-law of Premlal. The learned Revisional Court has further observed that why Leelabai has not filed the petition for maintenance against Rajaram with whom the marriage of the respondent was solemnized earlier. So far as presumption of legitimacy of the son U/s 112 of the Indian Evidence Act is concerned, the learned Court below has observed that since it is a summary inquiry for maintenance U/s 125 Cr.P.C., therefore, the petitioner is not entitled for any relief on that account.

8. While deciding the application for maintenance, it is necessary for the Court to come to the conclusion that Sandeep is legitimate or illegitimate son of the petitioner. So far as Section 112 of the Indian Evidence Act is concerned, the presumption is in favour of Premlal, petitioner. However, it could have been rebutted by the evidence that Rajaram had no access to Leelabai at any time when Sandeep could have been begotten. Such evidence must be strong, distinct, clear satisfactory and conclusive. Proof per se that Leelabai was living with the paramour Premlal is no evidence of non access by Rajaram. It appears that on this issue neither any evidence was adduced by the respondents nor any effective cross examination has been made by the petitioner.

9. In the facts and circumstances of the case, the impugned order passed by the learned Courts below holding the respondent No. 2 as son of the petitioner is set aside and the case is remanded back to the learned Trial Court to record the evidence of both the parties on this aspect of the case after framing a point of determination and to re-decide the case afresh. It is made clear that while re-deciding the case, the petitioner shall continue to pay the maintenance as an interim measure as awarded by the learned Trial Court and affirmed by the revisional Court.

10. Parties are directed to remain present before the learned Court below on 30/04/2009.

11. With the aforesaid observations, petition stands disposed of.

*Petition disposed of.*

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