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

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## M. P. SERIES

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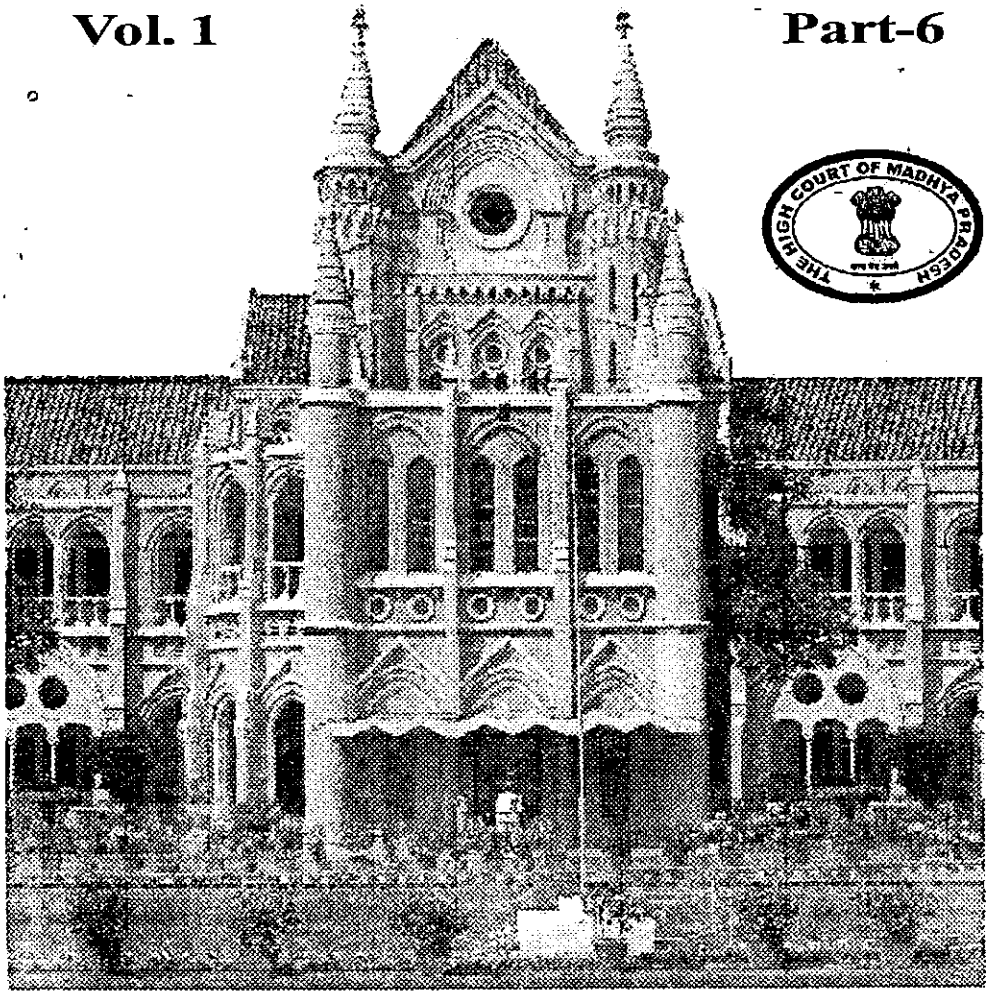
THE HIGH COURT OF MADHYA PRADESH

**Vol. 1** **Part-6**

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*Short Note*

*(28)*

A.K. Shrivastava, J

ANNAPURNA DUBEY (SMT.)
Vs.
CHAMPALAL @ CHAUA

**A. Civil Procedure Code (5 of 1908), Order 26 Rule 1** - *Plaintiff 80 years old lady patient of heart and arthritis diseases - Application for examination on commission filed supported by affidavit and certificate of Doctor that she is a patient of arthritis and is unable to walk - No reply to the application and counter affidavit has been filed by defendant - Trial Court rejected the application only on the ground that it cannot be inferred that plaintiff is seriously ill - Held - Court may permit any party to examine on commission if he or she is sick or infirm and is unable to attend the Court - Explanation to Rule 1 of Order 26 empowers a Court to accept a certificate purporting to be signed by Registered Medical Practitioner as a evidence of the sickness or infirmity without calling the medical practitioner as a witness - Trial Court adopted a wrong approach of law and in arbitrary manner dismissed the application - High Court set-aside the order and remanded the matter to trial Court. 2004(I) MPWN 98 (rel.)*

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 1 – वादी, 80 वर्ष की महिला हृदय और गठिया रोग की रोगी – कमीशन पर परीक्षा के लिए शपथपत्र और चिकित्सक के प्रमाणपत्र से समर्थित आवेदन पेश किया गया कि वह गठिया की रोगी है और चलने–फिरने में असमर्थ है – प्रतिवादी द्वारा आवेदन का कोई जवाब और प्रति–शपथपत्र पेश नही किया गया – विचारण न्यायालय ने केवल इस आधार पर आवेदन खारिज किया कि यह निष्कर्ष नही निकाला जा सकता कि वादी गम्भीर रूप से बीमार है – अभिनिर्धारित – न्यायालय किसी पक्षकार को कमीशन पर परीक्षा करने के लिए अनुज्ञात कर सकता है यदि वह बीमार या अशक्त है और न्यायालय में उपस्थित होने में असमर्थ है – आदेश 26 के नियम 1 का स्पष्टीकरण न्यायालय को रजिस्ट्रीकृत चिकित्सा व्यवसायी द्वारा हस्ताक्षरित होना तात्पर्यित किसी प्रमाणपत्र को चिकित्सा व्यवसायी को साक्षी के रूप में बुलाये बिना बीमारी या अशक्तता के साक्ष्य के रूप में ग्रहण करने के लिए सशक्त करता है – विचारण न्यायालय ने विधि का गलत दृष्टिकोण अपनाया और मनमाने ढंग से आवेदन खारिज किया – उच्च न्यायालय ने आदेश अपास्त किया और मामला विचारण न्यायालय को प्रतिप्रेषित किया। 2004(I) MPWN 98 (अवलंबित)

**B. Civil Procedure Code (5 of 1908), Order 26 Rule 1** - *Order allowing or disallowing an application u/O 26 R 1 CPC is a discretionary order, but if a judge proceeds on a wrong principle in a matter within its jurisdiction, his order may be set-aside by an appellate Court. 1969 JLJ 467 (rel.)*

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 1 – सि.प्र.सं. के आदेश 26 नियम 1 के अन्तर्गत किसी आवेदन को स्वीकार या अस्वीकार करने का आदेश एक विवेकाधीन आदेश है, किन्तु यदि एक न्यायाधीश उसकी अधिकारिता के किसी मामले में गलत सिद्धांत पर कार्यवाही करता है तो अपीलीय न्यायालय द्वारा उसका आदेश अपास्त किया जा सकता है। 1969 JLJ 467 (अवलंबित)

*Vishal Dhagat*, for the appellant.

*None*, for the respondent No.1.
*L.D.S. Baghel, Dy.G.A.*, for the respondent No.2.

***F.A. No.394/2007 (Jabalpur), D/- 24 September, 2008.**

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*Short Note*
**(29)**

S.R. Waghmare, J

CHOURADIYA TRADING COMPANY

Vs.

SUSHIL KUMAR

**Negotiable Instruments Act (26 of 1881), Sections 138 & 142 -** *Dishonor of cheque - Complaint filed before expiry of 15 days of receipt of demand notice - Held - Cognizance of the offence is taken after mandatory period prescribed u/s 142 and accused failed to make payment - Complaint maintainable - Order dismissing complaint as not maintainable and premature set-aside - Revision allowed.* 2005 CLDC 18, AIR 2000 SC 2946, (2008) 1 SCC (Cr) 703 = ILR [2008] MP 189 (ref.).

परक्राम्य लिखत अधिनियम (1881 का 26), धाराएँ 138 व 142 – चेक का अनादरण – परिवाद माँग के सूचनापत्र की प्राप्ति के 15 दिन की समाप्ति के पूर्व पेश किया गया – अभिनिर्धारित – अपराध का संज्ञान धारा 142 के अधीन विहित आज्ञापक कालावधि और अभियुक्त के संदाय करने में विफल रहने के बाद लिया गया – परिवाद पोषणीय – परिवाद को अपोषणीय और समयपूर्व मानकर खारिज करने का आदेश अपास्त – पुनरीक्षण मंजूर। 2005 CLDC 18, AIR 2000 SC 2946, (2008) 1 SCC (Cr) 703 = ILR [2008] MP 189 (संदर्भित).

*Sanjay Sharma*, for the applicant.
*Brajesh Garg*, for the non-applicant.

***Cr.R. No.13/2007 (Indore), D/- 29 April, 2009.**

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*Short Note*
**(30)**

Arun Mishra & Mrs. Sushma Shrivastava, JJ

DOMA

Vs.

SAYA BAI & anr.

**Civil Procedure Code (5 of 1908), Section 115, Specific Relief Act, 1963, Section 6(3) -** *Writ petition challenging final decision in case u/s 6 of the Specific Relief Act - Held - Writ petition not maintainable - Revision would be maintainable against final decision as no appeal is provided u/s 6 of Specific Relief Act - Petition dismissed.* 2007(3) MPLJ 130 (ref.)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 115, विनिर्दिष्ट अनुतोष अधिनियम,

1963, धारा 6(3) – विनिर्दिष्ट अनुतोष अधिनियम की धारा 6 के अधीन मामले में हुए अंतिम विनिश्चय को रिट याचिका में चुनौती – अभिनिर्धारित – रिट याचिका पोषणीय नही – अंतिम विनिश्चय के विरुद्ध पुनरीक्षण पोषणीय होगी क्योंकि विनिर्दिष्ट अनुतोष अधिनियम की धारा 6 के अधीन कोई अपील उपबंधित नही है – याचिका खारिज। 2007(3) MPLJ 130 (संदर्भित).

*Subodh Kathar,* for the petitioner.
*Santosh Jain,* for the respondents.

***W.P. No.11061/2007 (Jabalpur), D/- 5 February, 2009.**

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*Short Note*
**(31)**

K.S. Chauhan, J

IRSHAD KHAN
Vs.
SMT. RANI & anr.

**Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Sections 3 & 4, Criminal Procedure Code, 1973, Section 125 -** ***Maintenance - Applicant failed to prove that divorce was effected between the parties - Husband under obligation to maintain his wife - Grant of Rs.700 per month to wife and Rs.200 to child reasonable - Revision dismissed.*** AIR 2002 SC 3551, (2001) 7 SCC 740 (ref.)

मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धाराएँ 3 व 4, दण्ड प्रक्रिया संहिता, 1973, धारा 125 – भरण–पोषण – आवेदक यह साबित करने में असफल रहा कि पक्षकारों के मध्य विवाह विच्छेद हो गया था – पति अपनी पत्नी का भरण–पोषण करने की बाध्यता के अधीन – पत्नी को 700 रुपये प्रतिमाह और बच्चे को 200 रुपये प्रतिमाह का अनुदान युक्तियुक्त – पुनरीक्षण खारिज। AIR 2002 SC 3551, (2001) 7 SCC 740 (संदर्भित).

*R.R. Surwaria,* for the applicant.
*A.S. Usmani,* for the respondent.

***Cr.R. No.414/2008 (Jabalpur), D/- 6 February, 2009.**

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*Short Note*
**(32)**

Shantanu Kemkar, J

MANGILAL
Vs.
HAIDER ALI & anr.

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

*aside - Revision allowed.* W.P. No.6439/2008, 1994 ACJ 1 (SC), 2001 ACJ 1003 (ref.)

मोटर यान अधिनियम (1988 का 59), धारा 173 – अपील लोक अदालत में आपसी समझौते से निपटाई गई – राशि नगद रूप से निकालने के लिए आवेदन – खारिज – अभिनिर्धारित – आवेदक एक वयस्क व्यक्ति होकर उसे आई क्षतियों के लिए प्रतिकर के रूप में दिलाई गई राशि की आवश्यकता थी – अपील राशि सावधि जमा में जमा करने के बारे में कोई शर्त अधिरोपित किये बिना लोक अदालत में निपटाई गई – अधिकरण को राशि सावधि जमा में रखने का आदेश देने के स्थान पर उसकी निकासी का आवेदन मंजूर करना चाहिए था – अधिकरण का आदेश अपास्त – पुनरीक्षण मंजूर। W.P. No.6439/2008, 1994 ACJ 1 (SC), 2001 ACJ 1003 (संदर्भित).

*Lokesh Mehta,* for the applicant.

***C.R. No.60/2009 (Indore), D/- 22 April 2009.**

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***Short Note***

**(33)**

N.K. Mody, J

NIRMAL ENTERPRISES (M/S) & anr.
Vs.
SMT. NARGIS KAPADIYA

**Criminal Procedure Code, 1973 (2 of 1974), Section 311 -** *Complaint u/s 138 Negotiable Instruments Act, 1881 filed by non-applicant through power of attorney - Application u/s 311 filed after recording of evidence for permission to examine herself as complainant - Allowed - Held - Trial has yet to complete - To permit non-applicant to adduce evidence cannot be treated as permission to fill up lacuna - No prejudice caused to applicant as he will have right to cross-examine witness - Petition dismissed.* 2004(II) MPWN SN 71, AIR 1999 SC 2292, 2001(I) MPWN SN 96, 1994(II) MPWN SN 262, (2003) 11 SCC 486, 2007 CrLJ 4313 (ref.)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – अनावेदक द्वारा मुख्त्यारनामे के माध्यम से परक्राम्य लिखत अधिनियम, 1881 की धारा 138 के अधीन परिवाद पेश किया – साक्ष्य अभिलिखित किये जाने के बाद परिवादी के रूप में स्वयं की परीक्षा कराने की अनुमति के लिए धारा 311 के अधीन आवेदन पेश किया गया – मंजूर – अभिनिर्धारित – विचारण अभी पूर्ण होना है – अनावेदक को साक्ष्य पेश करने के लिए अनुज्ञात करने को कमी पूरा करने की अनुज्ञा के रूप में नही माना जा सकता – आवेदक को कोई पूर्वाग्रह कारित नही हुआ क्योंकि उसे साक्षी की प्रतिपरीक्षा करने का अधिकार होगा – याचिका खारिज। 2004(II) MPWN SN 71, AIR 1999 SC 2292, 2001(I) MPWN SN 96, 1994(II) MPWN SN 262, (2003) 11 SCC 486, 2007 CrLJ 4313 (संदर्भित).

*A.K. Sethi* with *Harish Joshi,* for the applicants.
*Ramesh Chhazed,* for the non-applicant.

***M.Cr.C. No.1905/2007 (Indore), D/- 6 March, 2009.**

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**I.L.R. [2009] M. P., 1545**

**SUPREME COURT OF INDIA**

*Before Mr. Justice S.B. Sinha & Mr. Justice Cyriac Joseph*

13 January, 2009*

MOHAN SINGH ... Appellant

Vs.

KASHI BAI & ors. ... Respondents

**Motor Vehicles Act (59 of 1988), Section 166 - *Second Schedule - Applicability - Second Schedule is applicable only in respect of claim petitions filed u/s 163A but the same provides for some guidelines while determining compensation u/s 166 - Deceased aged above 30 years but not exceeding 35 years - Multiplier of 17 in terms of Second Schedule is rightly applied by High Court - Appeal dismissed.*** (Paras 11 & 13)

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

**Cases referred :**

(1994) 2 SCC 176, (2001) 2 SCC 9, (2002) 6 SCC 281, (2002) 6 SCC 306, JT 2002 (Suppl. 1) SC 451, (2003) 3 SCC 148, (2005) 12 SCC 190, (2008) 4 SCC 259.

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

The Judgment of the Court was delivered by **S.B. Sinha, J.** :–Leave granted.

2. Appellant before us is the driver and owner of the jeep bearing registration No. MP-04J 1824 which met with an accident on 21.11.1999 having collided with a truck. The deceased Balma @ Balram Gond, Ramgopal and Shankarlal admittedly were travelling in the said vehicle.

3. A First Information Report was lodged. The heirs and legal representatives of the deceased filed applications for grant of compensation in terms of Section 166 of the Motor Vehicles Act, 1988 (for short "the Act") which was marked as Claim Case Nos. 76,78 and 79 of 2002.

4. The learned Tribunal, having regard to the rival contentions of the parties, framed the following issues:

> "1. Whether on 21.11.99 in the night at about 8 a.m. near village Semri, non applicant No.1 driving Jeep No. MP04 1824

*C.A. No.105/2009

and truck No. MP04K 2028 driven negligently and rashly the collision between the two vehicle occurred and in the result Shankarlal died.

2. Whether there was contributory negligence on the part of both the drivers? If so, effect

3. At 8 p.m. Jeep No. MP04J1824 was dashed by truck No. MP04 K 2028 and the accident was caused, if so, effect..

4. Whether applicants are entitled for compensation.

5. Relief & Cost"

5. The learned Tribunal upon consideration of the depositions of the witnesses held that neither the truck No. MP04K 2028 was involved in the accident, nor was it caused on account of rash and negligent driving on the part of its driver. The learned Tribunal passed awards in all the three cases as under:

| | |
|---|---|
| Claim Case No. 76 of 2002 | Rs. 1,32,000/- |
| Claim Case No. 78 of 2002 | Rs. 1,92,000/- |
| Claim Case No. 79 of 2002 | Rs. 4,22,400/- |

6. Appeals were preferred thereagainst by the appellant. By reason of the impugned judgment, the High Court, however, reversed the said findings, holding:

> "16. Coming to question of negligence, though Mohan Singh and two other witnesses examined by the claimant has stated that it was the truck driver who drove it in rash and negligent manner. However, in the claim petition, it was rightly mentioned that jeep driver also drove it in rash and negligent manner and the accident took place when two vehicles dashed against each other. Both were coming from opposite direction, thus, it was the duty of both the drivers to avoid the collision in which they have failed. Thus, we come to the conclusion that it is a case of contributory negligence in equal proportion of both drivers."

Although we are of the opinion that the High Court in doing so should have considered the matter at some details and it was further required to assign some reasons in support thereof, but, it is not necessary for us to consider that aspect of the matter as the owner or the insurer of the truck having not preferred any appeal, the same has attained finality.

In this appeal we are concerned with only one question, viz., as to whether any case has been made out for enhancement of the amount of compensation in favour of the appellant.

7 So far as the quantum of compensation is concerned, the Tribunal proceeded on the basis that the age of the deceased Shankarial was 35 years. His monthly

income was assessed at Rs. 1500/- per month. One-third of the said amount was deducted as his personal expenditure. Applying the multiplier of 10, it was held that the applicants were entitled to compensation of Rs. 1,20,000/-.

As regards the quantum of compensation payable to the heirs and legal representatives of the deceased Balma is concerned, the loss of dependency was determined at Rs. 12,000/- per annum by the Tribunal. Having regard to the fact that he was aged 25 years, the multiplier of 15 was used to hold that a compensation for a sum of Rs. 1,92,000/- should be granted.

The deceased Ram Gopal was aged 31 years at the time of the accident. A multiplier of 12 was used in his case and the amount of compensation of Rs. 4,22,400/- was held to be payable to him on the premise that the loss of dependency was Rs. 34,200/- per annum.

8. The High Court, however, although did not interfere with these finding of facts, applied the multiplier of 17 in all the cases.

9. Mr. Shiv Sagar Tiwari, learned counsel appearing on behalf of the appellant would contend that the High Court committed a serious error in holding that the multiplier of 17 should be applied in modification of the order of the Tribunal.

10. The liability to pay compensation in a case where a vehicle meets with an accident is principally that of the owner thereof. The age of the deceased as also the loss of dependency suffered by his heirs respectively and legal representatives is seriously not in dispute.

11. The core question, therefore, which arises for consideration is as to whether the multiplier specified in the table contained in the Second Schedule appended to the Act should have been applied. Although the Second Schedule is applicable only in respect of the claim petitions filed under Section 163A of the Act, indisputably, the same provides for some guidelines. In a case where the deceased was above 25 years but not exceeding 30 years, in terms of the said Second Schedule, the multiplier of 18 is to be applied. In the case of the deceased whose age was above 30 years but not exceeding 35 years, the multiplier of 17 in terms of the Second Schedule is required to be applied. The High Court, therefore, in our opinion, has applied the correct multiplier. The quantum of multiplicand, as noticed hereinbefore, is not in question. In a case of this nature, it is not necessary to go into the larger question, viz., as to whether the courts should apply the multiplier specified in the Second Schedule in a proceeding under Section 166 of the Act

12. In *General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas and others,* [(1994) 2 SCC 176] apart from applying the structured formula for determination of the amount of compensation with regard to the future prospect of the deceased, it was opined -

"19. In the present case the deceased was 39 years of age. His income was Rs 1032 per month. Of course, the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand. While the chance of the multiplier is determined by two factors, namely, the rate of interest appropriate to a stable economy and the age of the deceased or of the claimant whichever is higher, the ascertainment of the multiplicand is a more difficult exercise. Indeed, many factors have to be put into the scales to evaluate the contingencies of the future. All contingencies of the future need not necessarily be baneful. The deceased person in this case had a more or less stable job. It will not be inappropriate to take a reasonably liberal view of the prospects of the future and in estimating the gross income it will be unreasonable to estimate the loss of dependency on the present actual income of Rs 1032 per month. We think, having regard to the prospects of advancement in the future career, respecting which there is evidence on record, we will not be in error in making a higher estimate of monthly income at Rs 2000 as the gross income. From this has to be deducted his personal living expenses, the quantum of which again depends on various factors such as whether the style of living was spartan or bohemian. In the absence of evidence it is not unusual to deduct one-third of the gross income towards the personal living expenses and treat the balance as the amount likely to have been spent on the members of the family and the dependents. This loss of dependency should capitalize with the appropriate multiplier. In the present case we can take about Rs 1400 per month or Rs 17,000 per year as the loss of dependency and if capitalized on a multiplier of 12, which is appropriate to the age of the deceased, the compensation would work out to (Rs 17,000 x 12 =Rs 2,03,000) to which is added the usual award for loss of consortium and loss of the estate each in the conventional sum of Rs 15.000."

In *Kaushnuma Begum v. New India Assurance Co. Ltd.,* [ (2001) 2 SCC 9 ] this Court observed:-

"22. The appellants claimed a sum of Rs 2,36,000. But PW 1 widow of the deceased said that her husband's income was Rs 1500 per month. PW 4 brother of the deceased also supported the same version. No contra-evidence has been adduced in regard to that aspect. It is, therefore, reasonable to believe that the monthly income of the deceased was Rs. 1500. In calculating the amount of compensation in this case we lean ourselves to adopt the

structured formula provided in the Second Schedule to the MV Act. Though it was formulated for the purpose of Section 163-A of the MV Act, we find it a safer guidance for arriving at the amount of compensation than any other method so far as the present case is concerned."

In *United India Insurance Co. Ltd. v. Patricia Jean Mahajan.* [ (2002) 6 SCC 281 ], however, this Court held :-

"21. The purpose to compensate the dependants of the victims is that they may not be suddenly deprived of the source of their maintenance and as far as possible they may be provided with the means as were available to them before the accident took place. It will be a just and fair compensation. But in cases where the amount of compensation may go much higher than the amount providing the same amenities, comforts and facilities and also the way of life, in such circumstances also it may be a case where, while applying the multiplier system, the lesser multiplier may be applied. In such cases, the amount of multiplicand becomes relevant. The intention is not to overcompensate.

22. We therefore, hold that ordinarily while awarding compensation, the provisions contained in the Second Schedule may be taken as a guide including the multiplier, but there may arise some cases, as the one in hand, which may fall in the category having special features or facts calling for deviation from the multiplier usually applicable."

It is evident from the above that this Court in the said decisions had taken a departure from the Second Schedule.

In *Jyoti Kaul v. State of M.P.,* [ (2002) 6 SCC 306 ] multiplier of 15 was adopted, stating:-

"The aforesaid decision makes it clear that the principle of multiplier would depend on the facts and circumstances of each case. Looking to the facts of this case we find that the Tribunal has given good reasons for applying the multiplier of 15. This was in addition of taking into consideration that the predecessors of the deceased all lived for more than 80 years. The High Court reduced the multiplier from 15 to 10 without taking into consideration circumstances considered by the Tribunal and thus committed the error. We, accordingly, set aside the findings of the High Court only to the extent of the application of multiplier and uphold other findings including reduction of interest The present appeal accordingly, succeeds in part. The computation of

compensation now shall be made on the basis of multiplier of 15. The difference of enhanced amount which has yet not been paid by the respondent State shall be paid to the claimants within a period of three months from today."

In *Smt. Supe Dei & Ors. v. M/s. National Insurance Co. Ltd. & Anr.* [JT 2002 (Suppl.1) SC 451], this Court held:

"....While considering the question of just compensation payable in a case all relevant factors including the appropriate multiplier are to be kept in mind. The position is well settled that the second schedule under Section 163 A to the Act which gives the amount of compensation to be determined for the purpose of claim under the section can be taken as a guideline while determining the compensation under Section 166 of the Act. In that view of the matter, there is no reason why multiplier of 17 should not be taken as the appropriate multiplier in the case."

In *Abati Bezbaruah v. Dy. Director General, Geological Survey of India and Anothet* [(2003) 3.SCC 148] this Court held-

"11. It is now a well-settled principle of law that the payment of compensation on the basis of structured formula as provided for under the Second Schedule should not ordinarily be deviated from. Section 168 of the Motor Vehicles Act lays down the guidelines for determination of the amount of compensation in terms of Section 166 thereof. Deviation from the structured formula, however, as has been held by this Court, may be resorted to in exceptional cases. Furthermore, the amount of compensation should be just and fair in the facts and circumstances of each case.

12. The victim at the relevant time was 40 years of age. The Tribunal and the High Court, therefore, cannot be said to have committed an error in applying the multiplier of 15. The only question which is required to be considered now is as to how the multiplicand should be arrived at.

13. The deceased at the time of accident was a young man. He had a stable job. A reasonably liberal view of his future prospects should have, therefore, been taken into consideration by the High Court as well as by the Tribunal.

14. Having regard to the prospects and advancement of the future career, a higher estimate of the yearly income at Rs.45,000 would not be out of place. From the said amount, one-third of the gross income towards personal living expenses should be deducted. The amount of Rs 30,000 should thus be determined

as the loss of dependency. The said sum should be capitalized by applying the multiplier of 15, which comes to Rs 4,50,000."

In *Kanhaiyalal Kataria and Others v. Mukul Chaturvedi and Others* [(2005) 12 SCC 190], this Court held:

"3. Learned counsel for the claimants made submissions seeking enhancement of compensation on the ground that the income of the deceased has not been properly estimated. We are not going into any other aspect except the question of proper multiplier for computation of compensation. In our opinion, by taking the multiplier of 17, the amount of compensation deserves to be increased. The compensation amount may be suitably recomputed by Tribunal by applying the multiplier of 17 and interest at the rate of 12 per cent per annum on the increased amount be also granted."

In *Bilkish v. United India Insurance Company Limited and Another* [(2008) 4 SCC 259 this Court held:

"4. After hearing learned counsel for the parties, we are of the opinion that the view taken by the High Court and the Tribunal is not correct The incumbent was a bachelor and he could not have spent more than 1/3rd of his total income for personal use and rest of the amount earned by him would certainly go to the family kitty. Therefore, determining the loss of dependency by 50% was not correct. Therefore, we assess that he must be spending 1/3rd towards personal use and contributing 2/3rd of his income to his family. Therefore, we work out that Rs 30,000 was earned by him per annum. The loss of dependency was 2/3rd i.e. Rs 20,000. The multiplier of '11' applied for loss of dependency was also not correct and as per Schedule appended to the Motor Vehicles Act, 1988 it should be '12'. Applying the multiplier of 12 the total loss of dependency will be Rs 20,000 x 12=Rs 2,40,000 and Rs 10,000 towards loss of estate and funeral expenses, the total compensation comes to Rs 2,50,000 and incumbent is entitled for interest @ 9 % p.a. from the date of the petition. The appeal is allowed with the aforesaid modification."

13. We, therefore, keeping in view the aforementioned peculiar facts and circumstances of the case, are of the opinion that the judgment of the High Court in applying the multiplier of 17 need not be interfered with.

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

*Appeal dismissed.*

**I.L.R. [2009] M. P., 1552**

**SUPREME COURT OF INDIA**

*Before Mr. Justice Dr. Arijit Pasayat & Mr. Justice Asok Kumar Ganguly*

2 February, 2009*

STATE OF M.P. ... Appellant

Vs.

KASHIRAM & ors. ... Respondents

A. **Penal Code (45 of 1860), Sections 307 & 326** - *Attempt to murder - 1/3 of the leg of the injured chopped off below the knee - Trial Court convicted respondents u/s 307 whereas High Court altered the conviction u/s 326 - Held - To justify conviction u/s 307, if there is present an intent coupled with some overt act in execution thereof - Determinative question is intention or knowledge and not nature of injury - Respondents conviction and sentences u/s 307 IPC awarded by trial Court restored - Appeal allowed.* (Paras 9, 10 & 12)

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

B. **Penal Code (45 of 1860), Section 307** - *Attempt to murder - Sentence - Undue sympathy to impose inadequate sentence would do more harm to the judicial system to undermine public confidence in the efficacy of law and society could not long endure under such serious threats - Aggravating and mitigating factors and circumstances in which crime has been committed are to be delicately balanced - Object should be to protect society and deter criminals - Appeal allowed.* (Paras 13 to 16)

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

**Cases referred :**

(1983) 2 SCC 28, (2004) 3 SCC 793, JT 2004(2) SC 348, (2005) 5 SCC 554, AIR 1991 SC 1463, 402 US 183.

*Cr.A. No 191 2009

**STATE OF M.P. Vs. KASHI RAM**

## J U D G M E N T

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

2. Challenge in this appeal is to the judgment rendered by a learned Single Judge of the Madhya Pradesh High Court. The respondents faced trial for alleged commission of offences punishable under Section 307 read with Sections 149 and 148 of the Indian Penal Code, 1860 (in short the 'IPC'). Learned Additional Sessions Judge, Shihore, found the accused respondents guilty and sentenced each to undergo rigorous imprisonment for five years with fine and 6 months rigorous imprisonment for the other two offences. By the impugned judgment the High Court held that the appropriate conviction would be under Section 326 read with Section 149 IPC. Custodial sentence was reduced to the period already undergone, while the fine amount of Rs.500/- was enhanced to Rs.20,000/-.

3. Prosecution version as unfolded during trial is as follows:

On 21.7.1987 at about 4 O'clock in the evening the complainant-victim Jai Singh (PW5) was at the grass field for the purpose of grazing the cattle. The wife of respondent Lila Kishan and wife of Bapulal came there to collect some leaves in the field. Thereafter on account of some earlier enmity the respondents armed with rifle, sticks and axe came there and the accused Lilakishan, Bapu and Kashiram caught hold of the said victim while other accused Jagannath and Amar Singh tied his hands and legs by turban and accused Laakhan with the help of clothes pressed his mouth. Thereafter, his legs were caught by the respondents Bapu and Lila Kishan, while Kashiram chopped off the lower part of the left leg. Gangaram stood there with rifle. The victim sustained injuries on his back, right eye and left leg. After the incident the accused persons ran away from the spot. However, the victim reached the field of Chain Singh and mentioned the incident to him. Umrao Singh and Roop Singh took him to his home. They called the watchman and mentioned him the incident. Due to heavy rain, Jai Singh lodged the report to Police, Ahmadpur on 22.7.1988 at 6.40. On registering the offence, the victim was referred to hospital. The M.L.C. Report was prepared. He was admitted in the hospital and remained under treatment. On completion of the investigation, the accused persons were charge sheeted under Sections 147, 148, 149 and 326 and 307 IPC.

The Trial court believed the evidence of the victim PW 5 and also the other evidences brought on record and recorded conviction and imposed sentences as aforestated. The accused persons preferred an appeal before the High Court where the basic stand was that offence under Section 307 IPC is not made out. The High Court held that there was no material on record to show that the injury was sufficient to cause death in the ordinary course of nature. It was observed that chopping of the leg from the body cannot be treated sufficient to cause death.

As noted above with the aforesaid observation the conviction and the sentence were altered.

4. In support of the appeal learned counsel for the appellant-State submitted that the High Court has completely overlooked the gruesome nature of the offence. It has also overlooked the evidence of PW1, the Doctor that the injury could have caused death.

5. Learned counsel for the respondent on the other hand supported the judgment of the High Court.

6. With dismay we observe that the High Court has completely overlooked the evidence on record and the impugned judgment shows total non-application of mind. The High Court observed that the doctor has not stated that the injury was sufficient to cause death in the ordinary course of nature. PW 1 had noted that 1/3 of the leg was chopped off below the knee. He had categorically stated that the injury could have caused death. The Doctor (PW14) i.e. the Radiologist clearly stated that the aforesaid chopping of the leg was grievous in nature. With some strange logic the High Court observed that merely on the testimony of PW 1 it cannot be assumed that the injury was sufficient to cause death in ordinary course of nature.

7. The evidence of PW5 the victim clearly shows the gruesome nature of the attack and the intention of the accused persons. According to him, accused Ram Singh and Bapulal caught hold of him. He was laid down on the ground and the accused Krishan Lal chopped out the left foot and Ram Singh caught hold of his left leg and Bapulal caught hold of his right leg, Arjun caught hold of his leg and Krishan Lal kept his legs on his left hand and put clothes in his mouth and caught hold of his head. Leela Krishan said that his foot jaw has been chopped off and the heels should also be chopped out. Accused Suraj Singh kept his leg on a log of wood and Leela Krishan chopped out his feet by axe from above the ankle. The trial court noticed that the leg was chopped out between the knee and the ankle. Krishan Lal asked Ram Singh to keep the chopped pieces of the leg in the bag and Ram Singh picked up the pieces of legs and kept them in the bag. Though accused Arjun Singh asked that both his eyes should be taken out, accused Ganga Ram told him that chopping of his one leg was sufficient to cause his death.

8. 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."

9. 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.

10. 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 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.

11. 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 Madhya Pradesh v. Saleem @ Chamaru & Anr.* [2005 (5) SCC 554].

12. 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.

13. Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in *Sevaka Perumal etc. v. State of Tamil Naidu* (AIR 1991 SC 1463).

14. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in *Dennis Councle MCG Dautha v. State of Callifornia:* 402 US 183: 28 L.D. 2d 711 that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

15. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.

16. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

17. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

18. It also baffles us as to how the High Court uniformly directed reduction of sentence to the period already undergone. The various periods of custody suffered by the respondents during trial are as follows:

| | |
|---|---|
| Kashi Ram | 2 years 21 days |

| | |
|---|---|
| Lela Krishan | 2 years 12 days |
| Kesh lal | 17 days |
| Ram Singh | 4 months and 20 days |
| Arjun Singh | 4 months and 15 days |
| Suraj Singh | 4 months and 20 days |
| Bapu Lal | 2 years and 12 days |

19. Thereafter the High Court directed suspension of sentence. By then they had suffered custody for about 3 months 15 days more. There was no similarity in the period of sentence already suffered by the accused persons when the High Court passed the impugned judgment.

20. Looked at from any angle the judgment of the High Court is clearly unsustainable, deserves to be set aside which we direct. The judgment of the trial court stands restored so far as conviction as well as the sentences are concerned.

21. The appeal is allowed.

*Appeal allowed.*

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**I.L.R. [2009] M. P., 1557**
**SUPREME COURT OF INDIA**
***Before Mr. Justice Dr. Arijit Pasayat & Mr. Justice Asok Kumar Ganguly***
9 February, 2009*

KOMAL ... Appellant
Vs.
STATE OF M.P. ... Respondent

**Penal Code (45 of 1860), Section 34 - *Common Intention - Section 34 is only a rule of evidence and does not create a substantive offence - Distinct feature is the element of participation in action - Direct proof of intention is seldom available and such intention can only be inferred from the circumstances appearing from the proved facts and circumstances of the case.*** (Para 7)

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

**Cases referred :**
AIR 1977 SC 109, AIR 1993 SC 1899.

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

The Judgment of the Court was delivered by **Dr. Arijit Pasayat, J.** :–Leave granted.

*Cr.A. No.243/2009

2. Challenge in this appeal is to the judgment of a Division Bench of the Madhya Pradesh High Court at Jabalpur allowing the appeal filed by the State of M.P. upholding the appellant guilty for offence punishable under Section 304 Part I read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') and sentencing him to undergo imprisonment for 7 years. However, his acquittal for offences punishable under Sections 147, 148, 302 read with Section 149 IPC was upheld. Eight persons faced trial for alleged commission of offences. Gubdu and Ishwar A-1 and A-2 respectively were charged for commission of offences punishable under Sections 147, 148, 323, 149 and 302 IPC. Rest of the accused persons were charged under Sections 147, 148, 323 read with Section 149 and 302 read with Section 149 IPC. The trial Court recorded conviction and imposed sentences as follows:

A-2 Ishwar was convicted under Section 302 and sentenced to undergo imprisonment for life and also to pay fine of Rs.500/- and in default to further undergo simple imprisonment for one month. A-4 Komal was found guilty of the offence punishable under Section 323 IPC and was sentenced to pay fine of Rs.500/- and in default to undergo simple imprisonment for one month but was acquitted of the other offences and the other six accused (A-1, A-3, A-5 to A-8) were acquitted of all the charges.

Accused Ishwar preferred Criminal Appeal No.978 of 1992 while the State of M.P. filed Criminal Appeal No.245 of 1993 against the acquittal of seven accused persons.

3. Prosecution version in nutshell is as follows:

All the accused are residents of village Doomar, where complainant Shrilal (PW7) father of Daulat (hereinafter referred to as the 'deceased') also resided. He is a barber by profession. Although, he is generally engaged for the work of hair cutting, shaving etc., yet he also renders services as an assistant in marriages solemnized in accordance with traditional Hindu order. However, in view of dispute with A1, A3 & A4 as to payment of money for the services rendered, the complainant at the relevant point of time, was not serving as barber to these accused. In turn, they also called another barber namely Ishwar Das, the A2, from another village Purena.

On the auspicious occasion of "Akshay Tritiya" that fell on 19th April, 1988, a number of marriages were proposed to be solemnized in village-Doomar. Shrilal (PW7) was working in the Pangat (community feast) at the residence of one Komal Kachhi. He had deputed his son deceased Daulat to render service in the marriage ceremony organized at the residence of one Balram Ahir. At about 3:00 p.m., when the guests were taking meals at the residence of Bairam, A1 called Daulat through Narayan Singh to a place near Mata ki Madiya (place of worship of the Goddess). A1 and A2 gave Kharerua (piece of wood used in bullock cart)

blows on Daulat's head. He fell down and was rendered unconscious. His younger brother Harlal (PW8) immediately went to the house of Komal Kachhi and informed his father Shrilal (PW7) about the incident. Shri and his wife Phoolabai rushed to the spot, where he was also assaulted by Al and A2 with Kharerua. A3 & A4 wielded lathies on his wife Phoolabai and his younger son Harlal was also struck with lathies by A5 and A8.

Parents and brothers of unconscious Daulat immediately took him to the police station, where Shrilal lodged the first information report (Ex-P/7) Thereupon, a case under Sections 294 341 & 323 read with Section 34 IPC was registered. Daulat and other injured namely, Shrilal, Phoolabai and Harlal were sent to the PHC Bankhedi for medical examination. Dr. R.C. Agrawal (PWI5), after examining Daulat, referred him to the District hospital, Hoshangabad for admission and treatment and also advised radiological examination of the injury found on the scalp. Pursuant to his advice, Daulat was taken to the District Hospital at Hoshangabad where he succumbed to the injuries on 20.4.1988.

After inquest proceeding, the dead body of Daulat was sent for post mortem that was conducted by Dr. Ashok Kumar Tiwari (PW14). During investigation, the accused were arrested and at their instance respective weapons were recovered. One white shirt worn by the deceased at the time of incident was also recovered and seized. All these articles were sent to the FSL, Sager, along with the ordinary and blood stained soil seized from the spot for chemical examination. Observing bloodstains on all these articles excepting the ordinary earth seized from the spot, the Chemical Examiner forwarded the exhibits to Serologist for further examination. However, the Serologist could only determine presence of human blood on the shirt and the blood stained earth seized from the spot.

The trial Court as noted above convicted A-2 Ishwar and A-4 the present appellant for offence punishable under Sections 302 and 323 IPC respectively for their individual acts and sentenced them as indicated above. No appeal was filed by A-4 Komal against his conviction. Appeal was filed by State before High Court. According to the stand of State before the High Court, the true parameters of Section 149 IPC were not kept in view. The High Court accepted the stand and directed conviction as noted above.

4. In support of the appeal, learned counsel for the appellant submitted that the High Court having noted at one place that there was no common object, the question of convicting the present appellant for offence relatable to section 304 Part I read with Section 34 IPC does not arise. With reference to para 30 of the judgment it is submitted that there is lack of clarity as to what the High Court wanted to observe. The High Court has observed that there was common object and the appellant was not a member of the unlawful assembly. It has been held by the High Court that the present appellant was also convicted for causing injury on the

person of Daulat and he has not challenged his conviction. It was pointed out that the trial Court formulated the question as to whether the accused persons in furtherance of their common intention caused injuries on the complainants Shrilal, Phoolabai and Harlal intentionally. There was no evidence that the present appellant caused any injury on the person of Daulat It was pointed out that the evidence of Shrilal (PW-7) and his son Jagdish (PW-9) was held to be not acceptable.

5. Learned counsel for the respondent-State on the other hand supported the judgment.

6. We find that the High Court has erroneously come to the conclusion about the role of appellant. It was erroneously held that the appellant had caused injury on the person of Daulat. It was nobody's case.

7. Section 34 has been enacted on the principle of joint liability in the commission of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances.In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar v. State of Punjab* (AIR 1977 SC 109), the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

8. The Section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the commission of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in

which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in Ch. Pulla Reddy and Ors. v. State of Andhra Pradesh (AIR 1993 SC 1899), Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.

9. It has been categorically held by both the trial Court and the High Court that there was no common object and in any event the present appellant was not a member of any unlawful assembly. Having held so, the High Court ought not to have altered the conviction as recorded by the trial Court. Accordingly, the appeal is allowed. The order of the trial Court *vis-a-vis* the present appellant is restored and that of the High Court *vis-a-vis* the present appellant stands quashed. If the appellant has served the sentence as imposed by the trial Court, the bail bonds executed for giving effect to order dated 8.1.2008 shall stand discharged. Otherwise, the appellant shall surrender forthwith to serve the remainder of sentence.

*Appeal allowed.*

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**I.L.R. [2009] M. P., 1561**
**SUPREME COURT OF INDIA**
***Before Mr. Justice S.B. Sinha & Mr. Justice V.S. Sirpurkar***
18 February, 2009*

ORIENTAL INSURANCE CO. LTD. ... Appellant
Vs.
ANGAD KOL & ors. ... Respondents

**Motor Vehicles Act (59 of 1988), Sections 2(21), 3 & 10 - *Driving License - Light Motor Vehicle and Transport Vehicle - Driver of offending vehicle was having Light Motor Vehicle driving license and was driving goods vehicle - Transport vehicle may be light motor vehicle but a distinct licence is required for driving the same - Driver was not holding valid and effective licence at the time of accident - However, Insurance Company liable to deposit compensation amount with liberty to recover the same from the owner and driver.*** (Paras 9, 10, 15, 18, 19)

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

*C.A. No.1102/2009

Cases referred :

(2008) 3 SCC 464, (2008) 1 SCC 696, (1999) 6 SCC 620.

JUDGMENT

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

2. This appeal is directed against a judgment and order dated 21.9.2007 passed by a Division Bench of the High Court of Madhya Pradesh at Jabalpur in Misc. Application No.21/09/2007 whereby and whereunder the appeals preferred by the claimants/respondents from an award dated 29.1.2007 passed by the IInd Additional Motor Accident Claims Tribunal (Fast Track Court), Kanti (hereinafter referred to as 'the Tribunal') in M.V.C. No.350 of 2004, was allowed. A cross objection filed by the appellant herein has also been dismissed by the said judgment.

3. Heirs and legal representatives of Genda Bai, who died in an accident which took place on 31.10.2004, filed a claim application before the Tribunal, contending in that on the fateful day, when she had been standing near a turning known as 'Hardi turning', a mini door Auto bearing registration No.MP-20G-9937 dashed against her as a result whereof she suffered injuries. She was taken to the District Hospital where she succumbed thereto on the next day.

The deceased was aged about 45 years at the time of her death. She allegedly used to earn about Rs.5,000/- per month by preparing 'Donnapattals'.

4. Indisputably, the vehicle was a goods carriage vehicle which was owned by Respondent No.7, Narendra, and was being driven by Respondent No.6, Umesh. Before the Tribunal, a contention was raised that the driver of the vehicle did not possess a valid and effective driving licence. Overruling the said contention, an award of Rs.1,83,000/- was made.

5. Claimants, as noticed hereinbefore, preferred an appeal thereagainst. Appellant also filed a cross-objection.

Inter alia, on the premise that the contribution to the family by the deceased would have been about Rs.2,500/- per month and on deduction of conventional 1/3rd amount from her income, the annual loss of dependency was calculated at Rs.20,000/- per annum. The High Court applied the multiplier of 15 and, thus, awarded a sum of Rs.3,00,000/- towards loss of dependency. A sum of Rs.40,000/-was furthermore awarded under the heads of loss of estate, funeral expenses, loss of expectancy of life including a sum of Rs.10,000/- to the husband for loss of consortium.

6. Mr. Santosh Paul, learned counsel appearing on behalf of the appellant, would submit that the driving licence having been granted to the respondent No.6, Umesh, in the year 2003 for a period of 20 years, evidently it was not meant for driving a goods carriage vehicle.

7. Mr. Raj Kumar Gupta, learned counsel appearing on behalf of the respondent, however, would submit that as the appellant already deposited 50% of the awarded amount, this Court may direct it to pay the balance awarded amount with a right to recover the same from the owner and/or the driver of the vehicle.

8. Motor Vehicles Act, 1988 (hereinafter called as `the Act') was enacted to consolidate and amend the law relating to motor vehicles. `Driving licence' has been defined in Section 2(10) to mean the licence issued by a competent authority under Chapter II authorizing the person specified therein to drive, otherwise than as a learner, a motor vehicle or a motor vehicle of any specified class or description. "Goods carriage" has been defined in Section 2(14) to mean any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods. The said Act also defines `heavy goods vehicle', `heavy passenger motor vehicle', `medium goods vehicle' and `medium passenger motor vehicle' as well as a `light motor vehicle' in Section 2(21) of the Act to mean :

> "`light motor vehicle' means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7500 kilograms."

9. Although the definition of the `light motor vehicle' brings within its umbrage both `transport vehicle' or `omnibus', indisputably, as would be noticed infra, a distinction between an effective licence granted for transport vehicle and passenger motor vehicle exists.

Section 3 provides for the necessity of driveling licence, stating :

> **"3. Necessity for driving licence.**--(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorizing him to drive the vehicle; and no person shall so drive a transport vehicle other than a motor car or moter cycle hired for his own use or rented under any scheme made under sub-section (2) of Section 75 unless his driving licence specifically entitles him so to do.
>
> (2) ..."

Section 9 provides for grant of driving licence. Section 10 prescribes the form and contents of licences to drive which is to the following effect :

> **"10. Form and contents of licences to drive.**--(1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.
>
> (2) A learner's licence or, as the case may be, driving licence

shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following classes, namely:-

(a) to (c) ...

(d) light motor vehicle;

(e) transport vehicle;

(i) road Roller;

(j) motor vehicle of a specified description."

10. The distinction between a `light motor vehicle' and a `transport vehicle' is, therefore, evident. A transport vehicle may be a light motor vehicle but for the purpose of driving the same, a distinct licence is required to be obtained. The distinction between a `transport vehicle' and a `passenger vehicle' can also be noticed from Section 14 of the Act. Sub-section (2) of Section 14 provides for duration of a period of three years in case of an effective licence to drive a `transport vehicle' whereas in case of any other licence, it may remain effective for a period of 20 years.

11. The driver and the owner of the vehicle did not examine themselves. The driving licence was not produced. The application form praying for grant of driving licence was also not produced.

The insurance company examined Shri R.K. Hila, an officer of the Regional Transport Authority. The contents of his deposition, as has been noticed by the learned Tribunal in paragraph 7 of the award, is as under :

"The onus of issue No.2 is on Opposite Party No.3. But they could not establish their allegation that the vehicle was driver contrary to the conditions of the insurance contract. The witness No.1 of the Opposite Party Sri R.K. Hela of the Regional Transport Authority has stated that the Opposite Party No.1 had licence to driver Light Motor Vehicle for the period 30.07.2003 to 29.07.2023 and the vehicle involved is a Light Goods Vehicle. It is contended that the holder of the licence had to obtain an endorsement to drive goods vehicles but it has not been established whether the vehicle involved in the accident is a goods vehicle and whether the holder of the licence was entitled to drive a goods carriage vehicle. It has also not been established that the vehicle involved was a goods carriage vehicle. The Opposite Party No.3 could not establish that the vehicle was driven contrary to the terms and conditions of the insurance. As a result the Opposite Party No.3 has not been able to establish that the driver of the vehicle which caused the accident did not have an effective and valid licence. Hence issue No.2 is decided against the Respondent No.3."

12. Indisputably, the Regional Transport Officer, Jabalpur, in a letter addressed to Shri S.K. Yadav in response to his application dated 21.2.2005 furnished the particulars of driving licence No.MP70/0/6436/03 as under :

"As per this office record the particulars of driving licence No.MP70/0/6436/03 are as under :

| | | |
|---|---|---|
| 1. | Name of Licence holder | : Shri Umesh Gupta |
| 2. | Son of | : Shri M.L. Gupta |
| | | MP20/016436/03 |
| 3. | Address | : Karmata, Jabalpur |
| 4. | Date of issue | : 30.7.2003 |
| 5. | Date of expiry | : 29.7.2023 |
| 6. | Date of last renewal | : 8.4.2013 |
| 7. | Valid for | : 8.4.2013 |
| 8. | Class of vehicle | : M/Cycle + LMV only |
| 9. | Paid Employee | |
| | Endorsement if any." | |

13. The Central Government had framed Rules known as `Central Motor Vehicle Rules'. Form 4 prescribed therein provides for different columns for grant of a licence of light motor vehicle, medium goods vehicle or heavy goods vehicle. Rule 14 prescribes for filing of an application in Form 4 for a licence to drive a motor vehicle. An amendment was carried out on or about 28.3.2001 being JSR No.221(E) in terms whereof, inter alia, licence which is to be granted in Form 6 requires a specific authorization to drive a `transport vehicle'.

14. The licence was granted to Respondent No.6, Umesh, in 2003, i.e., after the said amendment came into force. The accident, as noticed hereinbefore, took place on 31.10.2004.

15. Licence having been granted for a period of 20 years, a presumption, therefore, arises that it was meant for the purpose of a vehicle other than a transport vehicle.

16. Had the driving licence had been granted for transport vehicle, the tenure thereof could not have exceeded to three years.

In *National Insurance Co. Ltd. v. Annappa Irappa Nesaria* [(2008) 3 SCC 464], this Court noticed the aforementioned development in the matter of grant of licence to a transport vehicle stating that the same became effective from 28.3.2001 in the following terms :

"20. From what has been noticed hereinbefore, it is evident that "transport vehicle" has now been substituted for "medium goods

vehicle" and "heavy goods vehicle". The light motor vehicle continued, at the relevant point of time to cover both "light passenger carriage vehicle" and "light goods carriage vehicle". A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well.

21. The amendments carried out in the Rules having a prospective operation, the licence held by the driver of the vehicle in question cannot be said to be invalid in law."

17. The effect of the different terms of licences granted in terms of the provisions of Section 2(14) and 2(47) has also been noticed by this Court in *New India Assurance Co. Ltd. v. Prabhu Lal* [(2008) 1 SCC 696], stated :

"30. Now, it is the case of the Insurance Company that the vehicle of the complainant which met with an accident was a "transport vehicle". It was submitted that the insured vehicle was a "goods carriage" and was thus a "transport vehicle". The vehicle was driven by Ram Narain, who was authorised to drive light motor vehicle and not a transport vehicle. Since the driver had no licence to drive transport vehicle in absence of necessary endorsement in his licence to that effect, he could not have driven Tata 709 and when that vehicle met with an accident, the Insurance Company could not be made liable to pay compensation.

XXX XXX XXX

37. The argument of the Insurance Company is that at the time of accident, Ram Narain had no valid and effective licence to drive Tata 709. Indisputably, Ram Narain was having a licence to drive light motor vehicle. The learned counsel for the Insurance Company, referring to various provisions of the Act submitted that if a person is having licence to drive light motor vehicle, he cannot drive a transport vehicle unless his driving licence specifically entitles him so to do (Section 3). Clauses (14), (21), (28) and (47) of Section 2 make it clear that if a vehicle is "light motor vehicle", but falls under the category of transport vehicle, the driving licence has to be duly endorsed under Section 3 of the Act. If it is not done, a person holding driving licence to ply light motor vehicle cannot ply transport vehicle. It is not in dispute that in the instant case, Ram Narain was having licence to drive light motor vehicle. The licence was not endorsed as required and hence, he could not have driven Tata 709 in absence of requisite endorsement and the Insurance Company could not be held liable.

38. We find considerable force in the submission of the learned counsel for the Insurance Company. We also find that the District Forum considered the question in its proper perspective and held that the vehicle driven by Ram Narain was covered by the category of transport vehicle under Clause (47) of Section 2 of the Act. Section 3, therefore, required the driver to have an endorsement which would entitle him to ply such vehicle. It is not even the case of the complainant that there was such endorsement and Ram Narain was allowed to ply transport vehicle. On the contrary, the case of the complainant was that it was Mohd. Julfikar who was driving the vehicle. To us, therefore, the District Forum was right in holding that Ram Narain could not have driven the vehicle in question."

The Court distinguished its earlier judgment in *Ashok Gangadhar Maratha v. Oriental Insurance* [(1999) (6) SCC 620], stating :

"41. In our judgment, Ashok Gangadhar did not lay down that the driver holding licence to drive a light motor vehicle need not have an endorsement to drive transport vehicle and yet he can drive such vehicle. It was on the peculiar facts of the case, as the Insurance Company neither pleaded nor proved that the vehicle was transport vehicle by placing on record the permit issued by the Transport Authority that the Insurance Company was held liable."

However, in this case, the finding of fact arrived at that the vehicle in question was not proved to be a goods vehicle is not correct. The Regional Transport Officer, in his deposition, stated that the vehicle in question was a goods vehicle.

18. From the discussions made hereinbefore, it is, thus, evident that it is proved that respondent No.6 did not hold a valid and effective driving licence for driving a goods vehicle. Breach of conditions of the insurance is, therefore, apparent on the face of the records.

19. By an order dated 10.7.2008, the insurance company was directed to deposit 50% of the awarded amount. In this view of the matter, we are of the opinion that interest of justice would be subserved if we, in exercise of our jurisdiction under Article 142 of the Constitution while directing the insurance company to deposit the balance amount before the Tribunal with liberty to the claimants to withdraw the same give right to the appellant to recover the said amount from the owner and the driver of the vehicle being Respondent Nos.6 and 7.

20. In view of the aforementioned findings, the appeal is allowed with no order as to costs.

*Appeal allowed.*

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**I.L.R. [2009] M. P., 1568**
**FULL BENCH**
*Before Mr. Justice Dipak Misra, Mr. Justice K.K. Lahoti &*
*Mr. Justice Rajendra Menon*
20 March, 2009*

MAA SHARDA WINE TRADERS (M/S),
GARAHAKOTA, SAGAR ... Petitioner
Vs.
UNION OF INDIA & ors. ... Respondents

**Finance Act (32 of 1994), Section 65(76b) [As amended by Finance Act, 2005], Central Excise Act, 1944, Section 2(f) - *Manufacture - Service Tax - Packaging and bottling of liquor come within the ambit and sweep of manufacture - There can be no levy of service tax on manufacture in view of clear postulate u/s 65(76b) of Act, 1994 - Decision rendered in M/s Vindhyachal Distilleries does not state law correctly - Decision rendered in Som Distilleries upheld.*** (Paras 31 & 32)

वित्त अधिनियम (1994 का 32), धारा 65(76बी) {वित्त अधिनियम, 2005 द्वारा यथासंशोधित}, केंद्रीय उत्पाद–शुल्क अधिनियम, 1944, धारा 2(एफ) – विनिर्माण – सेवा कर – शराब की पैकेजिंग और बोटलिंग विनिर्माण की परिधि और क्षेत्र के भीतर आती है – अधिनियम, 1994 की धारा 65(76बी) के अधीन स्पष्ट अभिधारणा को देखते हुए विनिर्माण पर कोई सेवा कर उद्गृहीत नही किया जा सकता – मेसर्स विंध्याचल डिस्टलरीज् में दिया गया विनिश्चय विधि को सही रूप में कथित नही करता – सोम डिस्टलरीज् में दिये विनिश्चय की पुष्टि की गई।

**Cases referred :**

(2007) 7 VST 197(MP) Not good law, 1997(1) JLJ 319, (2004) 5 SCC 632, AIR 1966 SC 856, AIR 1993 SC 192, AIR 1978 SC 793, (1998) 8 SCC 428, (1996) 10 SCC 304, (1966) 17 STC 576, (2006) 3 SCC 1, (2008) 2 SCC 614, (2008) 12 SCC 466, (2008) 13 SCC 1.

*Sumit Nema* with *Mukesh Agrawal,* for the petitioner.
*Shekhar Sharma,* Standing Counsel with *Sanjay Patel,* for the respondents.

**O R D E R**

The Order of the Court was delivered by DIPAK MISRA, J. :–In this batch of writ petitions, the constitutional validity of Section 65(76b) of the Finance Act, 1994 [for short 'the Act'] as amended by the Finance Act, 2005 was challenged primarily and principally on the ground that there is lack of legislative competence on the part of the concerned Legislature to bring in such a legislation and further, assuming the legislation meets the test of legislative competence, it is violative of Article 14 of the Constitution of India. The aforesaid writ petitions were listed along with W.A. No.1524/07.

*W.P. No.700/2008 (Jabalpur)

2. In the course of hearing of the writ appeal, on behalf of the appellant therein, it was contended that the decision rendered by the Division Bench in *M/s Vindhyanchal Distilleries Private Ltd. Vs. State of M.P. and others*, (2007) 7 VST 197 (MP) has not appropriately considered the decision rendered in *Som Distilleries and Breweries Pvt. Ltd. vs. State of M.P. and another*, 1997 (1) JLJ 319. and various other aspects which deserve consideration. The Division Bench hearing the writ appeal thought it apposite to refer the matter to a larger bench. The question that has been referred reads as follows:

> "Whether bottling of liquor amounts to manufacture of liquor or only packaging so as to attract the Service Tax ?"

3. It is worth-noting that W.A. No.1524/07 was held to be not maintainable by the Full Bench and in that backdrop, the reference was not answered. These writ petitions being connected with the writ appeal were heard by the Full Bench.

4. Mr. Sumit Nema, learned counsel appearing for the petitioners, submitted that by abundant caution, he had challenged the constitutional validity of the provision but on a keener scrutiny, it is felt by him that the cause of justice would be best subserved if only the apposite interpretative process is adopted to scan the anatomy of the provisions, to arrive at the conclusion whether the bottling of liquor would invite the impost of Service Tax as envisaged under Section 65(76b) of the Act.

5. Keeping in view the aforesaid limited submission of Mr. Nema, we will not dwell upon the constitutional validity but only advert ourselves to the question whether the Service Tax as defined under the Act in the amending provision takes in its net the bottling of liquor.

6. To appreciate the factual scenario in proper perspective we shall refer to the facts in W.P. No.700/2000 in brief. The petitioner purchases bottles of country spirit from the licensees who are engaged in the manufacture and supply of country liquor in sealed bottles pursuant to the license issued by the competent authority of the State Government under the provisions of the M.P. Excise Act, 1915 [for short 'the 1915 Act'] and the Rules framed therein. The rectified spirit is manufactured by the process of distillation in the distillery, the rectified spirit is blended in the warehouses, bottled, sealed labelled and is supplied to the retail contractors. Bottling license is issued in Form CS-1 appended in the M.P. Country Spirit Rules, 1995 [hereinafter referred to as 'the 1995 Rules']. The petitioner was granted a license in respect of the Excise Year 2005-2006 for supply in respect of the areas mentioned therein. The said license was issued pursuant to the tender notice dated 22-3-2005 issued by the Excise Commissioner and the said tender notice described "tender notice for the manufacture and supply of country spirit in sealed bottles in various districts of the State". Reliance has been placed on clause (6) of the Tender Notice to highlight that the entire activity of manufacture, bottling and supply is a composite one. In the 1915 Act as well as on the conditions of the tender, a licensee is under obligation to supply liquor in the sealed bottles.

7. According to the writ petitioner, the process of manufacturing involves various stages, viz., manufacture of rectified spirit at distilleries; transportation of rectified spirit from distilleries to manufacturing warehouses; manufacturing activity (blending) to make rectified spirit fit for human consumption; bottling, sealing, packaging of country spirit. It is contended that after the rectified spirit is rendered fit for human consumption the same is filled in bottles or some other packing mode as specified by the Excise Commissioner under the supervision of the Officer-in-Charge of the warehouses and sealing of the bottles is carried out as per specification and labels are affixed on each bottle and thereafter on demand of retail contractors and upon proof of payment into treasury of the issue price recoverable for it, the CS-1 license issues bottles of country spirit to the retail contractor. The 1915 Act contains provisions with regard to the manufacture, supply and sale of liquor. Chapter IV of the 1915 Act deals with the manufacture, possession and sale of liquor. Section 13 of the Act creates a bar on manufacture and collection of intoxicant except under the authority and subject to the terms and conditions of the license in that regard. Section 13(b) prohibits bottling of liquor for sale. Section 15 provides for payment of duty for removal of liquor from the warehouses, distillery or brewery. Section 16 restricts possession of intoxicant beyond the prescribed limit and Section 17 deals with sale of intoxicants with the stipulation that no intoxicant shall be sold except under the authority and subject to the terms and conditions of a license in that regard. Reference has been made to the 1995 Rules in detail to highlight how the said rules especially, Rules 3 and 4, prescribe the manner of supply of liquor in sealed bottles and, therefore, the entire process of bottling is a part of the process of manufacturing which is performed under the supervision and control of the excise authorities.

8. It is contended that if Section 65(76b) of the Finance Act and Section 2(f) of the Central Excise Act, 1944 (for short 'the 1944 Act') are read in a purposive manner, it would be clear as crystal that service tax as provided under the Finance Act would not be leviable on the manufacturing activity of country liquor, for the bottling is an integral and essential part of the process of manufacturing. Though various other averments have been made as regards the constitutional validity of the provision, yet the same having been abandoned, it is unnecessary to refer to them.

9. Mr. Shekhar Sharma, learned counsel appearing for the respondents in his turn, on the basis of abandonment of prayer pertaining to constitutional validity, has placed heavy reliance on the decision rendered in *M/s Vindhyanchal Distilleries Pvt. Ltd.* (supra) and put forth that the decision rendered therein covers the field in entirety and the same being in total consonance with the provisions of the 1944 Act and the Finance Act and the interpretation placed being absolutely impeccable, the bottling of liquor, by no stretch of imagination, can be regarded as a part of manufacturing process and, therefore, levy of service tax is totally justified.

10. Before we advert to the relevant provisions, we think it apt to dwell upon what has been held in *M/s Vindhyanchal Distilleries Pvt. Ltd.* (supra). In the said decision the Division Bench posed the question whether service tax on packaging, i.e., bottling and labelling of liquor can be collected from the distillers and whether they can pass on this liability to the contractors obtaining the supplies from them. The Bench referred to Section 65(76)(b) of the Act and the provisions under the 1995 Rules and Section 2(d) of the 1944 Act which defines excisable goods, the conditions of the tender, especially condition No.6 and the transactions as per tender notice and relied upon the decision rendered in *Tamil Nadu Kalyana Mandapam Assn. Vs. Union of India*, (2004) 5 SCC 632 wherein imposition of service tax on mandap keepers was upheld on the foundation that it is was permissible to lift the service tax on the catering services provided by the mandap keepers and the contention that it did tantamount to tax on land was rejected, and further adverted to the concept 'in relation to' as has been dealt with in the case of *Tamil Nadu Kalyana Mandapam Assn.* (supra) and thereafter, expressed the view as under:-

> *"It is clear from the transaction that only the service was to be provided for the purpose of packaging, which was controlled under the condition of tender notice and separate charges were paid for bottling, labelling and sealing, which were not forming part of the price of the country spirit. For country spirit separate bills were raised and for the aforesaid part of packaging service charges were prescribed and there were service obligations to be carried out in the form of bottling while undertaking the packaging activity. There was obligation to reuse the bottle offered by the contractors. The entire mechanism leaves no room for any doubt that it was packaging activity, which was clearly a service activity under section 65(76)(b) and not process of manufacture as defined in section 2(f) of the Central Excise Act. It may also be noted that in section 2(d) of the Central Excise Act "excisable goods" means those goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt. The Chapter 22 of the Central Excise Tariff Act, 1985 covers beverages, spirits and vinegar. However, as per the chapter note (4) this chapter does not cover alcoholic liquors for human consumption. Therefore, the activity of various distillers does not come under the purview of "manufacture" as defined in section 2(f) of the Central Excise Act, 1944. The bottled country liquor or its packing or re-packing activity has not been mentioned/specified in Central Excise Tariff Act. Even*

*if we consider the manufacturing activity, it is clear that manufacturing activity is de hors of event of its liability for the Central excise as defined in section 2(f). In our opinion, packaging cannot be said to be part of process of manufacture as defined in section 2(f) in the facts and circumstances of the instant case, it is clearly a service provided as per terms of tender."*

After so stating, the Bench proceeded to hold as under:-

*"....Thus it is a service part of the activity which is being taxed, which is independent of the process of manufacture and cannot be said to be integral part of process of manufacture as excluded in section 65(76)(b) inserted by the Finance Act, 2005 read with section 2(f) of the Central Excise Act. The apex court in Collector, Central Excise, Bombay vs. S.D. Fine Chemicals Pvt. Ltd., (1995) Supp.2 SCC 336 has laid down that whether a particular process is covered by "manufacture" as defined in section 2(f) is a question of fact, to be determined in the facts of each case. In Collector of Central Excise, Hyderabad vs. Javant Oil Mills Pvt. Ltd., (1989) 3 SCC 343, the apex court held that all processes do not constitute manufacture. In our opinion, it merely by providing service for bottling a new commodity, does not come into being new article, it is clearly a service provided. Manufacture is complete as soon as by the application of one or more process, the raw material undergoes some change. The moment there is a transformation into a new commodity commercially known as a separate and distinct commodity having its own character and use, "manufacture" takes place as held by the apex Court in Aditya Mills Limited vs. Union of India, (1989) 73 STC 195: (1988) 4 SCC 315. In Collector of Central Excise, Madras vs. Kutty Flusi Doors & Furniture Co. (P) Ltd., (1988) 70 STC 314: AIR 1988 SC 1164,it is held that by conversion of timber logs into sawn timber, no new produce emerged by sawing of timber, therefore, higher excise duty on sawn timber was not leviable."*

After so holding, the Division Bench referred to the decision rendered in *Som Distilleries & Breweries Pvt. Ltd.* (supra) and distinguished the same by observing as under:

*"...The decision is of no assistance to the question involved in the present case. It was rendered in the context of M.P. Excise Act, 1915 for imposition of duty and there was no*

*discrimination made while making the classification. Decision was not in context of Central Excise Act. The decision was not with respect to the activity of packaging under section 65(76)(b) and the definition under section 2(f). It was also laid down that bottling fee, which is charged, is not excise duty, though it is an excise revenue for the State and it was within the competence of the State entry under the Constitution. We are concerned about the service tax in the instant case, inserted by the Finance Act, 2005. The observations were made by the division Bench in the context of classifiction which was made under the M.P. Excise Act, 1915 where definition of "manufacture" is different and whether any service was rendered in the process was not the question agitated or decided. The decision is distinguishable and has no application to the controversy involved in the present petition."*

Eventually, the Bench expressed the opinion that service tax being an indirect tax can be passed on to the service receivers.

11. It is submitted by Mr. Sumit Nema, learned counsel for the petitioners that the interpretation placed by the Division Bench is not correct inasmuch as the language employed in the Finance Act has not been appositely appreciated. It is worth-noting that on 16-6-2005 Section 65(76b) of the Finance Act was amended and packaging activity was brought within the purview and ambit of service tax. The said definition reads as under:

*"65. Definitions - ...*

*In this Chapter, unless the context otherwise requires:*

*(76-b) "packaging activity" means packaging of goods including pouch-filling, bottling, labeling or imprinting of the package, but does not include any packaging activity that amounts to "manufacture" within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944 (No.1 of 1944)."*

12. On a scrutiny of the said definition, it is quite clear that packaging activity means packaging of goods including pouch-filling, bottling, labeling or imprinting of the package but the definition does not stop there, as the provision expressly shows, it does not include any packaging activity that amounts to manufacture within the meaning of clause (f) of Section 2 of the 1944 Act. Section 2(f) of the 1944 Act reads as follows:

*"2. Definitions – In this Act, unless there is anything repugnant in the subject or context-*

*(a) xx xx xx*

*(f) "manufacture" includes any process-*

*(i) incidental or ancillary to the completion of a manufactured product;*

*(ii) which is specified in relation to any goods in the section or chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture, or*

*(iii) which in relation to the goods specified in the Third Schedule involves packing or repacking of such goods in a unit container or labeling or relabeling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the produce marketable to the consumer;*

*and the work 'manufacture' shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods but also any person who engages in their production or manufacture on his own account."*

13. The learned counsel for the petitioners has laid immense emphasis on sub-clause (i) of Clause 2(f) which deals with "incidental or ancillary to the completion of a manufactured product". The learned counsel submitted that if bottling is treated as incidental or ancillary to the completion of a manufactured product, i.e., the country spirit, indubitably, would come within the sweep of the definition and get out of the net of packaging activity as defined under Section 65(76b) coming within the non-inclusive facet. The learned counsel has submitted that the definition is absolutely clear and there is no ambiguity. In this regard it would be fruitful to refer to two circulars, issued by the Central Board of Excise and Customs one bearing No.249/1/2006 dated November, 2006 and another being Circular F.No. 249/1/2006 – CX.4, dated 27th October, 2008. The Board was dealing with the similar definition in the context of business auxiliary service in the Finance Act, 1994 where similar exclusionary clause is stipulated in the definition clause. The relevant extract of 2006 circular is as under:-

*"The activities undertaken by the CBUs is appropriately classifiable under clause (v) of the definition of 'Business Auxiliary Service' which reads as under:-*

*(v) production or processing of goods for, on or behalf of the client; This taxable service, however, excludes from its purview 'any activity' that amounts to "manufacture" within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944'. In other words even if a service provider produces*

*or processes goods on behalf of the client; such activity would go out of the purview of the said taxable service, if the same amounts to manufacture as under Central Excise law. This poses a secondary or a related question because of the fact as per the Entry No.92C in list 1 of the VII Schedule to the Constitution of India, the Union Excise Duty is not extendable to the manufacture of potable liquor or alcoholic beverages for human consumption. Such being the case, a question arises as to whether the manufacture of potable of IMFL should be excluded from the purview of Business Auxiliary Service. There is no doubt that the process of making IMFL from its raw material involves change in name, character and use that have been laid down as criterion for a process being amount to manufacture by the judicial pronouncement of the Apex Court. But the question remains that irrespective of such laid down principles, the process of making IMFL would remain within the purview of section 2(f) of an Union Act which does not extend to the final product in question, namely, IMFL. On this subject the opinion of the Ministry of Law is that 'even though the definition under the Central Excise Act are for the purpose of that Act, yet by referential legislation, a few of them have been borrowed by reference to the first Act'. In other words when a definition from an Act is transposed unto another Act, it is the scope of that definition which is imported into the borrowing Act and not the scope of the first Act and the context in which such definition is used in the first Act. Admittedly the scope of the two Acts would be distinct and if the definition is borrowed from the first Act into the second Act having different scope, the same would get disturbed/distorted if the context and scope of the earlier Act is also imported. This is primarily a substitute to writing the entire defining terms in the second Act and not to change the scope of the borrowing Act. Thus just because Central Excise Act does not extend to the manufacture or production of alcoholic beverages meant for human consumption, it cannot be said that the terms 'manufacture' used in Business Auxiliary Service would also not cover the process of making the said product, namely IMFL."* *(Emphasis supplied)*

14. In the aforesaid circular of 2006 it was mentioned that as alcohol beverages are not covered under the Central Excise law the production of beverages would not fall within the meaning of manufacture as conceptualized under Clause (f) of

Section 2 of the Central Excise Act. The Board re-examined the matter in detail after receipt of the response and issued the Circular F-No.249/1/2006-CX.4, dated 27-10-2008 which relates to levy of service tax on production of alcoholic beverages on job work basis. The background of the circular reads as under:

> *"Issues relating to taxable services provided during the course of production of alcoholic beverages (such as Indian Made foreign Liquors, Branded Country liquors and similar products) are matters of dispute for a considerable period. In this regard, a draft Circular F.No.249/1/2006-CX.9., dated November, 2006 (on applicability of service tax on taxable services provided in certain cases during the course of production of alcoholic beverages) was placed on the official website for eliciting responses from the stakeholders. The responses received from various stakeholders were carefully examined. It was noticed that in certain cases such alcoholic beverages are produced by the distillers who also own the brand names affixed on such beverages. Such beverages are cleared on payment of State Excise Duty and there are no known disputes as regards the liability to pay service tax. In other cases, the owners of the brand name and the manufacturers may be two different entities and issues have been raised regarding provision of taxable services in such situations. There are several types of arrangements between the brand owners and the maker of the alcoholic beverages, which are as follows."*

Thus, the circular clarified the position about the packaging of alcoholic beverages. The relevant part of the circular is as follows:

> *"3.1. Under such arrangement the BO gets alcoholic beverages manufactured by the licencee/manufacturer, the latter holding the required State Licences for manufacture of the alcoholic beverages. In trade, such licencees/ manufacturers are called the Contract Bottling Units or CBUs. The cost of raw materials (and in some cases, even capital goods) and other expenses are either paid by the BO or reimbursed by the BO. Statutory levies (i.e. State excise duty) are also reimbursed to the CBU by the BO. The alcoholic beverages are sold by or as per the directions of the BO and profit or less on account of manufacturing and sale of alcoholic beverages is entirely on account of manufacturing and sale of alcoholic beverages is entirely on account of BO, who thus holds the property, risk and reward of the products.*

*The CBU receives consideration (i.e. Job charges) for undertaking the manufacturing activity on job work basis. There is no doubt that under such an arrangement, CBU is a service provider providing services to BO. A doubt has arisen, whether or not the CBU provides a taxable service namely, the Business Auxillary Service (BAS) to BO. This taxable services includes any service provided or to be provided in relation to production or processing of goods for, or on behalf of the client. This taxable service however, by definition excludes any activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 from its ambit. The issue in dispute is whether such activity would be hit by the exclusion clause mentioned above.*

*3.2 In the draft circular dated November, 2006, it was mentioned that as alcoholic beverages are not covered under central excise law, the production of beverages would not fall within the meaning of manufacture within the meaning of clause (f) of section 2 of the Central Excise Act. Thus, the exclusion clause would not apply to production of non-excisable goods, resulting in its coverage under BAS. However, the matter was re-examined in detail by the Board after receipt of the responses and it has now been concluded that the exclusion would be applicable in the instant case for the following reasons:*

*(a) Plain reading of section 3 of the Central Excise Act, 1944 shows that for levy and collection of central excise duty, the following conditions must be satisfied:*

*(i) The process undertaken must amount to manufacture as defined under section 2(f); and*

*(ii) The result of such process should be emergence of excisable goods, which as per section 2(d) are the goods specified in the First and the Second Schedule of the Central Excise Tariff Act, 1985 as being subjected to duty of excise.*

*Therefore, 'manufacture' and 'excisable goods' are two independent concepts and that it is not necessary that a process amounting to manufacture within the meaning of section 2(f) should always result in emergence of an excisable good and vice versa. Whether a process would amount to manufacture within the meaning of section 2(f) has to be seen independently, based on the criteria evolved through various judgments of the apex Court. There may be a case, when a*

*process may amount to manufacture under section 2(f) but it may not result in emergence of an excisable product. If that be so, then the exclusion clause under BAS, which refers only to the activity amounting to manufacture within the meaning of section 2(f), would still apply to such processes, whether or not the resultant product are excisable goods. Such is the case of production of also beverages, which qualifies to be a process amounting to manufacture within the meaning of section 2(f), when read with the relevant judicial pronouncements, because a new product with a distinct name, Character or use; and capable of being marketable, emerges; and*

*(b) In the instant case the exclusion provision under the definition of BAS (under the Finance Act, 1994) makes a reference to a definition of the word 'manufacture' figuring under another Act (i.e. The Central Excise Act, 1944). It is a settled law that when a definition from an Act is transposed into the borrowing Act without any reference to the context of such definition in the Act from which it is being borrowed. It is the words of that definition, which is imported into the borrowing Act and not the scope of the first Act and the context in which such definition is used in the first Act. Admittedly the scope of the two Acts would be distinct and if the definition is borrowed from the first Act into the second Act having different scope, the same would get disturbed/distorted if the context and scope of the earlier Act is also imported. Thus, just because Central Excise Act does not extend to the manufacture or production of alcoholic beverages meant for human consumption, it cannot be said that the term 'manufacture' used in BAS would also not cover the process of making the said product, namely, alcoholic beverages."*

*[emphasis supplied]*

15. If the basic aspect of manufacture as contained in Section 2(f) of the Act is appreciated, it would convey that the "manufacture" would include "any process incidental or ancillary with the completion of manufactured product." The dictionary clause further expands the scope of manufacture to include certain goods which are specified in the Section. The first limb of the inclusive definition of the manufacture under Section 2(f) of the Act has a very wide connotation. As the definition clause lays down an inclusive facet, the term "manufacture" has to be construed in a natural and plain manner and would include any process incidental or ancillary to the completion of a manufactured product. Keeping in view the context in which the term "manufacture" has been used, it would take in its fold

the incidental or ancillary process in the manufacture or finishing of any manufactured product. It does not leave any room for doubt that an allied process should be integral and inextricable part of manufacture for completeness and presentability of the manufactured product. In *Collector of Central Excise, Bombay v. S.D. Fine Chemical*, 1995 (77) ELT 49 (Supreme Court), the Apex Court after analysing the various earlier decisions expressed the view that the definition of the word/expression "manufacture" under Section 2(f) of the Act is not confined to the natural meaning of the said expression but is an extensive definition. It has been held therein that the certain processes which may not have otherwise amounted to manufacture are also brought within the ambit and purview of the said definition.

16. In this context it is worth-noting Section 65(76)(b) of the Finance Act uses the words "but it does not include". Thus, it is a definition which has the inclusive as well as exclusive facet. By virtue of the same it may include certain things and excludes others. It is a well settled principle of law that a definition is not to be read in isolation and has to be read in the context of phrase which it defines, realising that the function of a definition is to give precision and certainty to the word or phrase which would otherwise be vague and uncertain. The said principle has been stated by the Apex Court in *Purshottam H. Judye v. B. Potdar*, AIR 1966 SC 856 and *Pioneer Rubber Plantation Nilambur vs. State of Kerala*, AIR 1993 SC 192.

17. In this regard, we may profitably quote a passage from the Principles of Statutory Interpretation by Justice G.P.Singh (11th Edition Page 180) wherein the learned Author analyzing the various decisions has expressed the view as under :-

> *"A definition may be both inclusive and exclusive i.e. it may include certain things and exclude others. Limited exclusion of a thing may suggest that other categories of that thing which are not excluded fall within apparently wide or inclusive definition. But the exclusion clause may have to be given a liberal construction if the purpose behind it so requires."*

In view of the aforesaid principle and regard being had to the exclusionary facet in the Finance Act, though a limited one, it would exclude the manufacturing process as defined under section 2(f) of the 1944 Act.

18. Keeping in view the aforesaid dictionary clauses and circulars issued by the C.B.E.C. it is quite luminescent that word "manufacture" has to be understood in a broader sense and not to be confined or restricted to the excisable product in the Act. It would include all processes which amount to manufacture whether or not the final product is an excisable product.

19. It will not be out of place to mention that section 65(76)(b) while defining refers to the definition of manufacture as contained in Section 2(f) of the Central

Excise Act. Thus, in a way it is referral legislation. In this context, we may refer with profit to the decision rendered in *Bajya v. Smt. Gopikabai and another*, AIR 1978 SC 793 wherein it has been held as under:-

> *"27. Broadly speaking, legislation by referential incorporation falls in two categories: First, where a statute by specific reference incorporates the provisions of another statute as of the time of adoption. Second, where a statute incorporates by general reference the law concerning a particular subject, as a genus. In the case of the former, the subsequent amendments made in the referred statute cannot automatically be read into the adopting statute. In the case of latter category, it may be presumed that the legislative intent was to include all the subsequent amendments also, made from time to time in the generic law on the subject adopted by general reference. This principle of construction of a reference statute has been neatly summed up by Sutherland, thus:*
>
> *"A statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted."*
>
> *(Vide, Sutherland's Statutory Construction, Third Edition, Art. 5208, p. 5208) Corpus Juris Secundum also enunciates the same principle in these terms:*
>
> *"..... Where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof, ..... the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes made from time to time, at least as far as the changes are consistent with the purpose of the adopting statute."*

20. In view of the aforesaid enunciation of law, the non-exclusive part in the Finance Act has to be in the context of Section 2(f) of the 1944 Act. At this stage it is apropos to note certain relevant aspects with regard to concept of country liquor supply of contract. Such contracts are awarded only to distillers who are producers of rectified spirit. Under the Madhya Pradesh Country Liquor Rules, 1995 the distillers are given a CS-I licence to manufacture country spirit from rectified spirit by cleansing, colouring, flavouring, reducing, blending, etc. at the manufacturing warehouse. In the process of manufacturing of country spirit, the over proof spirit which is not potable is reduced to issuable strength, which is potable. Colouring and flavouring agents are added at the time of maturation.

Thereafter the liquor is supplied in sealed bottles to the retail contractors. This is the process of treatment given to over proof spirit in order to render it fit for human consumption in the form of country liquor. If the process is analysed there cannot be any scintilla of doubt that the process involves the manufacturing one under the provisions of Section 2(f) of the Central Excise Act, 1944. As per the M.P. Country Spirits Rules as well as Cl.6 of the Tender Conditions it is mandatory for a distiller to supply country liquor in sealed bottles and not otherwise.

21. It is urged by the learned counsel for the petitioners that the bottling and sealing done is an integral part of the manufacturing process of country liquor and no exclusive packaging service is provided to the retail contractors. The sealing charges which is being recovered from the retail contractors is, in fact, the manufacturing cost and the charge is not for bottling of the country liquor but in includes the cost of the whole manufacturing of country liquor.

22. In this context, we may refer with profit to the decision rendered in *Sir Shadilal Distillery and Chemical Works & another,* v. *State of U.P.*(1998) 8 SCC 428 wherein the Apex Court after referring to the decision rendered in *Khoday Distilleries Ltd. vs. State of Karnataka* (1996) 10 SCC 304 has expressed the view that bottling of liquor is an integral part of manufacture and supply thereof.

23. In view of the aforesaid enunciation of law whether an activity amounts to manufacture or not, it is incumbent to take not of any process which is incidental or ancillary to the completion of the final product whether the final product is excisable or not. This aspect has been clarified in the circular keeping in view the decision rendered by the Apex Court. It is worth noting that the definition of "manufacture" as contained in Section 2(14) of the 1915 Act is an inclusive definition which covers every process whether incidental or artificial by which an intoxicant is produced or prepared. The same has been taken note of by the earlier Division Bench of this Court in *Som Distilleries' case* (supra) wherein it has been held as under:

> *"11. There is another aspect of the matter also that section 27-A talks of duty and not the fee. It is a fee which the State is charging and not duty. Entry 8 of List-II of VII Schedule lays down that the State is competent to legislate on intoxicating liquours, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors. In fact, the bottling is a part of manufacturing process. No liquor can be supplied without bottling. 'Bottle' has already been defined under section 292 of the act of 1915. The State is competent to legislate in respect of rate of fees and how the bottling is to be done as the bottling is the part of manufacturing process."*

24. In *M/s Vindyachal Distilleries Pvt. Ltd.* (supra), the division Bench has placed heavy reliance on the tender notice and the conditions of tender notice. It has referred to separate charges which are to be recovered for bottling. In this regard we may refer to the decision rendered in *Arun Electrics Bombay vs. Commissioner of Sales Tax,* (1966) 17 STC 576 wherein it has been held as follows:

> *"the question whether in respect of a transaction (sales) Tax is exigible must determined only on the terms of the contract and not from the invoice issued by the person entitled to receipt money under the contract."*

25. In *Bharat Sanchar Nigam Ltd. And another vs. Union of India and others,* (2006) 3 SCC 1, their Lordships have expressed thus:-

> *"42. All the sub-clauses of Article 366(29-A) serve to bring transactions where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act, 1930 are absent, within the ambit of purchase and sales for the purposes of levy of sales tax. To this extent only is the principle enunciated in Gannon Dunkerley Ltd. (sic modified). The amendment especially allows specific composite contracts viz. works contracts [sub-clause (b)]; hire purchase contracts [sub-clause (c)], catering contracts [sub-clause (e)] by legal fiction to be divisible contracts where the sale element could be isolated and be subjected to sales tax."*

Thereafter, their Lordships proceeded to state as follows:-

> *"44. Of all the different kinds of composite transactions the drafters of the Forty-sixth Amendment chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in sub-clauses (b) and (f) of clause (29-A) of Article 366, there is no other service which has been permitted to be so split. For example, the sub-clauses of Article 366(29-A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the Sales Tax Authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer*

*drafts a document and delivers it to his/her client? Strictly speaking, with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases."*

26. Recently, in *Imagic Creative (P) Ltd. vs. Commissioner of Commercial Taxes and others,* (2008) 2 SCC 614 their Lordships opined thus:-

*"29. If the submission of Mr.Hegde is accepted in its entirety, whereas on the one hand, the Central Government would be deprived of obtaining any tax whatsoever under the Finance Act, 1994, it is possible to arrive at a conclusion that no tax at all would be payable as the tax has been held to be an indivisible one. A distinction must be borne in mind between an indivisible contract and a composite contract. If in a contract, an element to provide service is contained, the purport and object for which the Constitution had to be amended and clause (29-A) had to be inserted in Article 366, must be kept in mind."*

27. In view of the aforesaid authorities, the closer scrutiny of the terms and conditions of tender notice relating to price and invoice by the Division Bench in *M/s Vindhyanchal Distilleries Pvt. Ltd.* (supra) for the purpose of excluding packaging of liqure from the spectrum of manufacturing process is not correct.

28. At this stage, for the purpose of binding nature of Board's circulars we may refer with profit to the decision rendered in *R. & B. Falcon (A) Pty Limited v. Commissioner of Income Tax,* (2008) 12 SCC 466, wherein it has been held as follows:-

*"33. The CBDT has the requisite jurisdiction to interpret the provisions of the Income Tax Act. The interpretation of the CBDT being in the realm of executive construction, should ordinarily be held to be binding, save and except where it violates any provisions of law or is contrary to any judgment rendered by the Courts. The reason for giving effect to such executive construction is not only same as contemporaneous which would come within the purview of the maxim temporania caste pesto, even in certain situation a representation made by an authority like Minister presenting the Bill before Parliament may also be found bound thereby."*

29. In *Commissioner of Central Excise, Bolpur v. Ratan Melting & Wire Industries,* (2008) 13 SCC 1, the Constitution Bench has held as under:

*"7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective*

*statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/ circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."*

30. In the case at hand, the circular issued by the Central Board of Excise and Customs is in consonance with the statutory provisions as well as the law laid down by the Apex Court in *Sir Shadilal Distillery & Chemical Works*, (supra).

31. Though we have analysed and stated that we are unable to concur with the view taken by the Division Bench in *M/s Vindhyanchal Distilleries Private Ltd.* (supra) we think it condign to enunmerate the reasons therefor in seriatim :

*(i) Section 65(76b) of the Finance Act by referral legislation excludes the manufacturing process as defined under Section 2(f) of the 1944 and the said provision is not to be read in a composite and cumulative manner, inasmuch as each clause in the said provision is independent because of the language employed therein.*

*(ii) The manufacturing process does not necessarily mean it has to be excisable goods but would include any process which is incidental or ancillary to the completion of a manufactured product.*

*(iii) The definition under Section 65(76b) of the Act read with definition section 2(f) of the 1944 Act does not exclude the concept of manufacturing process as defined under Section 2(14) of the 1915 Act which is an inclusive definition that includes every process whether natural or artificial.*

*(iv) The dissection of the tender conditions especially the invoices and pricing by the Division Bench for the purpose of determining the manufacturing process is incorrect in view of the decisions rendered in Arun Electronics (supra), Bharat Sanchar Nigam Ltd. and another (supra) and Imagic Creative (P) Ltd. (supra).*

*(v) The view expressed by the earlier Division Bench in* ***Som Distilleries & Breweries Pvt. Ltd.*** *(supra) on the basis of scrutiny of anatomy of the various provisions of the 1915 Act that bottling is a part of the manufacturing process, could not have been distinguished on the ground that the decision was not with respect to the activity of packaging as enshrined under Section 65(76)(b) of the Finance Act and the definition under Section 2(f) of the Central Excise Act inasmuch as the said definition by its import excludes the manufacturing process under the Central Excise Act from the net of service tax.*

*(vi) The Circular F.No.249/1/2006-CX, dtd. 27th Oct., 2008 issued by the Central Board of Excise and Customs clarifies the position that the term 'manufacturing process' as far as bottling is concerned, has to be understood in the context of the decision of the Apex Court and keeping that in view, has taken it out of net of service tax and the said circular is in consonance with the decision rendered by the Apex Court in* ***Sir Shadilal Distillery & Chemical Works, Mansurpur*** *(supra).*

*(vii) The process of manufacture as defined under Section 2(14) of the 1915 Act falls within the ambit and sweep of Section 2(f)(1) of the Central Excise Act, 1944 and, therefore, there can be no levy of service tax on manufacture in view of the clear postulate under Section 65(76b) of the Finance Act, 2005. To elaborate: the fundamental concept of manufacture as engrafted under Section 2(14) of the 1915 Act cannot be regarded as alien to the definition of 'manufacture' under Section 2(f)(1) of the Central Excise Act as has been held by the Division Bench in* ***M/s Vindhyanchal Distilleries Private Ltd.*** *(supra).*

*(viii) The analysis that the bottling of liquor can be independent is not correct, as the liquor cannot be sold without bottling as there is statutory stipulation that the liquor has to be sold in bottles. To further clarify, the container becomes a part of manufacturing process, and that has been so held in* ***Som Distilleries and Breweries Pvt. Ltd.*** *(supra)*

32. In view of the aforesaid, we answer the reference on following terms:

*"The decision rendered in* ***M/s. Vindhyachal Distilleries*** *(supra) does not state the law correctly inasmuch as it has expressed the opinion that packaging and bottling of liquor are not the part of manufacturing process and hence, liable to service tax and we uphold the view taken in* ***Som Distilleries*** *(supra) and, therefore,*

*rule that packaging and bottling of liquor come within the ambit and sweep of manufacture within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944 in view of the definition contained in Section 65(76b) of the Finance Act especially keeping in view the exclusionary facet and further. regard being had to the circular issued by Central Board of Excise and Customs."*

33. Let the matter be listed before the appropriate Division Bench for final disposal.

*Order accordingly.*

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**I.L.R. [2009] M. P., 1586**
**FULL BENCH**
***Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice A.M. Sapre & Mr. Justice A.K. Saxena***
18 April, 2009*

SATYA PAL ANAND ... Applicant
Vs.
REGISTRAR GENERAL, HIGH COURT OF M.P. & anr. ... Non-applicants

**Constitution, Article 226** - ***Dispensation of court fee on regular writ petition filed as Public Interest Litigation*** - *View taken by Full Bench in ILR [2008] MP 2172 that court fee are payable on PIL filed as Writ Petition under Article 226 of Constitution except where the Chief Justice or a Judge designate directs on the basis of information received in a letter or any other document and considers that to be a fit case for registering case even though no court fee is paid on such letter or document is correct - Review dismissed.* (Para 5)

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

**Cases referred :**

AIR 1997 MP 223, 1981 (Supp) SCC 87, AIR 1982 SC 1473, (1984) 3 SCC 161, (1987) 1 SCC 395.

*Satya Pal Anand,* applicant in person.
*A.S. Kutumbale, Addl.A.G.* with *Mamta Shandilya, P.L.,* for the State.
*Piyush Mathur,* as Amicus Curiae.

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*M.C.C. No.640/2008 (Indore)

ORDER

The Order of the Court was delivered by A.K. PATNAIK, C.J. :– This is a petition for review of the order of the Full Bench dated 31.7.2008 in W.P. No.5806/2006.

2. The background facts briefly are that Writ Petition No.988/1999 was filed as a Public Interest Litigation (for short 'PIL') in this Court challenging the grant and payment of pension to Ex-Legislators of the State of Madhya Pradesh as well as the vires of the M.P. Vidhan Sabha Sadasya Vetan Tatha Bhatta Tatha Pension Adhiniyam. A Division Bench of this Court hearing the PIL found that the issue raised in the PIL had already been settled by another Division Bench of this Court in *Raghu Thakur vs. State*, AIR 1997 M.P. 223 and the grant and payment of pension to Ex-Legislators had been held as intra vires the Constitution and while disposing of the writ petition by order dated 9.9.1999 issued some directions for regulating filing of PIL in this Court. Thereafter, the petitioner filed W.P. No. 5806/2006 contending that the order dated 9.9.1999 of the Division Bench in W.P. No.988/1999 was a nullity inasmuch as it laid down the rules relating to practice and procedure in relation to filing of PILs under Art. 226 of the Constitution, but the power to lay down rules relating to practice and procedure of the High Court vested in the Full Court of the High Court under Section 54 of the State Re-organisation Act, 1956. The Division Bench hearing the writ petition referred several questions of law which arose for decision in W.P. No. 5806/2006 for opinion of a larger Bench and these substantial questions of law included the question whether the powers conferred under Section 54 of the State Re-organisation Act, 1956 on the High Court of Madhya Pradesh to make Rules and Orders relating to practice and procedure can be exercised by the Division Bench of the High Court under Art. 226 of the Constitution of India so as to lay down the practice and procedure of PIL and whether court fees are payable on a PIL ?

3. The substantial questions of law were referred to the Full Bench and the Full Bench in order dated 31.7.2008 held that under Art. 225 of the Constitution and Section 54 of the State Re-organisation Act, 1956. the Chief Justice and all the Judges of the Madhya Pradesh High Court have powers to make Rules and Orders with regard to practice and procedure relating to PIL and the order dated 9.9.1999 of the Division Bench in W.P. No.988/1999 in so far as it has laid down five conditions for filing of PIL is without jurisdiction. The Full Bench in the order dated 31.7.2008 also held that there is no provision in the Court Fees Act, 1870 enabling the High Court to exempt the petitioner from payment of court fees for filing the PIL and therefore court fee is payable on regular writ petitions filed as PIL under Art. 226 of the Constitution, but no court fee is payable when any information in a letter or other document is registered as PIL under Art. 226 of the Constitution with the direction of the Chief Justice or a Judge designate. The petitioner has filed this review petition against the opinion of the Full Bench that court fee is payable on regular writ petitions filed as PIL under Art. 226 of the Constitution.

4. The petitioner who appeared in person submitted that the High Court has inherent powers to dispense with court fees payable on regular writ petitions filed under Art. 226 of the Constitution to protect the fundamental rights of disadvantaged persons. In support of his contention, he cited the decision of Supreme Court in *S.P. Gupta vs. Union of India and another,* 1981 (Supp) SCC 87 in which P.N. Bhagwati, J. has held that the Court should readily respond even to a letter addressed by individual acting pro bono publico and unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in exercise of its dispensing power and treat the letter of the public-minded individual as a writ petition and act upon it. (Para 17 at page 210 of the SCC). He also relied upon the decision of Supreme Court in *People's Union for Democratic Rights and others vs. Union of India and others,* AIR 1982 SC 1473. He cited the decision of Supreme Court in *Bandhua Mukti Morcha vs. Union of India and others,* (1984) 3 SCC 161 in which it has been held relying on *S.P. Gupta vs. Union of India and another* (supra) that a member of a public acting bonafide may move the Court for enforcement of a fundamental right on behalf of a person or class of persons who on account of poverty or disability or socially or economically disadvantaged position cannot approach the Court for relief even by just writing a letter, because it would not be right or fair to expect a person acting pro bono publico to incur expenses out of his own pocket for going to a lawyer and preparing a regular writ petition for being filed in Court for enforcement of the fundamental right of the poor and deprived sections of the community. Finally, he cited the decision of the Supreme Court in *M.C. Mehta and Another vs. Union of India and others,* (1987) I SCC 395.

5. We have perused the decisions cited by the petitioner and in none of the decisions the Supreme Court has held that no court fee is payable on a PIL, although it has been held that a letter addressed by poor or disadvantaged person or by social activist group on their behalf can maintain as a public interest litigation on the directions of the Chief Justice. No provision of Act, Rule or any other law has been brought to the notice of this Court by the petitioner enabling the High Court to dispense with court fees on a regular writ petition under Art. 226 of the Constitution filed as a PIL. Hence, in our opinion, the view taken by the Full Bench in the order dated 31.7.2008 that court fees are payable on a PIL filed as a writ petition under Art. 226 of the Constitution except where the Chief Justice or a Judge designate directs on the basis of information received in a letter or any other document and considers that it is a fit case for registering a case even though no court fee is paid on such letter or document is correct.

5. In the result, we do not find any merit in the review petition and we accordingly dismiss the same.

*Petition dismissed.*

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I.L.R. [2009] M. P., 1589
WRIT APPEAL

*Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh*
16 January, 2009*

MADHYA PRADESH HOUSING BOARD & anr. ... Appellants
Vs.
K.V. SHRIVASTAVA ... Respondent

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

(Para 9 to 12)

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

**Cases referred :**

AIR 1963 SC 1756, AIR 1979 SC 1022, (2004) 5 SCC 689.

*T.S. Ruprah*, for the appellants.
*N.S. Kale*, for the respondent.

*W.A. No.788/2006 (Jabalpur)

**MADHYA PRADESH HOUSING BOARD Vs. K.V. SHRIVASTAVA**

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

The Judgment of the Court was delivered by AJIT SINGH, J. :–This appeal, under section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyay Peeth Ko Appeal) Adhiniyam 2005, is directed against the order dated 17.1.2006 passed in Miscellaneous Petition No. 4122/1993 by the learned Single Judge whereby the penalty of dismissal from service of respondent has been quashed with a direction to the appellants to reinstate him with full back wages.

2. Briefly stated the facts giving rise to this appeal are that appellant no. 1 is the Madhya Pradesh Housing Board (in short, "the Board") and appellant no. 2 is its Chairman. On 7.4.1981 a contract was given by the Board to one S. K. Pathak for the construction of 10 H.I.G. and 20 M.I.G. houses near Parijat Hotel in Satna town. Initially, the period of contract was for one year which was extended from time to time up to 15.3.1985. The respondent, who was working as Executive Engineer in the Board, was posted in Satna Division from 10.5.1982 to 29.6.1985. It is not in dispute that he supervised the construction work of the aforesaid houses and U. S. Agarwal was his Assistant Engineer. It appears that despite the regular supply of construction materials such as cement, steel, A.C. sheets, door and window panels, etc. by the Board, the contractor did not complete the work and as such his agreement was cancelled. After the cancellation of agreement, the Board found that the contractor caused a financial loss of Rs.3,02,818.82 to it by not returning the construction material supplied to him and removing the same from the work site. The Board also found that the respondent and U. K. Agarwal, without showing due care and caution and without taking into consideration the actual requirement of the construction work, issued more than the required construction material to the contractor and failed to restrain him from removing the same from the construction site which resulted into huge financial loss.

3. A departmental enquiry was, therefore, initiated against the respondent and U. K. Agarwal on the charge that they supplied excessive construction material to the contractor irrespective of his stock position and the requirement of work and that they failed to prevent the contractor from taking away the construction material from the site. As per the charge, the respondent and U. K. Agarwal showed lack of devotion to duty and want of absolute integrity as required under Rule 3(i) and (ii) of the Madhya Pradesh Civil Services (Conduct) Rules 1965 (in short, "the Conduct Rules"). The respondent, in his reply, to the charge sheet denied the charge and submitted that he issued the construction material as per rules in the interest of the Board with the sole object to complete the construction work at the earliest more particularly because the progress of work by the contractor was extremely slow. He also submitted that the figures with regard to the left construction material on the spot had been exaggerated and that his subordinate officers did not correctly record the quantity of construction material

issued to the contractor as a result of which the same was wrongly shown as excessive. Likewise, U. K. Agarwal also denied the charge by submitting a written reply.

4. The Enquiry Officer, after holding the enquiry, found the charge against the respondent proved to the extent that he irresponsibly issued excess cement bags to the contractor who was able to take away 2903 cement bags with him without utilizing them in the construction work which put the Board to the financial loss of Rs.1,74,180. The allegation of excess supply of other materials such as steel, A.C. sheets, etc. by the respondent was, however, not found proved. The Enquiry Officer exonerated U. K. Agarwal of the charge on the ground that he did not issue any cement bag to the contractor on his own and he had been regularly informing the Divisional Office about the excessive cement lying with the contractor. The Disciplinary Authority, agreeing with the findings of the Enquiry Officer, issued a show cause notice to the respondent making clear that a penalty of dismissal from service was proposed against him. The respondent submitted a detailed reply to the said notice but the Disciplinary Authority did not agree with it and held that he was guilty of gross negligence towards his duty. The Disciplinary Authority also held that the manner in which the respondent adopted the procedure in supplying the cement showed his lack of devotion to duty and made his integrity doubtful. On these findings, the Disciplinary Authority imposed penalty of dismissal from service on the respondent. Being aggrieved, the respondent filed a statutory departmental appeal before the Appellate Authority but without any success. The respondent then filed a petition under Article 226 of the Constitution which has been allowed by the impugned order passed by the learned Single Judge of this Court.

5. The learned Single Judge has held that in the absence of any finding of ill motive against the respondent by the Enquiry Officer for supplying excess cement to the contractor, he cannot be held guilty of committing misconduct. According to the learned Single Judge, there was also no finding that the respondent had colluded with the contractor in playing fraud with the Board and, therefore, at the most his conduct amounted to lack of efficiency and negligence which did not constitute misconduct. Relying upon the judgment of Supreme Court in *Union of India v. J. Ahmed* AIR 1979 SC 1022 the learned Judge quashed the penalty of dismissal from service of the respondent and directed the appellants to reinstate him with full back wages subject to the adjustment of financial loss of Rs.1,74,180/- suffered by the Board. The learned Judge also held that the Disciplinary Authority passed the order of punishment mechanically without discussing anything regarding the material brought on record and so did the Appellate Authority while dismissing the departmental appeal of respondent. Aggrieved with the impugned order as well as the findings arrived at by the learned Single Judge, the appellants have filed this appeal.

6. Shri T. S. Ruprah, learned senior counsel for the appellants, has argued

that the manner in which excessive cement bags were continuously supplied by the respondent clearly indicated that he was guilty of gross or habitual negligence in performing his duty which constitute misconduct for disciplinary proceedings. The learned senior counsel has further argued that gross or habitual negligence in performance of duty, though may not involve mens rea, but may still constitute misconduct for disciplinary proceedings entailing penalty of dismissal from service. According to the learned senior counsel, the Disciplinary Authority imposed the penalty of dismissal strictly in accordance with the rules after fully discussing the materials brought on record and the finding of the learned Single Judge that the order of punishment was passed mechanically is perverse. The learned senior counsel also argued that even the order passed by the Appellate Authority dismissing the departmental appeal of respondent is well reasoned which did not call for any interference by the learned Single Judge. On the other hand, Shri N. S. Kale, learned senior counsel for the respondent, defended the order passed by the learned Single Judge. He also brought to our notice that the respondent had cancelled the contract thrice because of the lapse on the part of the contractor but every time his orders were set aside by the Deputy Housing Commissioner. According to the learned senior counsel, these circumstances militate against malafide of the respondent and completely demolish the allegation that he was inclined to do every possible favour to the contractor.

7. After hearing the arguments advanced by the respective learned senior counsel for the parties, we find that the question which calls for consideration is whether the respondent was guilty of misconduct requiring initiation of disciplinary proceedings against him and the penalty of his dismissal from service is justified.

8. Rule 3(i) and (ii) of the Conduct Rules provides that every Government servant shall at all times maintain absolute integrity and devotion to duty. It, thus, follows that conduct of Government servant contrary to or in breach of this rule would constitute misconduct for disciplinary proceedings. The expression "misconduct" is a relative term and has to be construed with reference to the subject matter and the context wherein the term occurs. A single act or omission or error of judgment would ordinarily not constitute misconduct but if such error or omission results in serious or atrocious consequences, the same may amount to misconduct (See *P. H. Kalyani Vs. Air France* AIR 1963 SC 1756). For example, when a sentry sleeps at his post and the enemy is allowed to slip away, his negligence would definitely amount to misconduct though criminal intent may not be involved. In *Union of India Vs. J. Ahmed* (Supra) the Supreme Court has held that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would not ipso facto constitute misconduct but negligence or a lapse in performance of duty would constitute misconduct when the consequences directly attributable to negligence are irreparable or the resultant damage is so heavy that the degree of culpability is very high. In that case the

Supreme Court in para 12 of the judgment has also held that gross or habitual negligence in performance of duty may not involve mens rea but may still constitute misconduct for disciplinary proceedings. In *Noratanmal Chaurasia Vs. M. R. Murli* (2004) 5 SCC 689 it is held that the word "misconduct", inter alia, envisages breach of discipline and it is wide enough to include wrongful omission or commission whether done or omitted to be done intentionally or unintentionally.

9. Having examined that gross or habitual negligence in performance of duty even without involvement of mens rea would also constitute misconduct for disciplinary proceedings, we shall now see whether the respondent was guilty of habitual or gross negligence as held by the Disciplinary Authority. The Enquiry Officer in his report has stated that as per the adopted procedure the cement is issued to the contractor by the Board from time to time according to the requirement of construction work on market price and the price of cement issued is deducted from the bills of the contractor for the work done by him. The Enquiry Officer has also stated that the contractor is required to submit his bills to the Executive Engineer through the Sub-Engineer and Assistant Engineer so that the Executive Engineer is kept informed about the position of cement lying with the contractor vis-à-vis the work done by him. The respondent was Incharge of the construction work from 10.5.1982 to 29.6.1985 as Executive Engineer. In the departmental enquiry, the respondent has been found to have received the bills directly from the contractor and he continued to issue excess cement bags to him without applying any mind as to what quantity of cement was already lying with the contractor and what quantity was required for the construction work at a particular time. The enquiry report also reveals that many times, despite the information given by the Assistant Engineer about the excess cement lying with the contractor, the respondent issued orders to supply cement to the contractor without even recovering the price of excess cement from his bills. According to the enquiry report, because of the said irresponsible conduct of the respondent, the contractor succeeded in taking away as many as 2903 excess bags of cement without utilizing them in the construction work which put the Board to the loss of Rs.1,74,180/-. These findings of the Enquiry Officer, which are well founded, lead us to only one conclusion that the respondent committed gross negligence towards his duty. The submission made on behalf of the respondent that excessive cement may have been issued by him because he was overburdened with other construction projects is without any substance and cannot be accepted. The excessive cement bags were issued by him not on one or two occasions but continuously throughout the period when he was incharge of the construction work. He had also issued orders for the supply of cement bags despite the information given by the Assistant Engineer that the contractor was already in possession of excess cement. We accordingly affirm the finding of the Disciplinary Authority that the respondent was guilty of gross negligence in performing his duty.

10. We have already mentioned above that the gross negligence towards duty, even without involvement of mens rea, can constitute misconduct for disciplinary proceedings. The learned Single Judge was, thus, not correct in holding that in the absence of the finding of ill motive against the respondent he cannot be held guilty of misconduct. It appears that the attention of learned Single Judge was not drawn in *Union of India Vs. J. Ahmed* (Supra) itself, a case on which he relied, the Supreme Court has held that gross negligence towards duty without mens rea also constitutes misconduct. For this reason, we also find it difficult to agree with the view of the learned Single Judge that the departmental proceedings were initiated only to recover the huge financial loss caused to the Board from the respondent.

11. On perusal of the enquiry report we find that the Enquiry Officer has nowhere stated that the respondent had issued excess cement bags to the contractor for his wrongful gain and that his integrity was doubtful. Despite there being no finding about the doubtful integrity of the respondent in the enquiry report, the Disciplinary Authority has held that his integrity was doubtful. The Disciplinary Authority arrived at this finding only because of the method adopted by him in issuing cement bags to the contractor but this finding is based on surmises and conjectures. It is to be noticed that no reliable material had been placed on record by the Board to establish that the respondent had wrongfully gained anything by his such conduct. Thus, merely on the basis of presumption, the Disciplinary Authority could not have held the respondent guilty of doubtful integrity and we accordingly set aside this finding of the Disciplinary Authority.

12. This brings us to the question of appropriateness of punishment of dismissal. The Disciplinary Authority took into account its finding of doubtful integrity of the respondent along with his gross negligence in awarding the punishment of dismissal. Had the Disciplinary Authority not taken into account the finding of doubtful integrity which we have set aside, it may have awarded lesser punishment in place of dismissal such as compulsory retirement. The question of punishment will, therefore, require reconsideration by the Disciplinary Authority without taking into account its finding of want of integrity of respondent. We accordingly remit the matter to the Disciplinary Authority to decide the quantum of punishment and award any punishment lesser than dismissal and removal. The punishment may be in addition to the recovery of financial loss of Rs.1,74,180/-as directed by the learned Single Judge. The Disciplinary Authority is directed to take a decision on the question of punishment within two months from the date of receipt of the certified copy of this order.

13. The appeal is allowed. The order passed by the learned Single Judge and also the order passed by the Departmental Authority are both set aside. The case is remitted to the Departmental Authority for decision on the question of punishment as indicated above. No order as to costs.

*Appeal allowed.*

I.L.R. [2009] M. P., 1595

WRIT APPEAL

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

2 February, 2009*

SHYAMACHARAN PAUL & anr. ... Appellants

Vs.

M/S ROOPALI PROMOTERS & CONSTRUCTION & ors. ... Respondents

**Court Fees Act (7 of 1870), Section 7(iv)(c)** - *Suit for declaring sale deed as void - Plaintiffs are parties to the documents - Held - Consequential relief of cancelling sale deed is necessary - Plaintiffs are required to pay ad valorem court fees - Appeal dismissed.* (Paras 7 & 8)

न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv)(सी) – विक्रय पत्र को शून्य घोषित किये जाने के लिए वाद – वादी दस्तावेजों के पक्षकार हैं – अभिनिर्धारित – विक्रय पत्र को रद्द करने का पारिणामिक अनुतोष आवश्यक है – वादियों को एड्वेलोरेम न्यायशुल्क अदा करना आवश्यक है – अपील खारिज।

**Cases referred :**

(1976) 25 JLJ 503, 1987 MPLJ 25, AIR 1973 SC 2384, 1974 MPLJ 900, ILR 1939 Nag 373, 1970 MPLJ 363 (FB).

*Shripal Jain,* for the appellants.

**ORDER**

The Order of the Court was delivered by **DIPAK MISRA, J.** :–In this intra-court appeal, the challenge is to the order dated 12.9.2008 passed by the learned Single Judge in Writ Petition No.14545/2007.

2. The appellants as petitioners invoked the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India calling in question the legal validity of the order dated 25.8.2007 passed by the learned Second Additional District Judge, Jabalpur in Civil Suit No.16453/2007. The learned Single Judge has concurred with the conclusion recorded by the trial Judge whereby he had held that the appellants as plaintiffs were required to affix the ad valorem court fee for declaring the sale-deed dated 11.5.2004 registered on 12.5.2004/14.5.2004 as null and void.

3. We have heard Mr.Shripal Jain, learned counsel for the appellants, on the question of admission. It is submitted by Mr.Jain that the plaintiffs were trying to avoid the sale-deed and, therefore, they are only required to pay the fixed court fee.

4. On a perusal of the order passed by the learned Single Judge, it is perceivable that he has referred to the relief clause of the civil suit which clearly mentions for declaring the document executed by defendant No.3 in favour of respondents No.10 to 30 as null and void and to deliver the possession and prayed for other

*W.A. No.1134/2008 (Jabalpur)

ancillary reliefs. On a perusal of the relief clause, it is clear as crystal that it contains consequential reliefs. That apart, the plaintiffs are parties to the document. They intend to declare the sale-deed null and void. As is manifest from the order of learned Single Judge, he has referred to the decision rendered in *Pratap and another v. Punia Bai and others*, (1976) 25 JLJ 503.

5. In this context, we may profitably refer to the decision rendered in *Kunti Devi w/o of Ramdas v. Roshanlal s/o Ramdas*, 1987 MPLJ 25 wherein this Court, after referring to the decisions rendered in *Shamsher Singh v. Rajinder Prashad and others*, AIR 1973 SC 2384, *Ashok v. Narsinghrao and others*, 1974 MPLJ 900, *Dattaji Parashramji Patil v. Mst.Bhagirathi and others*, ILR 1939 Nag. 373 and *Santosh Chandra and others v. Gyan Sunder Bai and others*, 1970 MPLJ 363 (FB), held that the plaintiffs, being parties to the sale-deed, are prima facie bound by it and the relief of declaration simpliciter is not available. The declaration claimed by the plaintiffs necessarily involved a prayer for consequential relief of cancellation of the sale-deed, therefore, the Court fee is payable under Section 7(iv). (c ) of the Court Fees Act.

6. In *Mohammad Jameel Khan and others v. Miththulal Khushal Singh Gujar and others*, 1999 (1) MPLJ 37, it has been that while considering the question of payment of court fee, the allegations contained in the plaint have to be seen. The plaintiff cannot be permitted to mould the facts and circumstances and the real intention. It transpires that the intention of the plaintiff was something different than what had been claimed. The Court cannot overlook it. In case where the plaintiff sought a declaratory relief only, but in substance aimed at setting aside the sale deeds, the court fee has to be paid in accordance with the law governed by Section 7(iv)(c ) of the Court Fees Act. The third parties without notice of the alleged fraud can acquire rights and interest in the property and get it enforced against the person defrauded. It cannot, under the circumstances, be taken that he was not a party to the document. Unless the document is got cancelled by a decree of court, it remains a valid document. The relief of declaration cannot be sufficient. The plaintiff has to ask for a consequential relief of cancellation of the sale-deed in order to avoid it. Consequently, a consequential relief of cancellation of sale-deed is necessary and the plaintiff was required to pay ad valorem court fee on the value of the sale-deeds under Section 7(iv)(c ) of the Court Fees Act.

7. In the case at hand, the plaintiffs are parties to the sale-deed. In view of the same, the law enunciated in the aforesaid decision is applicable and, therefore, they are liable to pay ad valorem court fee and not the fixed court fee. That apart, there is a consequential prayer in the suit. Thus, considering the factual scenario in entirety, we are of the considered opinion that the concurrence of the learned Single Judge with the order passed by the learned Additional District Judge which requires the plaintiff to pay ad valorem court fee cannot be found fault with.

8. We have carefully perused the analysis made by the learned Single Judge. Regard being had to the analysis made by him, we are of the considered opinion that in view of the obtaining factual matrix, especially with regard to the prayer made, the appellants are required to pay the ad valorem court fee and not the fixed court fee.

9. Consequently, the writ appeal, being devoid of merit, stands dismissed in limine. We may note with profit that we have dealt with the appeal on merits despite the fact the that writ petition was preferred under Article 227 of the Constitution and the learned Single Judge has dealt with the same under Article 227 of the Constitution though the same could have been thrown overboard on the ground of maintainability.

*Appeal dismissed.*

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**I.L.R. [2009] M. P., 1597**
**WRIT APPEAL**

***Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice P.K. Jaiswal***
3 February, 2009*

SANTOSH SHARMA ... Appellant
Vs.
STATE OF M.P. & ors. ... Respondents

**National Security Act (65 of 1980), Section 3** - *Order of detention - Out of 17 grounds of detention, 9 incidents were old - Last incident mentioned in the ground of detention shows that appellants along with companions shot fire at deceased in busy market area in the afternoon - Held - Old incidents cannot constitute the basis of the order of detention but can at best suggest the criminal antecedents of appellant - Order of acquittal in such old cases have little relevance over order of detention of year 2008 - Act of shooting in market area and public place in afternoon seriously affecting the peace and tranquility of locality - Alleged act of appellant affected public order - Order of detention can not be said to be vitiated for non-application of mind - Appeal dismissed.* (Paras 8, 9 & 13)

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

*W.A. No.1139/2008 (Jabalpur)

**Cases referred :**

AIR 1992 SC 687, AIR 1989 SC 1282, AIR 1983 SC 541, 2003(3) MPLJ 372, AIR 1990 SC 2086, (2004) 8 SCC 591, AIR 1976 SC 780.

*Vijay Pandey,* for the petitioner.

*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 under Section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 against the order dated 26.09.2008 passed by the learned Single Judge dismissing Writ Petition No. 6080/2008 of the appellant against the order of detention passed by the District Magistrate, Hoshangabad under Section 3(2)(3) of the National Security Act, 1980 (for short 'the Act').

2. The relevant facts briefly are that on 5.1.2008 the District Magistrate, Hoshangabad in exercise of powers under Section 3 of the Act passed an order detaining the appellant on the request of Superintendent of Police, Hoshangabad in his letter dated 29.12.2007. Thereafter the matter was referred to the Advisory Board under Section 11 of the Act and pursuant to report of the Advisory Board, the State Government confirmed the order of detention on 21.4.2008 directing that the appellant shall remain in detention till 5.3.2009. Aggrieved, the appellant filed Writ Petition NO.6080/2008 under Article 226 of the Constitution and by the impugned order dated 26.9.2008 the learned Single Judge dismissed the writ petition.

3. Mr. Vijay Pandey, learned counsel for the appellant, submitted that on reading of the impugned order passed by the learned Single Judge it will be clear that the learned Single Judge has failed to appreciate the distinction between the law and order' and 'public order'. He cited the decision of the Supreme Court in *Victoria Fernades vs, Lalmal Sawma and others,* AIR 1992 SC 687 on the distinction between the law and order' and 'public order' and submitted that the facts stated in the grounds of detention dated 5.1.2008 served on the appellant would show that the appellant had not committed any act which would disturb public order and that the grounds of detention only contained allegations which are ordinary crimes such as gambling committed by the appellant which may amount to contravention of law but which had no effect on public order.

4. Mr. Pandey next submitted that in the grounds of detention various facts have not been correctly stated. He pointed out that it has been alleged that on 7.4.1998 Crime No.279/98 under Section 34 of the Excise Act was registered against the appellant and filed in the Court but the fact that the appellant was subsequently acquitted in the case has not been stated. He submitted that similarly in the grounds of detention it is mentioned that on 24.6.2001 one Sunil S/o

Ramnaresh Singh, resident of Village Rampur made a complaint that the appellant and his companions interrupted his way and caused assault which could be dangerous to his life and accordingly Crime No.273/01 under Section 307, 341, 147 I.P.C. and 25 Arms Act was registered, but the fact that the appellant was subsequently acquitted has not been stated. He submitted that all these would show that the orders of acquittal passed by the Court in the cases against the appellant were not brought to the notice of the detaining authority to prejudice his mind. He cited the decision in *D.C. Agrawal vs. Police Commissioner and another,* AIR 1989 SC 1282 in which the Supreme Court set aside the order of detention after having found that the acquittal of the detenu in case numbers mentioned against Sr. Nos.2 and 3 of the grounds of detention had not been brought to the notice of the detaining authority and the detaining authority was given to understand that the trial of those cases were pending.

5. He next submitted that in one of the grounds of detention it is stated that on 19.11.2007 one Prankit @ Janu reported that the appellant and four other companions shot Sanju Choksey dead at Galla Mandi, Piparia for which Crime No.473/07 under Sections 147, 148, 149, 307, 302 I.P.C. and Section 25 & 27 of the Arms Act were registered and the appellant was absconding since the date of incident and the matter was under investigation. He submitted that the Additional Superintendent of Police, Hoshangabad has subsequently given a report that the appellant had been falsely implicated in the offence as at the time of the incident the appellant was 75 kms. away from the place of incident and was attending externment case in the Court of Collector, Hoshangabad. He cited the decision of Supreme Court in *Mohd. Shakeel Wahid Ahmed vs. State of Maharashtra and others,* AIR 1983 SC 541 in which the opinion of the Advisory Board in a connected case which was relevant to the petitioner's case had not been placed before the detaining authority and the Supreme Court held that the detaining authority failed to apply its mind to this very relevant circumstance and accordingly set aside the order of detention. He also relied on a decision of Division Bench of this Court in *Ravi Tiwari and others vs. Union of India and others,* 2003 (3) MPLJ 372 for the proposition that the detention order not based on proper application of mind cannot be sustained.

6. Mr. Pandey finally submitted that in any case, the incident of 19.11.2007 is only one solitary incident for which the appellant should not have been detained under Section 3 of the Act. He cited the decision in *T. Devaki vs. Government of Tamil Nadu,* AIR 1990 SC 1086 for the proposition that a solitary incident can raise a law and order problem and cannot be said to have put public order in jeopardy so as to bring the case within the purview of the Act.

7. Mr. Vivekanand Awasthy, learned Government Advocate, on the other hand, relied on *State of U.P. and another vs. Sanjai Pratap Gupta @Pappu and others,* (2004) 8 SCC 591 and submitted that a single act can be considered

sufficient for holding that public order was affected and it is not the number of acts that matters but the effect of the act on the even tempo of life, the extent of its reach upon the society and its impact which has to be considered. He referred to the report of the Superintendent of Police annexed to the writ petition as Annexure P/2 to show that the appellant not only had criminal antecedents but committed series of acts in the year 2007 including the murder at Galla Mandi, Piparia on 19.11.2007 alongwith his companions and therefore had endangered public order in the area. Mr. Awasthy cited the decision in *State of U.P. vs. Kamal Kishore Saini*, AIR 1988 SC 208, in which the Supreme Court having found that the detenu was alleged to have opened fire in a busy locality resulting in the death of one on spot and injury to others during the day time, held that the incident does affect the public order as its reach and impact is to disturb public tranquillity and it affects the even tempo of the life of the people in the locality where the incident is alleged to have occurred. He also cited the decision in *Mohd. Shafiq Wahid Ahmad vs. State of Maharashtra* (supra) and submitted that where one of the grounds of detention was bad and unsustainable the detention order was not vitiated on the remaining grounds of failure.

8. We have perused the grounds of detention served on the appellant and we find that there are altogether 17 grounds of detention. Out of these 17 grounds of detention, 9 related to incidents which had taken place during 1998, 2001 and 2004 which are not in close proximity to the order of detention passed on 5.1.2008 and therefore cannot constitute the basis of the order of detention. The incidents of the year 1998, 2001 and 2004 can at best suggest the criminal antecedents of the appellant. Hence even if in some of these cases related to the years 1998 to 2004 there are orders of acquittal of the Courts, such orders of acquittal have little relevance to the question whether an order of detention passed in the year 2008 was sustainable. In *D.C. Agrawal vs. Police Commissioner and another* (supra) cited by Mr. Pandey, the Supreme Court did set aside the order of detention after having found that the orders of acquittal passed in two cases to which reference was made in the grounds of detention had not been placed before the detaining authority, but in *Mohd. Shafiq Wahid Ahmad vs. State of Maharashtra* (supra), the Supreme Court has also held that if one of the grounds of detention is bad and unsustainable, the order of detention would not be vitiated if there were other valid grounds supporting it and in *State of U.P. and another vs. Sanjai Pratap Gupta @ Pappu and others* (supra), in which the Supreme Court after considering its earlier decisions has emphatically held that there cannot be any straitjacket formula for dealing with such cases of detention and the circumstances of each case have to be seen for determining the question as to whether the detenu has to remain in detention.

9. The rest of the 8 grounds are of the year 2007 and English translation of these 8 grounds are extracted hereinbelow:

"10. On 14.06.07 Crime No.207/07 under Section 452, 294, 34 I.P.C. was registered against you and submitted to the Court.

11. On 14.06.07 Crime No.207/07 under Section 147, 148, 149, 294, 427, 506 I.P.C. 25, 27 of the Arms Act was registered and submitted to the Court.

12. On 15.06.07 Crime No.208/07 Section 25/27 of the Arms Act was registered and submitted to the Court.

13. On 29.06.07 in order to prevent your criminal activities Istgasa (Complaint) No. 2/07 for externment under Section 5(b) of the Rajya Suraksha Adhiniyam 1990 was presented on 30.0.607 in the Court of District Magistrate, Hoshangabad which is pending.

14. On 01.05.07 Crime No. 137/07 Section 294, 506, 325, 34 I.P.C. was registered.

15. On 19.11.07 Complainant Prankit @ Janu S/o Premshankar R/o Nehru Ward, Piparia reported that at Galla Mandi in Piparia accused Santosh Sharma and his 4 other companions shot Sanju Choksey dead for which crime No.473/07 under Section 147, 148, 149, 307, 302 I.P.C. Section 25, 27 Arms Act was registered. The accused is absconding since the date of incident. The matter is under investigation.

16. On 13.11.2007 against accused Santosh Sharma and other companions Istgaza (Complaint) No.688/07 Section 107/116(3) I.P.C. was submitted before the Court of S.D.M. on apprehension of breach of peace.

17. On 15.6.07 against Santosh Sharma being a habitual offender Istgaza (Complaint) No. 15/07 Section 119 I.P.C. was submitted in the Court of S.D.M. Piparia on 15.6.07."

It will be clear from the aforesaid grounds No. 10 to 17 that the detaining authority had found that according to the detaining authority, the appellant had increased his unlawful activities in the year 2007 and the last unlawful act of the appellant mentioned in the grounds of detention was on 19.11.2007 on which date the appellant alongwith his companions shot Sanju Chowksey dead at Galla Mandi in ,Piparia for which Crime No.473/01 under Section 147, 148, 149, 307, 302 I.P.C. and Section 25, 27 of the Arms Act was registered. Obviously, Galla Mandi in Piparia is a busy market area and a public place and the act of shooting another person dead at about 4.30 in the afternoon when the incident is reported to have taken place, was bound to terrorise people in the Mandi area seriously affecting the peace and tranquillity of the locality. We have therefore no doubt that this alleged act of the appellant affected public order.

10. Similar acts of detenues have been held by the Apex Court to disturb the public order. In *State of U.P. vs. Kamal Kishore Saini* (supra) cited by Mr. Awasthy, the detenu fired at Ram Kumar and Nand Kishore and Ram Kumar and Nand Kishore ran helter and skelter. Thereafter, the detenu chased Ram Kumar and fired twice or thrice and as a consequence Ram Kumar died on the spot and Nand Kishore and the rickshaw-puller sustained injuries. The Supreme Court held that the firing having been made in public street affected public order as its reach and impact was to disturb public tranquillity and it affected the even tempo of life of the people in the locality where the incident is alleged to have occurred.

11. In *State of U.P. and anothers vs. Sanjai Pratap Gupta @ Pappu and others* (supra) again cited by Mr. Awasthy, the detenu while going on the scooter alongwith his other associates in the busiest market of town Mainpuri, near Bad Chauraha in front of Shafi Hotel on the road itself and in the daytime, stopped Anand Kumar Jain and fired bullets indiscriminately on him and committed his murder and when his son wanted to save him, the detenu also fired aiming at him who however fled away and the Supreme Court rejected the contention of the detenu that a single act cannot be considered sufficient for holding that public order was affected and held that it is not the number of acts that the matter but what has to be seen is the effect of the act on the even tempo of life, the extent of its reach upon society and its impact.

12. In *T. Devaki vs. Government of Tamil Nadu* (supra) relied on by Mr. Pandey, the detenus attempted a murderous assault with knives on Thiru Durai Murugan, Minister for Public Works Department, created scare and a feeling of insecurity in the minds of the persons present in the hall and the detenu's action interrupted the "proceedings of the Seminar for a while" but the Seminar continued later on and the Supreme Court held that this solitary incident did not and could not affect public peace and tranquillity nor it had the potential to create a sense of alarm and insecurity in the locality. This was thus a case where the Supreme Court found that the proceedings of the Seminar were interrupted only for a while by the murderous assault on the Minister with knives by the detenus and the Seminar continued later on and held that this solitary assault can hardly be said to have disturbed public peace. In the present case, on the other hand, the appellant and his four other companions are alleged to have fired at Sanju Chowksey in a busy Mandi area at 4.30 p.m. in Piparia and this act, in our considered opinion, was bound to have an adverse effect on the peace of the locality and affect public order.

13. We may now deal with the contention of Mr. Pandey that the inquiry report dated 31.3.2008 of the Office of the Additional Superintendent of Police, District Hoshangabad would show that the appellant was at Hoshangabad and not at Piparia on 19.11.2007 and therefore the allegation that he alongwith his four other companions shot Sanju Chowksey at Galla Mandi in Piparia is false. We have

perused the inquiry report dated 31.3.2008 of the Office of the Additional Superintendent of Police, District Hoshangabad and we find that it inter alia states that on 19.11.2007 the appellant had marked his attendance in one of the ten cases of externment which were fixed for hearing in the Court of the Collector, Hoshangabad at 3.30 p.m. The inquiry report however states that it is not known upto which time the appellant remained present in the Court of Collector, Hoshangabad and when he left from there. The inquiry report further states that the distance between Hoshangabad and Piparia is 75 kms and it takes approximately one hour to cover the distance and therefore the complaint of Prankit alias Janu in Crime No.473/07 of Piparia appears to be doubtful. This inquiry report therefore does not altogether falsify the complaint that the appellant shot Sanju Chowksey in Galla Mandi at Piparia at 4.30 p.m. as submitted by Mr. Pandey but only throws some doubt on the complaint. In any case, the Supreme Court has held in *Narayan Debnath vs. State of West Bengal,* AIR 1976 SC 780 that while examining the validity of an order of detention, the Court cannot go into truth or otherwise of the allegations in the grounds of detention which have to be assumed to be true. Moreover, the order of detention was passed by the District Magistrate, Hoshangabad on 5.1.2008, and the inquiry report of the Office of the Additional Superintendent of Police, District Hoshangabad dated 31.3.2008 could not have been placed before the District Magistrate when he passed the order of detention and hence the order of detention cannot be said to be vitiated for non-application of mind as contended by Mr. Pandey.

14. In the result, we hold that the order of detention is not vitiated and the appeal has no merits. The appeal is dismissed.

*Appeal dismissed.*

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**I.L.R. [2009] M. P., 1603**
**WRIT APPEAL**
***Before Mr. Justice R.S. Garg & Mr. Justice U.C. Maheshwari***
13 February, 2009*

STATE OF M.P. & ors. ... Appellants
Vs.
SHOBHA BAI SINGH & anr. ... Respondents

**Land Acquisition Act (1 of 1894), Sections 23(1A) & 34 - *Distinction - Held - Section 23(1A) directs payment of compensation from the date of notification upto the date of the award or of dispossession while on the other hand Section 34 directs for payment of interest on the amount of compensation from the date of dispossession till the amount of compensation is paid.***
(Para 13)

*W.A. No.1303/2008 (Jabalpur)

**STATE OF M.P. Vs. SHOBHA BAI SINGH**

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

*Deepak Awasthy, G.A.*, for the State/appellants.
*Vipin Yadav*, for the respondents.

**J U D G M E N T (ORAL)**

The Judgment of the Court was delivered by **R.S. GARG, J.** :–The appellant being aggrieved by the order dated 7.8.2008 passed in W. P. No.245/08 *(Shobha Bai Singh and another Vs. State of M. P. and others)*, allowing the petition filed by the present respondents, are before this court with a submission that the order passed by the learned Single Judge runs contrary to the provision of Section 23(IA) and Section 34 of Land Acquisition Act 1894 (Tor short "the Act.).

2. The material facts necessary for disposal of the present appeal are that the notification under Section 4 for acquisition of the land of the petitioners was published on 29.10.1969. A declaration under Section 6 was made and ultimately the award was passed on 25.11.1985. It was directed that particular amount be paid to the petitioners and land in lieu of the land be also given to the original petitioners. On 6.2.2003 a supplementary award was made determining the amount of compensation for trees, solatium at the rate of 30% and compensation under Section 23 (-1A) of the Act from the date of notification issued under Section 4 of the Act up to the date of award. Against the award dated 6.2.2003 the present appellants filed an appeal before the Collector under Section 17 of the Indian Forest Act, which was dismissed on 8.8.2003, the revision filed against the same also came to be dismissed by revisional authority on 14.2.2005. Thereafter an application under Section 18 (1) read with Section 13(A) of the Act was filed. The application was dismissed. A writ petition bearing W.P.No.630/06 challenging the said order was filed, which also was dismissed on 3.5.2008.

3. As the petitioners were not paid their dues, they came to this Court in W. P. No.4708/04, which was finally disposed of on 19.4.2005 with a direction to the respondents to implement the orders of the revisional authority. In pursuance to the said direction the petitioners were paid compensation of Rs.9,75,131/- and Rs.21,73,351/- on 13.8.2004 and 11.9.2006 respectively. As the petitioners were not paid the interest under Section 34 of the Act, they filed Contempt Petition No.3864/05, which was disposed of by this Court on 27.9.2006 observing that in absence of direction for payment of interest under Section 34, non-compliance would not lead to any contempt on the part of the present appellants.

4. The petitioners thereafter filed an application on 6.10.2006 before Collector/

Forest Settlement Officer with a submission that they were entitled to interest under Section 34 of the Act and such order be passed in their favour. The application filed by the original petitioners was allowed with a direction that interest under Section 34 of the Act be paid, but however, the concerning land Acquisition Officer deleted the earlier direction to pay compensation under Section 23(1 A) of the Act. Being aggrieved by the said directions contained in order dated 24.12.2007 (Annexure P-13), the petitioners again filed W. P. No-245/08, the learned single Judge allowed the said petition, therefore the State and its officer are before this Court.

5. Shri Awasthy, learned counsel for the appellant submitted that as the interest is to be paid under Section 34 of Act the petitioners would not be entitled to compensation under Section 23 ( 1A) of the Act. His submission is that if the petitioners were not dispossessed from their land then they would not be entitled to claim payment of interest on the amount of compensation.

6. Shri Yadav, learned counsel for the respondents on the other hand submitted that the order in relation to Section 23 (1A) of the Act, attained finality, and therefore, such order could not be recalled by the Collector/ Forest Settlement Officer. It is submitted by him that Forest Settlement Officer was not justified in not appreciating that the amount paid to the respondents under Section 23(1A) of the Act could not be adjusted or appropriated towards the amount now proposed to be paid under Section 34 of the Act.

7. Section 23 of the Land Acquisition Act refers to the matters to be considered in determining the compensation. Sub-section 1 of Section 23 provides that while determining the amount of compensation to be awarded for land acquired under the Act, the Court shall take into consideration the aspects referred in sub-section 1. Sub-section 1A of Section 23 provides that in addition to the market value of the land, as provided in sub-Section 1, the Court shall in every case award an amount calculated at the rate of twelve percent per annum on such market value for the period commencing on and from the date of the publication of the notification under Section 4, sub-section (1), in respect of such land to the date of the award of the Collector or the date of taking possession of the land, whichever is earlier.

8. From the perusal of sub-section (1A) of Section 23, it would clearly appear that the compensation is required to be paid from the date of the publication of the notification under Section 4 (1) of the Act to the date of the award of the Collector or the date of taking possession of the land, whichever is earlier.

9. Sub-section (1A) of Section 23 has nothing to do with the interest, it simply provides that if a notification under Section 4 is issued then compensation is required to be paid from the date of the notification up to the date of the award or from the date of the notification up to the date of dispossession. The basic reason behind introducing sub-section (1A) was that in number of the cases notifications were

issued, declaration were not made and the owners of the land were deprived of their valuable rights, they were not entitled to sell the land and being in state of suspension were not even in a position to develop the land and get better usufruct. It was thought prudent that if a notification is issued and ultimately the land is acquired then such person who is in the state of suspension should not unnecessarily suffer because of the delay on the part of the State and he should be paid extra compensation @ 12% from the date of the notification to the date of award or to the date of dispossession.

10. Section 34 reads as under :

> **Payment of interest-** When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of [nine per centum] per annum from the time of so taking possession until it shall have been so paid or deposited.
>
> Provided that if such compensation or any part thereof is not paid or deposited within a period of one year from the date on which possession is taken, interest at the rate of fifteen per centum per annum shall be payable from the date of expiry of the said period of one year on the amount of compensation or part thereof which has not been paid or deposited before the date of such expiry.

11. A perusal of Section 34 would make it clear that if the compensation amount is not paid or deposited on or before taking the possession of the land the Collector shall pay the amount awarded with interest thereon @ 9 % per annum from the time of taking possession until it shall have been so paid or deposited. Section 34 no where talks of providing additional compensation. It talks of paying, interest on the amount of compensation. Undisputedly compensation is to be determined under Section 23 of the Act and interest on the said amount of compensation is required to be paid under Section 34 of the Act.

12. Section 34 of the Act is not in derogation of Section 23(1A). A juxtapose reading would show that it is a step in aid and holds thread from where Section 23(1A) leaves it.

13. On one side Section 23(1A) directs payment of compensation from the date of notification up to the date of the award or of dispossession while on the other hand Section 34 directs for payment of interest on the amount of compensation from the date of dispossession till the amount of compensation is paid. Section 23 (1A) and 34 act in different fields and cover different contingencies, while Section 23(1A) covers the field up to the date of dispossession, Section 34 talks of the situation which emerges after the dispossession. Sections are to be read in harmony and supplementary to each other.

14. On this legal question we are in conformity with the order passed by the learned single Judge.

15. Even otherwise it will clearly appear that the question relating to compensation under Section 23 (1A) came to be settled between the parties on an earlier occasion, the State and its officer never challenged the said part of the award. If the State wanted to challenge that part of the award then they were required to take separate proceedings. On an application filed by the petitioners the officers of the State/ Collector / Forest Settlement Office could not pass an order contrary to the interest of the land owners.

16. Taking into consideration the totality of the circumstances we hold that there is no force in this appeal. It is accordingly dismissed.

*Appeal dismissed.*

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**I.L.R. [2009] M. P., 1607**
**WRIT APPEAL**
***Before Mr. Justice R.S. Garg & Mr. Justice U.C. Maheshwari***
16 February, 2009*

LALLU KOL ... Appellant
Vs.
STATE OF M.P. & ors. ... Respondents

**Service Law - Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 69(1), Panchayat (Resignation by Office Bearer) Rules, M.P. 1995, Rules 3 & 4 -** *Appointment of Panchayat Secretary challenged on the ground that his brother was working as Panch in the Gram Panchayat - Panch resigned before the meeting in which the resolution for appointment of Panchayat Secretary was passed - Held - In absence of acceptance of resignation, brother of Panchayat Secretary continued to be a Panch and Panchayat Secretary being his near relative could not be selected as Panchayat Secretary.* (Para 20)

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

*Sanjay Agrawal,* for the appellant.
*Deepak Awasthy,* for the respondent Nos.1 & 2.

*W.A. No.1140/2008 (Jabalpur)

*Sanjay Tamrakar,* for the respondent No.3.
*Dharmendra Soni,* for the respondent No.4.

JUDGMENT

The Judgment of the Court was delivered by U.C. MAHESHWARI, J. :–The appellant has directed this appeal under Section 2 (1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeet) Ko Appeal), Adhiniyam 2005 being aggrieved by the order dated 25.9.08 passed by learned Single Bench in W.P. No. 14999/07 dismissing his writ petition filed under Article 226 of the Constitution of India.

2. The facts giving rise to this appeal in short are that the appellant, herein approached to this court with the aforesaid Writ Petition contending that he being permanent resident of Gram Panchyat Amiliyia, Tahsil Maihar, District Satna is belonging to the Scheduled Tribe Category while the respondent no. 4 being a practicing Lawyer of the Civil Court, Maihar belongs to general category. On inviting applications by the respondent no. 3 the Gram Panchyat Amilyia for appointment of Panchyat Karmi under the Scheme of Panchayat Karmi Yojana, hereinafter referred as "The Scheme", twelve candidates including the appellant and respondent no. 4 submitted their respective applications. According to the aforesaid Scheme the requisite qualifications for the aforesaid appointment are prescribed that a candidate should be passed 10th standard in the 10+2 System with the minimum age of 18 years. He must be local resident of such Gram Panchyat and having sufficient time to carry out the prescribed work and while making selection amongst the candidates, the preference will be given to the candidates belonging to S.C., S.T. O.B.C., and Woman category. As per the provision of the aforesaid Scheme the respondent no. 3 Gram Panchyat in its meeting dated 28.1.07 passed a resolution (Annexure P-1 with the writ petition) whereby the name of respondent no. 4 was resolved to be appointed as Panchyat Karmi. In pursuance of it, the respondent no. 2 – Collector by virtue of Section 69 (1) of the Madhya Pradesh Panchayat Raj and Gram Swaraj Adhiniyam 1993, in short "The Adhiniyam", notified the name of the respondent no. 4 as a Secretary of such Gram Panchyat, vide order dated 17.9.07, (Annexure P-2 with the Writ Petition). Such resolution and notification were challenged by way of aforesaid writ petition on the ground interalia that the selection of the respondent no. 4 being contrary to Section 69 of the Adhiniyam was illegal and bad. As he could not hold the charge of such post because of his near relative brother Shri Rajendra Prasad Tiwari was existing Panch of such Panchyat and by virtue of second proviso of such Section (1) of said Section 69 of the Adhiniyam the respondent no. 4 could not be selected. The other grounds are that the appointment process has not been carried out by the respondent no. 3 within thirty days from the date of issuance of letter by the competent authority, vide order dated 10.7.07

(Annexure P-6 with the writ petition). As such after 30 days the Gram Panchyat became functus officio and did not have any authority to appoint the Panchyat Karmi. In such situation the power to appoint Panchyat Karmi was with the prescribed authority under Section 86 of the Adhiniyam. Besides this, the appointment of the respondent no. 4 was also challenged stating that the appellant being member of Scheduled Tribe Category was entitled to be given priority preference under the Scheme. Such provisions are violated in such appointment. It is further pleaded that inspite of giving representation no action was taken by the authorities. With these grounds the appellant has prayed to quash the aforesaid resolution dated 21.8.07 and the notification dated 17.9.07 with further prayer for appropriate direction to the authorities to appoint him on such post.

3. In the return of respondent no. 1 and 2 denying the allegations of the petition made against them the aforesaid appointment of respondent no. 4 on the post of Panchyat Karmi and his notification as Secretary of Gram Panchyat Amiliyia are justified. It is also stated that such appointment is made in accordance with the Scheme, circular and guidelines issued by the State Government. The claim of the appellant is stated to be misconceived.

4. The respondent no. 3 – Gram Panchyat Amiliyia by filing its return supported the case of the appellant.

5. In reply of respondent no. 4 the allegations made by the appellant against his appointment on the post of Panchyat Karmi and Secretary have been denied. It is admitted that the elder brother of the respondent no. 4 Shri Rajendra Prasad Tiwari was Panch from ward no. 14 in Gram Panchyat Amiliyia but vide order dated 30.7.07 he had tendered his resignation from such post and thereafter he did not participate in the meeting of the Gram Panchyat dated 21.8.07 in which the aforesaid resolution was passed. All other allegations have also been denied and the prayer for dismissal of the writ petition is made.

6. On consideration the learned Single Bench had dismissed the writ petition holding that in comparison of the appellant, the respondent no. 4 was more meritorious as he had secured 74% marks in the High School Certificate Examination whereas the appellant had secured only 59.6% marks in such Examination. So far giving preference to the appellant is concerned, it was held that no reservation was made for such post under the Scheme or the existing law. According to the Scheme candidates of different categories if are equal on merits than the candidates belonging to S.C., S.T., O.B.C. and Woman category are to be given preference for such post. It was also held that under such Scheme Gram Panchyat was empowered to appoint the Panchyat Karmi under the Scheme even after thirty days receiving the letter dated 10.7.07 from the authority. Besides this by giving interpretation to the provision of Section 69 of the Adhiniyam and the rules enacted under the Adhiniyam "The Madhya Pradesh Panchyat

(Resignation) By Office Bearer) Rules, 1995" it was held that the selection/ appointment of the respondent no. 4 on such post was not illegal but till the resignation submitted by Shri Rajendra Prasad Tiwari, the elder brother of the respondent no. 4 from the post of Panch is accepted in accordance with such Rules, the respondent no. 4 shall not be entitled to hold the charge of such post in Gram Panchyat. In such premises, by giving some observations for holding the meeting of Gram Panchyat to consider the resignation of Shri Rajendra Prasad Tiwari within thirty days, the writ petition was dismissed, on which the original petitioner has come forward with this appeal.

7. Shri Sanjay Agrawal, learned counsel for the appellant by referring the provision of Section 69 (1) and it's second Proviso of the Adhiniyam said that it is undisputed fact on record that on the dates of passing the resolution dated 21.8.07 by the respondent no. 3 and issuing the notification dated 17.9.07 by the respondent no.2, the brother of the respondent no. 4 Shri Rajendra Pradesh Tiwari was elected Panch of such Gram Panchyat and was squarely covered with the explanation of the aforesaid Sections and as per said provision the relative of Panch was not entitled to hold the charge of such post. According to the rules relating to the resignation of the office bearer of Panchyat his tendered resignation was not accepted or resolved by the Gram Panchyat or authority in accordance with law. Thus, on the date of such selection said brother of the respondent no.4 was Sitting Panch for all purposes and, therefore, the respondent no. 4 was not entitled to become Secretary for holding such charge. He further said that non participation in the meeting of Panchyat by the brother of the respondent no.4 on dated 21.8.07, does not wash out the aforesaid position. In such premises, he prayed for quashment of impugned appointment of respondent no. 4 with a further prayer to appoint the appellant on such post by allowing his appeal. It is made clear that impugned order has not been assailed by the appellant's counsel on other ground except the aforesaid.

8. Learned counsel for respondent no. 1, 2 and 4 have justified the impugned order and it's findings stating that the same do not require any interference at this stage.

9. Having heard learned counsel for the parties at length and after going through the record of the Panchyat and the petition alongwith the impugned order, we are of the considered view that the impugned order requires some interference at this stage.

10. As the appellant's counsel has assailed the impugned order only on the ground that in view of the provision of Section 69 (1) of the Adhiniyam the resplendent no. 4 being near relative of the Panch of such Gram Panchyat was not entitled to be selected for appointment of Panchyat Karmi to hold the charge of Secretary in such Panchyat and prayed to adjudicate this appeal only on such

ground, therefore, the other findings given by the learned Single Judge do not require any reconsideration at this stage. Therefore, in this appeal this court has to adjudicate only the question whether under the Panchyat Karmi Yojna promulgated by the Stage of M.P by virtue of the power vested under Section 70 (1) r/w Section 69 (1) of the Adhiniyam, the respondent no. 4 was entitled to be selected for appointment of Panchyat Karmi for holding the charge of Secretary in the Gram Panchyat- respondent no. 3.

11. Before proceeding further to examine the aforesaid issue for convenience, we would like to reproduce Sub Section 1 of Section 69 of the Adhiniyam the same reads as under :-

> **69. Appointment of Secretary and Chief Executive officer –**
>
> (1) The State Government or the prescribed authority may appoint a Secretary for a Gram Panchyat or group of two or more Gram Panchyats;
>
> Provided that the person holding the charge of a Secretary of Gram Panchyat immediately before the commencement of this Act shall continue to function as such till a Secretary is appointed in accordance with this section.
>
> Provided further that a person shall not hold charge of a Secretary of Gram Panchyat, if such a person happens to be relative of any office bearer of the concerned Gram Panchyat.
>
> **Explanation** :- for the purpose of this sub – section the expression 'relative' shall mean father, mother, brother, sister, husband, wife, son daughter, father-in-law, mother -in-law, brother-in-law, sister-in-law, son-in-law, daughter- in – law.

12. In view of the aforesaid provision, on examining the case at hand, it is apparent that on the date of passing the resolution dated 21.8.07 (Annexure P-1 with the writ petition) and on the date of issuing notification dated 17.9.07 (Annexure P-2 with the writ petition) the brother of the respondent no. 4 Shri Rajendra Prasad Tiwari was the sitting Panch of respondent no. 3 – Gram Panchyat. Although according to the respondent no.4 he had tendered his resignation from such office on 30.7.07 and thereafter he did not participate in any meeting including the meeting dated 21.8.07. As per available record, it appears that the resignation was received by some official on 24.9.07, subsequent to the meeting in which the impugned resolution (Annexure P-1 with the writ petition) was passed. We have not found any proceeding of the Panchyat or the order of the competent authority showing that even after receiving such resignation by the Sarpanch the same was accepted in any meeting of Panchyat. In such circumstances, it is apparent that on the date of passing of the resolution to select the respondent no. 4 his brother Shri Rajendra Prasad Tiwari was existing Panch of such Panchayat.

13. As per finding in the impugned order passed by the learned Single Judge the provision of IInd Proviso of Sub Section (1) of Section 69 of the Adhiniyam are not an embargo against selection and appointment of respondent no. 4 on such post of Panchyat Karmi under the Scheme (Yojna) but ban would be against holding of the charge of the Secretary in such Gram Panchyat unless the resignation of his brother Shri Rajendra Prasad Tiwari from the post of Panch is accepted in accordance with the procedure provided under the rules enacted for that.

14. The Proviso II of the aforesaid Sub Section 1 of Section 69 speaks that a person shall not hold the charge of a Secretary of Gram Panchayat if he happens to be relative of the office bearer of the concerned Gram Panchyat and as per its explanation the brother is squarely covered under the expression of "relative". In view of such provision it could not be disputed that on the date of appointment or selection of the respondent no. 4 on the alleged post of Panchyat Karmi his brother was the Panch in such Panchayat for all purposes because his alleged tendered resignation was not accepted by the Panchayat in accordance with the aforesaid rules. Therefore, respondent no. 4 could not be selected or appointed on such post for holding the charge of Secretary in such Gram Panchyat.

15. Although as per record the brother of the respondent no. 4 said Panch Shri Rajendra Prasad Tiwari had not participated in the meeting of 21.8.07, in which the impugned resolution was passed, in pursuance of which, the notification dated 17.9.07 for giving charge as Secretary of such Gram Panchyat to respondent no. 4 was issued. But we are of the considered view that only on account of non participation of Shri Rajendra Prasad Tiwari in the aforesaid meeting would not provide a ground to draw the inference that he did not remain the Panch and the disqualification of the respondent no.4 on such ground was washed out. In such situation, Shri Rajendra Prasad Tiwari if is held to be Panch of Such Panchayat on the date of said resolution, then the respondent no. 4 could not have been appointed as Panchayat Karmi or for holding the charge of Secretary after the notification.

16. Now in the light of the Rules, we proceed to consider that impact of resignation letter (Annexure P-10) of said Shri Rajendra Prasad Tiwari from the post of Panch addressed to the Sarpanch. According to the endorsement on it the same was received by some official on 24.9.07 while as per further endorsement the same was referred to the Secretary of the Gram Panchyat on dated 2.4.07. Such discrepancies are not properly explained on record. Besides this, we have not found any agenda or proceeding of the Gram Panchyat or the order of any competent authority showing that at any point of time prior to the meeting of Panchayat dated 21.8.07 after receiving such resignation in compliance of concerning rules, any meeting of the Gram Panchyat in that respect was held or any resolution in this regard either for acceptance or refusal of resignation was passed.

17. Under the Adhiniyam for dealing with the resignation of such office Bearer, the Madhya Pradesh Panchyat (Resignation By Office Bearer ) Rules 1995 are enacted and the concerning Rules 3 and 4 are read as under:-

**3. Manner of giving notice :-**

(1) Any member who desires to resign his office shall give notice, thereof in writing in Form 'A' duly signed by him to the Sarpanch or president as the case may be either in person or through his representative authorized by him in writing in this behalf, a copy of the said notice shall also be sent to the Secretary or Chief Executive Officer, as the case may be.

(2) On receiving the notice under sub -rule (1) the Secretary or Chief Executive Officer as the case may be, shall record on the notice the date on which and the time at which the notice was given to him and give a receipt thereof in Form 'B'.

**4. Acceptance of Resignation :-**

(1) On receipt of the notice under rule 3, the Secretary or Chief Executive Officer shall forward such notice immediate to the District Deputy Director, Panchyat and Social Welfare and the Collector.

(2) The notice of resignation given by the member shall be considered by the Panchyat at its next meeting. Notice of the meeting shall also be given to the member who has submitted the resignation.

(3) The Panchyat shall in its meeting may ascertain from the member concerned whether he desires to withdraw his resignation and if the member desires to withdraw his resignation, he shall give in writing to that effect in Form 'C'.

(4) If the member concerned furnishes the statement in Form 'C' his resignation shall become infructuous. If the member does not withdraw his resignation, then his resignation shall be accepted by the panchyat.

(5) The member whose resignation has been accepted shall cease to be a member immediately after the termination of the said meeting.

(6) If the member who has submitted his resignation, does not attend the meeting called for considering his resignation after valid service of the notice on him and without sufficient reasons, his resignation shall be deemed to have been accepted after termination of such meeting and he the shall cease to be a member

of the panchayat. If any member does not attend the meeting due to sufficient reasons his resignation shall be considered in the next meeting of the Panchyat.

(7) The Secretary or Chief Executive Officer of the Panchyat, as the case may be shall give intimation to the Collector and to the District Deputy Director Panchyat and Social Welfare about the acceptance of the resignation by the Panchyat.

18. Even otherwise for a moment contrary to record, if it is assumed that the resignation letter was given by the brother of the respondent no. 4 even on 24.7.07 as per provision of aforesaid rule 3, even then in the absence of its acceptance in accordance with the provision of aforesaid Rules, it can not be inferred that same was accepted and Shri Rajendra Prasad Tiwari ceased to be member of such Gram Panchyat before holding the aforesaid meeting on dated 21.8.07.

19. According to the aforesaid Rule 3 a member of the Gram Panchyat who desires to resign his office then he shall give a notice in writing in form 'A' duly signed by him to the Sarpanch either in person or through his representative and the copy of the same shall also be sent to the Secretary. On receiving such notice the Secretary shall record on the notice the date on which and the time at which the notice was given to him. Thereafter such resignation could be dealt with in accordance with procedure prescribed under the above mentioned Rule 4. According to Sub Rule (2) of Rule 4 the notice of resignation was to be considered in the next meeting of the Panchayat after giving information to Shri Rajendra Prasad Tiwari. On holding such meeting Shri Rajendra Prasad Tiwari had option to withdraw his resignation by giving in writing. If it is not withdrawn in such meeting then as per Sub Rule (5) of Rule 4 if such resignation is accepted by the Panchyat then only such member shall cease to be member immediately after termination of said meeting while as per Sub Rule (6) of Rule 4 if concerning member whose resignation is under consideration inspite intimation, is not present in such meeting then his resignation shall be deemed to have been accepted after termination of such meeting thereafter he shall cease to be the member of the Panchyat.

20. We have not found any proceeding either of the Panchyat or other official showing that any meeting with respect to consider the aforesaid notice of the resignation from the post of Panch by the Rajendra Prasad Tiwari was held. In absence of holding of such meeting it cannot be inferred that resignation of Shri Rajendra Prasad Tiwari was accepted and he ceased to be a Panch and vacated the office of Panch before 21.7.08, the date on which impugned resolution was passed. In such circumstances, in absence of acceptance of resignation, brother of respondent no. 4 continued to be a Panch of such Panchyat and the respondent no. 4 being his near relative could not be selected to hold the post of Panchayat Karmi or to hold the office of Panchayat Secretary.

21. In view of the aforesaid and juxtapose reading of the provisions of the Scheme (Yojna) and aforesaid 69 (1) of the Adhiniyam and the above mentioned Rules 3 and 4 relating to resignation of Office Bearer of Panchayat, it would be clear that the respondent no. 4 could not be selected for the post on the date of passing the resolution, i.e. 21.7.07. The Panchyat Karmi Yojna is brought in force to appoint a Panchyat Karmi with an object to give him the charge of the office of the Panchyat Secretary after the notification by competent authority. In such premises, we hold that the learned Single Judge has committed error in dismissing the petition of the appellant contrary to the provision of Section 69 of the Adhiniyam. Hence such finding of the impugned order is hereby set aside.

22. Consequently by allowing this appeal, the petition of the appellant is allowed in part and the resolution dated 21.7.07 (Annexure P-1 with the writ petition) passed by the Gram Panchyat – respondent no. 3 selecting the respondent no. 4 as Panchyat Karmi and in pursuance of it notification dated 17.9.07 (Annexure P-2 with the writ petition) issued by the respondent no. 2 are set aside. In the available circumstances we have not found fit to give any direction for appointment of the appellant as Panchayat Karmi of the respondent no. 3. However, it is made clear that respondent no. 3 with the consultation of it's authority shall be at liberty to appoint the Panchayat Karmi for holding the charge of Secretary of Gram Panchyat by adopting the fresh process of appointment under the aforesaid scheme. There shall no order as to the costs.

23. The appeal is allowed.

*Appeal allowed.*

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**I.L.R. [2009] M. P., 1615**
**WRIT APPEAL**

*Before Mr. Justice A.K. Shrivastava & Mr. Justice A.P. Shrivastava*

31 March, 2009*

VISHNU AGRAWAL & anr. ... Appellants

Vs.

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

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

*W.A. No.230/2007 (Gwalior)

*order was passed by Collector of Stamps, Satna, which is outside the territorial jurisdiction of Gwalior Bench, would in itself is no ground to hold that Gwalior Bench is not having the territorial jurisdiction over the matter.* (Para 11)

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

**B. Civil Procedure Code (5 of 1908), Section 20 -** ***Cause of action - Part of cause of action - Jurisdiction - Held - U/s 20(c) a suit can also be instituted at a place where the cause of action, wholly or in part, arises - Part of cause of action has arisen within the territorial jurisdiction of Gwalior Bench -Writ petition maintainable at Gwalior.*** (Para 11)

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

**Cases referred :**

(2004) 8 SCC 254, 1989 MPJR HC 721(DB), 1987 JLJ 341(FB), 2006(2) MPLJ 50, (2007) 11 SCC 335, AIR 1976 SC 331, AIR 1972 All. 200, AIR 2000 SC 2966, 1991 RN 2.

*S.P. Jain & Sanjeev Tiwari,* for the appellants.
*Ami Prabal, Dy.A.G.,* for the respondent/State.

## J U D G M E N T

The Judgment of the Court was delivered by **A.K. Shrivastava, J.** :–Feeling aggrieved by the impugned order dated 13.2.2007 passed by learned Single Bench of this Court inW.P.No.646/2004 the appellants have preferred this writ appeal under section' 2 (1) of the Madhya Pradesh Uchcha Nyaylaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005.

2. The order passed in this appeal would also decide the fate of connecting Writ Appeal No.231/07 *(.Sushiladevi Agrawal Vs. State of Madhya Pradesh*

*and others)* since both the appeals have arisen from a common order passed by learned Writ Court holding that the Gwalior Bench of this Court is not having territorial jurisdiction over the matter.

3. The facts necessary for disposal of this appeal lie in narrow compass. A sale deed executed by one Smt. Hardevi in favour of the appellant on 2.5.1998. This sale deed was tendered for registration before Sub-Registrar, Satna who found that the document does not disclose correct market value of the property which was sold and hence the Sub-Registrar referred the matter to the Collector of Stamps, Satna. The Collector of Stamps found that correct market value has not been described in the sale deed, which was required to be registered and hence passed an order making demand of deficit amount of stamp duty as well as registration charges indicated in the order. This order was challenged by the appellants before the Commissioner, Rewa Division, Rewa who dismissed the appeal, and thereafter appellants preferred a second appeal in the Board of Revenue at Gwalior. The Board of Revenue dismissed the appeal of appellants on merit on 16.1.2004 vide Annexure P/5.

4. The appellants thereafter by filing writ petition before this Bench assailed the order of Board of Revenue as well as the order of Collector of Stamps, Satna and order of Commissioner Rewa Division, Rewa passed in an appeal. It would be relevant to quote the reliefs which have been sought by the appellants in their writ petition, which reads as under:

> "(a) That, a Writ of Certiorari or any other appropriate Writ, Order or Direction may kindly be issued for quashing the impugned order dated 16.1.2004 (Annexure-P/5) passed by the Board of Revenue, MP Gwalior, whereunder the order dated 20.3.2003 (Annexure P/4) passed by Commissioner, Rewa Division and also the order dated 10.7.1998 (Annexure P/3) passed by the Collector of Stamps, Distt. Satna (respondent no.4 herein) have been upheld. The order dated 20.3.2003 (Annexure P/4) passed by the Commissioner, Rewa Division as well as the order dated 10.7.1998 (Annexure P/3) passed by the Collector of Stamps, Distt. Satna, may kindly be also ordered to be quashed by issuing a Writ of Certiorari or any other appropriate Order or Direction.
>
> (b) That, after quashing the said impugned orders Annexure P/3, P/4 and P/5, a further direction may kindly be given to the Respondent no.4 Collector of Stamps as well as to the Respondent no.5 Sub-Registrar, Registration Deptt., Satna, to deliver the instrument in question registered sale-deed dated 2.5.1998 to the petitioners being a validly registered document on

adequate stamp duty.

(c) Any other such orders or directions which the Hon'ble Court may deem fit and proper in the facts and circumstances of the case, be also passed alongwith the costs of writ petition."

5. A preliminary objection was raised on behalf of the State Government before the learned Writ Court that the sale deed was submitted for its registration in the office of Sub-Registrar at Satna who referred the matter to collector of Stamps, Satna who found that in the sale deed, value of the property to be sold has been shown to be quite less, and therefore, directed to pay deficit stamp duty as well as registration charges in terms of the order passed by it. An appeal which was preferred by the appellants before Commissioner, Rewa Division, Rewa has also been dismissed, and therefore, material cause of action has arisen within the territorial jurisdiction of the Principal Seat of this Court. This objection was combatted by the petitioners.

6. The learned Single Bench of this Court upheld the preliminary objection raised on behalf of the State of M.P. and has held that this Bench is not having territorial jurisdiction, on the contrary the Principal Seat at Jabalpur is having the territorial jurisdiction. Eventually, the learned Writ Court dismissed the writ petition.

7. It has been contended on behalf of the appellants that the order of Board of Revenue was also challenged by the appellants in the Writ Court and since the Board of Revenue is in Gwalior, therefore, the Bench of High Court at Gwalior is also having territorial jurisdiction. In support of his contention learned counsel for the appellants has placed reliance on the following decisions:

**(i) *Kusum Ingots & Alloys Ltd. Vs. Union of India and another,* (2004) 3 SCC 254.**

**(ii) *Devendra Bahadur Singh Vs.State of M.P. and four others,* 1989 MPJR HC 721 (Division Bench).**

**(iii)*K.P. Govil Vs. Jawaharlal Nehru Krishi Vishwa Vidyalya, Jabalpur and another,* 1987 JLJ 341 (Full Bench).**

**(iv) *State of M.P. Vs. Shabir Khan and others,* 2006 (2) M.P.L.J. 50 (Single Bench).**

8 On the other hand it has been submitted by Smt. Ami Prabal, learned Deputy Advocate General that since the document of sate was tendered for registration before Sub-Registrar Satna and the Collector of Stamps, Satna passed order making demand of the deficit stamp duty as well as the registration charges and it's order in appeal was also affirmed by the Commissioner, Rewa Division, Rewa, therefore, merely because the said order was challenged before the Board

of Revenue at Gwatior by filing an appeal by the writ petitioner would not confer any territorial jurisdiction to this Bench. Learned Deputy Advocate General in support of her contention has placed reliance on the decision of the Supreme Court *Alchemist Ltd. and another Vs. State Bank of Sikkim and others,* (2007) 11 SCC 335.

9. Having heard the learned counsel for the parties: we are of the view that the appeal deserves to be allowed.

10. True, the Collector of Stamps, Satna passed an order directing the appellants to deposit the deficit stamp duty as well as registration charges and the said order was affirmed in appeal by the Commissioner, Rewa Division Rewa, but both these orders were challenged in appeal filed by the appellants before the Board of Revenue at Gwalior, who also dismissed the appeal on merit, which would mean that the order of Collector of Stamps, Satna as well as the order of the Commissioner, Rewa Division, Rewa merged in the order of the Board of Revenue. Three Judge Bench of Supreme Court in the case of *Kusum Ingots & Alloys Ltd.* (supra) in para 27 has categorically held that when an order is passed by a Court or Tribunal or even by an executive authority under any of the provisions of a statute or otherwise, a part of cause of action would also arise at that place. It would be profitable to quote para 27 of the aid decision which reads as under:

> "27. When an order, however, is passed by a Court or Tribunal or an executive authority whether under provisions of a statute or otherwise, a part of cause of action arises at that place. Even in a given case, when the original authority is constituted at one place and the appellate authority is constituted at another, a writ petition would be maintainable at both the places. In other words as order of the appellate authority constitutes a part of cause of action, a writ petition would be maintainable in the High Court within whose jurisdiction it is situate having regard to the fact that the order of the appellate authority is also required to be set aside and as the order of the original authority merges with that of the appellate authority."

The ratio decided of the decision of Supreme Court in *Kusum Ingots & Alloys Ltd.* (supra) is applicable in the present case because the Board of Revenue which is situated in Gwalior, has dismissed the appeal of appellants, and therefore, a part of cause of action has arisen to appellants at Gwalior also.

11. Undisputedly one of the order which was impugned in the Writ Court is the order of the Board of Revenue, which is within the territorial jurisdiction of this Bench and therefore, according to us if the order of the Board of Revenue as well has been challenged by filing Writ petition under Article 226 of the Constitution of India before learned Single Bench of this Court, the part of cause of action

also arose within the territorial jurisdiction of this Bench, and merely because the original order was passed by Collector of Stamps, Satna, which is outside the territorial jurisdiction of this Bench, would in itself is no ground to hold that this Bench is not having the territorial jurisdiction over the matter. Indeed, "cause of action wholly or on part thereof arises" can be looked upon from different angles and in this context we may also borrow sufficient light from section 20 of the C.P.C. which speaks about the suit to be instituted where defendants reside or cause of action arises. Under section 20 (c) of the C.P.C. a suit can also be instituted at a place where the cause of action, wholly or in part, arises. Since the part of cause of action has arisen within the territorial jurisdiction of this Bench we are of the firm view that the writ petition was maintainable at this Bench.

12. The Full Bench of this Court in *K.P.Govil* (supra) inpara 9 has categorically held as under:

> "It must, therefore, follow and we hold that the expression 'in respect of cases arising in the revenue districts of Gwalior, Shivpuri, Datia, Guna, Vidisha (Bhilsa), Bhind and Morena "means the place or places within the specified revenue districts where the whole or a part of cause of action arises. If the cause of action arises wholly or in part at a place or places within the specified revenue districts, the Gwalior Bench will have jurisdiction."

13. The Four Judge Bench of Supreme Court in *Nasiruddin Vs. S.T.A. Tribunal,* AIR 1976 SC 331 took the decision by reversing the Full Bench decision of Allahabad High Court *Nirmal Dass Khatuira and others Vs. The State Transport (Appellate) Tribunal, U.P. Lucknow and others,* AIR 1972 All 200 and has categorically held that the cause of action in a petition under Article 226 would be as the expression is understood and if the cause of action arose because of the appellate order or the revisional order which came to be passed at Lucknow then Lucknow Bench would have jurisdiction though the original order was passed at a place outside the areas of Oudh. It would be condign to quote para 36 of the said decision which reads as under:

> "36. The conclusion as well as the reasoning of the High Court is incorrect. It is unsound because the expression "cause of action" in an apptication under Article 226 would be as the expression is understood and if the cause of action arose because of the appellate order or the revisional order which came to be passed at Lucknow then Lucknow would have jurisdiction though the original order was passed at a place outside the areas in Oudh. It may be that the original order was in favour of the person applying for a writ.

> In such case in adverse appellate order might be the cause of action. The expression "cause to action" is well-known. If the cause of action arises wholly or in part at a place within the specified Oudh areas, the Lucknow Bench will have jurisdiction. If the cause of action arises wholly within the specified Oudh areas, it is indisputable that the Lucknow Bench would have exclusive jurisdiction in such a matter. If the cause of action arises in part within the specified areas in Oudh it would be open to the litigant who is the dominus litis to have his forum conveniens. The litigant has the right to go to a Court where part of his cause of action arises. In such cases it is incorrect to say that the litigant chooses any particular Court. The choice is by reason of the jurisdiction of the Court being attracted by part of cause of action arising within the jurisdiction of the Court. Similarly, if the cause of action can be said to have arisen partly within specified areas in Oudh and partly outside the specified Oudh areas, the litigant will have the choice to institute proceedings either at Allahabad or Lucknow. The Court will find out in each case whether the jurisdiction of the Court is rightly attracted by the alleged cause of action. (emphasis supplied)

If the aforesaid decision of the Supreme Court is tested on the anvil and touchstone of the present factual scenario, it would reveal that this decision is squarely applicable to the point in hand because in the present case also the original and appellate orders were passed at Satna which is under the domain of Principal Seat of this Court at Jabalpur. However, the order in second appeal has been passed by the Board of Revenue at Gwalior, which is under territorial jurisdiction of this Bench and therefore the writ petition filed by appellants before this Bench is maintainable.

14. Yet there is another decision of the Supreme Court on the point which is *Navinchandra N. Majithia Vs. State of Maharashtra,* AIR 2000 SC 2966. In para 8 and 9 of the said decision, the Apex Court has held as under:

> "8. "Cause of action" is a phenomenon well understood in legal parlance. Mohapatra, J. has well delineated the import of the said expression by referring to the celebrated lexicographies. The collocation of the words "cause of action wholly or in part arises" seems to have been lifted from Section 20 of the Code of Civil Procedure, which section also deals with the jurisdictional aspect of the Courts. As per that section the suit could be instituted in a Court within the legal limits of whose jurisdiction the "cause of action wholly or in part arises". Judicial pronouncements have accorded almost a uniform interpretation to the said

compendious expression even prior to the Fifteenth Amendment of the Constitution as to mean "the bundle of facts which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court."

9. In *Read v. Brown* (,1888)22 QBD 128 Lord Esher, M.R., adopted the definition for the phrase "cause of action" that it meant "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

15. Similar is the view of the Division Bench of this Court in *Devendra Bahadur Singh* (supra). The other Division Bench of this Court in *M.P. Co-operative Marketing Federation, Bhopal Vs. Bhojraj Ghanshyamdas and another,* 1991 RN 2 again also took the same view which was taken in the decision of *Devendra Bahadur Singh* (supra) by holding that although the original order was within the territory of Rewa, but the order of Board of Revenue has also been challenged and therefore, the Gwalior Bench of this Court is having territorial jurisdiciton. Two Judge Bench decision of Supreme Court *Alchemist Ltd. and another* (supra) placed reliance by learned Deputy Advocate General would not come in the way because in *Kusum Ingots & Alloys Ltd.* (supra) it has been specifically held in para 27 that the cause of action would also accrue to the place where an order is passed by a Court or Tribunal or even by an executive authority under any of the provisions of a statute or otherwise, and therefore, according to us, the decision of *Alchemist Ltd. and another* (supra) relied by learned Deputy Advocate General is not applicable in the present case.

16. For the reasons stated hereinabove, we hereby hold that this Bench is having territorial jurisdiction over the matter and the writ petition filed by the appellants is maintainable.

17. Resultantly, this appeal succeeds and is hereby allowed. The impugned order passed by learned Writ Court holding the writ petitions to be not maintainable on account of want of territorial jurisdiction is hereby set aside. The Writ Court is hereby requested to decide the writ petition on its own merit.

*Appeal allowed.*

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I.L.R. [2009] M. P., 1623
WRIT PETITION
*Before Mr. Justice Prakash Shrivastava*
5 January, 2009*

AYAZ AHMAD KHAN & ors. ... Petitioners
Vs.
STATE OF M.P. & ors. ... Respondents

A. **Constitution, Article 226** - ***Locus standi*** - *Respondents selected for the post of Notary - However, no appointment order issued so far - Held - If the report sent by competent authority is vitiated, then any action taken in pursuance to that report would be vitiated - Petition maintainable.* (Para 13)

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

B. **Notary Rules, 1956, Rule 7** - ***Recommendation of Competent Authority*** - *Report sent by competent authority merely contains factual details and no recommendation has been made - Held - Competent authority is required to consider knowledge and experience of commercial law and nature of obligations and also to the extent of practice and record a conclusion - No findings as regards fitness of candidate for being appointed as Notary has been recorded - Report not in accordance with Rule 7 - Selection of respondents is in contravention of Rule 7 - Selection quashed - Matter remitted back.* (Paras 23 to 25)

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

**Cases referred :**

1998(1) MPLJ 490, AIR 2000 MP 260, (2003) 12 SCC 119.

*Alok Aradhe* with *K.P. Kushwaha*, for the petitioners.
*Samdarshi Tiwari, G.A.*, for the respondent Nos.1 to 3.
*V.S. Shroti* with *Vikram Johri*, for the respondent No.4.

*W.P. No.7328/2008 (Jabalpur)

*R.P. Agarwal* with *Praveen Dave,* for the respondent No.7.
*R.K. Patel,* for the respondent No.9.
*Satish Shrivastava,* for the respondent No.10.
*U.K. Sharma* with *Suyash Tripathi,* for the respondent No.11.
*C.K. Sharma,* for the respondent No.12.
*J.L. Mishra,* for the respondent No.13.

**ORDER**

PRAKASH SHRIVASTAVA, J. :–This order will govern the disposal of Writ Petition No.7328/2008 Writ Petition No.7557/2008, Writ Petition No.7559/2008, Writ Petition No.7743/2008, Writ Petition No.8042/2008, Writ Petition No.8290/2008, Writ Petition No.8291/2008, Writ Petition No.9650/2008 and Writ Petition No. 10204/2008. In all these matters a challenge has been raised to the selection and appointment of Notaries in Katni district which includes Katni, Deemarkheda, Bohriband, Rithi, Badwara and Barhi Tahsil.

2. For convenience facts of W.P.No-7328/2008 have been noted in this order. Brief facts are that by notification dated 12.10.2007, 11 posts of Notary were notified for Katni district which include 4 posts for Katni, 1 for Dheemarkheda, 2 for Bohriband, 1 for Rithi, 2 for Badwara and 1 for Barhi. In pursuant to the notification, the State Govt. vide communication dated 31.10.07 wrote to the respondent no.4 requesting him to sent a panel along with the memorial of eligible local Advocate by taking action under rule 6 and 7 of the Notary Rules, 1956. 77 candidates had filed the applications from Katni, 5 from Dheemarkheda, 9 from Bohriband, 10 from Rithi, 14 from Badwara and 9 from Barhi. The respondent no. 4 vide communication dated 14.12.2007 addressed to the President / Secretary of the District Bar Association, Katni, invited objections by forwarding these names to the Bar Association.

3. The respondent no.4 thereafter forwarded the list of candidates on 25.1.2008 to the Principal Secretary of the Law and Legislative department of the State Govt. and by the impugned communication dated 9.6.08 the State conveyed it to the respondent no.4 that names of respondent no.5 to 15 were short listed for appointment as Notary in the aforesaid Tahsils of Katni District and the respondent no.4 accordingly on 16.6.08 intimated the concerned respondents requiring them to deposit the requisite fee on non-judicial stamp etc. for further action. The petitioners submitted representation and objection dated 26.2.2008 and 28.2.2008 to the State and thereafter filed the present writ petition challenging the selection of respondents no.5 to 15 as Notary.

4. Learned counsel appearing for the petitioner submitted that while selecting respondents no. 5 to 15, Rule 7 of the Notary Rules, 1956 (for short 'the Rules') has not been complied with. Referring to annexure R/1 filed along with the return of respondents no. 1 to 3 by which names were forwarded by the respondent no.

4, learned counsel appearing for the petitioner submitted that while forwarding these names rule 7 has been given a complete go bye. He further submitted that applications for appointment of other candidates were pending since before, therefore, there is violation of rule 7(e). He further submitted that respondents no.7, 11 and 12 are not eligible for being appointed on the post of Notary. In support of his submission he placed reliance upon the judgments in the case of *Ashok Kumar Chowdhary V. State of M.P.* 1998(1) MPLJ 490 and *Suryakant Chandrakar V. State of Madhya Pradesh,* AIR 2000 MP 260. An allegation has also been made that notice dated 14.12.2007 issued to the Bar Association was not brought to the notice of members of the Bar Association and was not put on the Notice Board of the Bar Association, Katni.

5. Learned counsel appearing for respondents no. 1 to 3 has produced the original record of the case and has submitted that the decision to appoint respondents no.5 to 15 has been taken by following the due procedure.

6. Learned counsel appearing for respondent no. 4 submitted that vide annexure R/1 objections were invited and since no objections were submitted, therefore, the list was forwarded by the respondent no. 4 and accordingly appointments have been made. He also made a submission that there is no procedure prescribed for assessing the suitability of the candidates, therefore, the list of all the eligible candidates was forwarded by Respondent No. 4.

7. Counsels appearing for the selected candidates have challenged the locus of the petitioners to file the writ petition on the ground that they were not the applicants from the concerned Tahsil. They have further defended their appointment by submitting that the appointments have been done by following the prescribed procedure and that they fulfilled all the eligibility conditions and having been found suitable therefore they have been rightly selected for appointment as Notary.

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

9. The first question raised by the respondents is about locus of the petitioners. The petitioners in W.P.No.7328/08 were the candidates who had submitted the memorials for their appointments as Notary from Katni. In the writ petition some of the candidates for whom the recommendation was made for Bohribandh and Dheemerkheda have been impleaded as respondents and they have raised the objection on the ground that the petitioners had not submitted the application from those Tahsils, therefore, the petitioners have no locus.

10. Counsel for respondents no.9 to 11 submitted that respondents no. 9, is a candidate frop Dheemarkheda and respondent no. 11 is a candidate from Bohriband. No applications were moved by the petitioners from Dheemarkheda and Bohriband, therefore, W.P.No.7328/2008 could not have been filed by these petitioners and they have no locus to challenge the appointment of respondents

11. Such a plea raised by respondents no. 9 to 11 is meaningless. It is correct that W.P.No-7328/2008 has been filed by the applicants from Katni but there are other connected writ petitions filed by candidates from Bohribandh and Dheemarkheda. W.P.No-7579/2008 has been filed by the candidates from Dheemarkheda and Bohriband. Similarly, W.P.No.7743/2008 and W.P.No. 10204/2008 have been filed by the candidates from Bohriband.

12. A preliminary objection has also been raised by counsel for respondents raising a ground that writ petition is premature. Respondents no.5 to 15 have not been appointed Notaries and only a decision has been taken to appoint and the matter is still pending consideration.

13. Such an objection has no merit since the very action of the respondent no.4 under rule 7 has been impugned in the matter. If the report sent by the respondent no.4 to the State Govt. itself is not as per the requirements of rule 7 then any action taken in pursuance to that report would be vitiated. Even otherwise the original record indicates that on the basis of the report, names of respondents no. 5 to 15 have already been short listed by the State to appoint them as Notary and the formalities are being complied with in this regard. Thus, the objection that the writ petition is pre-mature is rejected.

14. Another objection has been raised that there is alternative remedy available under rule 8(3), which provides for making an application to the appropriate Govt. for review of the order rejecting the application or allowing the application in respect of any part of the area to which it relates or challenging the order as to cost made under sub rule (1). A reading of this rule indicates that a candidate can apply for review questioning rejection of his application but he cannot question the selection of other candidates who may have been selected by ignoring the relevant rules. Even otherwise the remedy of review cannot be held to be an equally efficacious remedy. Even if it is held to be equally efficacious alternate remedy 'then also availability of alternate remedy is not an absolute bar but it is only a self-imposed restriction. Considering the nature of dispute involved it would not be appropriate to reject the writ petitions on the ground that remedy of review is available under rule 8(3).

15. Now coming to the merits of the case. The Notaries Act, 1952, has been enacted to regulate the profession of Notaries who are appointed for all recognized notorial purposes. Section 8 of the Act deals with the functions of the notaries which are wide and important in nature. The Notaries Rules, 1956, have been framed under the Act. Rule 3 prescribes qualification for appointment as a Notary. Rule 4 provides for making an application for appointment as a Notary in the form of memorial. Rule 6 provides for preliminary action on the application by the competent authority which includes satisfaction by the authority about qualification, earlier rejection of the application etc. and inviting objection from

the Bar Association or Bar Council etc. Rule 7 prescribes the detailed procedure to be followed for making recommendations by the competent authority and reads as under :

> **7. Recommendation of the competent authority.** (1) The competent authority shall, after holding such inquiry as he thinks fit and after giving the applicant an opportunity of making his representations against the objections, if any, received within the time fixed under sub-rule (2) of rule 6, make a report to the appropriate government recommending either that the application may be allowed for the whole or any part of the area to which the application relates or that it may be rejected.
>
> (2) The competent authority shall also make his recommendation in the report under sub-rule (1) regarding the persons by whom the whole or any part of the costs of the application including the cost of hearing, if any, shall be borne.
>
> (3) In making his recommendation under sub-rule (1), the competent authority shall have due regard to the following matters, namely, ?
>
> (a) Whether the applicant ordinarily resides in the area in which he proposes to practise as a notary;
>
> (b) Whether, having regard to the commercial importance of the area in which the applicant proposes to practise and the number of existing notaries practising in the area, it is necessary to appoint any additional notaries for the area;
>
> (c) Whether, having regard to his knowledge and experience of commercial law and the nature of the objections, if any, raised in respect of his appointment as a notary, and in the case of a legal practitioner also to the extent of his practise, the applicant is fit to be appointed as a notary;
>
> (d) Where the applicant belongs to a firm of legal practitioners, whether, having regard to the number of existing notaries in that firm, it is proper and necessary to appoint any additional notary from that firm; and
>
> (e) Where applications from other applicants in respect of the area are pending, whether the applicant is more suitable than such other applicants.

16. It is worth noting that under sub rule (1) of Rule 7 the competent authority is required to hold such enquiry as he thinks fit. The competent authority after receiving the objections, if any, is required to make a report to the appropriate

Govt. and the competent authority is required to make a recommendation either allowing the application for the whole or any part of the area to which the application relates or for rejecting it. Sub Rule 3 requires the matters which are to be taken into consideration while making the recommendation under sub rule 1. Clause (e) of Sub Rule 3 requires the authority to give due regard to the fact whether the applicant is more suitable than such other applicants where applications from other applicants in respect of the area are pending. The report sent by the competent authority under Rule 7 is considered by the State Govt. under rule 8 and the action on the report as prescribed in the rule is taken.

17. The State had issued the circular dated 17.12.1998 stating that before sending the memorial for appointment, full enquiry will be made. Special emphasis was made to comply with the requirement of rule 7 and making the recommendation of the competent candidates. By this circular the judgment of this court reported in *Ashok Kumar Chowdhary* (supra) was required to be considered while making recommendation.

18. Under rule 7(1) on receipt of the application forms and objections the competent authority is required to hold appropriate enquiry then he is required to make a report to the appropriate Govt. and in that report he is required to make a recommendation and the recommendation should be either that the application may be allowed for the whole or any part of the area to which the application relates or that it may be rejected.

19. This court in the matter of *Ashok Kumar Chowdhary* (supra) has considered the scope of rule 7 of the Notary Rules and has held that the competent authority is bound to follow the procedure laid down in rule 7. The competent authority is required to make endorsement regarding knowledge and experience of each applicant and their suitability for appointment. In the absence of any material before the State Govt. and without determining the comparative suitability of the applicants, no appointment can be made. This court in the matter of *Ashok Kumar* (supra) after noting rule 7 held that :

> 11. After the applications are received, the competent authority, that is, District Judge, should not act as a post-office and forward the papers to the State Govt. The competent authority is bound to follow the procedure laid down in Rule 7 of the Rules. When there are more than one applications then the competent authority should have made recommendations for appointment of notary indicating the name of applicant, who is more suitable than other applicants. From the file it appears that enquiry as provided under rule 7(3) has not been conducted. There is no endorsement by the District Judge regarding knowledge and experience of each applicant and their suitability for appointment. The notaries are

required to perform a responsible job and they cannot be appointed in an arbitrary manner. The notary performs very important functions and his actions are having far reaching effects. He must have sound knowledge of the laws referred to in Rule 7 and in respect of Notaries Act, Oaths Act, Stamp duty, conveyance and various types of documents and local laws. A confidential enquiry in respect of honesty and integrity before the licence is issued, should be held to determine the suitability of the applicant to hold such a creditable post of responsibility and credibility. The competent authority should keep in mind and send the recommendations for appointment of notary after receving the applications. In the present case, the competent authority has not sent recommendations.

12. In the absence of any material before the State Govt. and without determining the question as to person who is more suitable for appointment, no appointment could be made. From going through the record, it is apparent that the appointments have been made in an arbitrary manner without following the procedure of rule 7(3)(e) of the Rules.

20. Same issued came up before this court in the matter of *Suryakant Chandrakar* (supra), wherein this court after noting rule 7 held that :

10.....A plain reading of Rule 7(1) of the Rules makes it clear that the competent authority is required to make recommendation either that the application may be allowed for the whole or any part of the area to which the application relates or that it may be rejected under rule 7(3) of the Rules, the competent authority while making recommendation is required to give due regard to various aspects enumerated in clauses (a) to (e). After the report of the competent authority is required to consider the same and make appointment of Notaries. The State Govt. while making appointment of a Notary is required to consider the report. Here, in the present case, the competent authority has stated in clear terms that he did not make any recommendation. From the letter of competent authority dated 2nd March 1998, it is apparent that he has just forwarded the memorials of 7 persons including respondents no.3 to 5 along with the other documents to the State Govt. for appropriate action. The original records have been produced before me by Mr.Ghildiyal and a perusal thereof also does not show that the competent authority had made any recommendation as required under Rule 7 of the Rules. In fact, he has forwarded memorials of all the applicants

along with the documents. Such a recommendation was obliged to be made by the competent authority under Rule 7 of the Rules. Non-rejection of the memorials under Rule 6 of the Rules and forwarding the same along with the documents of the respective memorialists, in my opinion, cannot be construed as recommendation of the competent authority. He has thus failed to discharge his statutory obligation. That being so, appointment of the respondents no.3 to 5 as Notaries suffers from procedural ultra vires and cannot be allowed to stand. The view which I have taken finds support from the judgment of this Court in the case of *Ashok Kumar Chowdhary* (Supra).

21. Supreme Court also in the matter of *S.D. Chaddha V. State ofU.P. and others,* (2003)12 SCC 119. has declined to approve the appointment made in violation of Rule 7.

22. In the present case the reports which were sent by the respondent no. 4 for Tahsil Barhi, Rithi, Dheemarkheda, Bohriband, Badwara and Katni in terms of rule 7 to the State Govt. are available in the original record submitted by the counsel for the State. A perusal of these reports indicate that the respondent no.4 in these reports had only noted the name, date of birth, caste, place of residence, registration no. and year and number of years of practice of the candidates. The respondent no.4 only by noting the aforesaid factual details had forwarded the report to the State Govt. In the reports in terms of rule 7(1) there is no recommendation by the respondent no. 4 for accepting the application of any candidate or rejecting it. There is also no recommendation to accept the application of any candidate for the whole of the area or any part of the area to which the application relates. Rule 7(1) requires the competent authority to make a recommendation which denotes a positive act of application of mind on the relevant factors enumerated in rule 7 and a conclusion by the competent authority in respect of each candidate for accepting or rejecting the application or accepting the application for whole or any part of the area.

23. In terms of rule 7(3)(c) the competent authority is required to consider the knowledge and experience of commercial law and the nature of the objections, if any, raised in respect of his appointment as a notary, and in the case of a legal practitioner also to the extent of his practice and record a conclusion if the applicant is fit to be appointed as a Notary. The report does not indicate that any of the factors required to be considered by the competent authority under rule 7(3) have been considered. In the report no finding as regards the fitness of the candidate for being appointed as Notary as required by rule 7(3)(c) has been recorded. The report has been prepared completely ignoring the requirements of rule 7 of the Rules and the judgment of this court in the matter of *Ashok Kumar Chowdhary* (supra) and *Suryakant Chandrakar* (supra).

24. It is worth noting that it is this report which is considered by the State under rule 8 to accept or reject the application. Since the report itself does not contain any material in support of the fitness of the candidates to be appointed as Notary, therefore, sufficient material was not available before the State Govt. to take a fair decision to accept or reject any application under rule 8.

25. A perusal of the original record, indicates that all the names, which were forwarded by the respondent no.4, were placed before the Law Minister with certain notings by the Additional Secretary, Law. The Law Minister picked up the names of respondents no. 5 to 15 for appointment as Notary in Katni, Barhi, Rithi, Dheemarkheda, Bohriband and Badwara. There is nothing on record to show on what basis these names were picked up. Rules nowhere prescribe for appointment by draw of lots. Thus, it is found that the concerned respondents have been selected in complete violation of rule 7.

26. In view of the aforesaid analysis it is held that respondents no. 5 to 15 have been selected for appointment as Notaries in violation of rule 7. The report in the form of panel which was forwarded by the respondent no.4 to the State Govt. dated 25.1.2008 was prepared without complying with the requirements of Rule 7. Therefore, the reports dated 25.1.2008 sent by the respondent no.4 in respect of Tahsil Barhi, Rithi, Dheemarkheda, Bohriband, Badwara and Katni are set aside. Any decision taken by the State Govt. in pursuance to the said report and any order issued in favour of respondents no. 5 to 15 in pursuance to the selection made on the basis of the aforesaid report is also set aside. The matter is remitted back to the competent authority to send the fresh report to the government after complying with the provisions contained in Rule 7 keeping in mind the law settled in the judgments noted above.

27. The writ petition is accordingly disposed of. No orders as to costs.

*Petition disposed of.*

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**I.L.R. [2009] M. P., 1631**
**WRIT PETITION**
***Before Mr. Justice Sanjay Yadav***
12 January, 2009*

PHOOL BAI ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

**Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 40** - *Removal of Sarpanch - Petitioner's application to cross-examine the Enquiry Officer was allowed but Enquiry Officer did not appear and petitioner's right to cross-examine was closed - Held - Prescribed authority*

*W.P. No.3186/2008 (Jabalpur)

*heavily relied upon the findings of Enquiry Officer - Not affording of an opportunity to cross-examine the Enquiry Officer resulted in miscarriage of justice and denial of opportunity of hearing - Order of removal quashed - Petition allowed.* (Paras 9 to 12)

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

**Cases referred :**

2003(3) MPLJ 260, 2004(3) MPHT 737, 2004(5) MPHT 79, AIR 1970 SC 150, AIR 2001 SC 2319.

*Kuldeep Singh,* for the petitioner.
*Harish Agnihotri, G.A.,* for the respondent Nos.1 to 4.
*Brajesh Choubey,* for the respondent Nos.5 & 6.

**O R D E R**

SANJAY YADAV, J. :–The petitioner calls in question the legality of order dated 26.11.2007, 7.1.2008 and 5.3.2008 in this petition filed under Article 226/ 227 of the Constitution of India. By order dated 26.11.2007 the Sub Divisional Officer (Revenue) Manpur, district Umaria in exercise of the power under Section 40 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 disqualified the petitioner for holding any post under Gram Panchayat for next six years. The said order has been upheld by the appellate and revisional authority respectively by their orders dated 7.1.2008 and 5.3.2008. The challenge put-forth by the petitioner is on the anvil that, the order of disqualification has been passed by the prescribed authority without adhering to the norms of principles of natural justice.

2. The facts briefly are that the petitioner was elected for the post of Sarpanch for the Gram Panchayat Mahroi in the year 2004. There were certain complaints lodged against the petitioner in respect of the construction of WBN Road, in respect of certain purchases made by the petitioner and certain repairs undertaken and the favour extended to her son and sister under Kapildhara Yojna. The said complaints lodged against the petitioner led to a fact finding enquiry conducted by the Deputy Director, Panchayat & Social Justice district Umaria and Chief Executive Officer, Janpad Panchayat, Manpur district Umaria (M.P.), wherein charge of misuse of fund in respect of construction of WBN Road found substantiated. Thereafter the proceedings were initiated against the petitioner before prescribed authority. In the said proceeding evidence were led by both

parties, i.e., by the complainant as well as by the petitioner. During the proceedings, petitioner filed an application before the prescribed authority for summoning the officials who have conducted the fact-finding enquiry for cross-examination. The said application was allowed by order dated 31.8.2007. However, on 14.9.2007 when the matter was posted for cross-examination of the officers who were summoned by order dated 31.7.2007 the prescribed authority recorded a finding that since the concerning officers are not available, therefore, the right of the petitioner to cross-examine was closed and the matter was posted for argument. Thereafter the impugned order dated 26.11.2007 was passed whereby the petitioner was disqualified for a period of six years to hold any post under the Panchayat. The appeal preferred by the petitioner was dismissed by the appellate authority by order dated 7.1.2008 and the revision against the said order was also negatived by revisional authority vide its order dated 5.3.2008. Aggrieved whereof the petitioner has approach this Court in the present petition.

3. The challenge put-forth by the petitioner to the order is on the ground that the same has been passed without affording a reasonable opportunity of hearing. It is contended by the learned counsel for the petitioner that even the opportunity to cross-examine the prosecution witnesses who prepared the report on the basis of which the prescribed authority has arrived at a conclusion that disqualification was not extended to the petitioner. To substantiate the aforesaid submissions, the learned counsel for the petitioner has taken this Court through the proceedings before prescribed authority. It is contended that the provisions contained under Section 40 of the Act of 1993 contemplates an opportunity of hearing before any order is passed under the said provision. It is urged that, though the prescribed authority has extensively relied upon the report of the fact finding enquiry, however, the petitioner was deprived to cross-examine the officers who recorded the said finding and the concerning authority though aware of this fact went on to arrive at an adverse conclusion on the basis of said document. This action, it is contended, of the prescribed authority has resulted in deprivation of proper opportunity of hearing. The petitioner in support of his contention relied on a judgment rendered by this Court in the case of *Kailashchandra Jain v. State of M.P. and others* [2003 (3) MPLJ 260], *Rajendra Singh Raghuvanshi v. State of M.P. and others* [2004 (3) M.P.H.T. 373] and *Smt. Babita Lilhare v. Shri Surendra Rana and others* [2004 (5) MPHT 79]. It is on the anvil of these submission the petitioner seeks quashment of order of removal and disqualification and the subsequent order passed in revision.

4. The respondents on their turn have supported the order of removal/disqualification passed by prescribed authority in exercise of power under Section 40 of the Act of 1993 on the anvil that the petitioner was afforded ample opportunity to defend herself and there was ample evidence on record to bring home the charges of misconduct levelled against the petitioner which formed the basis for

holding the petitioner ineligible to hold the post of Sarpanch and further disqualified her for six years to hold any post under the Panchayat. It is accordingly urged that there is no substance in the challenge put-forth by the petitioner as there is no iota of violation of principles of natural justice.

5. After hearing the respective counsel for the parties the sole issue which crops up for consideration in the present petition is whether the impugned order passed by the prescribed authority was after affording a reasonable opportunity to the petitioner and whether the petitioner was deprived of proper opportunity.

6. Before dwelling upon the issue, pertinent it will be to note the observations made by Supreme Court in the case of *A.K. Kraipak and others v. Union of India and others* (AIR 1970 SC 150):

> "The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. .... .... ...."
>
> It was further observed by their Lordships in paragraph 20 that "what particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the frame-work of the law under which the enquiry is held and the constitution of the Tribunal or body of person appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

7. For the present, therefore, pertinent it will be to examine the extent of an opportunity of hearing which a person is entitled for under Section 40 of the Act of 1993. Section 40 makes a provision for removal of office bearer of Panchayat. It stipulates:-

> **"40. Removal of office bearers of Panchayat.** - (1) The State Government or the prescribed authority may after such enquiry as it may deem fit to make at any time, remove an office bearer-
>
> (a) if he has been guilty of misconduct in the discharge of his duties; or
>
> (b) if his continuance in office is undesirable in the interest of public:
>
> Provided that no person shall be removed unless he has been given an opportunity to show cause why he should not be removed from his office.
>
> Explanation. For the purpose of this sub-section "Misconduct" shall include

(a) any action adversely affecting -

(i) the sovereignty, unity and integrity of India; or

(ii) the harmony and the spirit of common brotherhood amongst all the people of State transcending religious, inguistic, regional, caste or sectional diversities; or

(iii) the dignity of women: or

(b) gross negligence in the discharge of the duties under this act.

(c) the use of position or influence directly or indirectly to secure employment for any relative in the Panchayat or any action for extending any pecuniary benefits to any relative, such as giving out any type of lease, getting any work done through them in the Panchayat by an office bearer of Panchayat.

Exlanation.- For the purpose of this clause the expression 'relative' shall mean father, mother, brother, sister, husband, wife, son, daughter, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law:

Provided further that the final order in the inquiry shall be passed within 90 days from the date of issue of show cause notice to the concerned office bearer and where the pending case is not decided within 90 days, the prescribed authority shall inform all facts to his next senior officer in writing and request extension of time for disposal of the inquiry but such extension of time shall not be more than 30 days.

(2) A person who has been removed under sub-section (1) shall forthwith cease to be a member of any other Panchayat of which he is a member, such person shall also be disqualified for a period of six years to be elected.

Proviso to clause (b) of sub section (1) of Section 40 contemplates that no person shall be removed unless he has been given an opportunity to show cause why he should not be removed from his office. The requirement for affording an opportunity of hearing is because, an order of removal entails a disqualification for a period of six years to be elected under the Act of 1993 as is contemplated under sub-section (2) of Section 40. Thus, the person against whom an order of removal is passed under Section 40 is also burdened with disqualification for a period of six years. These stipulations call for a close observation of the principles of natural justice or in other words an effective opportunity of hearing. Thus, when a person is charged of a misconduct under the aforesaid provisions, it is incumbent upon the prescribed authority to extend the opportunity of hearing to the persons so charged so that he can put an effective defence towards the charge.

8. In the aforesaid context the following observation made by their Lordships of the Supreme Court in the case of *State of U.P. v. Harendra Arora and another* (AIR 2001 SC 2319) would be of relevance:

> "13. The matter may be examined from another view point. There may be cases where there are infractions of a statutory provisions, rules and regulations. Can it be said that every such infraction would make the consequent action void and/or invalid? The statute may contain certain substantive provisions, e.g. who is the competent authority to impose a particular punishment on a particular employee. Such provision must be strictly complied with as in these cases the theory of substantial compliance may not be available. For example, where a rule specifically provides that the delinquent officer shall be given an opportunity to produce evidence in support of his case after the close of the evidence of the other side and if no such opportunity is given, it would not be possible to say that the inquiry was not vitiated. But in respect of many procedural provisions, it would be possible to apply to theory of substantial compliance or the test of prejudice, as the case, may be. Even amongst procedural provisions, there may be some provisions of a fundamental nature which have to be complied with and in whose case the theory of substantial compliance may not be available, but the question of prejudice may be material. In respect of procedural provisions other than of a fundamental nature, the theory of substantial compliance would be available and in such cases objections on this score have to be judged on the touchstone of prejudice. The test would be, whether the delinquent officer had or did not have a fair hearing. In the case of *Russel v. Duke of Norfolk* (1949) 1 All ER 109, it was laid down by the Court of Appeal that the principle of natural justice cannot be reduced to any hard and fast formulae and the same cannot be put in a straitjacket as its applicability depends upon the context and the facts and circumstances of each case.
>
> 14. Even under general law, i.e., the Code of Civil Procedure, there are various provisions, viz., Section 99-A and 115 besides Order 21, Rule 90 where merely because there is defect, error or irregularity in the order the same would not be liable to be set aside unless it has prejudicially affected the decision. Likewise, in the Code of Criminal Procedure also Section 465 lays down that no finding, sentence or order passed by a competent Court shall be upset merely on account of any error, omission or irregularity unless in the opinion of the Court a failure of justice,

has, in fact, been occasioned thereby. We do not find any reason why the principle underlying the aforesaid provisions would not apply in cases of the statutory provisions like Rule 55-A of the Rules in relation to disciplinary proceeding. Rule 55-A referred to above embodies in it nothing but the principles of reasonable opportunity and natural justice.

15. Some decisions in this regard may be referred to. In the case of *Ridge v. Baldwin* (1964) AC 40, the House of Lords was considering a case where a Chief Constable was dismissed from service without notice and inquiry by the Watch Committee. The question was raised whether the decision was void or merely voidable. The House of Lords laid down that such a decision given without regard to the principles of natural justice was void. The violation in that case, though a procedural one, was of a fundamental nature as it was a case of total violation of the principles of natural justice."

9. In the case at hand it is observed from the order-sheet dated 31.7.2007 that the petitioner filed an application for summoning the officers who conducted the fact finding enquiry and had prepared the report. The prescribed authority while allowing the said application, summoned the concerning officers and posted the matter for their cross-examination. However, on 14.9.2007 since concerning officers were not available the prescribed authority closed the right of examination in the following terms:

14/9/2007 आवेदक की ओर से अधिवक्ता श्री ब्रजेश द्विवेदी उप.।
उतरवादी की ओर से अधि. श्री मनोज द्विवेदी उप.।

पूर्व पेशी तिथि 07/09/2007 को तत्कालीन मुख्य कार्यपालन अधिकारी को सूचना देकर बुलाये जाने हेतु आदेशित किया गया था। सूचना तारीख उपरांत अनुपस्थित रहे हैं एवं साक्ष्य हेतु उपस्थित नहीं हुए प्रकरण का निराकरण समय सीमा में किया जाना है। ऐसी स्थिति मुख्य कार्यपालन अधिकारी के साक्ष्य हेतु दिया गया अवसर समाप्त किया जाता है।

प्रकरण तर्क हेतु 21/09/2007।

10. Subsequent thereafter, the matter was posted for arguments and the prescribed authority passed the impugned order wherein paragraph 4, 5 and 6 following conclusions were recorded.

"4. ..... ..... अनावेदिका द्वारा इस संयुक्त जांच प्रतिवेदन के संबंध में जांच कर्ता अधिकारियों से प्रतिपरीक्षण किये जाने के संबंध में एक आवेदन पत्र प्रस्तुत किया गया किन्तु संबंधित अधिकारियों के सुलभ न होने के कारण प्रतीपरीक्षण की कार्यवाही नहीं की जा सकी।

5. ..... ..... ..... जांच प्रतिवेदन को खण्डन नहीं कराया गया है। जांच प्रतिवेदन प्रतिपरीक्षण कराने के अवसर समाप्त करने के आदेश को चुनौती नहीं दी गई है। ..... .....

6. ..... ..... प्रकरण में संलग्न मूल्यांकन रिपोर्ट एवं मुख्य कार्यपालन अधिकारी के जांच प्रतिवेदन से सरपंच के विरूद्ध लगाया गया यह आरोप प्रमाणित होता है। ..... ..... .."

11. Thus, the prescribed authority though aware of the fact that the officers who prepared the enquiry report did not appear for cross-examination, yet proceeded to hold the petitioner guilty of charges on the basis of same enquiry report. The procedure, therefore, as adhered to by the prescribed authority cannot, in the considered opinion of this Court, by any stretch of imagination be termed as a fair trial. It is not the case that because the concerning officials who have furnished the enquiry report were not cross-examined, the report was not taken into consideration. On the contrary the prescribed authority has heavily relied upon the findings recorded in the enquiry report and in the considered opinion of this Court not affording of an opportunity to cross-examine the officers who prepared the enquiry report has resulted miscarriage of justice and denial of a reasonable opportunity of hearing. An order of removal/ disqualification based on such defective enquiry cannot be given the stamp of approval.

12. Therefore, the order dated 26.11.2007 is hereby set aside. Consequent thereof, the subsequent orders dated 7.1.2008 and 5.3.2008 passed in appeal and the revision are also set aside. The matter is remitted to the prescribed authority for further enquiry from the stage when the respective officers who had prepared and furnished the enquiry report were called for cross-examination. The prescribed authority will do well to decide the matter within a period of three months from the date of communication of this order.

13. In the result, the petition is allowed to the extent above. No order as to costs.

*Petition allowed.*

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**I.L.R. [2009] M. P., 1638**
**WRIT PETITION**

*Before Mr. Justice Arun Mishra & Mr. Justice Sanjay Yadav*
19 January, 2009*

GEETA MISHRA (SMT.) & anr. ... Petitioners
Vs.
KRISHNA MOHAN MISHRA ... Respondent

**Evidence Act (1 of 1872), Section 112** - *Presumption of legitimacy of child born during continuance of marriage - Application for conduction of*

*W.P. No.6514/2008 (Jabalpur)

**GEETA MISHRA (SMT.) Vs. KRISHNA MOHAN MISHRA**

*DNA test of child allowed by trial Court - Held - Documents show that child was born in 1992 and wife has allegedly deserted husband in 1992 - Section raises a conclusive presumption regarding paternity and the presumption is yet to be rebutted in the case by leading evidence - Trial Court erred in allowing application for conducting DNA test - Petition allowed.*

(Paras 4, 8 & 9)

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

**Cases referred :**

AIR 2007 (DOC) 158 (MAD), AIR 1993 SC 2295, AIR 2001 SC 2226, (2005) 4 SCC 449.

*Avinash Zargar,* for the petitioners.

*Prakash Upadhyaya,* for the respondent.

**ORDER**

The Order of the Court was delivered by SANJAY YADAV, J. :–The challenge put forth in the present writ petition filed under Article 227 of the Constitution of India, is to an order dated 15.5.2008 passed by the presiding Officer, Family Court Rewa, whereby the trial court while entertaining an application under section 26 Rule 10 A Code of Civil Procedure in a proceeding under section 13 of Hindu Marriage Act, 1955 initiated at the instance of the respondent husband, allowed the conduction of DNA test of the child, Pankaj Kumar, petitioner no.2.

2. The petitioner wife questions the order on the anvil that, the same, besides being at a premature stage also tantamount to collection of evidence regarding paternity of the child which otherwise is to be rebutted by leading evidence by the respondent husband. The facts on which the objection is being raised is that the respondent husband has set up his case of divorce on the ground of desertion alleging that the petitioner wife after marriage in the year 1987 lived with the respondent till 1992 and thereafter is living with her parents, she gave birth to petitioner no.2 in the year 1994. This fact is however, disputed by the petitioner no.1 who has brought on record the certificate issued by the District Education Board indicating therein the date of birth of the petitioner no,2 being 12.10.1992. It is therefore contended on behalf of the petitioner that unless the respondent/ husband proves the fact that the petitioner no.2 was born in the year 1994 and not

in the year 1992, and the fact and that she was leading an adulterous life, the respondent cannot resort to seek DNA test of the child merely to collect evidence.

3. The respondent on his turn, however, supports the impugned order. The learned counsel for the respondent further relies upon the judgment rendered by various High Court, viz, *Radhey Shyam V. Mst. Pappi:* AIR 2007 Rajasthan 42; *Heera Singh V. State of U.P and others:* 2005 CRI.L.J 3222; *Smt. B. Vandana Kumari V. P. Praveen Kumar & another* : AIR 2007 ANDHRA PRADESH 17; *V.K. Bhurvaneshwari V. N.Venugopal:* AIR 2007(DOC) 158(MAD).

4. Considered the rival submissions and perused the impugned order and the pleadings thereof. It is observed therefrom that the certificate which is placed on record as Annexure P/4 reveals the date of birth of the child as 12.10.1992 and the pleadings reveals that the petitioner/wife had allegedly deserted the respondent husband in the year 1992. The factum of paternity is yet to be rebutted because section 112 of the Evidence Act, raises a conclusive presumption regarding paternity, stipulating therein:

> **112. Birth during marriage, conclusive proof of legitimacy.-** The fact 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 the parties to the marriage had no access to each other at any time when he could have been begotten.

5. The presumption under section 112 is rebuttable and " can be displaced" as was held by the Supreme Court in *Goutam Kundu V. State of West Bengal & another :* AIR 1993 SC 2295: "by a strong preponderance of evidence, and not by a mere balance of probabilities."

6. Similarly in *Kamti Devi V. Poshi Ram:* AIR 2001 SC 2226, their lordships of the Apex Court were pleased to observe thus:

> **"10. But Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on**

the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The raison d'etre is the legislative concern against illegitimatizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents.

11. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleic Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.

7. In *Banarsi Dass V. Teeku Dutta:* (2005) 4 SCC 449, a judgment though rendered in the realm of the Succession Act, 1925, but has a bearing in the context of the present case, whereof their Lordships were pleased to observe:

"13.We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would

**be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above. (See *Kamti Devi V. Poshi Ram.*)**

8. The judgments relied upon by the respondent turn on their own facts and the principle laid down therein are not attracted in the facts of present case. On the contrary the principle of law laid down by the Apex Court in the case of *Gautam Kundu, Kanti Devi and Banarsi Dass* (ibid) enunciating the concept of conclusive presumption regarding the paternity of a child under section 112 of the Evidence Act, applies on all its fours in the facts of present case; wherein, evidence is yet to be led by the respondent/husband in respect of the pleas he has taken.

9. In our considered opinion, therefore, the trial Court was not within its right to have allowed the application under Order 26 Rule 10 A Code of Civil Procedure calling upon to conduct the DNA test of the petitioner no.2. Consequently, the impugned order is quashed.

10. In result the petition is allowed. However no costs.

*Petition allowed.*

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**I.L.R. [2009] M. P., 1642**
**WRIT PETITION**
***Before Mr. Justice Arun Mishra & Mr. Justice Sanjay Yadav***
20 January, 2009*

GULAM HUSAIN & anr. ... Petitioners
Vs.
ARSHAD IQBAL & ors. ... Respondents

A. **Civil Procedure Code (5 of 1908), Section 151, Order 23 Rule 3** - *Decree obtained fraudulently - Aggrieved party can file civil suit or appeal or application in the same court to assail it.* (Para 12)

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

B. **Civil Procedure Code (5 of 1908), Section 151, Order 23 Rule 3** - *When one cannot challenge compromise decree u/s 151 CPC - Compromise*

*W.P. No.119/2008 (Jabalpur)

*decree directing specific performance of agreement to sell the land - Decree challenged by way of application u/s 151 CPC on the ground that petitioners have purchased the land vide registered sale deed and are in possession of land but not impleaded as party in the suit - Application rejected - Held - Prima facie from sale deed it appears that under the sale deed the amount of loan was secured - Petitioners did not take step for getting their names mutated for a period of 29 to 30 years - Untill & unless it is proved that it was not executed as collateral security for loan it cannot be said that fraud has been played in obtaining compromise decree - It would be appropriate to relegate petitioners to file a civil suit.* (Para 12)

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

**Cases referred :**

2008(1) MPLJ 235, AIR 1993 SC 139, AIR 2003 SC 2686, 2005(II) MPWN 351, 2008 ACJ 2874.

*Ashok Lalwani* with *Satish Singh Thakur,* for the petitioners.

*K.N. Fakhruddin,* for the respondent Nos.1 to 3.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :– The instant writ petition has been filed by the petitioners challenging the order dated 17-12-2007 (Annexure-P/15) passed in M. J. C. No. 388/07 by Second Additional District Judge, Bhopal (M.P.) by which the application filed by petitioners under section 151 of C.P.C. to set aside the judgment and decree passed in Lok Adalat in Civil Suit No. 139-A/07, has been dismissed.

2. Civil Suit No. 139-A/07 was filed by respondents Arshad Iqbal and Arif Siddiqui against respondents Hemraj and State of Madhya Pradesh. State of Madhya Pradesh was impleaded as proforma party defendant No.2. The said suit was filed for specific performance of the agreement to sell entered into between the parties for a sum of Rs. 47,60,000/-. Out of the amount Rs. 10,00,000/- was already paid. The parties entered into the compromise in the suit and application under

Order 23 Rules 3 read with section 151 of C.P.C. for passing a compromise decree was filed, which was signed by plaintiffs as well as by defendant No. 1 and their counsel. It was certified by the parties present before the Lok Adalat and in terms of the compromise application Lok Adalat passed the consent judgment and a decree on 6-10-2007 directing specific performance of agreement to sell.

3. Present petitioners Gulam Husain and Gulzar Husain filed an application under section 151 read with Order 23 Rule 3 of the C.P.C. before the trial Court on 5-11-2007 for setting aside the compromise decree passed in Lok Adalat. It was submitted that they had purchased the land from Hemraj in a sum of Rs. 11,000/- vide registered sale deed dated 22-4-1977 and they are in possession of the land. They applied for mutation in November, 2006. The plaintiffs were aware of the dispute between the petitioners and the defendant No. 1. They were not impleaded as party to the suit and the compromise decree was passed.

4. The plaintiffs in their reply contested that consent order passed by the Lok Adalat cannot be assailed by third party. The applicants were not having right, title or interest in the land hence it was not necessary to implead them.

5. Defendant Hemraj in his reply denied the allegations which were made in the application. He submitted that the sale deed was not executed in fact loan was obtained and sum of Rs. 11,000/- has been repaid to the applicants. As a security of loan the nominal and fictitious sale deed was executed. He had remained in possession of the land. Land revenue was also paid by him for last 30 years. Sale deed was not to be acted upon and had it been out and out sale it was incumbent upon applicants to get their name mutated. The compromise has been lawfully entered into between the parties to the suit.

6. The trial Court vide impugned order dated 17-12-2007 (Annexure-P/15) has held that application under section 151 of the C.P.C. is not maintainable. Even otherwise it is open to the applicants to file civil suit as they were not party to the civil suit and compromise decree.

7. Shri Ashok Lalwani, learned counsel for the petitioners has submitted that compromise was not lawful. The trial Court did not record satisfaction as to the lawfulness of the compromise which is sine qua non under Order 23 Rule 3 of the C.P.C. He has further submitted that three recourse are available to assail the fraudulent compromise decree by way of civil suit, appeal or by application before the same Court. He has also relied upon the decisions of the Apex Court in *A. A. Gopalakrishnan vs. Cochin Devasworn Board and others* [2008 (1) M.P.L.J. 235], *Banwari Lal v. Smt. Chando Devi (through L.R.) and another* [A.I.R. 1993 S. C. 1139] and *Dwarka Prasad Agarwal and another v. B. D. Agarwal and others* [AIR 2003 S.C. 2686]. To explain what is fraud the learned counsel has relied upon the decision of the Apex Court *State of A. P. v. T. Suryachandra Rao* [2005 (II) M.P.W.N. 351]. He has also referred to the decision of *State of*

*Punjab and another v. Jalour Singh and others* [2008 A.C.J. 2874] in which power of Lok Adalat has been dealt with.

8. Shri K. M. Fakhruddin, appearing on behalf of the respondents No. 1 to 3 has supported the order. He has submitted that no fraud has been played. There is a condition in the sale deed that after payment of the loan it was not to be acted upon and the land was to be reverted back to the defendant Hemraj after one year. Mutation was not obtained by the petitioners which indicate sale deed was not acted upon. The name of Hemraj continued to be recorded as Bhumiswami in possession in the revenue records. Consequently, the compromise entered into is lawful. It is open to the applicants in case they want to establish their title, they are free to file independent civil suit. It would not be proper to interfere in the instant case even if the application filed under section 151 of the C.P.C. before the trial Court is held to be maintainable.

9. In the instant case the sale deed was executed in favour of the petitioners with a condition that it was executed for a period of one year. It was executed way back in the year 1977 and para 3 and 5 contains the condition that sale deed is valid for one year. As such there was no violation of the provisions of Ceiling Act. It also contains the condition that on repayment of the amount of Rs. 11,000/- which was secured till 22nd April, 1978, the land was to be reverted back to Hemraj and on repayment the document shall not be acted upon.

10. Prima-facie from para 3 and 5 of sale deed it appears that under the sale deed the amount of loan was secured and sale deed was not intended to be acted upon on repayment of Rs. 11,000/-, which was paid under it. It is also not disputed that applicants Arshad Iqbal and Arif Siddiqui did not get their name mutated on the strength of so-called sale deed executed in the year 1977. The name of Hemraj, defendant No. 1, continued to be recorded as Bhumiswami in possession in the revenue record. It appears that after 29 years in October, 2006 the application was filed for mutation by the applicants which has not been allowed so far. It appears that the agreement of sale was entered into between defendant Hemraj and plaintiffs of the Civil Suit No. 139-A/07. After making payment of the requisite court fees the civil suit was filed and it is not in dispute that defendant and plaintiffs had agreed for passing of a compromise decree before the Lok Adalat. The decree was passed on the basis of compromise application which was signed by the parties. Shri Lalwani has submitted that lawfulness of compromise was not ascertained by the trial Court. The order sheets mention that wishes of the parties were ascertained and the Court was satisfied about the lawfulness and factum of compromise and willingness of the parties. Accordingly the judgment and decree was passed in Lok Adalat.

11. Shri Lalwani has submitted that the State of M. P. had not signed on the compromise application. It was necessary as per the provision of Order 23 Rule 3

of the C.P.C. that the State should have also signed the compromise application. In our opinion the State was only a proforma defendant in the instant case and it was not necessary for the State to sign the compromise application, which was reached between the plaintiffs and defendant No. 1. The State was impleaded to ascertain that the land held by the parties does not exceed the ceiling limit. It was not necessary for it to sign the compromise application. It was open to the State to inquire the aforesaid aspects under the Ceiling Act as provided under Order 1 Rule 3 B and Order 6 Rule 4A of the C.P.C. as per the Madhya Pradesh State Amedment.

12. We agree with the submission that in case fraudulent decree has been obtained recourses are available to the party aggrieved i.e. to file civil suit to assail it by filing appeal or by application in the same Court. Even this question can be looked into the writ petition. Question is whether in the facts of the instant case it would be appropriate to set aside the compromise decree which has been passed on the application filed by applicants or they should be asked to get their title adjudicated in separate suit. The Apex Court in *A. A. Gopalakrishnan vs. Cochin Devasworn Board and others* (supra) has held that in case compromise decree has been obtained by fraud on the part of the statutory board which has attained finality challenge to such compromise decree cannot be rejected on technical ground and compromise decree was set aside. We are of the same opinion. However, the question in the instant case is whether it would be appropriate to set aside the compromise decree passed in the case on an application which has been filed under section 151 of the C.P.C. When we consider the facts mentioned in para 3 and 5 of sale deed of the year 1977, it is required to be proved by present petitioners that the sale deed was out and out sale and secured amount of Rs.11,000/- was not repaid to them. Sale deed contains a stipulation that it was executed only for one year. It was obviously to secure the loan amount. The fact also remains that for the purpose of mutation on the basis of sale deed the present petitioners did not take any step for getting their name mutated for a period of 29-30 years. Until and unless it is proved that it was not executed as collateral security for loan it cannot be said that fraud has been played by plaintiffs or defendant in obtaining compromise decree. In our considered opinion it would be open for the petitioners to file civil suit to establish that it was out and out sale and loan was not repaid to them. In the instant case the defendant No. 1 has continued to be as Bhumiswami in the revenue record, he was at least ostensible owner. It would be appropriate to relegate petitioners to file fresh civil suit. The judgment and decree would not be binding upon them as they were not party to the suit.

13. Shri Lalwani has also placed reliance on the decision of *Dwarka Prasad Agarwal and another v. B. D. Agarwal and others* (supra) wherein the question agitated was about lawfulness of the agreement. In that context it was held that as compromise was not lawful, it should not have been recorded. In the instant

case prima-facie the compromise appears to be lawful and the trial Court has not committed any error in recording it. However, in case right of the present petitioners is effected, it would be proper for them to establish their right, title or interest on the basis of aforesaid sale deed by filing an independent suit.

14. Learned counsel has also relied upon the decision of *Banwari Lal v. Smt. Chando Devi (through L.R.) and another* (supra) in which it has been held that a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under section 96(1) of the C.P.C., in which he can now question the validity of the compromise. Since the petitioners were not party, their rights are not going to be effected and it would not be binding on the petitioners. In the facts the matter can be examined in ar elaborate manner in fresh civil suit.

15. Shri Lalwani has also submitted to press into service *State of Punjab and another v. Jalour Singh and others* (supra) in which the Apex Court has laid down that Lok Adalat cannot adjudicate upon and decide without the consent of the parties. In the instant case the decision is of no help to the petitioners as parties were consensus ad idem and admittedly compromised the matter before the Lok Adalat. There is no dispute that the parties have entered into a compromise and Lok Adalat has not adjudicated the matter on merit but decided it on the basis of the terms of compromise petition entered into between the parties and has looked into the lawfulness part only.

16. In view of the aforesaid we are not inclined to interfere in the impugned order. Resultantly, we find no merit in the petition and the same is dismissed. We leave the parties to bear cost of the petition as incurred.

*Petition dismissed.*

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**I.L.R. [2009] M. P., 1647**
**WRIT PETITION**

***Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice P.K. Jaiswal***

21 January, 2009*

GAURAV TECHNICA INDIA PVT. LTD. ... Petitioner

Vs.

MUNICIPAL CORPORATION, KATNI ... Respondent

**Constitution, Article 226** - *Contract - Notice inviting tender - Notice inviting tender mentioned that the earnest money in the form of FDR in favour of Municipal Corporation has to be deposited one day prior to the opening of the tender - Petitioner's tender was not opened as he deposited the earnest money in the form of FDR in favour of Municipal Corporation along with his tender and not one day prior - Held - Notice inviting tender did not*

*W.P. No.9453/2008 (Jabalpur)

*clearly or expressly state that the FDR receipt towards the earnest money deposit should be furnished to the Municipal Corporation one day prior to the date of opening of the tender - That Fixed Deposit was infact made in favour of the Municipal Corporation one day prior to the date of opening of the tender, but Fixed Deposit Receipt was not furnished to the Municipal Corporation one day prior to the date of opening of the tender, but was submitted alongwith the tender of the petitioner to the Municipal Corporation on the date of opening of tender - Fairness demands that the tender of the petitioner be considered by the Municipal Corporation.* (Para 8)

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

**Cases referred :**

AIR 1991 SC 1579, (1990) 1 SCC 492, AIR 2000 SC 2272, (1997) 1 SCC 53.

*M.K. Agrawal,* for the petitioner.

*A.J. Pawar & Hitendra Singh,* for the respondent.

## J U D G M E N T

The Judgment of the Court was delivered by **A.K. Patnaik, C. J. :**–In response to a notice inviting tender (N.I.T.) dated 23.7.08 issued by the Municipal Corporation, Katni, the petitioner submitted a tender for item no. 5, of the NIT alongwith Fixed Deposit Receipt (F.D.R.) of State Bank of India, Arnlai Branch in favour of the Municipal Corporation, Katni dated 31.7.08. The tender was opened on 2.8.08 while the tender of the petitioner and another contractor were not opened, the tenders of other tenderers were opened. The reasons for not opening the tender of the petitioner was on the ground that petitioner had not deposited the earnest money with the Municipal Corporation, Katni one day prior to the date of opening of the tender. Aggrieved the petitioner has filed this petition under Article 226 of the Constitution of India for direction to respondent to open the tender of the petitioner and consider the same.

2. A return filed by the respondent stating that the condition in the notice dated

27.2.08 was that the tenderer was to deposit the earnest money one day prior to the date of opening of the tender and this condition was mandatory and since the petitioner and another contractor had not deposited the earnest money with the Municipal Corporation, Katni one day prior to the date of opening of the tender, the tender of the petitioner and another contractor was not considered and only the tenders of those tenderers who had deposited the earnest money with the Municipal Corporation, Katni one day prior to opening of the tender were considered by the respondent.

3. Mr. M.K. Agrawal, learned counsel for the petitioner submits that in the tender notice inviting tender all that was mentioned was that earnest money in cash or F.D.R. or NSC should be deposited one day prior to the date of opening of the tender and it was not mentioned in the notice inviting tender that the Fixed Deposit Receipts, (FDR) should be filed with the Municipal Corporation, Katni one day prior to the opening of the tender and for this reason the petitioner made F.D.R. for earnest money in favour of the Municipal Corporation, Katni in the State Bank of India, Amlai Branch, one day prior to the date of opening of the tender but submitted the F.D.R. alongwith his tender on the date of opening of the tender before the competent authority of the Municipal Corporation, Katni. He cited the decision of the Supreme Court in *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others* - AIR 1991 S.C. 1579 in which the Supreme Court found that as per terms of the tender notice the earnest money was to be drawn on State Bank of India but the tenderer had sent a cheque of Union Bank of India instead of the State Bank of India and the Supreme Court held that the authority who invited the tender could deviate from the terms of the tender notice, which were not essential conditions of eligibility and cheque of Union Bank of India could be treated as sufficient for the purpose of achieving the object of the conditions.

4. Mr. Agrawal, further submitted submits that the petitioner had quoted a rate 19% above the Approved Schedule of Rate whereas the tenderers whose tender were opened and considered by the respondent had quoted 39.8% and 38% above the Approved Scheduled of Rate. He submitted that if the tender of the petitioner was considered, the Municipal Corporation, Katni would save about Rs. 12 lacs and, hence opening of the tender of the petitioner was in the public interest. He cited the decision of the Supreme Court in *Raunaq International Ltd. Vs. I. V.R. Constructions Ltd. And others* - (1990) I SCC 492 wherein it was held that court should find out the competent public interest in the matter of judicial review of award of contract.

5. Mr. Arpan J. Pawar with the Hitendra Singh, learned counsel for the respondent submitted that other tenderers, besides the petitioner and one of the tender, had deposited the earnest money with the Municipal Corporation, Katni one day prior to the date of opening of the tender and, therefore, there was no difficulty in

understanding the stipulation in the NIT that the earnest money in the form of cash, F.D.R. or N.S.C. was to be deposited prior to the date of opening of the tender with the Municipal Corporation, Katni. He submitted that the petitioner and another tenderer did not submit the earnest money in the form of cash or F.D.R. or N.S.C. with the Municipal Corporation, Katni, one day prior the date of opening of the tender and the respondent, therefore, rightly did not consider the tender of the petitioner and another tenderer. He cited the decision of the Supreme Court in *M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and others* - AIR 2000 SC 2272, in which the Supreme Court found that instead of depositing the earnest money of a sum of Rs. 1.70 crores in the form of demand draft/pay order or cash as stipulated in the notice inviting tender, the tenderer had deposited a cheque for Rs. 1.70 Crores and the Supreme Court held that the Municipal Corporation was justified in rejecting the tender made by the tenderer as not fulfilling the conditions of the tender.

6. We have carefully perused the Notice Inviting Tender (NIT) and we find it states that earnest money deposit has to be made one day prior to the date of opening of the tender in the form of F.D.R. Or N.S.C. or cash but it does not say that the receipt of F.D.R. has to be deposited with the Municipal Corporation, Katni one day prror to the date of opening of the tender. So far cash is concerned, obviously the same will have to be deposited with the Municipal Corporation, Katni one day prior to the date of opening of the tender and so far as N.S.C. is concerned, the same has to be pleased in favour of the Municipal Corporation, Katni one day prior to the date of opening of the tender but so far as the Fixed Deposits is concerned, the same has to be deposited with the bank, in this case in favour of the Municipal Corporation, Katni one day prior to the date of opening of the tender. If at the time of opening of the tender, the tenderer apprised the authorities opening the tender that he had made a fixed deposit in favour of the Municipal Corporation, Katni one day prior to the date of opening of the tender, in our considered opinion, the condition of the tender notice that the earnest money has to be made one day prior to the date of opening of the tender is said to have been complied.

7. If the intention of the respondent was that whether Fixed Deposit was made in favour the Municipal Corporation, Katni the Fixed Deposit Receipt was to be filed with the Municipal Corporation, Katni, one day prior to the date of opening of the tender then the same should have been stipulated clearly or expressly in the notice inviting tender. As has been held by the Supreme Court in the *Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and others* - (1997) I SCC53 :-

> "We reiterate that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of the tender should be transparent, fair and open."

8. In the present case we have seen the notice inviting tender dated 23.7.08 did not clearly or expressly state that the F.D.R. receipt towards the earnest money deposit should be furnished to the Municipal Corporation, Katni one day prior to the date of opening of the tender. That Fixed Deposit was infact made in favour of the Municipal Corporation, Katni one day prior to the date of opening of the tender, but Fixed Deposit Receipt was not furnished to the Municipal Corporation one day prior to the date of opening of the tender, but was submitted alongwith the tender of the petitioner to the Municipal Corporation on the date of opening of tender. Fairness demands that the tender of the petitioner be considered by the Municipal Corporation.

9. That apart, the petitioner claimed to have quoted a rate 19% above the Approved Schedule of Rate, whereas the two tenderers whose tenders have been considered have quoted much higher rates 31.9% and 38% above the Approved Scheduled of Rate for the same work. Public Interest demands that Corporation should consider the tender of the petitioner alongwith tender of other valid tenderers.

10. Therefore, we allow the writ petition and direct the respondent to consider the tender of the petitioner alongwith valid tenders of other tenderers.

*Petition allowed.*

June-09 (First)

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**I.L.R. [2009] M. P., 1651**
**WRIT PETITION**
*Before Mr. Justice Dipak Misra & Mr. Justice S.A. Naqvi*
21 January, 2009*

SHASHANK SAXENA (DR.) ... Petitioner
Vs.
THE PRINCIPAL SECRETARY, PUBLIC HEALTH & FAMILY WELFARE DEPARTMENT GOVERNMENT OF M.P. & ors. ... Respondents

**Medical Dental Postgraduate Entrance Examination Rules, M.P. 2007, Rule 2(f) -** ***Rural area - Petitioner posted in Agar which has been notified as municipal area - Definition of rural area is clear and unambiguous - Agar cannot be construed as rural area u/R 2(f) of Rules as departure from categorical, unambiguous definition would cause violence to Rules - Petition dismissed.*** (Paras 12 & 14)

चिकित्सा दंत स्नातकोत्तर प्रवेश परीक्षा नियम, म.प्र. 2007, नियम 2(एफ) – ग्रामीण क्षेत्र – याची आगर में पदस्थ जो नगरपालिका क्षेत्र के रूप में अधिसूचित किया गया – ग्रामीण क्षेत्र की परिभाषा स्पष्ट और असंदिग्ध है – नियम 2(एफ) के अधीन आगर को ग्रामीण क्षेत्र के रूप में नही माना जा सकता क्योंकि सुस्पष्ट, असंदिग्ध परिभाषा से विचलन नियमों का उल्लंघन होगा – याचिका खारिज।

*W.P. No.4788/2007 (Jabalpur)

*Rajendra Tiwari* with *Amitabh Gupta,* for the petitioner.
*Deepak Awasthy, G.A.,* for the respondents.

**ORDER**

The Order of the Court was delivered by DIPAK MISRA, J. :–Invoking the extraordinary jurisdiction of this Court the petitioner has prayed that Rule 10(2)(b)(d) and Rule 10(3) of M.P. Medical Dental Postgraduate Entrance Examination Rules, 2007 (for short 'the 2007 Rules') be declared ultra vires the Article 14 of the Constitution and further to issue a mandamus to the respondents to treat him as an in-service candidate from the rural area for the purpose of grant of weightage regard being had to the weightage conferred for posting in such areas.

2. At the very outset it is condign to mention that on 10-3-08 the learned counsel for the petitioner abandoned the challenge to the Rules inasmuch as the Rules had been declared intra vires in of *Dr. Arvind Bhatia Vs. State of M.P. and others,* AIR 2007 MP 196. This Court on the said date recorded abadonment of the prayer and kept the other issues alive. Thereafter on 17-3-08 this Court passed the following order:

> *"It is submitted by Mr. Rajendra Tiwari, learned senior counsel being assisted by Mr. Gupta that the controversy involved in the case at hand would rest on a singular ground, namely, whether the station which is treated as rural posting for compulsory rotating internship would be excluded for awarding marks for in-service candidates. To bolster his submission he has drawn our attention to the order dated 31.3.2007 as contained in Annexure P-12. On a scrutiny of the same it is revealable that interns have been posted at Agar which finds mention at serial No.9 and is treated as rural posting. The seminal question that emerges for consideration is whether posting to such place would enure benefit to the in-service candidate who is holding the posting there for a period of eight years.*
>
> *Mr. Deepak Awasthy, learned Government Advocate shall file an affidavit exclusively in this regard. The affidavit shall also indicate on what foundation/base Agar is treated as station for rural posting."*

In view of the aforesaid, the spinal issue that requires advertence is whether the petitioner by virtue of his posting at Agar in the district of Shajapur can be conferred weightage as postulated in the Rules.

3. Rule 2 of 2007 Rules is the dictionary clause. Rule 2(d) defines `in-service' candidate. It reads as under:

*"In-Service Candidate" means,*

*1. Medical officer of Public Health and Family Welfare Department, who is serving under the Government of Madhya Pradesh and not serving on contract basis;*

*2. Demonstrator working on regular basis in Medical colleges under Medical Education Department Demonstrator working on contractual basis, will be not eligible."*

*Rule 2(f) defines 'rural areas'. It reads as under:*

*"Rural area" means the area other than Municipal Corporation and Municipal Council area."*

Rule 10 deals with examination and merit list of in-service candidate. Rule 10(2) deals with inter-se merit of Medical Officer. Rule 10(3) deals with grant of benefit to demonstrators. To get the complete picture frescoed it is apt to reproduce Rule 10 in entirety.

*"10. Examination and Merit List: (In-service candidates)*

*(1) There will be one common entrance examination for Post Graduate entrance conducted by Professional Examination Board. The In-service candidates will be selected on the basis of the same entrance examination. The In-service candidates shall have to secure minimum qualifying marks in the Pre-P.G.Entrance Examination. As prescribed in those rules for admission. The Professional Examination Board will prepare and declare separate merit list of selected In-service candidates. Total marks for the examination for In-service candidates shall be 200. Such In-service candidates, declared successful will be considered for final merit list by addition of marks calculated on the following basis.*

*(2) Medical officer*

*The inter-se merit of the selected In service candidate shall be fixed up by adding marks of weightage for their services rendered in rural areas. The candidates serving in rural area will get maximum of 50 marks, alloted on the following basis:-*

*(a) For Government service of one year duration white posted in rural area a weightage of maximum 06 marks will be given. For the service in rural area, the maximum gain of marks will be 30 or 20 as per following marks for one year each, for five years.*

*If the regular service are rendered in Primary Health Centre or Community Health Centre situated in rural area then*

*06 marks will be given for one year and if regular services are rendered in primary Health Centre or Community Health Centre in Nagar Panchayat Area, which has been formed under the "Municipalities Act, 1961" then 04 marks will be given for one year.*

*(b) For every year of regular service, 04 additional marks will be given, if the rural area comes under tribal sub plan. If such services are rendered in Primary Health Centre the candidate will get maximum 20 additional marks at the rate of 04 additional marks per year for five years and for rendering such regular services at community health center, the candidate will get total additional 10 marks at the rate of 02 marks per year for five eyars.*

*(c ) For the purpose of this rule, the period of service of candidate while posted in rural area or Nagar Panchayat area or tribal area and if he/she was on unauthorized absence from duty/any dies non period/any period of leave without pay/any period on training exceeding 2 month/attachment in urban area during the tenure of rural service will not be counted for the purpose of calculation of marks for weightage of rural service.*

*(d) The final merit of In-service candidates will be prepared by Professional Examination Board for counselling on the basis of marks obtained in entrance examination (equivalent to 200 marks) and marks secured for weightage of rural/tribal area service (equivalent to maximum 50 marks) thus a total of 250 marks.*

*(e) In case of two or more candidates obtaining equal marks, the inter-se merit will be decided as per procedure described in sub-rule (2) of rule 19.*

*(f) The counselling of In-service candidates will be done by the Medical Examination Department.*

*(3) Demonstrator- Demonstrator will be given 10 marks for each year of service after 5 yrs of minimum service rendered whose maximum limit shall be 50 marks for 5 yrs. The marks will be allotted to by the Dean of the concern college."*

4. The averments made in the petition which are relevant for the purpose of determination of grant of weightage to the petitioner are only to be stated as other pleadings have paled into insignificance because of abandonment of challenge to the constitutional validity of the Rules. It is contended in the petition that Agar is

a small Tahsil having population of 40,000 to 50,000. Although it is municipality but mostly the composition of the municipalities covered by the rural villages. Reference has been to Section 5 of the M.P. Municipalities Act, 1961 which provides for constitution of `Municipal Council' and `Nagar Panchayat'. As per definition of `Nagar Panchayat' it is a transitional area which is in the transition from rural area to urban area and the municipal area is also a smaller urban area which is also in transition from rural to urban. Therefore, as set forth, for all practical purposes municipal council is to be treated as an area akin to Nagar Panchayat. It is averred that there is no difference between Nagar Panchayat and Municipal council and Agar where the petitioner is catering to the needs of people of rural areas and for all practical purposes has to be treated as a Medical Officer working in rural areas.

5. A counter affidavit has been filed justifying the validity of the Rules. That apart, certain factual aspects have been highlighted. Keeping in view the abandonment of challenge tot he constitutional validity the stand and stance taken in the return in that regard need not be stated. As far as rendering of service of the petitioner in the rural area it has been asserted in the return that Medical Officers who were working in the municipal area cannot be covered under the concept of rural area as the municipal council cannot be treated as a 'Nagar Panchayat'.

6. A rejoinder affidavit has been filed by the petitioner contending, inter alia, that the first posting of the petitioner was made after his selection by the P.S.C. In Zila Yojna Samiti, Shajapur, Agar. Agar is a a Tahsil place surrounded by villages and while working at Agar the petitioner was Sector Incharge which includes cluster of 50 villages and he worked from 1-6-02 to 25-10-04. While working as Assistant Surgeon in Agar the petitioner was required to visit villages in order to achieve national programme like vaccination, family welfare, antenatal check-ups, blindness central programme. He also provides medical assistance to the villagers suffering and are unable to come to Agar. On 25-10-04 he was appointed as Block Medical Officer, Agar and his duties involved looking after 138 villages and he was administering treatment and providing medical aid for achieving national programme. It is also put forth that the petitioner has worked in Knad Village also while discharging his duties as a Sector Incharge or Block Medical Officer. Averments have been made that he has worked in many a hospital in rural area and has been given Rs.50,000/- forgiving best servides to the rural areas. It is also contended that the Medical Education Department itself has posted interns for six months prior to posting as a rotating rural internship at Agar which would go a long way to show that Medical Department has been treating Agar as a rural area. An affidavit has been filed how the candidates who are placed lower in merit list have been extended the benefit of admission.

7. Be it noted, an affidavit has been filed by the Director, Public Health and Family Welfare stating that Agar is notified as a municipality having 18 wards. It

is also setforth therein that students are posted for six months rural posting as a part of one year compulsory rotating internship and that cannot be equated as rural service and that by itself would not make Agar a rural area.

8. We have heard Mr. Rajendra Tiwari, learned Senior Counsel along with Mr.Amitabh Gupta for the petitioner and Mr. Deepak Awasthi, learned Govt. Adv. For the State.

9. Submission of Mr. Tiwari, learned senior counsel is that when the Rule provides conferral of weightage to a Medical Officer for his posting in rural area regard being had to the duration, the petitioner cannot be deprived of the said weightate inasmuch as the has really served in the rural area and faced the problems of ground reality. It is urged by him that rural posting should not be understood in a pedantic manner and it would be appropriate to abandon the doctrinaire approach and assess the essential concept of rural. Learned senior counsel submitted that Rule 10(2) uses the terms 'service in rural area' and the said terms should be given expanded meaning and in its connotative expanse should be construed including the service rendered by doctors who might have been posted in an area which comes within the municipality but fundamentally require the service in rural area. Emphasis, submits Mr. Tiwari, has to be on the purpose of 'rural service' but not the literal understanding of "rural area" by adopting ultra technical approach as has been done by the authorities. Learned senior counsel has further canvassed that the State Govt. in the Department of Community and Medicines while treating the posting at Agar for intern as rural posting, it is contradictory in terms that it would not take into consideration the posting of the petitioner at Agar as part of rural service for conferral of weightage of Admission Rules, 2007.

10. Resisting the aforesaid submissions it is contended by Mr. Deepak Awasthi, learned Govt. Adv. For the State that the Rules categorically define what is rural area and when there is meaning given to a term, it would be inapposite to extend the meaning. It is put forth by him that if the contentions of the petitioner is accepted it will usher in chaos inasmuch as in the State of M.P. there are many municipalities which is adjacent to rural areas having interior base and if the Medical Officer is posted in such a municipality and allowed to work then the members who are posted in interior areas would be deprived of the same. Regard being had to the said concept the Rule has made a classification between the Medical Officer rendering services in rural area and other categories. It is propounded by Mr. Awasthi, that once the validity of the Rule has been upheld the same has to be respected from all spectrums and no bending should be made to include a particular person or a category or to analyse the facts to scrutinse to give the benefit as that would tantamount to subverting the very purpose of the rule. Learned Governed Advocate submitted that the Rule of purposive construction is not attracted to the case at hand as the language is unambiguous, clear and also has a definite purpose.

11. We have already reproduced the relevant rules in question. Rule 2(f) defines 'rural area' to an area other than municipal corporation area and municipal council area. As per document Ann.R-1 attached to the affidavit by the Director, Public Health and Family Welfare the State Govt. by notification No.68-XVIII-III-94 dated 13-7-1994 published in M.P. Rajpatra (Ashadharan) dated 13-7-1994 P.674(2) as amended by Niotification dated 2-7-1999 published in Rajpatra Part-2, dated 16-7-99 P.154 in exercise of the powers conferred by sub-Section (1) of Section 29 of M.P. Municipalities Act, 1961 (No.37 of 1961) and in supersession of all previous notifications issued on the subject has determined the number of wards specified in corresponding column (3) of the said Table. In the said notifications in column No.2 the name of municipalities and in column (3) number of wards are mentioned. Agar, situate in District, Shajapur, has been placed at serial number 29 and it has been stated that it contains 18 wards. From the aforesaid notification it is clear as day that Agar is a municipality.

12. Rule 10(2) postulates that weightage of marks shall be given for government service to a Medical Officer in rural area. Rule 2(f) defines 'rural area'. The definition is clear and unambiguous. It is an area which is other than municipal corporation or the municipal council area. The municipal area has been defined in Municipal Corporation Act, 1956 as under:-

> *"2(34-a) "Municipal area" means the territorial area of a Municipal Corporation as is notified by the Governor under sub-section (2) of Section 7 of this Act."*

Municipality area has been defined in Municipalities Act, 1961 which is as under:-

> *"2(18-a) "Municipal area" means the smaller urban area or the transitional area, as the Governor may, by public notification, specify, in accordance with the provisions laid down in Section 5 of this Act."*

On a perusal of both the provisions it is vivid that certain positive actions are to be taken by the Governor by issuing public notification. Agar has been notified to be a municipal area. Thus, it cannot be construed as a rural area under Rule 2(f) of the Rules.

13. Submission of Mr. Tiwari, learned senior counsel is that when the Medical Department treated Agar to be a rural posting for inters there is no justification not to treat rendering of service by the petitioner at Agar as service in rural area. The aforesaid submission on a first blush looks quite attractive but on a keener scrutiny it pales into insignificance. The interns are not the Medical Officers. They are not in-service candidates as the dictionary clause stipulates 'in-service candidate' to mean Medical Officer of Public Health and Family Welfare Department who is serving under the Government of India and not serving on

contract basis. Six months rural posting given to interns is a part of one year compulsory rotating internship and it cannot be equated with rendered services. Thus, reliance placed on the said document is totally misconceived and, therefore, the submission is unacceptable.

14. It is also urged by Mr. Tiwari that a benevolent and beneficial approach has to be taken while construing the terms rural service. In quintessentiality his proponement is that the conferral of weightage for service in rural area has to be leniently understood. It is urged by him that if a medical officer is actually working in rural area and serving rural public should be extended the benefit. The aforesaid submsision would have deserved delineation but when the rural area has been defined in a categorical, unambiguous and definitive manner, departure from the same would cause violence to the rules. That apart, as we are disposed to think, the same really does not require any purposive construction as there are Medical Officers who are working in rural area which are well demarcated.

15. A stand has been taken that the petitioner has never denied to accept the posting in a rural area. Be that as it may, the weightage having been attached to rural service and same being distinct and definite its benefit cannot be extended as that would usher in chaos because an endeavour has to made to find out who is actually rendering service in rural area. The rule making authority to avoid that kind of confusion has given a clear-cut definition. It has a purpose and the purpose is to avoid any kind of confusion and assertion of unwarranted claims. As Agar is a municipality in the District, Shajapur and is excluded by the definition clause we are afraid, he cannot be regarded as a Medical Officer who has rendered services in rural area and hence, is entitled to weightage of marks.

16. In view of the foregoing analysis, there is no substance in the writ petition and accordingly the same stands dismissed. There shall be no order as to costs.

*Petition dismissed.*

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**I.L.R. [2009] M. P., 1658**
**WRIT PETITION**
***Before Mr. Justice R.S. Jha***
27 January, 2009*

NATHURAM ... Petitioner
Vs.
FOOD CORPORATION OF INDIA & anr. ... Respondents

A. **Service Law** - *Disciplinary Authority - Competence - Punishment - Petitioner removed from service by an order of Senior Regional Manager - He filed an appeal before the Zonal Manager which was entertained - Prior to passing of the order Regulations were amended and Regional Manager*

*W.P. No.2400/1997 (Jabalpur)

*was made the Disciplinary Authority - Action challenged on the ground that the order of punishment was passed by an authority senior to the Disciplinary Authority and his right of appeal was prejudiced - Held - Order of removal was passed by an authority higher than the one prescribed in the Regulations as on the date the order was issued, no prejudice or discrimination resulted therefrom as the petitioner successfully availed of the remedy of appeal and even though the remedy of review was also available to him, he chose not to avail the same.* (Para 13)

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

**B. Service Law** - *Concurrent finding of fact by Disciplinary Authority and Appellate Authority - Held - Cannot be interfered with when dealing with the charge both the authorities applied their mind and no document was produced by the petitioner in support of his case in respect of a particular charge before the Disciplinary Authority.* (Para 15)

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

**Cases referred :**

(1995) 2 SCC 474, (1997) 3 SCC 371, (2007) 10 SCC 662.

*Sheel Nagu,* for the petitioner.

*S.K. Rao* with *S. Pandey,* for the respondents.

**ORDER**

**R.S. JHA, J.** :–The petitioner who was employed as Assistant Grade II in the establishment of the respondent-Corporation, has filed this petition being aggrieved by the order of his removal from service dated 25-3-1986 and the order dated 16-2-1995 dismissing his appeal.

2. Before we advert to the facts necessary for adjudication of the present

petition, it is necessary to take note of the fact that the petitioner was suspended while performing his duties as Depot Incharge, Ashoknagar Depot in Gwalior region. Subsequently, his order of suspension was revoked and he was posted at Jabalpur and thereafter at Balaghat. The impugned order of removal from service was issued while the petitioner was working at Balaghat and his appeal has been decided by the appellate authority at Bhopal, however, the petitioner had filed a writ petition which was registered as W.P.No. 521/95 before the Gwalior Bench of this Court assailing the order of his removal as well as the appellate order. This writ petition was dismissed on 30-9-96 recording a finding that the Gwalior Bench had no jurisdiction to hear the petitioner's case but while doing so the learned single Judge also recorded findings on merits and, therefore, the petitioner had filed an appeal against the order of the learned single Judge which was registered as L.P.A. No. 407/96 and was decided on 29-4-97 and while the order in respect of jurisdiction was upheld, the findings recorded by the learned single Judge on merits of the case were directed not to come in the way of the petitioner if he presents a fresh petition before the main seat of the High Court at Jabalpur which had jurisdiction to entertain the petition and it is pursuant to the aforesaid observations of the Division Bench that the petitioner has filed the present petition.

3. The facts necessary for adjudication of the issues raised before this Court by the petitioner are that the petitioner, while working as Depot Incharge, at Ashoknagar, was suspended and served with a charge sheet on 12-10-84 wherein charges of misappropriation of 31.25.500 quintals of sugar between January, 1984 to April, 1984; misappropriation of five bags from the railway rake, received on 14-1-84 and production of false certificate in that respect; misappropriation of Rs.20,500/withdrawn as labour advance; issuance of two false gate passes for two trucks and threatening of the Assistant Manager, K.C.Yadav, during suspension were levelled against the petitioner. After due enquiry an enquiry report was submitted by the enquiry officer who found all the charges proved against the petitioner and thereafter the disciplinary authority i.e. Senior Regional Manager passed orders of removal of the petitioner from service on 25-3-86. The petitioner filed an appeal against the order of removal before the Zonal Manager which was also dismissed by the impugned order dated 16-2-95. Being aggrieved by the aforesaid, the petitioner has filed the present petition before this Court.

4. The petitioner has assailed the impugned orders on two grounds, firstly, that during the pendency of the disciplinary proceedings the Food Corporation of India (Staff) Regulations 1971 which have been framed under section 45 of the Food Corporations of India Act, 1964 was amended with effect from 31-1-86 and the petitioner's disciplinary authority was redesignated as Regional Manager/Joint Manager in place of Senior General Manager and his appellate authority was redesignated as the Zonal Manager/Senior Regional Manager in stead of the Senior Regional Manager and, therefore, on the date the impugned order of removal

from service was issued i.e. 25-3-86, the petitioner's disciplinary authority was the Regional Manager and not the Senior Regional Manager and in such circumstances the impugned order of removal from service deserves to be quashed as the impugned order, in fact, has been issued by the appellate authority and has resulted in depriving the petitioner of a right of appeal and in support of this submission the learned Counsel for the petitioner has relied upon the judgment of the Supreme Court in *Surjit Ghosh v. Chairman & Managing Director, United Commercial Bank and others,* (1995) 2 SCC 474.

5. The second contention of the learned counsel for the petitioner is that the disciplinary authority has failed to take into consideration the fact that the receipt-invoice of the railways dated 14-1-84 indicates that there was shortage of five bags of sugar in the rake received by them on 14-1-84 and, therefore, the charge against the petitioner regarding misappropriation of these five bags is misconceived inasmuch as these five bags of sugar were, in fact, misappropriated and misplaced by the railways and for such act of the railways the petitioner cannot be punished. It is submitted that as the authorities have failed to take into consideration all these facts, the impugned order suffers from perversity and deserves to be set aside.

6. Per contra, the learned senior counsel appearing for the respondents, submits that disciplinary proceedings were initiated by the Senior Joint Manager who was the disciplinary authority at the relevant time and though the Food Corporation of India (Staff) Regulations 1971 was amended with effect from 31-1-86 i.e. just about two months before the issuance of impugned order of removal by the Senior Regional Manager, no prejudice was caused to the petitioner as he was allowed the right to appeal before the Zonal Manager which was entertained and decided by the said authority and in such circumstances the impugned orders cannot be said to have caused any prejudice. The learned counsel for the respondents, in support of his submissions, has relied upon the judgments of the Supreme Court in *Balbir Chand v. Food Corporation of India Ltd., and others,* (1997) 3 SCC 371 and *Goa Shipyard Ltd. v. Babu Thomas,* (2007) 10 SCC 662.

7. As far as the second contention of the learned counsel for the petitioner regarding second charge relating to five bags of sugar is concerned, it is submitted by the learned senior counsel appearing for the respondents that it is apparent from a perusal of the enquiry report as well as the orders of the disciplinary authority and the appellate authority that the petitioner failed to produce any document before the enquiry officer to establish the aforesaid submissions. It is further submitted that in view of the positive findings recorded by all the authorities against the petitioner in respect of charge No.1 and charges No. 3 to 5, even if a contrary finding could not have been recorded by the authority in respect of the second charge, it would have not made any difference on the ultimate result and the consequent order of removal of the petitioner.

8. I have heard learned counsel for the parties at length and perused the record.

9. There is no dispute in respect of the factual aspect of the case to the extent that the Food Corporation of India (Staff) Regulations 1971 was amended with effect from 31-1-86 and the disciplinary authority was changed from Regional Manager to the Senior Regional Manager. In the case of *Surjit Ghosh* (supra) the regulations prevailing in the establishment of the United Commercial Bank prescribed the disciplinary authority as Divisional Manager or the AGM (Personnel) and the appellate authority as Deputy General Manager or any other officer of the same rank with a further right of review to the General Manager but in case of the petitioner therein the action was taken against him by the Deputy General Manager who was his appellate authority as a result of which the appellant was denied the right to appeal and also the right of review which lay only against an appellate order and in such circumstances the Supreme Court held that the action of the authorities of the United Commercial Bank resulted in discrimination and caused serious prejudice to the petitioner therein by depriving him the right to appeal and review.

10. In the case of *Balbir Chand* (supra) wherein the present respondent i.e. Food Corporation of India was a party, the impugned order was passed by the Managing Director though the regulations prescribed the Zonal Manager as a competent authority and in such circumstances the law laid down by the Supreme Court in *Surjit Ghosh* (supra) was pressed into services but the Supreme Court taking into consideration the fact that the order of punishment was issued by a higher authority and that the petitioner had filed an appeal and availed of that remedy, held that no discrimination or prejudice was caused to him and dismissed the petition.

11. Similar view has been taken by the Supreme Court in the case of *Goa Shipyard* (supra) and the order of the High Court allowing the petition on the basis of the aforesaid preliminary contention was set aside and the matter was remanded back for adjudication on merits to the High Court in the following terms :

> "15. Mr Rao next referred to the amended CDA Rules wherein it has been provided that for all officers up to and inclusive of Manager, the disciplinary authority who can impose major penalties is the General Manager/Functional Director and the appellate authority is the Chairman & Managing Director. According to Mr Rao, since the order of dismissal has been issued by the Chairman & Managing Director who is an appellate authority, the respondent has been deprived of his right of appeal to the Chairman & Managing Director. According to him, under the amended CDA Rules the appellate authority is the Chairman & Managing Director but as the major penalty has been imposed by the Chairman & Managing Director, he cannot act as an

appellate authority and therefore the respondent has lost one form of remedy available to him. We are unable to countenance to this submission. The respondent was not denied the right of appeal. Undisputedly, the respondent filed an appeal before the Board of Directors, as the order of dismissal was passed by the CMD, and the Board of Directors considered his appeal and by a detailed order dismissed the appeal on 27-9-1997. In fact, the Board of Directors independently considered the appeal and while dismissing the appeal held that Charges (ii),(v), (x)(a), (x)(b), (xi) and (xiii) are not fully or entirely proved and confirmed the dismissal order on Charges (i), (vi), (vii), (x)(c) and (xii). The appeal was considered independently by the appellate authority and a detailed order passed after application of mind. In such circumstances, we are clearly of the view that no prejudice whatsoever has been caused to the respondent as he availed an opportunity of an appeal before the Board of Directors as an appellate authority.

16. Mr Rao invited our attention to the decision of this Court rendered in *Surjit Ghosh v. Chairman & Managing Director, United Commercial Bank where* this Court observed as under: (SCC p. 477, para 6)

"6. However, when an appeal is provided tothe higher authority concerned against the order of the disciplinary authority or of a lower authority and the higher authority passes an order of punishment, the employee concerned is deprived of the remedy of appeal which is a substantive right given to him by the Rules/ Regulations. An employee cannot be deprived of his substantive right. What is further, when there is a provision of appeal against the order of the disciplinary authority and when the appellate or the higher authority against whose order there is no appeal, exercises the powers of the disciplinary authority in a given case, it results in discrimination against the employee concerned."

17. In our view, this decision would be of no help to the respondent's case on facts. As already noticed in the present case, the respondentin fact, had availed the remedy of appeal and filed the appeal before the Board of Directors. That apart, the decision in *Surjit Ghosh* has been distinguished by this Court in *Balbir Chand v. Food Corpn. of India Ltd.* It was pointed out asunder: (SCC pp. 373-74, para 3)

"3. The learned counsel for the petitioner has raised the contention that since the petitioner was required to be dismissed by the disciplinary authority, namely, Zonal Manager, who alone is

competent to remove him, the order of dismissal passed by the Managing Director is bad in law. In support thereof, he placed reliance on a judgment of this Court in *Surjit Ghosh v. Chairman and Managing Director, United Commercial Bank*[6]. It is an admitted position that as a joint enquiry was conducted against all the delinquent officials, the highest in the hierarchy of competent authority who could take disciplinary action against the delinquents was none other than the Managing Director of the Corporation. In normal circumstances the Managing Director being the appellate authority should not pass the order of punishment so as to enable the delinquent employee to avail of right of appeal. It is now a well-settled legal position that an authority lower than the appointing authority cannot take any decision in the matter of disciplinary action. But there is no prohibition in law that the higher authority should not take decision or impose the penalty as the primary authority in the matter of disciplinary action. On that basis, it cannot be said that there will be discrimination violating Article 14 of the Constitution or causing material prejudice. In the judgment relied on by the counsel, it would appear that in the Rules, officer lower in hierarchy was the disciplinary authority but the appellate authority had passed the order removing the officer from service. Thereby, the appellate remedy provided under the Rules was denied. In those circumstances, this Court opined that it caused prejudice to the delinquent as he would have otherwise availed of the appellate remedy and his right to consider his case by an appellate authority on question of fact was not available. But it cannot be laid as a rule of law that in all circumstances the higher authority should consider and decide the case imposing penalty as a primary authority under the Rules. In this case, a right of second appeal/revision also was provided to the Board. In fact, appeal was preferred to the Board. The Board elaborately considered the matter through the Chairman. It is not violative of Article 14 of the Constitution." (emphasis supplied)

18. The High Court had allowed the respondents' writ petition by upholding the preliminary contention that the CMD did not have the authority and jurisdiction to pass the order of dismissal. It did not consider the several contentions raised by the respondent on merits. In the view that we have taken, the decision of the High Court dated 25-11-2003 on the preliminary contention cannot be sustained. We, therefore, set aside the order of the High Court dated 25-112003 which allowed Writ Petition No. 414 of 1997 on

a preliminary ground. Consequently the writ petition shall stand restored to the file of the High Court. The High Court shall now consider the other contentions raised by the respondent-writ petitioner other than the issue answered by this Court."

12. In the instant case Regulation 56 and Appendix 2 of the Regulation of 1971 prescribe the disciplinary authority and Regulations 67 and 69 provide for filing of an appeal and prescribe the appellate authority, while Regulation 74 provides for filing of a review before the Board. In the instant case on the date the disciplinary proceedings were initiated the Senior Regional Manager was competent to take up the proceedings against the petitioner and impose all the penalties but just two months before the order of removal was passed, the Regulations were amended with effect from 31-1-86 prescribing a lower authority i.e. Regional Manager, as the disciplinary authority as a result of which the order of removal in the petitioner's case was issued by an authority higher in rank than the disciplinary authority prescribed in the Regulations. Apparently, the petitioner did not take up this issue before the appellate authority but availed of the remedy of appeal before the Zonal Manager and was permitted to do so and the appeal was ultimately decided by the impugned order dated 16-2-95. Although the remedy of review under Regulation 74 before the Board of the respondents was available to the petitioner, but he chose not to avail the same and opted for filing of a writ petition against the order of the disciplinary authority and the appellate authority.

13. In view of the aforesaid admitted facts it is apparent in the instant case that though the order of removal was passed by an authority higher than the one prescribed in the Regulations as on the date the order was issued, no prejudice or discrimination resulted therefrom as the petitioner successfully availed of the remedy of appeal and even though the remedy of review was also available to him, he chose not to avail the same and in such circumstances the impugned orders of the disciplinary authority and the appellate authority cannot be held to be either discriminatory or prejudicial to the interest of the petitioner as has been held by the Supreme Court in the cases of *Balbir Chand* (supra) and *Goa Shipyard* (supra). In the facts and circumstances of the case the reliance placed by the petitioner on the judgment in the case of *Surjit Ghosh* (supra) is misconceived in view of the subsequent judgments of the Supreme Court wherein the judgment in the case of *Surjit Ghosh* (supra) was considered and distinguished and as the facts in the present case are totally different.

14. In view of the aforesaid discussion, I am unable to agree with the learned counsel for the petitioner as far as his first contention is concerned.

15. The contention of the petitioner against the impugned orders on merits also do not warrant consideration in view of the fact that there is concurrent findings of the disciplinary authority as well as the appellate authority in respect of all the

five charges levelled against the petitioner whereas the petitioner in the present petition has only taken up the issue against charge No. 2 regarding five bags of sugar. From a perusal of the record it is apparent that the disciplinary authority and the appellate authority have applied their minds to charge No.2 and have recorded a finding against the petitioner on account of the fact that no document in support of his case was produced by him before the enquiry officer.

16. In such circumstances, it cannot be said that the findings recorded by the disciplinary authority and the appellate authority suffer from any perversity, manifest illegality or unreasonableness warranting interference of this Court in concurrent findings as held by the Supreme Court in the case of *Yoginath D. Bagde Vs. State Of Maharashtra and another*, (1999) 7 SCC 739.

17. Resultantly, as I do not find any merit in the petition, the same is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

*Petition dismissed.*

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**I.L.R. [2009] M. P., 1666**
**WRIT PETITION**
*Before Mr. Justice Rajendra Menon*
3 February, 2009*

RAMAKANT CHOUDHARY ... Petitioner
Vs.
DISTRICT & SESSIONS JUDGE, GUNA & anr. ... Respondents

**A. Service Law - Constitution, Article 235 - *Appointing authority - Control over subordinate Courts - Control on subordinate courts conferred to High Court under Article 235 of Constitution is not confined only to matters pertaining to District Judge or subordinate Judges but also expands to ministerial officers and servants of establishment of subordinate Courts - Although District Judge is appointing authority, however, if control exercised by High Court with regard to functioning by District Courts in the matter of recruitment and appointment, it cannot be said that the same is unsustainable or illegal.*** (Paras 13 to 17)

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

*W.P. No.5131/2005(S) (Jabalpur)

B. **Constitution, Articles 235 & 309** - *Subsequent correction of number of reserved vacancies - One post each reserved for SC and OBC in advertisement issued for recruitment of Process Writer - Interview was held as per the advertisement - However on recalculation it was found that no post of SC or OBC is available - Merely because advertisement speaks about availability of vacancy in SC and OBC category, that does not mean that respondent is estopped from re-examining the matter.* (Para 19)

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

C. **Constitution, Article 309** - *Empanelment - Mere empanelment of petitioners does not confer upon them any legal right to seek appointment.* (Para 20)

ग. संविधान, अनुच्छेद 309 – सूची में सम्मिलित करना – याचियों का केवल सूची में सम्मिलित किया जाना उन्हें नियुक्ति की माँग करने का कोई विधिक अधिकार प्रदान नही करता है।

**Cases referred :**

(1992) 4 SCC 10, (2001) 6 SCC 380, 2004 AIR SCW 5768, (2006) 3 SCC 330.

*A.D. Deoras* with *R.K. Jaiswal,* for the petitioner.

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

**ORDER**

RAJENDRA MENON, J. :–As the questions involved and the legal issues are common, all the three petitions are being heard and decided by this common judgment.

2. For the sake of convenience averments made and the documents filed in W.P. No.5131/2005(s) is referred to.

3. Petitioners in all these three petitions submitted applications in the office of District and Sessions Judge, Guna, seeking appointment in pursuance to the advertisement issued vide Annexure A/1. By the aforesaid advertisement process for recruitment to the post of Process Writer (Assistant Grade III) were initiated. The recruitment was for filling up seven posts. Out of the seven posts of Process Writer, one post was reserved for Scheduled Caste candidate, one for Scheduled Tribe, one for OBC and four for General Candidate. Petitioner Ramakant Choudhary in W.P. No.5131/05(s) submitted his application seeking appointment on a post reserved for Scheduled Caste candidate. Petitioner Sunil Sharma in

W.P. No.5133/05(s) sought appointment in the General category and petitioner Anand Suryavanshi in W.P. No. 5132/05(s) sought appointment on the post reserved for OBC candidate.

4. It is case of the petitioners that all of them were eligible for appointment and finding them to be so they were noticed vide Annexure P/2 on 7.7.2004 to appear in the written examination which was scheduled to be held on 25.7.2001 on 11 a.m. It is stated that they appeared in the written test and on being found successful they were called to appear in a interview to be held on 26.9.2004 vide communication Annexure P/3 dated 9.9.2004. On being found successful it is stated that the District and Sessions Judge vide his memo dated 16.11.2004 Annexure P/4 informed the petitioner Ramakant Choudhary that the caste certificate attached with his application had expired and therefore, he was directed to submit the requisite caste certificate issued by the prescribed authority within seven days. It is stated that the petitioner Ramakant Choudhary complied with the aforesaid direction. In the case of petitioner Anand Suryawanshi vide similar memo dated 16.11.2004 Annexure A/4 he was directed to submit certificate of permanent residence and caste certificate. This petitioner also complied with the said requirement. In the case of petitioner Sunil Sharma it is stated that no such communication was received. Further after following the aforesaid procedure it is stated that the District and Sessions judge who is the appointing authority as per the Recruitment Rules instead of issuing appointment orders to the selected candidate i.e. all the three petitioners forwarded the selection proceedings and the select list for approval to the Registrar General of the High Court in accordance to some administrative and executive instructions issued in this regard.

5. According to the petitioners even though they were found suitable in this process of selection and they had complied with all the formalities in this regard, the District and Sessions Judge who was the appointing authority forwarded the matter to the Registry of the High Court for approval which was not needed. When the matter came to the High Court it is stated that in the case of petitioner Ramakant Choudhary further objection was raised to the effect that the computer education certificate of this petitioner is not from an approved institute and therefore, he was directed to submit the requisite certificate. D.O. Letter in this regard is filed as Annexure A/6. It is stated that this petitioner complied with the aforesaid requirement also vide Annexure A/7 but still when no appointment order was issued and when the District and Sessions Judge appointing authority, legally bound to issue appointment order did not do so, this petition was filed. Similar action was taken in the case of petitioner Anand Suryawanshi also but in his case he was directed to produce certain documents with regard to his residence and caste vide Annexure A/5 filed in his petition which is said to have been complied with.

6. Grievance of the petitioners now in these petitions are that even though it is the District and Sessions Judge who was competent to make the selection and he

having selected the petitioners in the category mentioned in each of the cases, referred the matter to the High Court and on the ground that vacancies in the reserved category are not available or that the Certificate is not proper, appointment orders are not being issued. Petitioners contended that once under the recruitment rules, it is the District and Sessions Judge who is empowered to make appointment, referring the matter to the High Court and seeking approval of the High Court was not required. It is stated that the High Court cannot interfere in the matter and refuse appointment to the petitioners when the Recruitment Rules provide for appointment in accordance to the said Rules and the appointment is made by the District and Sessions Judge who is the appointing authority. By referring to the Recruitment and Conditions of Service of Contingency Paid (District and Sessions Judge) Employees Rules, 1980, it is emphasized by the learned counsel that the appointing authority under the aforesaid Rules is the District and Sessions Judge and therefore, the action initiated at the instance of the High Court which is not the authorized statutory authority in the matter is unsustainable. It is the case of the petitioners that when the District and Sessions Judge is the statutory appointing authority referring the matter to the High Court and thereafter refusing to issue appointment order on the objection of the High Court or without approval of the High Court is an action which is not permissible under the Rules and therefore, unsustainable.

7. The second limb of argument advanced by Shri A. D. Deoras, learned Senior Counsel was that in the notice Annexure A/1 seven vacancies notified were determined after considering the reservation roaster as is apparent from the indications made in the said advertisement. It is argued by him that once the advertisement is issued after determination of vacancies as per the roaster then contending that the vacancies is not properly determined cannot be accepted and respondents are estopped from changing the vacancy position on the ground that 100 point roaster is not properly followed. The third ground advanced at the time of hearing was that in case of all the petitioners all the requisite information and documents sought for by the District and Sessions Judge was forwarded and on being satisfied when the District and Sessions Judge had forwarded the list to the High Court then the High Court could not go back on the list on the ground that some documents produced particularly the certificate about qualification pertaining to computer education being not approved, cannot be raised as a ground when such an objection was not raised on any earlier occasion. That apart it is stated that the certificates produced by the petitioners pertaining to computer education is from a recognized institute and on the aforesaid ground appointment cannot be denied to the petitioners. Accordingly petitioners submitted that they are entitled to the relief claimed in this petition.

8. Respondents have refuted the aforesaid and have filed a return in each case and according to the return of the respondents the High Court is empowered under Article 235 of the Constitution to interfere in the matter and as the High

Court has power to control functioning of the subordinate courts action initiated is proper and not vitiated. It is the case of the respondents that petitioner Sunil Sharma in W.P. No.5133/05(s) was not recommended in the selection process conducted and therefore, he cannot claim any relief. However, as far as petitioners Ramakant Choudhary and Anand Suryawanshi are concerned it is pointed out that as per Memo issued by the High Court on 14th October 1999 and further vide 16th August 2004 approval of the High Court is necessary and when the matter was scrutinized by the High Court it was found the reservation policy and the requirement of the statutory provision as per Anusuchit Janjati Aur Anya Pichhada Varg ke Liye Arakshan Adhiniyam 1994 and 1998 have not been followed. Only one post was vacant in the reserved Scheduled Tribe category and no posts was available in the OBC and Scheduled Caste category and therefore, Ramakant Choudhary and Anand Suryawanshi cannot seek appointment as the vacancies indicated in their respective category was found to be not in existence and therefore, it was not approved. It is further stated that the petitioners Ramakant Choudhary and Anand Suryawanshi have not submitted proper certificate from an approved Computer Education institute and therefore, they were not selected. Case of the respondents are that the 100 point roaster was not properly followed before issuing the advertisement and as the certificate with regard to fulfilling the qualification of computer education was not from an approved university or authority name of petitioners Ramakant Choudhary and Anand Suryawanshi were not approved. Accordingly, respondents have refuted the claim of the petitioners.

9. Having heard learned counsel for the parties and on consideration of the facts that have come on record it is seen that the following questions arise for consideration:- (1) The first question is as to whether the power and control exercised by the High Court and the approval sought for by the District and Sessions Judge was proper or not and to what extent power under Article 235 can be exercised by the High Court in the matter of recruitment process? (2) The second question would be as to whether refusal to accord approval by the High Court in case power exists on the grounds raised in the return is justified or not?

10. As far as the first question is concerned it would be seen that the control vested in the High Court with regard to functioning of the subordinate Courts is contemplated under Article 235 of the Constitution. Article 235 of the Constitution makes a provision with regard to control of the High Court over subordinate Courts. In fact, Chapter VI of the Constitution deals with Subordinate Courts and the procedure for appointment of District Judge, Validation of appointments of, and judgments, Recruitment of persons other than distruct judges to the judicial service, Control over subordinate courts, interpretation of the expression "district judge" and 'judicial service" and application of the provisions of Chapter VI to certain class or classes of magistrates. Article 235 of the Constitution reads as under :-

> "235. **Control over subordinate courts** - The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed undersuch law."

11. The provision of Article 235 itself was considered by the Supreme Court in the case of *R. M. Gurjar and another Vs. High Court of Gujarat and others* - (1992)4 SCC Page 10, in that case the question involved was as to whether the control vested in the High Court under Article 235 of the ' Constitution extends to ministerial officers and servants in the establishment of the subordinate courts or only to the District Judge and the other Judges and presiding officers in accordance to the expressions and interpretation to the expressions "district judge" and "judicial service".

12. In the case of *R. M. Gurjar* (supra) the Supreme Court was dealing with a judgment rendered by a Full Bench of the Gujarat High Court, wherein this question arose, it is seen that faced with some difficulties on account of interpretation to Article 235 made by different Benches a Learned Single Judge of the Gujarat High Court referred the following two questions to be decided by a larger Bench. The two questions referred to are :

> "(1) Whether the High Court or its administrative side has jurisdiction to enhance the penalty imposed by the District Judge upon a member of the ministerial staff of the subordinate court in exercise of the powers of review conferred by Rule 23 of the Gujarat Civil Services (Discipline and Appeal) Rules 1971?
>
> (2) Whether the control vested in the High Courts under Article 235 of the Constitution is exercisable only over members of the judicial service of the State as defined in Article 236(b) or whether the ministerial officers and servants on the establishment of the sub-ordinate courts are also ultimately subject to such control?"

The Full Bench of the High Court dealt with question No.2 and recorded a conclusion that the control under Article 235 of the Constitution extends to the ministerial officers and servants of the establishment of the subordinate Courts also and after interpreting Article 235 and the Discipline and Appeal Rules, the first question was also decided against the petitioners. The Supreme Court in the case of *R. M. Gurjar* (supra) examined both these questions and as far as the

second question is concerned in para 7 recorded the following conclusion with regard to the aforesaid question :-

> "We are also of the opinion that the answer to the second question as rendered by the Full Bench of the High Court is unexceptional and does not call for any interference."

13. Keeping in view the aforesaid principles laid down by the Supreme Court it is clear that the control on subordinate courts conferred to the High Court under Article 235 of the Constitution is not confined only to matters pertaining to the District Judge or other subordinate Judges but also expands to ministerial officers and servants of the establishment of the subordinate courts.

14. In that view of the matter, even though the District Judge is the appointing authority for Class III and IV staff but the Chief Justice of the High Court on the basis of power vested on him vide delegation from the Full Court has issued certain guide lines and directions warranting information with regard to appointment and recruitments to be sent to the High Court, certain procedures to be followed and thereafter the appointment to be made. In this regard the instructions and guide lines issued by the High Court are contained in Annexure R/1 dated 16.10.99, Annexure R/3 dated 16th August 2004 and the reasons for doing so is available in the note sheet Annexure R/4.

15. Even though the District Judge is the appointing authority but by virtue of the powers vested under Article 235 if the High Court has prescribed certain procedures to be followed and for verification of the said procedures if the records and information are called from the District Courts and certain observations made and control exercised with regard to functioning by the District Courts in the matter of recruitment and appointment, it cannot be said that the same is unsustainable or illegal when the constitutional mandate under Article 235 permits for the same.

16. In the present case, the District Judge referred the matter to the High Court only in view of the aforesaid requirement and when the High Court had pointed out some irregularities in the matter, the District Judge has accepted the same and has refused to issue appointment orders. The procedure so followed is nothing but the exercise of power by the High Court and acceptance of the same by the District and Sessions Judge and in doing so no error is committed which warrants interference.

17. Even though the power of appointment is vested with the District and Sessions Judge and in exercise of the control granted over the subordinate Courts by the Constitution when the matter is scrutinized and the High Court makes certain observations or instructions in exercise of that power and on acceptance of the same the District Judge changes his initial opinion and recommendation, it cannot be said that the District and Sessions Judge's power for appointment is

taken away or that the High Court has interfered with the statutory jurisdiction of the District Judge available in his capacity as an appointing authority. In fact the District and Sessions Judge after initiating the selection process forwarded the proceedings and select list to the High Court for its consideration and when the High Court pointed out some irregularities in the same, the District Judge has accepted it and has refused to issue appointment order. This is what has happened in the matter and therefore, the arguments of Shri A. D. Deoras, learned Senior counsel with regard to the interference made by the High Court and breach of statutory provisions pertaining to powers of the District and Sessions Judge being infringed cannot be accepted and therefore, question No.1 is answered against the petitioners as it is found that the procedure followed and the action is in accordance to law.

18. As far as the second question and refusal to appoint on merit consideration is concerned, from the return filed by the respondents, it is seen that the selection committee with regard to General candidate recommended the name of three persons namely, Sumit Dwivedi, Ajay Kumar Dave and Jagdish Sharma. In the OBC category petitioner Anand Suryawanshi was recommended and in the Scheduled Caste Category petitioner Ramakant Choudhary was recommended and in Scheduled Tribe category one Jagat Singh Dabar was recommended. In the General category only four posts were available. According to the return filed by the respondents, for three posts Sumit Dwivedi, Ajay Kumar Dave and Jagdish Sharma were recommended and for one post due to transfer of an employee from Gwalior in the category of Assistant Grade III and his posting in the establishment of District and Sessions Judge, Guna the posts was not available, as there were only three vacancies in this category. That being so for the three vacancies available as per merit, three persons have been appointed and petitioner Sunil Sharma who is claiming appointment in this category cannot be appointed as all the four posts are filled up by the process initiated.

19. As far as appointment in the OBC and Scheduled Caste category is concerned respondents have pointed out that after scrutiny of the available vacancy in accordance to the 100 point roaster, it is found that only one post in the category of Scheduled Tribe is available and against this one post one Jagat Singh Dabar has been appointed. Respondents have pointed out that they have recalculated the vacancies as per the Adhiniyam of 1994 and 1998 and the 100 point roaster and it is seen that no vacancy in the Scheduled Caste and OBC category is available. Merely because the advertisement speaks about availability of vacancy as per the roaster, that does not mean the respondents are estopped from re-examining the matter. If earlier some mistake is committed in calculating the vacancy and if on subsequent scrutiny this mistake is detected respondents are well within their right in making correction of the said mistake. When vacancies are not available in the category of Scheduled Caste and OBC category

respondents cannot be mandated to make appointment of the two petitioners Ramakant Choudhary or Anand Suryawanshi. Contention of Shri Deoras, learned Senior Counsel to the effect that once the advertisement is issued as per the 100 point roaster, the vacancies are indicated to be existing is not correct. Respondents can always reassess the matter and in the absence of any arbitrariness or illegality in such reassessment being pointed out, interference on this ground is not permissible.

20. Infact this is a case where petitioners name are empanelled and after empanelment for the reasons as indicated hereinabove, the appointing authority has refused to issue orders of appointment. Mere empanelment of the petitioners does not confer upon them any legal right to seek appointment. Inclusion in the panel does not confer any such enforceable right. This principle is laid down by the Supreme Court in the cases of *All India SC and ST Employees Association and Another Vs. A. Arthur Jean and others*, 2001(6) SCC 380, *Punjab State Electricity Board and others Vs. Malkiat Singh*, 2004 AIR SCW 5768, so also in the case of *State of U.P. and others Vs. Rajkumar Sharma and others*, 2006(3) SCC 330. In that view of the matter, empanelment by the District Judge does not mean that petitioners are entitled to be appointed. The District Judge after empanelment can always refuse to issue appointment order on cogent and justifiable reasons being established.

21. That apart from the records it is seen that as per the advertisement knowledge of computer was a mandatory requirement and certificate from a approved institute imparting computer education was to be submitted. In the case of petitioners Anand Suryawanshi and Ramakant Choudhary the certificate of computer education and knowledge submitted does not indicate that the institute which has issued this Certificate is approved by any Government, Authority, University or establishment. The certificate in this regard submitted by the petitioners and available on record only indicates that they have undergone some computer education in the case of Shri Ramakant Choudhary from Harsh Computer Centre, Rajgarh. There is nothing to indicate that this institute is approved by the Government or any other University or authority empowered under the rules to approve the institute. Similar is the position in the case of petitioner Anand Suryawanshi. In his case certificate is issued by Computer Point, Computer Services, Guna vide Annexure P/5. This Certificate also does not indicate as to by which authority, government or university this institute or centre is approved. In the absence of fulfilling qualification of computer education from a recognized institute or university, objection of the respondents cannot be overruled merely on the ground that on earlier occasion, District and Sessions Judge had approved the Certificate or qualification. The District and Sessions Judge's approval is subject to further scrutiny by the High Court and if on such scrutiny the High Court has pointed out some irregularity which is accepted by the District and Sessions Judge, the same cannot be termed as illegal warranting interference into the matter.

22. Accordingly, in the facts and circumstances of the case finding the action of the respondents to be based on proper consideration, in accordance to the requirement of law, no case is made out for interference. Accordingly, all the three petitions are dismissed without any order as to costs.

*Petition dismissed.*

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I.L.R. [2009] M. P., 1675
WRIT PETITION

*Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh*
11 February, 2009*

SUNIL KUMAR MISHRA (DR.) ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

**Ayurveda/Homeopathy/Unani Medical Cadre Contract Service (Appointment and Conditions of Service) Rules, M.P. 2006, Rule 5 -** ***Appointment of Medical Officers - Scrutiny for interview on the basis of marks obtained in Graduate level - Held - Valid - Rule 5 provides minimum qualification as Bachelor degree - It further provides that in case large number of applications are received, the selection committee will reserve the right to reduce the number of candidates three times the available post on the basis of eligible candidates - Assessment of merit of eligible candidates would only be possible by considering the marks obtained in Graduate level and not by considering the marks of some of the candidates who had obtained Post Graduate degree or diploma - Petition dismissed.*** (Paras 5 & 6)

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

**Cases referred :**

(1994) 6 SCC 293.

*P.K. Kaurav*, for the petitioner.
*Samdarshi Tiwari, G.A.*, for the respondent Nos.1 to 3.

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*W.P. No.8300/2007 (Jabalpur)

ORDER

The Order of the Court was delivered by A.K. PATNAIK, C. J. :–The Indian System of Medicine and Homoeopathy, Madhya Pradesh, Bhopal issued an advertisement in May, 2007 inviting applications for filling up 200 posts of Medical Officers in Ayurved, Homoeopathy and Unani on contract basis at the Primary and Community Health Centres at district level under the scheme of National Rural Health Mission. The selection and appointment was to be governed by the 'Madhya Pradesh Ayurveda/Homeopathy/Unani Medical Cadre Contract Service (Appointment and Conditions of Service) Rules, 2006 (for short **'the Rules of 2006'**). In response to the advertisement, the petitioner amongst others applied, but the petitioner was not called for interview. Aggrieved, the petitioner has filed this writ petition for appropriate reliefs.

2. Mr. P.K. Kaurav, learned counsel for the petitioner submitted that before calling the candidates for interview, only the marks obtained by the candidates at the Graduate Degree level have been taken into consideration and no marks have been allotted to the petitioner and other candidates who have obtained Post Graduate Decree/Diploma and as a result, the petitioner as well as other candidates who had got Post Graduate Degree/Diploma, have not been called for interview. He submitted that the respondents have thus contravened the provisions of sub-rule (7) of Rule 5 of the Rules of 2006 which clearly provided that marks have to be allotted to a candidate who has obtained Post Graduate Degree/Diploma out of total of twenty marks and therefore, the entire selection should be set aside by the Court and the respondents should be directed to conduct the selection afresh.

3. Mr. Samdarshi Tiwari, learned Government Advocate, on the other hand, relying on the return filed on behalf of the respondents submitted that the Note below sub-rule (7) of Rule 5 of the Rules of 2006 clearly provides that in case the applications received for the posts are in large number, the selection committee will have the right to reduce the number of candidates three times to the available posts by adopting the procedure as prescribed in the advertisement and in the advertisement it was specified that in case applications received are in large number, the candidates may be called for interview three times to the available posts, on the basis of their merit. He submitted that sub-rule (4) of Rule 5 of the Rules of 2006 prescribed the 'minimum educational qualification' as per Schedule and applications of candidates were scrutinized by fixing a bench mark on the basis of marks obtained at the graduate level (minimum educational qualification) and accordingly, the merit of the candidates was determined and candidates as many as three times the number of available posts were called for interview and in such a selection process, the petitioner and other candidates who may have obtained Post Graduate degree/diploma could not be called for interview.

4. Sub-rules (4) and (7) of Rule 5 of the Rules of 2006 which are relevant for deciding this case are extracted herein below:

"5. Selection and method of appointment -

(4) **Minimum Education Qualification** - Minimum Educational qualification for the appointment of the candidates, shall be as specified in the schedule.

(5).....

(6).....

(7) **Recommendation of the Selection Committee** - The selection committee shall make its recommendation after making its assessment of the candidates on the basis of marks awarded to the candidates in the following manner, namely:-

| | | |
|---|---|---|
| (a) | In the ratio of marks obtained at Graduate degree level. | 60 marks |
| (b) | Post Graduate Degree/Diploma | 20 marks |
| (c) | Interview | 20 marks. |
| | Total | 100 marks. |

Note - In case of the applications received in large numbers, the selection committee will reserve the right to reduce the number of candidates 3 times to the available posts by adopting the procedure as may be specified in the advertisement."

5. It will be clear from sub-rule (4) of Rule 5 of the Rules of 2006 that the minimum educational qualification for appointment of candidates has been specified in the Schedule to the Rules of 2006. Column 3 of the Schedule to Rule 5 as amended by the notification dated 17th April, 2007 provides that the minimum qualification would be a Bachelor Degree in Ayurved/Homoeopathy/Unani system of medicine from any University established by law and recognised by CCIM (Central Council of Indian Medicine), CCH (Central Council of Homoeopathy) or four year Diploma (DHMS) awarded by any board/council recognized by CCH and registered under the law. Thus, candidates must have this minimum educational qualification as prescribed in Column 3 of the Schedule to the Rules of 2006 and need not possess a post-graduate degree/diploma. Accordingly, for the purpose of determining the merit of all the eligible candidates who had applied pursuant to the advertisement, the marks secured by the candidates in the degree or diploma course, as mentioned in column 3 of the Schedule to the Rules of 2006 had to be considered and the marks secured by the candidates in the post graduate degree/ diploma could not be considered. To put it differently, if the marks secured by some of the candidates who had obtained post graduate degree/diploma were considered, there could be no comparison of merit of such candidates having post graduate degree/diploma with candidates who do not have post graduate degree/ diploma. The procedure for determining the merit of all eligible candidates for the

purpose of finding who amongst them would be called for interview adopted by the selection committee thus was a fair procedure and cannot be held to be arbitrary or violative of Arts. 14 and 16 of the Constitution of India.

6. A reading of sub-rule (7) of Rule 5 of the Rules of 2006 further makes it clear that the selection committee will have to make its recommendations after making assessment of the candidates on the basis of marks awarded to the candidates in a manner indicated in sub-rule (7) of Rule 5 of the Rules of 2006. There is nothing in sub-rule (7) to Rule 5 to show that before the interview, the marks of those candidates who have obtained post-graduate degree/diploma have to be considered. Rather, the Note below sub-rule (7) of Rule 5 of the Rules of 2006 states that in case large number of applications are received, the selection committee will reserve the right to reduce the number of candidates three times to the available posts, by adopting the procedure as may be specified in the advertisement. The procedure prescribed in the present case was to confine the interview to candidates three times the number of available posts on the basis of merit of the eligible candidates. As we have seen, comparative assessment of merit of all the eligible candidates would only be possible by considering the marks secured in the graduate degree or diploma and not by considering the marks of some of the candidates who had obtained post graduate degree or diploma. Thus, the procedure adopted by the Selection Committee was also not in contravention of sub-rule (7) of Rule 5 of the Rules of 2006 as contended by Mr. Kaurav.

7. Moreover, in *M.P. Public Service Commission vs. Navnit Kumar Potdar,* 1994 (6) SCC 293 cited by Mr. Samdarshi Tiwari, the Supreme Court has taken a view that if large number of applicants were called for interview in respect of four posts, interview is bound to be casual and superfluous and the members of the interview board shall not be in a position to assess properly the candidates, in which case the search and selection of best amongst the applicants, which is the sole purpose of interview, would be frustrated. In our considered opinion, as long as the selection committee, while short-listing the candidates for the interview for a few posts, adopts a fair procedure and the procedure is not in violation of the statutory rules, the Court in exercise of its power under Art.226 of the Constitution of India, should not interfere with the selection process.

8. For the aforesaid reasons, we do not find any merit in the writ petition and accordingly we dismiss the same. There shall be no order as to costs.

*Petition dismissed.*

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I.L.R. [2009] M. P., 1679

WRIT PETITION

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

13 February, 2009*

SUNIL TIWARI ... Petitioner

Vs.

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

A. **National Security Act (65 of 1980), Section 3 - *Preventive Detention - Public Order - Order of detention - Three alleged offending acts of petitioner - Staged riotous demonstration by blocking the road - Kidnapped one person and brutally murdered him in the Jungle - Abused and threatened to kill the family of a person - No narration in the grounds of detention that the alleged acts committed by the petitioner created any terror in the locality - Incident cannot also be said to have affected even tempo of life of any locality - Incident has no nexus with public order - Order of detetion quashed.*** (Paras 9 to 11)

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

B. **National Security Act (65 of 1980), Section 3 - *Preventive Detention - Offences committed in the years 1987-2004 have no proximity to impugned order of detention passed in the year 2008.*** (Para 12)

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

**Cases referred :**

AIR 1974 SC 1264, AIR 1974 SC 1336, AIR 1975 SC 473, AIR 1992 SC 687.

*Manish Tiwari*, for the petitioner.

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

ORDER

The Order of the Court was delivered by A.K. PATNAIK, C. J. :–In this writ petition filed under Article 226 of the Constitution, the petitioner has challenged the order of detention, detaining him under Section 3(2) of the National Security Act 1980 (for short "the Act").

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*W.P. No.9174/2008 (Jabalpur)

2. The facts briefly are that on 3.4.2008 District Magistrate, Katni, in exercise of powers conferred under sub-Section (2) of Section 3 of the Act passed an order of detention, detaining the petitioner in the Central Jail, Jabalpur. The matter was referred to the Advisory Board and pursuant to the opinion given by the Advisory Board the State Government confirmed the order of detention and directed that the petitioner shall continue to be under detention for a period of 12 months from the date of detention till 2.4.2009. Aggrieved, the petitioner has filed this writ petition praying for quashing the order of detention.

3. Mr. Manish Tiwari, learned counsel for the petitioner, submitted that the detention order has been passed against the petitioner for political reasons and was necessitated under Section 3(2) of the Act and this would be clear from the grounds of detention served on the petitioner.

4. Mr. Vivekanand Awasthy, learned Deputy Government Advocate, on the other hand, submitted that the grounds of detention served on the petitioner would show that right from 1987, the petitioner has been indulging in various criminal acts and considering the propensity of the petitioner to commit repeated violent acts, the District Magistrate, Katni, passed the order of detention under sub-Section (2) of Section 3 of the Act and on the basis of the opinion given by the Advisory Board, the State Government has confirmed the order of detention.

5. The law is well settled in *Lakshman Khatik Vs. The State of West Bengal* AIR 1974 SC 1264, *Golam Hussain Vs. Commissioner of Police, Calcutta* AIR 1974 SC 1336 and in *Gora Vs. State of West Bengal* AIR 1975 SC 473 that there must be a close proximity between the offending acts mentioned in the grounds of detention and the order of detention and there should not be too long and unexplained intervals between the offending acts and the order of detention. The Supreme Court has, however, held that no mechanical test by counting the months of the interval is sound and it all depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short or long, on the reason for the delay in taking preventive action, like information of participation being available only in the course of an investigation.

6. The Supreme Court has also held in series of cases that there is a clear distinction between ' law and order' and 'public order'. In *Victoria Fernandes Vs. Lalmal Sawma and others,* AIR 1992 SC 687 the Supreme Court held:

> "The distinction between the areas of 'law and order' and 'public order' is one of degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it would raise the problem

of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps distinguish it as an act affecting 'public order' from that concerning law and order'. The question to ask is : Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? This question has to be faced in every case on its facts. (See : *Dr. Ram Manohar Lohia v. State of Bihar,* (1966) I SCR 709 : (AIR 1966 SC 740); *Arun Ghosh v. State of West Bengal,* (1970) 3 SCR 288: (AIR 1970 SC 1228); *Ram Ranjan Chatterjee v. State of West Bengal,* (1975) 3 SCR 301: (AIR 1975 SC 609); *Ashok Kumar v. Delhi Administration,* (1982) 2 SCC 403: (AIR 1982 SC 1143)."

7. Keeping in mind the law, as laid down by the Supreme Court, we will have to see whether in the grounds of detention there are some alleged offending acts of the petitioner which have close proximity to the order of detention and whether such alleged offending acts of the petitioner affect public order or are only acts of contravention of law not disturbing public order.

8. The order of detention, as we have seen, was passed in the present case on 3.4.2008 and from the grounds of detention we find the following three alleged offending acts of the petitioner committed on 30.8.2006, 17.11.2007 and 31.3.2008 which can be said to have close proximity to the order of detention:

(i). On 30.8.2006 the petitioner with his companions without legal permission had staged riotous demonstration by blocking the road at Subhash Chowk. Offence no. 502/06 u/ss. 341, 147 IPC was registered against them and challan was filed in the Court in case no. 5390/06 which is pending.

(ii). On 17.11.2007 the petitioner - his brother - Mukesh Tiwari and companions -Bhawanikant Dubey, Rakesh Chowdhary, Sunil Vishwakarma, Shrichand Kori, Dharmendra alias Pappu Tiwari, Deepak Tiwari, Banty alias Shailendra Tiwari through criminal conspiracy had kidnapped Sagar Singh, S/o Guman Singh Thakur, R/o Gayatri Nagar, Katni, from Shivhare Complex and took him to the jungle where they brutally murdered him. On the report of Sonu Ben, S/o Lal Ben, R/o Gayatri Nagar, Katni, offence no.853/07 u/ss. 365, 368, 34 IPC was registered and investigation was carried out. When dead body of the kidnapped Sagar Singh was recovered, sections 302, 364, 201, 120-B IPC was added therein. Charge sheet no. 57/08 dated 12.2.2008

was prepared and filed in the Court of C.J.M. Katni, in Case No. 460/08 which is pending.

(iii) On 31.3.2008 the petitioner with his companions had abused and threatened to kill family of the applicant - Sardar Singh, S/o late Mangal Singh, R/o village Badkhera, PS Kuthla. On the applicant's report offence no. 88/08 u/ss. 294, 506, 34 IPC was registered in the PS Kuthla. which is under investigation.

9. The alleged act, which the petitioner has committed on 30.8.2006, is a staged riotous demonstration by blocking the road at Subhash Chowk, Katni, for which offence under Section 341/147 IPC has been registered against him. This may be an offence under the IPC but cannot be held to be one which unleashed a terror wave so as to affect the even tempo of life in the locality. In fact, there is no narration whatsoever in the grounds of detention that the aforesaid alleged act committed by the petitioner on 30.8.2006 created any terror in the locality so as to affect its peace and tranquility.

10. The second act alleged to have been committed by the petitioner is on 17.11.2007.It is alleged that the petitioner along with his companions kidnapped Sagar Singh from Shivhare Complex and brutally murdered him in the jungles. There is no mention whatsoever in the grounds of detention that the petitioner created terror in and around the Shivhare Complex while kidnapping Sagar Singh. As per the allegation in the grounds of detention the murder of Sagar Singh was committed in the jungles and not in any place so as to cause a terror amongst people of the locality. This alleged incident cannot also be said to have affected the even tempo of life of any locality and thus has no nexus with the public order.

11. The last incident mentioned in the ground of detention is alleged to have been committed by the petitioner on 31.3.2008 and as per the allegations in the ground of detention the petitioner and his companions abused and threatened to kill the family of Sardar Singh. There is no mention whatsoever in the grounds of detention that the petitioner allegedly abused Sardar Singh and threatened to kill him in presence of the public in a locality so as to create a terror amongst them. This alleged act of the petitioner also cannot be said to have affected the even tempo of the life of the community and, thus, has no nexus with the public order.

12. The rest of the grounds mentioned in the grounds of detention relate to acts alleged to have been committed by the petitioner in the years 1987, 1988, 1989, 1990, 1991, 1993, 1994, 1995, 1997, 1999, 2000, 2002 and 2004 which have no proximity to the impugned order of detention passed in the year 2008 and cannot constitute the basis of detention of the petitioner for maintenance of public order. In our considered opinion, there was no immediate necessity for detaining the petitioner under the Act in the interest of maintenance of public order. The grounds of detention reveal that the petitioner is alleged to have committed large number

of offences from 1987 to 2008 but for such alleged offences, the petitioner has to be tried by the ordinary criminal courts. These offences may be acts of contravention of law and may be cases of law and order but have no rational nexus with public order so as to warrant the detention of petitioner under the Act.

13. For the aforesaid reasons, we allow this writ petition and quash the impugned orders of detention passed by the District Magistrate, Katni, as well as the State Government and direct that the petitioner be forthwith set at liberty unless he is arrested in connection with some other case.

*Petition allowed.*

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**I.L.R. [2009] M. P., 1683**
**WRIT PETITION**
***Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh***
13 March, 2009*

JITENDRA SINGH & anr. ... Petitioners
Vs.
STATE OF M.P. & ors. ... Respondents

**A. Mines and Minerals (Development and Regulation) Act (67 of 1957), Sections 10 & 24-A, Mineral Concession Rules, 1960, Rules 22, 26 & 31 - *Constitutional validity - Consent of owner of land or opportunity of hearing to owner of land - Opportunity of hearing to occupier of the surface of land before grant of reconnaissance permit, prospecting licence or mining lease must be held as impliedly excluded - Constitutional validity upheld.*** (Para 20)

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

**B. Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 24-A, Mineral Concession Rules, 1960, Rules 72 & 73 - *Determination of compensation - Opportunity of hearing to occupier of surface of land before determination of compensation has to be granted - Principles of Natural Justice are implicit in Section 24-A(2) & (3) of Act, 1957and Rules 72 & 73 of Rules, 1960.*** (Para 21)

ख. खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 24–ए, खनिज रियायत नियम, 1960, नियम 72 व 73 – प्रतिकर का अवधारण

*W.P. No.6048/2008 (Jabalpur)

– प्रतिकर के अवधारण के पूर्व भूमि की सतह के अधिभोगी को सुनवाई का अवसर दिया जाना चाहिए – अधिनियम 1957 की धारा 24–ए(2) व (3) और नियम, 1960 के नियम 72 व 73 में नैसर्गिक न्याय के सिद्धांत अंतर्निहित हैं।

**Cases referred :**

1965 JLJ 413, AIR 2007 SC 2458, 1995 Supp (1) SCC 596, AIR 1986 SC 180, AIR 1976 SC 1393, AIR 1981 SC 271, AIR 1973 SC 1461, (1981) 1 SCC 166, W.P. No.7745/2006 Shyam Bihari Singh Vs. State of M.P., (1985) 5 SCC 170, (2004) 2 SCC 447, 1991 Supp (1) SCC 600, (1994) 4 SCC 328, (2000) 7 SCC 529.

*Naman Nagrath,* for the petitioners.

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

*S.B. Upadhyaya, R.P. Agarwal* with *Manas Mahapatra & Sanjay Agrawal,* for the respondent No.4.

*Dharmendra Sharma, A.S.G.,* for the respondent No.5.

**ORDER**

The Order of the Court was delivered by **A.K. PATNAIK, C. J.** :–The petitioners have filed this writ petition under Art.226 of the Constitution of India for declaring the provisions of Sections 10 and 24-A of the Mines and Minerals (Develonment and Regulation) Act, 1957 (for short "the Act of 1957") and Rules 22 and 26 and Form 'K' prescribed under Rule 31 of the Mineral Concession Rules, 1960 (for short "the Rules of 1960") made thereunder as ultra vires the Constitution of India and for quashing the order dated 8.12.2006 of the State Government of Madhya Pradesh in the Mineral Resources Department granting mining lease of the land of the petitioners in favour of the respondent No.4 as well as the lease agreement dated 15.1.2007 executed between the State Government of Madhya Pradesh and the respondent No.4 pursuant to the order dated 8.12.2006 of the State Government.

2. The relevant facts briefly are that the petitioner No. 1 is the recorded bhumiswami of land in khasra Nos.56, 57, 354, 369, 370, 371,372,374 and 390 situated at village Sarda, Tahsil Rampur Naikin, District Sidhi. The petitioner No.2 is the recorded bhumiswami of the land in khasra Nos.283/430, 283/2, 203/2, 201/2, 219/2, 199/2, 120/2, 202/2 situated at village Kariyajhar, Tahsil Rampur Naikin, District Sidhi. By an order dated 8.12.2006 of the Government of Madhya Pradesh, Mineral Resources Department, mining leases for extracting limestone from the lands of the petitioners have been granted by the State Government in favour of the respondent No.4 and accordingly mining leases in Form-K. prescribed under the Rules of 1960 have been executed by the State Government on 15.1.2007 in favour of the respondent No.4 in respect of the aforesaid lands.

3. Writ petitions were filed by other bhumiswamis in respect of whose lands similar mining leases had been granted by the State Government. The main ground taken in these writ petitions was that the State Government could not grant mining leases in respect of the land to a third party without the consent of the bhumiswami of the land and without affording him an opportunity of hearing and learned single Judge of this Court who heard the writ petitions referred two questions of law to a Division Bench of this Court: (1) whether grant of any lease by the State Government without the consent of the bhumiswami was sustainable in law and (2) whether the Division Bench of this Court in *Premchand vs. State* 1965 JLJ 413 (CN 73) had rightly held that for assignment of right in respect of any minerals, the mines and quarries by the Government to a third person under Section 247 of the M.P. Land Revenue Code, an opportunity of hearing or consent of bhumiswami was not required. The Division Bench to which the reference was made held in its opinion dated 2nd May, 2008 in W.P.No.7745 of 2006 *(Shyam Bihari Singh vs. State of M.P. and others)* and the other connected writ petitions that the rights of the lessee and the owner of the private land in respect of which the mining lease of minerals covered under the Act of 1957 was granted are governed by the provisions of the Act of 1957 and the Rules of 1960 and hence the decision of the Division Bench in *Premchand* (supra) under Section 247 of the M.P. Land Revenue Code was not applicable to grant of mining lease under the Act of 1957. In the opinion dated 2nd May, 2008, the Division Bench also held that the consent of the owner of the private land or opportunity of hearing to such owner of private land was not mandatory before grant of mining lease under the Act of 1957 and the grant of mining leases by the Government without the consent of the private owner of the land is sustainable in law.

4. A contention was also raised before the Division Bench in W.P.No.7745 of 2006 and other connected writ petitions that if grant of lease in respect of minerals located in the private land in favour of a third party without the consent of the owner of the private land can be made by the Government, then the valuable right to property which is not only a constitutional right but also human right would be seriously affected, but the Division Bench observed that as and when a challenge to the provisions of the Act of 1957 and the Rules of 1960 is made on this ground, the same can be considered by the Court, but so long as the language of the Act of 1957 and the Rules of 1960 was clear, the Court had no option but to hold that consent of the owner of the private land in respect of which mining lease is sought to be given by the Government is not mandatory. The petitioners have therefore filed this writ petition challenging the provisions of the Act of 1957 and the Rules of 1960 as ultra vires the Constitution of India.

5. The provisions of the Act of 1957 and the Rules of 1960, which are challenged in this writ petition are Sections 10 and 24 of the Act of 1957 and Rules 22 and 26 of the Rules of 1960 and Form 'K', which is the form of the mining lease deed

prescribed by the Rules of 1960. Section 10 of the Act of 1957 is titled "Application for prospecting licences or mining leases" and provides that the State Government may grant or refuse to grant a reconnaissance permit, prospecting licence or mining lease in respect of any land in which the minerals vest in the Government. Section 24-A of the Act of 1957 is titled "Rights and liabilities of a holder of prospecting licence or mining lease" and makes it lawful for the holder of a reconnaissance permit, prospecting licence or mining lease, his agents or his servants or workmen to enter the lands over which such permit, licence or lease has been granted and to carry out reconnaissance, prospecting or mining operations. Rule 22 of the Rules of 1960 is titled "Applications for grant of mining leases" and prescribes the form in which the applications for mining leases are to be made and the documents which are to accompany the application. Rule 26 of the Rules of 1960 is titled "Refusal of application for grant and renewal of mining lease" and provides that the State Government may after giving to the applicant an opportunity of being heard and for reasons to be recorded in writing and communicated to the applicant, refuse to grant or renew a mining lease over the whole or part of the area applied for. Form 'K' is the form of mining lease deed prescribed under Rule 31 of the Rules of 1960. These impugned provisions of the Act of 1957 and the Rules of 1960 do not make the consent of the owner of the land or an opportunity of hearing to the owner of the land mandatory before grant of a mining lease to the applicant of a mining lease.

6. Mr. Naman Nagrath, learned counsel for the petitioners submitted that the right to property is a Constitutional right guaranteed under Art. 300-A of the Constitution of India. He submitted that in *Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Power and Chemicals Limited and others,* AIR 2007 S.C. 2458, the Supreme Court has held that the right to property is now considered not only a constitutional right but also a human right. He submitted that the petitioners as bhumiswamis of the land have a right to occupy and use their land. He cited the decision in *Jilubhai Nanbhai Khachar vs. State of Gujarat and another,* 1995 Suppl.1 SCC 596, in which the Supreme Court has taken a view that taking possession of property belonging to a person amounts to depriving the person of his property. He argued that Section 10 of the Act of 1957, in so far as it empowers the State Government to grant a mining lease and Section 24-A of the Act of 1957 in so far as it makes it lawful for a lessee of a mining lease or its agent, or its servant or workman to enter upon the land in respect of which such mining lease has been granted and to carry out mining operations, amount to taking of possession of the land of the bhumiswami and depriving him of his property. He submitted that Sections 10 and 24-A of the Act of 1957 and Rules 22 and 26 and Form 'K' prescribed under Rule 31 of the Rules of 1960, which do not make opportunity of hearing to the bhumiswami or consent of the bhumiswami

mandatory before grant of mining lease and before allowing the lessee to enter into the land of the bhumiswami are unreasonable and arbitrary and are violative of Article 14 of the Constitution. He also submitted that in *Olga Tellis vs. Bombay Municipal Corporation,* AIR 1986 S.C. 180, the Supreme Court has held that the right to life guaranteed under Art.21 of the Constitution includes the right to livelihood and any person who is deprived of his right to livelihood except in accordance with the just and fair procedure established by law can challenge the deprivation of his right to life conferred by Art.21 of the Constitution. He submitted that in *Olga Tellis* (supra), the Supreme Court has further held that the procedure prescribed by law for the deprivation of right conferred by Art.21 of the Constitution must be fair, just and reasonable. He argued that since no opportunity of hearing is granted to the occupier of the land, nor his consent taken before grant of a mining lease and before allowing entry to the lessee or his agent or servant or workman upon the land of the occupier for carrying out the mining operations, the impugned provisions of Sections 10 and 24-A of the Act of 1957 are ultra-vires Arts. 14 and 21 of the Constitution.

7. Mr. Dharmendra Sharma, learned counsel appearing for the Union of India, relying on the decision of the Supreme Court in *Bhagwan Das vs. State of U.P. and others,* AIR 1976 S.C. 1393, submitted that the rights over the minerals vest in the State Government and under impugned Section 10 of the Act of 1957, the State Government only assigns its own rights over the minerals to a lessee. He further submitted that the occupier of a land, however, has a right to use the surface of the land and impugned Section 24-A of the Act of 1957 makes it lawful for the lessee, his agent or his servant or his workmen to enter into the land over which lease has been granted to carry out mining operations and for such interference with the rights of the occupier of the land, the impugned Section 24-A of the Act of 1957 provides for compensation for any loss or damage, which arises, or has arisen from or is in consequence of the mining operations. He argued that Art.300-A of the Constitution itself provides for deprivation of property with the authority of law and the impugned Section 24-A of the Act of 1957 is a provision of law authorising deprivation of the right to property of the occupant of the land in respect of which the mining lease is granted by the State Government.

8. Mr. S.B. Upadhyaya, learned senior counsel appearing for the respondent No.4, in reply, submitted that the Act of 1957 is specified in the Ninth Schedule of the Constitution with effect from 10th August, 1975 and Art.31-B of the Constitution provides that none of the Acts and Regulations prescribed in the Ninth Schedule of the Constitution or any provision thereof shall be deemed to be void or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights

conferred by any provisions of Part III of the Constitution. He submitted that in *Waman Rao vs. Union of India and others,* AIR 1981 S.C. 271, the Supreme Court has held that various constitutional amendments by which amendments were made to Ninth Schedule of the Constitution on or after 24th April, 1973 when the judgment of the Supreme Court in the case of *Keshwanand Bharati vs. State of Kerala,* AIR 1973 S.C. 1461 was delivered, will be valid only if they do not damage or destroy the basic feature of the Constitution. He submitted that the right to property guaranteed under Art.300-A of the Constitution is also not a basic feature of the Constitution as has been observed by Krishna Iyer, J. in *Bhim Singhji vs. Union of India and others,* 1981 (1) SCC 166. He further submitted that since the Act of 1957 is specified in the Ninth Schedule to the Constitution by the Thirty Ninth Constitutional Amendment with effect from 10th August, 1975 and Sections 10 and 24-A of the Act of 1957 do not in any way destroy the basic feature of the Constitution, these provisions are saved from challenge on the ground that they are violative of any of the rights guaranteed by Part III of the Constitution. He further submitted that the State Government has a right over the minerals embedded in the land and can lease out the minerals to any party for development of the minerals and the lessee of a mining lease must be allowed to carry out mining operations in the land. He submitted that as the occupier of the surface of the land is compensated for any loss or damage that he may suffer, the provisions in Sections 10 and 24-A of the Act of 1957 and Rules 22 and 26 of the Rules of 1960 are reasonable and fair.

9. Art.31 -B of the Constitution is extracted herein below:

> **"31-B. Validation of certain Acts and Regulations** - Without prejudice to the generality of the provisions contained in article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provision thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

In *Keshwanand Bharati* (supra) decided on 24th April, 1973, the majority of the Judges of the Supreme Court held that Parliament has no power to amend the Constitution so as to damage or destroy its basic or essential feature or structure. After the judgment in the case of *Keshwanand Bharati* (supra), the Ninth Schedule to the Constitution was amended from time to time to include various Acts and Regulations and a question arose before the Supreme

Court in *Waman Rao* (supra), whether such constitutional amendments to include Acts and Regulations in the Ninth Schedule are constitutionally valid and the Supreme Court held in para 52 at page 291 as reported in the AIR that all Acts and Regulations included in the Ninth Schedule to the Constitution prior to 24 April, 1973 will receive the full protection of Art.31-B and they will not be open to challenge on the ground that they are inconsistent with, or takes away or abridges any of the rights conferred in Part-III of the Constitution, but Acts and Regulations which are, or will be included in the Ninth Schedule to the Constitution on or after 24th April, 1973 will be constitutionally valid and will receive the protection of Art.31-B of the Constitution only if they do not damage or destroy the basic structure of the Constitution. The Act of 1957 was included in Entry 90 in the Ninth Schedule of the Constitution with effect from 10th August, 1975 by the Thirty Ninth Constitutional Amendment and therefore, the provisions of Sections 10 and 24-A of the Act of 1957 impugned in this writ petition will be constitutionally valid and will receive the protection of Art.31-B of the Constitution if they do not damage or destroy the basic structure of the Constitution. Hence, we will have to find out whether they damage or destroy the basic structure of the Constitution.



10. The impugned Sections 10 and 24-A of the Act of 1957 are extracted herein below:

> **" 10. Application for prospecting licences or mining leases –**
>
> (1) An application for a reconnaissance permit, prospecting licence or mining lease in respect of any land in which the minerals vest in the Government shall be made to the State Government concerned in the prescribed form and shall be accompanied by the prescribed fee.
>
> (2) Where an application is received under sub-section (1), there shall be sent to the applicant an acknowledgement of its receipt within the prescribed time and in the prescribed form.
>
> (3) On receipt of an application under this section, the State Government may, having regard to the provisions of this Act and any rules made thereunder, grant or refuse to grant the permit, licence or lease."
>
> **"24-A - Rights and liabilities of a holder of prospecting licence or mining lease -**
>
> (1) On the issue of a reconnaissance permit, prospecting licence or mining lease under this Act and the Rules made

thereunder, it shall be lawful for the holder of such permit, licence or lease, his agents or his servants or workmen to enter the lands over which such permit; lease or licence had been granted at all times during its currency and carry out all such reconnaissance prospecting or mining operations as may be prescribed:

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

(2) The holder of a reconnaissance permit, prospecting licence or mining lease referred to in sub-section (1) shall be liable to pay compensation in such manner as may be prescribed to the occupier of the surface of the land granted under such permit, licence or lease for any loss or damage which is likely to arise or has arisen from or in consequence of the reconnaissance, mining or prospecting - operations.

(3) The amount of compensation payable under sub-section (2) shall be determined by the State Government in the manner prescribed."

11. So far as the State of Madhya Pradesh is concerned, Section 247 of the Madhya Pradesh Land Revenue Code, 1959 states that the right to all minerals, mines and quarries shall vest in the State Government which shall have all powers necessary for proper enjoyment of such rights. A reading of sub-section (1) of Section 10 of the Act of 1957, quoted above, would show that under the provision, State Government has the power to grant permit, licence or lease in respect of any land in which the minerals vest in the Government. Thus, it is only where the property in the minerals vests in the State Government that the State Government has the power to grant a permit, licence or lease and not otherwise. Sub-section (1) of impugned Section 24-A of the Act of 1957, quoted above, provides that on the issue of a reconnaissance permit, prospecting licence or mining lease under the Act and the Rules, it shall be lawful for the holders of such permit, licence or lease, his agents or his servants or workmen to enter the lands over which such permit, licence or lease is granted at all times during its currency and carry out all such reconnaissance, prospecting or mining operations as may be prescribed. An occupier of the surface of the land obviously has a right to occupy and use the land in the manner he chooses and this right of the occupier of the surface of the land is no doubt affected when a mining permit, lease or licence is granted in favour of a third party by the State Government under Section 10

of the Act of 1957. Hence, the provisions of Sections 10 and 24-A of the Act of 1957 have the effect of depriving an occupier of the surface of the land, his right to property but the question we have to decide is whether they are ultra vires Article 300-A of the Constitution.

12. Article 300-A of the Constitution is quoted herein below:

> **"300A. Persons not to be deprived of property save by authority of law** - No person shall be deprived of his property save by authority of law."

Art.300-A of the Constitution quoted above provides that no person shall be deprived of his property save as authorised by law. Thus, Art.300-A itself authorises deprivation of property by authority of law and no constitutional amendment even is necessary to deprive a person of his property. The right to property as guaranteed under Art.300-A of the Constitution cannot therefore be a basic feature of the Constitution. In *Bhim Singhji* (supra), Krishna Iyer, J. has also taken a view that the right to property is not part of the basic structure of the Constitution. We are thus of the view that Sections 10 and 24-A of the Act of 1957 do not damage or destroy the basic structure of the Constitution and these being provisions of law authorising deprivation of property are also not ultra vires Art.300-A of the Constitution.

13. We may now consider whether the impugned provisions violate the right to livelihood guaranteed to every person under Article 21 of the Constitution. A reading of sub-section (2) of Section 24-A of the Act of 1957 shows that the holder of a reconnaissance permit, prospecting licence or mining lease is liable to pay compensation in such manner as may be prescribed to the occupier of the surface of the land for any loss or damage which is likely to arise or has arisen from or in consequence of the reconnaissance or prospecting or mining operations. Sub-section (3) of Section 24-A of the Act of 1957 provides that the amount of compensation payable under sub-section (2) shall be determined by the State Government in the manner prescribed. Section 3 (f) of the Act of 1957 states that in the Act, unless the context otherwise requires, 'prescribed' means prescribed by rules made under the Act. Rules 72 and 73 of the Rules of 1960 prescribe the manner in which the amount of compensation is to be determined and are extracted herein below:

> **" 72. Payment of compensation to owner of surface rights, etc. -**
>
> (1) The holder of a reconnaissance permit or prospecting licence or mining lease shall be liable to pay to the occupier of the surface of the land over which he holds the reconnaissance permit or prospecting licence or mining lease, as the case may be, such annual compensation as may be

determined by an officer appointed by the State Government by notification in this behalf in the manner provided in sub-rules (2) to (4).

(2) In the case of agricultural land, the amount of annual compensation shall be worked out on the basis of the average annual net income from the cultivation of similar land for the previous three years.

(3) In the case of non-agricultural land, the amount of annual compensation shall be worked out on the basis of the average annual letting value of similar land for the previous three years.

(4) The annual compensation referred to in sub-rule (1) shall be payable on or before such date as may be specified by the State Government in this behalf."

**" 73. Assessment of compensation for damage-**

( 1 ) After the termination of a reconnaissance permit or a prospecting licence or a mining lease, the State Government shall assess the damage, if any, done to the land by the reconnaissance or prospecting or mining operations and shall determine the amount of compensation payable by the permit holder or licensee or the lessee, as the case may be, to the occupier of the surface land.

(2) Every such assessment shall be made within a period of one year from the date of termination of the reconnaissance permit or prospecting licence or mining lease and shall be carried out by an officer appointed by the State Government by notification in this behalf."

14. Sub-rule (2) of Rule 72 of the Rules of 1960 thus clearly provides that in the case of agricultural land, the amount of annual compensation shall be worked out on the basis of the average annual net income from the cultivation of similar land for the previous three years. Sub-rule (3) of Rule 72 of the Rules of 1960 provides that in case of non-agricultural land, the amount of annual compensation shall be worked out on the basis of average annual letting value of similar land for the previous three years. Sub-Rule (4) of Rule 72 of the Rules of 1960 further provides that annual compensation shall be payable on or before such date as may be specified by the State Government in this behalf. Sub-Rule (1) of Rule 73 of the Rules of 1960 further provides that after the termination of the reconnaissance permit or a prospecting licence or a mining lease, the State Government shall assess the damage, if any done

to the land by the reconnaissance or prospecting or mining operations and shall determine the amount of compensation payable by the permit holder or licensee or the lessee, as the case may be, to the occupier of the surface land. Sub-rule (2) of Rule 73 of the Rules of 1960 further provides that every such assessment shall be made within a period of one year from the date of termination of the reconnaissance permit or prospecting licence or mining lease and shall be carried out by an officer appointed by the State Government by notification in this behalf. These provisions in sub-sections (2) and (3) of Section 24-A of the Act of 1957 and Rules 72 and 73 of the Rules of 1960, therefore, ensure that the occupier of the surface of the land is reasonably compensated for loss of income which he would have earned by using the land either for agricultural or non-agricultural purpose during the currency of the reconnaissance permit, prospecting licence or mining lease and also for the damage done to the land by the reconnaissance permit or prospecting licence of mining lease soon after termination of the permit, licence or lease, as the case may be. These statutory provisions also ensure that the compensation amount is assessed and paid in time to the occupier of the surface of the land. In our considered opinion, therefore, the right to livelihood guaranteed under Art.21 of the Constitution of the occupier of the surface of the land is not affected by the impugned provisions.

15. The impugned Sections 10 and 24-A of the Act of 1957 and the impugned Rules 22 and 26 of the Rules of 1960, however, do not provide for an opportunity of hearing to the occupier of the surface of the land nor do they provide for consent to be taken of the occupier of the surface of the land before grant of a reconnaissance permit, prospecting licence, or a mining lease. In fact, in *Shyam Bihari Singh vs. State of M.P. and others* - W.P.No.7745 of 2006 and other connected cases, the Division Bench in its opinion dated 2nd May, 2008 has held that the consent of the owner of the private land or opportunity of hearing to the occupier of the surface of the land is not mandatory for grant of mining lease under the Act of 1957 and that the grant of mining lease by State Government without consent or opportunity of hearing is sustainable in law. In our considered opinion, however, the absence of provision for opportunity of hearing to the occupier of the surface of the land or consent to be taken from the occupier of the surface of the land before grant of a reconnaissance permit, prospecting licence or a mining lease will not make the impugned provisions unreasonable and arbitrary. Where the property in the minerals vests in the Government, the State Government has the right to grant permit, licence or lease in respect of such minerals and the occupier of the surface of the land who merely has a right to occupy and use the surface of the land in the manner he likes cannot obstruct the exercise of such right of the State Government to grant reconnaissance permit, prospecting licence or a mining lease. Parliament has, therefore, not provided for an

opportunity of hearing to the occupier of the surface of the land and has also not provided that consent has to be taken from the occupier of the surface of the land before grant of a reconnaissance permit, a prospecting licence or a mining lease. Instead, Parliament has provided that the occupier of the surface of the land must be compensated for the loss of income that he may suffer or for the damage to the land on account of carrying out of the operations in accordance with the reconnaissance permit, prospecting licence or mining lease. Considering the nature of the right of the State Government to the minerals embedded in the land and the nature of the right of the occupier of the surface of the land, we do not think that the provisions of Sections 10 and 24-A of the Act of 1957 are unreasonable and arbitrary for not making a mandatory provision for an opportunity of hearing to the occupier of the surface of the land or a consent to be taken of the occupier of the surface of the land before grant of reconnaissance permit, prospecting licence or a mining lease by the State Government to a third party. The impugned Sections 10 and 24 of the Act of 1957 have protected both the right of the State Government to the minerals vested in it as well as the right of the occupier of the surface of the land in a fair and reasonable manner by enabling the State Government to explore and develop the minerals by reconnaissance, prospecting and mining operations through its assignees and at the same time by making provisions for reasonable compensation to the occupier of land for the loss of income or damage to the land that he will suffer by such reconnaissance, prospecting and mining operations.

16. Mr. Naman Nagrath, learned counsel for the petitioners, next submitted that law is well settled that even where a statute does not provide for an opportunity of hearing, principles of natural justice have to be read into the statutory provision. In support of this proposition, he cited the decisions of the Supreme Court in *S.K. Bhargava vs. Collector, Chandigarh and others*, 1998 (5) S.C.C. 170 and *Mangilal vs. State of M.P.*, 2004 (2) S.C.C. 447. He submitted that considering this settled position of law, even if Section 10 of the Act of 1957 and Rules 22 and 26 of the Rules of 1960 do not contain a mandatory provision for an opportunity of hearing to the occupier of the surface of the land, this Court should hold that opportunity of hearing should be provided to the occupier of the surface of the land before grant of mining lease in respect of the land in favour of third party by the State Government considering the fact that rights of the occupier of the surface of the land would be seriously affected by the grant of such mining lease.

17. Mr. Dharmendra Sharma, learned Assistant Solicitor General for the Union of India and Mr. Upadhyaya, learned senior counsel for the respondent No.4, on the other hand, submitted that Section 10 of the Act of 1957 excludes the application of principles of natural justice by implication and, therefore, the

Court cannot hold that an opportunity of hearing has to be granted before grant of a mining lease. He submitted that if the Court holds that principles of natural justice have to be read into Section 10 (3) of the Act of 1957, then development and regulations of mines and minerals, which are the objects of the Act of 1957, will be frustrated. He cited the decisions of the Supreme Court in *Delhi Transport Corporation vs. D.T.C. Mazdoor Congress and others*, 1991 Supp (1) S.C.C.600, *Dr. Umrao Singh Choudhary vs. State of M.P. and another*, 1994 (4) S.C.C. 328, and *Aligarh Muslim University and others vs. Mansoor Ali Khan*, 2000 (7) S.C.C. 529 in support of this contention.

18. We may first consider the authorities cited by Mr. Naman Nagrath. In *S.K. Bhargava* (supra), Section 3 of the Haryana Public Money s (Recovery of Dues) Act, 1979 provided that where any sum is recoverable from a defaulter, the authority named therein shall determine the sum in default and the Supreme Court held that even though Section 3 of the Act did not expressly provide for an opportunity to be given to the alleged defaulter to explain whether any amount is due or not, the principles of natural justice must be read into it in view of the nature of the provision. In *Mangilal* (supra). Section 357 of the Criminal Procedure Code, 1973, as amended by the State of M.P., came up for interpretation and the question before the Supreme Court was whether the Court was required to hear the accused before fixing the quantum of compensation payable by the accused to any person for any loss or injury caused by the offence committed by the accused and the Supreme Court held that even if the statute was silent in this regard, there could be nothing wrong in spelling out the need to hear the authorities whose rights and interests are likely to be affected by the order that may be passed and the irresistible conclusion was that an opportunity has to be granted to the accused before granting compensation under Section 357 (4) of the Criminal Procedure Code. These are cases where determination of the sum had to be done and the Supreme Court held that even though the statutory provision does not expressly provide for a hearing, an opportunity of hearing must be provided to the party to be affected by the determination.

19. We may also examine the authorities cited by Mr. Upadhyaya. In *Delhi Transport Corporation* (supra), Sabyasachi Mukharji, J. in his dissenting judgment has observed that the rule of ***audi alteram partem*** can be excluded where having regard to the nature of action to be taken, its object and purpose and the scheme of relevant statutory provision, fairness in action does not demand its application and even warrants its exclusion. In *Dr. Umrao Singh Choudhary* (supra), Section 14 of the M.P. Vishwa Vidyalaya Adhiniyam, 1973 engrafted an elaborate procedure to conduct enquiry against the Vice Chancellor and after giving reasonable opportunity, to take action thereon for his removal from the office, but Section 52 engrafted an exception thereto and provided a different procedure altogether and the Supreme Court held that by necessary implication, the application

of principles of natural justice has to be excluded and rejected the contention of the petitioner in that case that he was entitled to grant of opportunity before taking action under Section 52 (1), saying that this procedure will be self defeating. In *Aligarh Muslim University and others* (supra), the Supreme Court observed that if upon admitted and undisputed facts, only one conclusion was possible, it was not necessary to quash the order which was passed in violation of the principles of natural justice as observing the principles of natural justice would be an useless formality.

20. After considering all the authorities cited by both Mr. Nagrath and Mr. Upadhyaya, we are of the opinion that where the statute does not itself provide for an opportunity of hearing, the nature of the particular statutory provision has to be kept in mind by the Court for deciding whether the principles of natural justice will have to be read into that statutory provision. As we have seen, Parliament has conferred power on the State Government to grant reconnaissance permit, prospecting licence or a mining lease in respect of the minerals vested in the State Government to a party and if an opportunity of hearing was provided to the occupier of the surface of the land in respect of which the reconnaissance permit, prospecting licence or a mining lease is granted, the State Government would not be able to assign its right over the minerals vested in it and develop the mines and minerals and the object of the Act of 1957 would be frustrated. Hence, considering the object of the Act of 1957 and the nature of the provisions as well as the right of the State Government to the minerals embedded in the land, an opportunity of hearing to the occupier of the surface of the land before grant of the reconnaissance permit, prospecting licence or mining lease must be held as impliedly excluded.

21. But we hasten to add that the opportunity of hearing to the occupier of the surface of the land before determination of compensation though not expressly provided in sub-sections (2) and (3) of Section 24-A of the Act of 1957 and the Rules 72 and 73 of the Rules of 1960, will have to be granted to the occupier of the surface of the land considering the nature of these statutory provisions. Sub-section (2) of Section 24-A of the Rules of 1960 provides that the holder of a reconnaissance permit, prospecting licence or mining lease is liable to pay compensation to the occupier of the surface of the land for any loss or damage which is likely to arise or has arisen from or in consequence of reconnaissance, prospecting or mining operations and sub-section (3) of Section 24-A of the Act of 1957 provides that the amount of compensation shall be determined by the State Government in the manner prescribed. Rules 72 and 73 of the Rules of 1960 provide the manner in which such compensation has to be determined by the State Government. Obviously, the occupier of the land has to be given an opportunity to make his claim in accordance with the aforesaid statutory provisions and support his claim before the authority determining the compensation amount by materials,

otherwise the compensation amount that is paid to the occupier of the surface of the land may not be adequate compared to the average annual net income of agricultural land or average annual letting value of similar land for the previous three years or compared to the actual damage done to this land by the reconnaissance, prospecting or mining operations carried out by the assignee of the State Government. Hence, the principles of natural justice are implicit in sub-sections (2) and (3) of Section 24-A and Rules 72 and 73, considering the nature of these statutory provisions and the kind of determination that the authority has to make under these statutory provisions. If reasonable compensation in accordance with the provisions of sub-sections (2) and (3) of Section 24-A of the Act of 1957 and Rules 72 and 73 of the Rules of 1960 is not determined and paid to such occupier of the surface of the land, the right of such occupier of the surface of the land to livelihood guaranteed under Art. 21 of the Constitution of India shall be affected.

22. In the result, while upholding the provisions of Sections 10 and 24-A of the Act of 1957 and Rules 22 and 26 and Form 'K' prescribed under Rule 31 of the Rules of 1960 as constitutionally valid, we direct that the petitioners will be afforded opportunity of hearing while determining compensation payable to the petitioners under sub-sections (2) and (3) of Section 24-A of the Act of 1957 and Rules 72 and 73 of the Rules of 1960. We further direct that such compensation will be determined and paid in time to the petitioners in accordance with the said statutory provisions. With the aforesaid findings and directions, the writ petition stands disposed of. No order as to costs.

*Petition disposed of.*

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**I.L.R. [2009] M. P., 1697**
**WRIT PETITION**
***Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava***
25 March, 2009*

SURENDRA RATHORE ... Petitioner
Vs.
VISHWANATH BHASIN & anr. ... Respondents

**A. Civil Procedure Code (5 of 1908), Sections 94 & 151** - *Application u/s 94 r/w Section 151 CPC for grant of injunction filed without filing the suit and waiting for amicable settlement out of Court - Rejection - Held - There is no power under CPC, even inherent power cannot be exercised by the Court to grant injunction particularly in view of the fact that there is no legal impediment in filing the suit - Merely on the ground that some talks are going on between the parties, would not clothe the applicant with right to invoke Section 94 r/w Section 151 CPC to claim interim injunction - Application not maintainable - Petition dismissed.* (Para 11)

*W.P. No.1693/2009 (Jabalpur)

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

**B. Civil Procedure Code (5 of 1908), Section 94** - *Power u/s 94 is not in derogation to the other provision of CPC, it is supplemental - It empowers the Court to grant temporary injunction in order to prevent the ends of justice from being defeated, if it is so prescribed.* (Paras 6 & 14)

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

**C. Civil Procedure Code (5 of 1908), Section 151** - *Inherent powers can be exercised to grant relief in case the case does not fall under any of the rules prescribed.*

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

**D. Civil Procedure Code (5 of 1908), Order 39 & Section 94(c)** - *Order 39 CPC deals with the temporary injunction and exercise of powers u/s 94(c) CPC - Thus, it is clear that Section 94(c) and Order 39 are not the two alternative sources of powers.* (Para 13)

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

**E. Civil Court Rules, M.P. 1961, Rule 372** - *Rule 372 provides that which cases can be registered as M.J.C. - There is no such enabling provision under the Rules for registration of application simplicitor - Application u/s 94 CPC cannot be registered as M.J.C. under the Rules.* (Para 15)

ङ. सिविल न्यायालय नियम, म.प्र. 1961, नियम 372 – नियम 372 उपबंधित

करता है कि कौन से मामले एम.जे.सी. के रूप में पंजीबद्ध किये जाएँगे – केवल आवेदन के पंजीयन के लिए कोई सामर्थ्यकारी उपबंध नियमों के अन्तर्गत नही है – नियमों के अन्तर्गत सि.प्र.सं. की धारा 94 का आवेदन एम.जे.सी. के रूप में पंजीबद्ध नही किया जा सकता।

**Cases referred :**

AIR 1962 SC 527, 2004 AIR SCW 4269, 1982 MPLJ 460, 2002(3) MhLJ 791, AIR 1976 Mad 45, 1955 MBLJ 1117, AIR (32) 1945 Nag 97, 1969 JLJ (SN) 101.

*Ravi Ranjan,* for the petitioner.

**ORDER**

The Order of the Court was delivered by ARUN MISHRA, J. :– Significant question which arises in the writ petition is whether an application under section 94 of Code of Civil Procedure, 1908 is maintainable for the purpose of grant of injunction without institution of the suit, there being no legal impediment in institution thereof.

2. Petitioner Surendra Rathore without filing suit has filed an application before the Court of Second Additional District Judge under section 94(c) and 94(e) read with section 151 of CPC and prayed for grant of temporary injunction against the respondents, restraining them from selling or alienating agricultural land comprised in survey No. 67/1 area 0.344 hectare, survey No. 68/1 area 1.011 hectare, total area 1.355 hectare.

3. The petitioner averred in the application that Vishwanath Bhasin and Pramod Bhasin had agreed to sell the aforesaid agricultural land for a consideration of Rs.10,25,000/-per acre. Pursuant to the agreement, the petitioner had paid a sum of Rs. 3 Lakhs by cheque no. 10585 and Rs. 1 Lakh by cheque No. 10587 of Bank of Maharashtra, Jabalpur to Vishwanath Bhasin and further paid Rs. 3 Lakhs by cheque No. 10584 and Rs. 1 Lakh by cheque No. 10586 of the same Bank to Pramod Bhasin. Thus total advance of Rs. 8 Lakhs was paid as part payment of price on 7.4.2007. In acknowledge of oral agreement, petitioner and respondent executed the agreement on 7.4.2007. The petitioner approached the respondents several times but they did not execute the sale deed within the agreed time of three months. The petitioner came to know that respondents were trying to sell the property to someone else, thereafter the petitioner published a notice in Dainik Bhaskar newspaper on 15.7.2007 not to purchase the property from the respondents as he was holding the agreement to purchase the property. Time was not the essence of the contract. The act of unilateral cancellation of agreement and forfeiture of advance was illegal and not tenable in law. The petitioner was preparing to file suit for specific performance of the agreement but as a last resort he approached the persons through whom the bargain was settled to persuade the respondents to execute the sale deed. In the meanwhile the aforesaid part of the land was acquired by the Jabalpur Development Authority (for short

JDA) for its scheme No. 41. The petitioner required the said mediators to find out as to how much land out of the said Khasra numbers was acquired by JDA. He also made it clear that if any small portion taken by the JDA, he was willing to pay for the whole. Matter is pending with the mediators they are persuading the petitioner not to file the suit for specific performance and wait for settlement until the last date of limitation. As if the suit for specific performance is filed, it is likely to take long time for ultimate outcome with the result that petitioner will have nothing in hand except endless litigation, therefore, the petitioner has prayed that respondents be restrained from selling or otherwise alienating the property to someone else during the period right of the petitioner to file suit for specific performance subsists.

4. The Trial Court vide order dated 31.1.2009 passed in MJC No. 4/2009 has rejected the application on the ground that application is not maintainable. It would not be appropriate to grant injunction without filing of the suit. Such a case cannot be registered as per rule 372 of M.P. Civil Court Rules framed by the High Court of Madhya Pradesh. Dissatisfied with the aforesaid order of the Trial Court, instant writ petition has been preferred by the petitioner.

5. Shri Ravi Ranjan, learned counsel appearing for the petitioner has submitted that it was incumbent upon the Trial Court to have registered the case as MJC to entertain it on merits. He has further submitted that without filing of the suit, an application can be filed under section 94 of CPC for grant of injunction. Even if the matter is not covered under Order 39 Rule 1 and 2 CPC, injunction can be granted under section 94 of CPC. The mediator was desisting the petitioner from filing of the suit, limitation remains for filing of the suit, in the circumstances the Trial Court ought to have granted the injunction prayed for by the petitioner as he has paid a sum of Rs. 8 Lakhs to the respondents, which is a valuable amount. Thus the order passed by the Trial Court be set aside.

6. In order to appreciate submission, it is necessary to consider Section 94 of CPC. Section 94 of the CPC reads thus :

> **94. Supplemental proceedings.**-In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,
>
> (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;
>
> (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;
>
> (c) grant a temporary injunction and in case of disobedience

commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.

It is apparent from the provision of Section 94 of CPC that to prevent the ends of justice from being defeated, it is open under section 94(c) to grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold. Section 94(e) empowers the Court to make such other interlocutory orders as may appear to the Court to be just and convenient. Section 94 is a leading provision with respect to power of the Court to grant injunctions. The power under section 94 is not in derogation to the other provision it is supplemental. Inherent powers can be exercised to grant relief in case the case does not fall under any of the rules prescribed.

7. The meaning of the words 'if it is so prescribed' in section 94 has been considered by the Apex Court in *Manoharlal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal* -AIR 1962 SC 527. The majority view of the Apex Court is that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of expression 'if it is so prescribed' in Section 94 is only this that when the rules in Order 39 CPC prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Further, when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code. Thus, there being no such expression in Section 94 which expressly prohibits the issue of a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code, the Courts have inherent jurisdiction to issue temporary injunction in circumstances which are not covered by the provisions of Order 39,

CPC. No doubt about it that Court has the power to grant injunction in the circumstances which are not covered under Order 39 or rules made thereunder. In the exceptional circumstances using the inherent power under section 151, the order of injunction can be granted.

8. The Apex Court has considered the question of grant of interim relief under section 94 in *Vareed Jacob vs. Sosamma Geevarghese and others* - 2004 AIR SCW 4269, in which the majority of the Apex Court has laid down that source of power of the Court to grant interim relief is under Section 94. However, exercise of that power can only be done if the circumstances of the case fall under the rules. Therefore, when a matter comes before the Court, the Court has to examine the facts of each case and ascertain whether the ingredients of Section 94 read with the rules in an Order are satisfied and accordingly grant an appropriate relief. It is only in cases where circumstances do not fall under any of the rules prescribed that the Court can invoke its inherent power under section 151, CPC. Accordingly, the Courts have to grant relief of attachment before judgment. The Courts will grant temporary injunction if the case satisfied Order 39. So depending on the circumstances falling in the prescribed rules, the power of the Court to grant specified reliefs would vary. Therefore, each set of rules prescribed are distinct and different from the other and therefore, one cannot equate rules of temporary injunction with rules of attachment before judgment although all are broadly termed as interlocutory orders. The Apex Court in *Vareed Jacob* (supra) has laid down thus -

> 9. In the case of *M/s Ram Chand & Sons Sugar Mills Pvt. Ltd. v.Kanhayalal Bhargava* reported in AIR 1966 SC 1899, it has been held by this Court that the inherent power of the Court under Section 151, C.P.C. is in addition to and complimentary to the powers expressly conferred under C.P.C., but that power will not be exercised in conflict with any of the powers expressly or by implication conferred by other provisions of C.P.C. If there is express provision covering a particular topic, then Section 151, C.P.C. cannot be applied. Therefore, Section 151, C.P.C. recognizes inherent power of the Court by virtue of its duty to do justice and which inherent power is in addition to and complementary to powers conferred under C.P.C. expressly or by implication.
>
> 11. The above discussion shows that the source of power of the Court to grant interim relief is under Section 94. However, exercise of that power can only be done if the circumstances of the case fall under the rules. Therefore, when a matter comes before the Court, the Court has to examine the facts of each case and ascertain whether the ingredients of Section 94 read with the rules in an Order are satisfied and accordingly grant an appropriate

relief. It is only in cases where circumstances do not fall under any of the rules prescribed that the Court can invoke its inherent power under section 151, CPC. Accordingly, the Courts have to grant relief of attachment before judgment. The Courts will grant temporary injunction if the case satisfied Order 39. So depending on the circumstances falling in the prescribed rules, the power of the Court to grant specified reliefs would vary. Therefore, each set of rules prescribed are distinct and different from the other and therefore, one cannot equate rules of temporary injunction with rules of attachment before judgment although all are broadly termed as interlocutory orders.

The Apex Court has laid down that the inherent power is in addition to and complimentary to the powers expressly or by implication conferred under C.P.C., but that power will not be exercised in conflict with any of the powers conferred expressly or by implication. Order 39 Rule 1 provides the expression "wherein any suit it is proved by affidavit or otherwise". By using the expression "wherein any suit" Order 39 Rule 1 contemplates for filing of the suit and grant of injunction. Order 39 Rule 2 CPC also uses expression "in any suit". Thus the power to grant injunction conferred under Order 39 Rule 1 and 2 is in a suit. Section 94 uses the expression "if it is so prescribed" which has been considered by the Apex Court in *Manoharlal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal and Vareed Jacob vs. Sosamma Geevarghese and others* (supra).

9. There may be cases where plaint is presented before the Court but notice period has not expired, such suits are used to be registered as MJC earlier before amendment of section 80 CPC, if the period for notice has not expired. After amendment of Section 80, it is for the Court to grant permission to institute the suit as per sub-section (2) of Section 80. Nonetheless, earlier the plaint used to be filed along with the applications. Even under Municipal Corporation Act if period of notice has not expired, the method is adopted of filing of the plaint along with the application for injunction which is registered as MJC but nonetheless plaint is presented, it is registered later on after expiry of period of notice. In such a case in exceptional circumstances Court used to grant injunction under inherent power. In our opinion, for grant of injunction under section 94 read with inherent power it is necessary to seek main relief by filing the plaint. It is a different matter whether Court has not allowed to register it due to some legal impediments in case it exists, then the inherent power can be exercised by the Court for grant of injunction as the case is not covered under Order 39 Rule 1 and 2. When the case is squarely covered under Order 39 Rule 1 and 2, inherent power cannot be exercised for grant of such an injunction. Inherent power is exercised to grant injunction which are not covered under Order 39 Rule 1 and 2 but this power is supplemental not to violate the provisions.

10. In *Anilkumar Komalchand v. Kashinath Balkrishna Patel and others* - 1982 MPLJ 460 this Court has laid down that the power to issue temporary injunction is conferred on the Courts by Section 94 read with Order 39, Rules 1 and 2, CPC. The Courts have also inherent power to issue temporary injunction on an appropriate case being made out. Accordingly, the impugned order cannot be regarded to have been passed under section 80(2) CPC but has to be regarded to be one passed under Order 39, Rules 1 and 2, CPC. The submission raised that the order of injunction was passed under section 80 (2) CPC, was rejected.

11. We have to distinguish between the cases where main relief is claimed by filing the application in a case where plaint has not been presented at all and person is waiting for amicable settlement out of Court and seeks grant of injunction till limitation expires for filing of the suit from a case where there is legal impediment to register a case but plaint is filed before the Court. In the instant case ultimately a suit may itself be not presented, in case mediation succeeds. In our opinion, in such circumstances there is no power under CPC, even inherent power cannot be exercised by the Court to grant injunction particularly in view of the fact that there is no legal impediment in filing of the suit. Merely on the ground that some talks are going on between the parties, would not clothe the applicant with right to invoke section 94 read with Section 151 of CPC to claim interim injunction, which he can seek in properly instituted suit under Order 39 Rule 1 and 2. As suit has not been filed, which could have filed, recourse of filing of the application by indirect method to seek injunction, cannot be permitted to be resorted to. Such an application cannot be said to be maintainable. Main relief itself has not been asked in plaint by filing it. The grant of temporary injunction is supplemental to main relief, cannot be the main relief. The expression "if it is so prescribed" in Section 94 has been considered in *Dinkar Tippanna Mirajkar vs. Bank of India, Jaisingpur* 2002(3) MhLJ 791, the Court has held that Section 94 reveals the limitation of exercise of power by the Court. The execution of power under section 94 has necessarily to be in relation to the subject matter of dispute or the property relating to the dispute in the matter. Certainly, such power cannot be resorted to in relation to the property totally foreign to the dispute and unconnected with the claim of the parties to the suit. In the instant case there is no foundation of filing of suit is available.

12. In the absence of main relief which is sought in a plaint, interim relief or temporary injunction cannot be sought, has been laid down by the Madras High Court in *Kazimar Periya Pallivasal and others Vs. K.A.S. Arumugam and others* AIR 1976 MADRAS 45. It has been observed that if any person seeks relief under section 94 and inter alia asked for appointment of receiver, the condition precedent for making such a request is the existence of a main action which was already initiated by the person seeking the interlocutory relief. It would be improper in view of provisions of Section 94 and Order 40 Rule 1 to invoke the inherent

jurisdiction of the Code under Section 151 to entertain a bare suit for the appointment of a receiver and hold that such interlocutory orders can be made in the absence of a request for any other main relief. In ILR 1988 KR. 2378 the High Court of Karnataka has laid down that temporary injunction under section 94 cannot be granted without their being a directly instituted suit. In *Jhatalomal Vs. Bhagwan Prasad Tiwari* -1955 MBLJ 1117 this Court has opined that to file a suit only for the appointment of a receiver appears to be very queer on the fact of it. The proceedings for the appointment of a receiver are termed supplemental proceedings in CPC Supplemental proceedings cannot be harnessed to ensure a continuance of partnership through the agency of a receiver. It is always open to a party to arbitration proceedings to move the court for the appointment of a receiver. Such an application for a receiver must follow arbitration proceedings and not precede it. In the instant case there is no plaint presented to the Court. Main relief itself has not been sought as such recourse of the supplemental proceedings of grant of interim/temporary injunction cannot be resorted to.

13. In *Dhian Singh Sobha Singh vs. Secretary of State through Deputy Commissioner, Nimar and another* - AIR (32) 1945 Nagpur 97, it has been laid down that Section 94 and Order 39 CPC are not alternative sources thus :

> The jurisdiction of the Court to attach property before judgment is indicated by the words 'if so prescribed' in S.94, and that condition is satisfied when rules are made to order attachment of any property of the defendant. The meaning of the expression 'if so prescribed' would be clear when they are compared with the words 'subject to such conditions and limitations as may be prescribed' occurring in S.107, Civil P.C. 'Prescribed' means prescribed by rules (see S.2(16), Civil P.C.) In the latter case if the rules prescribe any conditions or limitations as affecting the jurisdiction of the Court, the jurisdiction cannot arise unless the conditions or limitations are satisfied. Section 94 merely says "so prescribed" and does not like S.107 say "subject to conditions and limitations as may be prescribed." Rules 5 and 6 of O.38 bring into effect the jurisdiction that is conferred by S.94 in so far as they make it clear that the Court has power to order attachment before judgment. In the absence of words such as those used in S.107 (1) Civil P.C. the other provisions made in Rr. 5 and 6 of O.38 must be interpreted as laying down the manner in which the Court's jurisdiction is to be exercised, and accordingly regarded as dealing with matters of procedure regulating the mode of exercise of a jurisdiction that exists. On this view any error in the manner of the exercise of the jurisdiction conferred by S.94 would not affect the validity of the Court's act if the Court's jurisdiction is derived from a source

independent of the provisions which merely prescribe the manner of its exercise.

Order 39 CPC deals with the temporary injunction and exercise of power under section 94(c) CPC, thus it is clear that Section 94(c) and order 39 are not the two alternative sources of power.

14. Shri Ravi Ranjan, learned counsel appearing for the petitioner has relied upon the decision of this Court in *State of M.P. vs. Caltex (India) Ltd. & two others* - 1969 JLJ (SN) 101 in which the Single Bench of this Court has laid down in the backdrop of the fact that notice under section 80 was served upon the Collector. The applicant has filed the suit with the requisite court fees coupled with the request that it should not be registered as notice period has not expired. The Court registered it as MJC. The order of injunction was sought, it was granted. The State opposed grant of injunction on the ground that suit could not be filed before expiry of two months from the date of service of notice, the Court was not competent to grant injunction. In the backdrop of the fact that suit itself was filed along with the application for injunction, it was registered as MJC, the Single Bench of this Court has laid down that it is open to the Court to grant injunction in view of the contemplated suit to maintain status quo. Section 94 of the code of Civil Procedure empowers the Court to grant a temporary injunction in order to prevent the ends of justice from being defeated, if it is so prescribed. Order 39 Rules 1 and 2, which deal with the grant of injunction, however, provide for grant of injunction during the pendency of the suit. There is no provision in the CPC providing that an injunction can be granted if no suit is pending, however, relying upon the Apex Court decision in *Manoharlal vs. Seth Hiralal* (supra) it has been laid down that if interest of justice so requires, Court may exercise inherent power. The view has been expressed that the object of granting temporary injunction is to ensure maintenance of status-quo until the final adjudication of the rights of the plaintiff. Where a party wants to institute a suit and is unable to do so on account of some "legal impediment", the Court may in a suitable case grant an injunction to maintain status quo until he is able to institute the suit. The decision of this Court cannot be so widely construed, it only means that the Court has power to grant an injunction before the registration of the plaint which has been presented in case of legal impediment in registering it but it must only be exercised in rare and exceptional cases where the party concerned has no other suitable remedy to prevent mischief. In the aforesaid case *State of M.P. vs. Caltex* (supra) the plaint itself was presented with the requisite court fees but it was not registered as regular suit. Application for grant of injunction was also filed. The case was registered as MJC as such the Single Bench has observed that inherent power can be exercised, in the said case there was legal impediment in the registration of suit. The facts are not similar in the instant case. Here there is no such legal impediment.

15. Consequently, the application which has been filed could not be said to be maintainable. Apart from that Rule 372 of M.P. Civil Court Rules framed by the High Court provides that which cases can be registered as MJC. There is no such enabling provision under the aforesaid rules for registration of application simplicitor. On the strength of decision of this Court in *State of M.P. vs. Caltex (India) Ltd. & two others* (supra), such application can be filed and registered only in case there is any legal impediment in registration of the suit but nonetheless it has been filed with requisite steps. There being no legal impediment in the instant case, the application being untenable has been rightly rejected by the Trial Court.

16. Resultantly, we find no merit in the writ petition, same deserves dismissal, is hereby dismissed.

*Petition dismissed.*

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**I.L.R. [2009] M. P., 1707**
**APPELLATE CIVIL**
*Before Mr. Justice K.K. Lahoti*
6 January, 2009*

SITARAM ... Appellant
Vs.
COOPERATIVE BHUMI VIKAS (LAND MORTGAGE) BANK LTD., KHANDWA & ors. ... Respondents

**Civil Procedure Code (5 of 1908), Section 9, Sahkari Bhumi Vikas Bank Adhiniyam, M.P. 1966, Sections 27, 64 & 82** - *Bar of jurisdiction of Courts - Appellant purchased land after obtaining NOC from Bank - Land was auctioned for recovery of dues from other persons without issuing notice to appellant - Held - Even if jurisdiction of civil court is excluded, the civil court has jurisdiction to examine into cases where the provisions of the Act were complied with or the statutory tribunal had not acted in conformity with fundamental principles of judicial procedure - Civil suit as framed and filed was maintainable - Matter remitted back.* (Paras 11, 12 & 16)

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

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*S.A. No.694/1996 (Jabalpur)

**Cases referred :**

AIR 1963 SC 1547, AIR 1964 SC 322, AIR 1969 SC 78, (2002) 7 SCC 46, (2006) 7 SCC 496, (2008) 5 SCC 542, AIR 2002 SC 997, 2001(3) MPHT 363.

*A.G. Dhande* with *D. Soni,* for the appellant.

*Rajneesh Gupta,* for the respondent Nos.1 & 7.

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

**K.K.LAHOTI, J.** :–The plaintiff has filed this appeal, aggrieved by the judgment and decree dated 12.3.1996 by Additional Judge to the Court of District Judge Khandwa in Civil Appeal No.7-A/1983, by which judgment and decree dated 16.3.1983 by the Civil Judge Class I, Burhanpur in Civil Suit No.8-A/1975 was confirmed. Both the Courts below found that the Civil Court has no jurisdiction to decide the suit and the controversy lies within the purview of section 64 of the M.P.Cooperative Societies Act, 1960 (hereinafter referred to as 'Act' for short) and dismissed the suit.

2. This appeal was admitted on 25.9.1998 on the following substantial question of law :-

> "Whether the Courts below erred in law in holding that the civil Court has no jurisdiction to grant the relief in view of section 27 of the M.P.Bhumi Vikas Adhiniyam, 1966 ?"

3. Learned counsel for appellant challenged the judgment and decree on the following grounds :-

> (1) That the Court below erred in holding that the suit was barred under section 27 of the M.P.Sahakari Bhoomi Vikas Bank Adhiniyam, 1966 (hereinafter referred to as 'Adhiniyam of 1966' for short) while the civil Court was having jurisdiction to decide the controversy between the parties.
>
> (2) That the appellant was not a borrower or a member of the Society and his case was not covered under section 64 of the Act. The appellant purchased the property by registered sale deed dated 27.4.1964 after obtaining no objection certificate dated 14.4.1964 from the Bank. The appellant was a bonafide purchaser of the property after obtaining due no objection certificate from the Bank. The appellant after purchase of the property remained in possession of the land for more than 10 years and without any notice to the appellant, the property was auctioned on 30.5.1974 and 1.6.1974. Before auction of land of appellant, notice was mandatory, in absence of which the entire proceeding vitiates. It is submitted that as the provisions of section 64 are not applicable in the case of appellant the Court below erred in dismissing the suit in view of section 27 of the Adhiniyam of 1966.

(3) That section 27 of the Adhiniyam of 1966 is not applicable in the present case. It provides that only the title of the purchaser shall not be impeachable, but in case where the auction took place without any notice to the plaintiff, the provision of section 27 shall not be applicable. The Court below erred in wrongly interpreting section 27 of the Adhiniyam of 1966.

(4) The appellant has placed reliance to Apex Court judgment in Firm Seth Radha Kishan (Deceased) represented by *Hari Kishan and others Vs. The Administrator, Municipal Committee, Ludhiana* (AIR 1963 SC 1547), *Firm and Illuri Subbayya Chetty and sons Vs. The State of Andhra Pradesh* (AIR 1964 SC 322), *Dhulabhai Vs. State of M.P., and another* (AIR 1969 SC 78), *Prakash Narain Sharma Vs. Burmah Shell Cooperative Housing Society Ltd.* [(2002)7 SCC 46], *Kishorilal Vs. Sales Officer, District Land Development Bank and others* [(2006)7 SCC 496] and *Rajasthan SRTC & others Vs. Mohar Singh* [(2008)5 SCC 542] and submitted that the judgment and decree passed by the Court below dismissing the suit of appellant are not sustainable under the law. The Civil Court was having jurisdiction to examine into the cases where the provisions of the Act were not complied with and also to examine whether the tribunals had not acted in conformity with the fundamental and judicial procedure.

4. Shri Rajneesh Gupta, learned counsel for respondent nos.1 & 7 supported the judgment and decree of the Court below and submitted that the appellant stepped into the shoes of the borrower. He purchased the property from the purchaser of the borrower. The lands in question were mortgaged with the bank and under section 64(1)(c) the appellant is a person who was claiming through the borrower. In these circumstances, the appropriate remedy for the appellant was to file a dispute under section 64 of the Act and the civil Court was having no jurisdiction to entertain and decide the dispute between the parties. He has also referred section 27 of the Adhiniyam of 1966 and submitted that the title of the purchaser cannot be impeached merely for irregularity. In the written statement the respondent has specifically pleaded that the appellant was having knowledge of the sale proceedings since 1970 and when the appellant was having knowledge of sale he ought to have approached to the cooperative tribunal for redressal of the grievance. The Court below rightly dismissed the suit of appellant in which no interference is needed in this appeal. He has placed reliance to the Apex Court judgment in *C.T.Nikam Vs. Municipal Corporation, Ahmedabad* (AIR 2002 SC 997) and Single Bench judgment of this Court in *Bruhtakar Sahakari Sakh Sanstha Maryadit Naitabali, Mandsaur Vs. Bherulal and another* [2001(3) MPHT 363] and submitted that this appeal may be dismissed with costs.

5. To appreciate the rival contentions of the parties, factual position in the case may be stated. Appellant Sitaram filed suit before the Civil Judge Class-I Burhanpur on 18.7.1975 for declaration that auction sale of khasra no.11 area 15.75 acres of village Kharkheda, Tahsil Burhanpur held on 30.5.1974 was void in law and the plaintiff being rightful bhumiswami of the land was entitled to its possession mesne profit and costs. The suit was filed on the allegations that plaintiff was the owner and in possession of the suit land since 1964. The disputed land khasra no.11 area 15.75 acres of village Kharkheda was recorded in the name of plaintiff as Bhumiswami in the record of rights.

That before purchasing the suit land defendant approached to the Bank on 14.4.1964 and moved an application for issuance of no objection certificate. The defendant bank certified that there was no charge or mortgage of bank on the suit land. After obtaining such no objection certificate plaintiff purchased the suit land on 27.4.1964 by registered sale deed.

In para 1(b)(3) the plaintiff pleaded that after having issued such no objection certificate, that there was no charge or mortgage on the suit land and the defendant bank was not entitled to proceed against the suit land for recovery of the loan under the doctrine of estoppel.

That the plaintiff purchased the suit land from defendant no.9 Raghunath S/o Bekhu, Tehsil Burhanpur by registered sale deed dated 27.4.1964 and since then the plaintiff was in possession of the land on his own rights. The plaintiff was arrested and detained on 29.7.1975 under the Defence of India Act by Kaknar Police and he was sent to Khandwa Jail, where he remained confined till 18.8.1975. The plaintiff also pleaded in para 2(b) of the plaint that respondent no.7 Dilipsingh in league with others, lodged false report against the plaintiff and got him arrested under the Defence of India Act and after the next date of arrest of plaintiff, Dilipsingh took unauthorised and unlawful possession of the suit land.

That the defendant no.7 threatened to the plaintiff that he was purchaser of the suit land in auction sale held by the sales officer of defendant no.2 under the Cooperative Societies Act for recovery of a debt due to defendant no.2 from Narayan S/o Kishan defendant no.4 and his deceased brother Kashinath.

In para 4(b) of the plaint it was pleaded that some proceedings were going on before the sales officer in respect of sale of alleged mortgage lands. The plaintiff applied to the sale officer that the suit land was not mortgaged with Bank and lands survey nos.59 and 63 were in possession of original mortgage Narayan and heirs of Kashinath. The debt amount could be recovered from them, but inspite of this the land of plaintiff was put to sale.

That the plaintiff who was a recorded Bhumiswami of the land and was in possession. He was never intimated about the date of sale. He was also not served with the demand notice in consequence of which the sale was held. Infact the

plaintiff had no information about the alleged auction sale of land and became aware after two weeks of the alleged auction.

With the aforesaid allegations and some other allegations in respect of irregularity of sale, the suit was filed for the aforesaid reliefs.

6. The defendants contested the suit by filing written statement in which allegations of the plaint were denied inter alia. The defendants also took a plea that the civil Court was having no jurisdiction to entertain and decide the dispute between the parties.

7. The trial Court framed the issues. The issue no.19 was the preliminary issue which was framed by the trial Court thus :-

> "Whether jurisdiction of civil Court is barred by M.P.Cooperative Societies Act and M.P.Sahakari Bhoomi Vikas Bank Adhiniyam, 1966 ?"

The trial Court heard the parties on the preliminary issue and found that under section 27 of the Adhiniyam of 1966 the suit was barred and dismissed the suit. Against the aforesaid judgment of the trial Court an appeal was preferred, but was also dismissed on the same grounds.

8. To appreciate the rival contentions of the parties it would be appropriate if section 27 of the Adhiniyam of 1966 is referred thus:-

> **"27. Title purchaser not impeachable for irregularities -** When a sale has been made in professed exercise of a power of sale under section 19 and has been confirmed under section 21, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercise of the power shall have his remedy in damages against the Development Bank."

Section 64 of the Act provides dispute to be filed before the Registrar. For ready reference section 64 may be referred which reads thus :-

> **"64. Disputes** -(1) Notwithstanding anything contained in any other law for the time being in force, [any dispute touching the constitution, management or business, terms and conditions of employment of a society or the liquidation of a society shall be referred to the Registrar] by any of the parties to the dispute if the parties thereto are among the following :-
>
> (a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or a nominee, heirs or legal representatives of any deceased agent or deceased servant of the society, or the liquidator of the society;

(b) a member, past member or a person claiming through a member, past member or deceased member of a society or of a society which is a member of the society;

(c) a person other than a member of the society who has been granted a loan by the society or with whom the society has or had business transactions and any person claiming through such a person;

(d) a surety of a member, past member or deceased member or a person other than a member who has been granted a loan by the society, whether such a surety is or is not a member of the society;

(e) any other society or the liquidator of such a society; and

(f) a creditor of a society.

(2) For the purposes of sub-section (1), a dispute shall include -

(i) a claim by a society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not;

(ii) a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor, whether such debt or demand be admitted or not;

(iii) a claim by a society for any loss caused to it by a member, past member or deceased member, any officer, past officer or deceased officer, any agent, past agent or deceased agent, or any servant, past servant or deceased servant, or its committee, past or present, whether such loss be admitted or not;

(iv) a question regarding rights, etc., including tenancy rights between a housing society and its tenants or members; and

(v) any dispute arising in connection with the election of any officer of the society or representative of the society or of composite society:

Provided that the Registrar shall not entertain any dispute under this clause during the period commencing from the announcement of the election programme till the declaration of the results].

(3) If any question arising whether a dispute referred to the Registrar is a dispute, the decision thereon of the Registrar shall be final and shall not be called in question in any court."

Section 82 of the Act bars the jurisdiction of the Court. For ready reference section 82 is referred thus :-

"**82. Bar of jurisdiction of Courts** - (1) Save as provided in this Act, no civil or revenue court shall have any jurisdiction in respect of -

(a) the registration of a society or of bye-laws or of an amendment of a bye-law ;

(b) the removal of a committee and the management of the society after such removal;

(c) any dispute, required to be referred to the Registrar or his nominee or board of nominees;

(d) any matter concerning the winding up and the dissolution of a society.

(2) While a society is being wound up, no suit or other legal proceedings relating to the business of such society shall be proceeded with, or instituted against, the liquidator as such or against the society or any member thereof, except by leave of the Registrar and subject to such terms as he may impose.

(3) Save as provided in this Act, no order, decision or award made under this Act shall be questioned in any court or any ground whatsoever."

9. In this case, the allegations of the plaintiff are that the plaintiff purchased the property after obtaining No objection certificate from the respondent Bank. The aforesaid no objection certificate was issued on 14.4.1964. The appellant filed this no objection certificate before the appellate Court alongwith an application dated 11.12.1985. A specific averment was made in the plaint itself that such no objection certificate was obtained by the plaintiff before purchase of the land on 14.4.1964 and thereafter on 27.4.1964, the plaintiff purchased the land from the predecessor. Apart from this the plaintiff very specifically averred that before auction of the land no notice, as envisaged under the Adhiniyam of 1966, was issued to the appellant. Section 18 of the Adhiniyam of 1966 provides power of sale when and how to be exercised. For ready reference section 18 may be referred which reads thus :-

"**18. Power of sale when and how to be exercised** - (1) Notwithstanding anything contained in the Transfer of Property Act, 1882 (IV of 1882), or the Trustees and Mortgages Powers

Act, 1866 (XXVIII) of 1866) the committee of the bank or any person authorised by such committee in this behalf shall, in case of default of payment of mortgage money or any part thereof, have power, in addition to any other remedy available to the bank, to bring the mortgaged property to sale without the intervention of the Court.

(2) No such power shall be exercised unless and until ;

(a) the Board has previously authorised the exercise thereof after hearing the objections, if any, of the mortgagor or mortgagors :

[Provided that the Board shall be deemed to have authorised the exercise of such power if no reply is received from the Board within thirty days of making a reference by the committee of the bank or any person authorised by the committee for the purpose.]

(b) notice in writing requiring payment of such mortgage money or part thereof has been served upon -

(i) the mortgagor or each of the mortgagors;

(ii) any person who has any interest or charge upon the mortgaged property or in or upon the right to redeem the same so far as known to the committee;

(iii) any surety for the payment of the mortgage debt or any part thereof; and

(iv) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property; and

© default has been made in payment of such mortgaged money or part thereof for three months after service of the notice."

Sub-section (2) of section 18 specifically provides that no such power shall be exercised until and unless notice upon the persons specified in section has been served, including the person who has interest or charge in the mortgage property.

10. In this case, the plaintiff purchased the property after obtaining no objection certificate dated 14.4.1964 from the Bank. The land was purchased by the plaintiff on 27.4.1964 and for a period of nearbaout 10 years the plaintiff was in possession of the property and as per averments in the plaint he was recorded Bhumiswami of the property. In this circumstances, the plaintiff was a person whose interest was involved in the property and was entitled to a notice as required under section 18 of the Act. It is a settled law that for deciding preliminary issue averments in the plaint are to be seen. Though defendant in the written statement had alleged

that the plaintiff was having knowledge of sale, but in the written statement nowhere it was stated that a due notice as required under section 18 was served on the plaintiff. In absence of aforesaid in the written statement, the averments made in the plaint may be taken into consideration while deciding preliminary issue no.19 in the matter. Recently the Apex Court in *Kishorilal* (supra) considered this aspect of non issuance of notice. The Apex Court in para 10 & 11 of the judgment considered non issuance of notice and scope of section 27 of the Adhiniyam. The Apex Court held that section 27 of the Act does not state that no notice is necessary to be served. It speaks of due notice has been served. Admittedly no notice was served on the appellant of that case and in those circumstances the Apex Court set aside the auction proceedings, though directed refund of sale consideration to the purchaser, but the sale was found to be invalid.

11. In this case as per the averments made in the plaint, as no notice as required under section 18 of the Act was served and when no such notice was served upon the plaintiff, the auction cannot be said to be a legal auction within the purview of provisions of Adhiniyam and in that circumstances, the provisions of section 27 may not be applicable. But this question is to be decided by the trial Court. If at this juncture this Court records any finding then it may effect the interest of the parties, who shall be free to adduce evidence in this regard. But from the perusal of averments made in the plaint it can very well be gathered that plaintiff specifically averred that no such notice was issued and without issuance of notice as required under section 18, an auction took place. In these circumstances as per averments of the plaintiff the entire auction was invalid. The civil Court was having jurisdiction to examine such issue, about the auction took place without following the mandatory provisions of the Act.

12. The Apex Court in *Firm and Illuri Subbayya Chetty* (supra), held that even if the jurisdiction of civil Court is excluded, the civil Court has jurisdiction to examine into cases where the provisions of the Act were complied with or the statutory tribunal had not acted in conformity with the fundamental principles of judicial procedure.

The Apex Court in *Dhulabhai* (supra) held that an exclusion of jurisdiction of civil Court is not readily to be inferred unless the conditions enumerated in the judgment apply. The Apex Court enumerated as far as 7 conditions in which the jurisdiction of the Civil Court may be excluded, but in the present case any of the aforesaid conditions does not apply.

The Apex Court in *Prakash Narain Sharma* (supra) considering the legal position held that even where exclusion of jurisdiction of civil Court is statutorily provided still on availability of requisite grounds the civil Court can entertain a civil suit on well defined parameters settled by the constitution Bench of the Apex Court in *Dhulabhai* (supra).

13. The judgment relied on by *Shri Rajneesh Gupta in C.T.Nikam* (supra) relates to termination order passed by an employer and in that case the Apex Court was considering the question of jurisdiction of civil court qua an industrial dispute. The Apex Court held that the relief sought for can be properly given by forum under the Industrial Disputes Act and the jurisdiction of civil court was impliedly barred. But the factual position in the present case is entirely different. In this case as per the avements made in the plaint the plaintiff alleged that he purchased the property after obtaining due no objection certificate from the Bank and was in possession of the property for a period of more than 10 years when the auction took place and that to without any notice as was mandatorily required under the Act. In the light of aforesaid fact the judgment of *C.T.Nikam* (supra) is not applicable in the present case.

14. So far as the judgment of Single Bench of this Court in *Bruhtakar Sahakari Sakh Sanstha Maryadit Naitabali* (supra) relied on by the learned counsel for respondents is concerned, this Court though held that independent suit for declaration of title on land in dispute is maintainable, but question whether any amount was due to the society was in exclusive domain of the authorities empowered to decide under the Cooperative Societies Act and the civil Court for enforcement of the charge or for recover of loan would be barred under the Cooperative Societies Act.

15. But the factual position in the present case is entirely different and the aforesaid judgment is not applicable in the present case. The Court below without properly considering the preliminary issue no.19 held that the civil Court was having no jurisdiction, while as per the settled law by the Apex Court the civil Court was having jurisdiction to examine the question that without following the mandatory provision of the Act such sale was legal or not and what was the effect of no objection certificate issued by the Bank before purchase of the property by the plaintiff. All these questions alongwith other questions were to be examined by the trial Court, while deciding the issue no.19. The issue no.19 could not have been decided without recording evidence in the matter.

16. In view of aforesaid the impugned order passed by the trial Court and appellate Court are not sustainable under the law. Both the orders are set aside. The matter is remitted back to the trial Court to decide the matter after extending opportunity to both the parties to lead the evidence. The parties present herein are directed to remain present before the trial Court on 30th of March, 2009 for which date no notice shall be necessary. On the aforesaid date the trial Court shall fix a date for recording evidence of both the parties. Both the parties if needed, may produce necessary documents before the trial Court on the date. Thereafter the trial Court shall proceed in the matter in accordance with law.

17. Considering the facts of the case, there shall be no order as to costs. While

remanding the matter, looking to the long pendency of the case, the trial Court is directed to expedite the hearing of the case and shall make an endeavour to decide the case expeditiously as far as possible within a period of six months from the aforesaid date.

*Order accordingly.*

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**I.L.R. [2009] M. P., 1717**
**APPELLATE CIVIL**
*Before Mr. Justice P.K. Jaiswal*
10 February, 2009*

STATE OF M.P. & ors. ... Appellants
Vs.
M/S SHUKLA CONSTRUCTION COMPANY ... Respondent

**Arbitration Act (10 of 1940), Section 30** - *Arbitrtor - Misconduct - Award challenged on the ground that appellant not afforded proper opportunity of hearing in violation of principles of Natural Justice by the Arbitrator and thus he committed misconduct by ignoring the terms of the contract - Held - Arbitrator in his award recorded finding on the basis of documents filed by parties - Appellant failed to point out as to how Arbitrator misconducted - Reason assigned by the Arbitrator and the view taken by the Arbitrator is a possible view - Appeal dismissed.* (Para 11)

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

**Cases referred :**
(1997) 4 SCC 693, (1994) 6 SCC 485, AIR 1989 SC 402.

*Sudesh Verma, G.A.*, for the State/appellants.
*Rohit Arya* with *Shekhar Sharma*, for the respondent.

**ORDER**

P.K. JAISWAL, J. :–This appeal is directed against the order dated 12.5.1998 passed by the Additional District Judge, Bhopal in Arbitration Case No.102-A/97, whereby the learned trial Court partly allowed the objections filed by the appellants under Section 30 of the Arbitration Act, 1940 ( for short "the Act") and partly

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*M.A. No.1074/1998 (Jabalpur)

confirmed the award dated 31.7.97 passed by the Arbitrator and issued a decree in terms of the award in favour of the respondent.

2. The facts giving rise to this appeal are that an agreement was executed between M/s. Shukla Construction Company (for short "the Contractor") and the State vide agreement No.3/DL/77-78 for construction of approach road at Betwa River Bridge and work order was issued on 5.5.1977. As per the term of the contract, the Contractor had to complete the work within a period of 12 months. The Contractor immediately after receipt of the work order started the work. There arose a dispute for lifting of fixed quantity of earth from the quarry and therefore the earth work was effected for the period from June 1977 to April 1978. The Contractor filed a claim petition before the appropriate authority as per the terms of the contract. As per the final bill, the work was completed and the payment was made on 24.9.1986. On 18.6.1980, the Contractor filed another claim in respect of the other Claims to the appellant no.4 as per the terms and conditions of the contract. The contractor being dissatisfied with the said award dated 11.5.1983 challenged the same before the Civil Court in Special Case No.24/84, which was allowed vide order dated 6.4.95 with a direction to the appellant no.3 to refer the matter to the Superintending Engineer for deciding the dispute between the parties.

3. The appellant no.3 referred the dispute to one Shri H. K. Arora, Superintending Engineer in the Office of the Chief Engineer, PWD. He was appointed as Arbitrator by the appellant no.3. The respondent-contractor, however, filed 12 claims before the Arbitrator. Parties led oral and documentary evidence. The Arbitrator after hearing the parties and taking into consideration the documents on record decided all the disputes and passed an award in favour of the respondent on 29.7.1997. The contractor was intimated about passing of the award dated 31.7.97. The respondent-contractor filed an application under Section 17 of the Act for making an award rule of the Court.

4. The appellants filed objections under Section 30 of the Act on the ground that the Arbitrator without granting proper opportunity to the appellants and in violation to the principle of natural justice, passed the impugned award and has misconducted himself inasmuch as he had ignored the terms of the contract and passed an award contrary to the terms of the contract.

5. The trial Court after perusing the record of the case and hearing arguments of the learned counsel for the parties, by the impugned order dated 12.5.95, allowed the Claim Nos. 1, 2, 5, 6, 7, 10 and 11 and in respect of Claim no.4, the learned trial Court directed to make payment as per the actual work done by the Contractor and held that the respondent is entitled for Rs.21,720.20 towards watering work and in respect of reming rolling work Rs. 17,335.62 cubic metre as per the terms of the control. In respect of Claim No.6, the learned trial Court

directed the payment towards the work of embankment on the same rate which was paid to M/s. Suresh Brothers. In respect of Claim No.7, the learned trial Court directed the payment of 25,622.28 cubic metre of earth work as per the rate in the agreement. In respect of transportation of 2159.85 cubic metre and 32000 cubic metre earth work, the payment be made considering the lead of two kilometers. In respect of Claim No. 10, the trial Court upheld the amount of award of Rs.2,97,507/- awarded by the Arbitrator. It has also been held that the respondent is entitled for interest at the Bank rate from 19.6.1980 to 31.7.1997. With the aforesaid, the learned trial Court upheld the amount of the award on the basis of the work done by the Contractor and modified the award dated 31.7.1997 and made the award a rule of the Court and passed a decree in terms thereof.

6. It is submitted by the learned Government Advocate that the Arbitrator did not apply his mind in passing the award dated 31.7.1997 and he committed a legal misconduct in allowing the claim of the Contractor. It is further contended that the learned trial Court has upheld the finding of fact recorded by the Arbitrator without assigning reasons and the amount awarded is contrary to the terms and conditions of the agreement and the scope of the contract.

7. On the other hand, the learned counsel for the respondent submitted that the Arbitrator after recording the necessary evidence and after examining the whole material on record passed the award and the learned trial Court after examining the whole material on record came to the conclusion that the claim of the Contractor deserves to be accepted partially and therefore partly modified the award and made it rule of the Court by its order dated 12.5.1998. He has strenuously urged before me that the scope in this appeal is very limited and it is not open to this Court to examine the matter like an appellate authority nor it is open to this Court to sit as a Court of appeal while disposing of the award of the Arbitrator, which was made the rule of the Court.

8. The Apex Court in the case of *B.V. Radha Krishna v. Sponge Iron India Ltd.* (1997) 4 SCC 693 has observed in Para 13 as under:-

> "13. Bearing in mind the principles laid down by this Court in the abovesaid cases, if we look into disposal of the matter by the High Court, it would be evident that the High Court has substituted its own view in place of the arbitrator's view as if it was dealing with an appeal. That is exactly what is forbidden by the decisions of this Court. Therefore, we have no hesitation to set aside the judgment of the High Court on this issue."

9. The Apex Court in the *State of Rajasthan v. Puri Construction Co. Ltd.* ( 1994) 6 SCC 485 has held as under ;-

> "However, in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidence

intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate Court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. If a question of law is referred to arbitrator and the arbitrator comes to a conclusion, it is not open to challenge the award on the ground that an alternative view of law is possible. Even if it is assumed that on the materials on record, a different view could have been taken and the arbitrators have failed to consider the documents and materials on record in their proper perspective, the award is not liable to be struck down in view of judicial decision referred to hereinbefore. Error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the arbitrator may be held to be erroneous. An error of law or fact committed by an arbitrator by itself does not constitute misconduct warranting interference with the award."

10. It is not the case of the State that there was no material on which the finding was recorded by the Arbitrator. It is well settled law that the award can be set aside if the same is in violation to the terms of the contractor if relevant documents are not considered by the Arbitrator, therefore, I asked the learned Government Advocate to substantiate his arguments and point out as to how the Arbitrator committed a legal misconduct when the finding recorded by the Arbitrator is based on the material on record. The Arbitrator in his detailed award has recorded his finding on the basis of the documents filed by the parties and as per the terms of the contract allowed certain claims to the Contractor. But the learned Government Advocate failed to point out as to how the Arbitrator misconducted or he has drawn inconsistence conclusion while awarding the amount to the contractor.

11. On perusal of the material available on record, I find that the majority of claims, which was upheld by the learned trial Court, is in terms of the contract. The learned Government Advocate failed to point out as to how the Arbitrator had gone beyond the terms of the contract or allowed the claim against the terms of the contract. The Arbitrator gave a reasoned order. It is well settled law that if an interpretation of term contract is involved, then the interpretation of the Arbitrator must be accepted unless it is one which could not be reasonably possible. It is also well settled that the Court cannot substitute its own interpretation to avoid arbitrariness so long as the interpretation of the Arbitrator is a possible one. Here in the present case, the reason assigned by the Arbitrator and the view taken by the Arbitrator is a possible view. The Arbitrator gave reasoning while

allowing the claim of the Contractor and therefore it cannot be said that the Arbitrator has misconducted in passing the impugned award or it would be a legal misconduct. The decision cited by the learned Government Advocate in the case of *Union of India and others v. Santiram Ghosh* AIR 1989 SC 402 is not be applicable in the present facts and circumstances of the case. The award was passed under Indian Arbitration Act, 1940. The appellants failed to satisfy the Court that there was any misconduct on the part of the Arbitrator. The findings recorded by the trial Court are just and proper. Nothing could be pointed out by the appellants to interfere in the impugned order.

12. For the above mentioned reasons, the appeal filed by the appellants has no merit and is accordingly dismissed with costs. Counsel's fee Re.3,000/-.

*Appeal dismissed.*

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**I.L.R. [2009] M. P., 1721**
**APPELLATE CIVIL**
*Before Mr. Justice U.C. Maheshwari*
20 February, 2009*

PHULA BAI (SMT.) ... Appellant
Vs.
KRISHNA & ors. ... Respondents

**A. Civil Procedure Code (5 of 1908), Order 6 Rule 2, Easements Act, 1882, Section 13(a) - *Pleading - Suit for perpetual injunction that plaintiff is the exclusive owner of the wall adjoining with the defendants house - Trial Court held that the wall is a common wall - Lower appellate Court held that defendant No.4 had acquired an easement right of necessity of such wall - Held - No case of easement right was put forth by defendant No.4 before the Court below - In absence of pleadings even if evidence is adduced on record then such evidence cannot be looked into for giving relief to either of the parties - Finding given by the lower appellate Court set-aside - Appeal allowed.*** (Paras 11 & 12)

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

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*S.A. No.278/1994 (Jabalpur)

B. Civil Procedure Code (5 of 1908), Section 100(4) - *Substantial question of law - If a relief is granted to a party which was not the case of either of the parties, contrary to record and under violation of existing laws then such question is not a question of fact but purely a substantial question of law covered u/s 100(4) of CPC.* (Para 13)

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

**Cases referred :**

(2000) 8 SCC 191.

*B.P. Sharma,* for the appellant.

*Nirmala Raikwar,* for the respondents.

JUDGMENT

U.C.MAHESHWARI J. :–This Appeal is directed by the appellant/plaintiff being aggrieved by the judgment and decree dated 24.1.94 passed by the IInd Addl. District Judge to District Judge, Sagar in Civil Appeal No.8-A/91 dismissing her Appeal by maintaining the judgment and decree dated 5.7.91 passed by Civil Judge Class-I in Civil Original Suit No.30-A/84 whereby her suit for declaration and injunction, was partly dismissed.

2. The Appellant/plaintiff herein filed the suit for declaration and injunction against the respondents declaring her to be the exclusive owner of disputed wall with a prayer restraining the respondents to interfere her enjoyment of such wall. As per averments of the plaint, the appellant purchased a house with some land including the disputed wall situated at village Chandpur, Tehsil Rehli in consideration of Rs.975/- from its earlier owner Purushottam vide sale deed dated 27.6.61. Since then, he is in possession of such house and the disputed wall. Subsequently, respondents No.1 and 2 and one Khilona Bai sold their adjoining house with the aforesaid wall, to respondent No.3 Roopchand vide sale deed dated 6.1.82. It is further pleaded that respondent No.1 and 2 did not have any legal right to sale the aforesaid wall measuring 34 feet in length. Such wall is also shown in the map annexed with the plaint. It is further stated that the sale deed dated 6.1.82 executed in favour of respondent No.3 did not confer any right to respondents and the same is not binding against the right of the appellant. After knowing the aforesaid fact, a notice dated 15.1.82 was given by the appellant to respondent No.3 and, in continuation of it, to protect his interest, the impugned suit was filed by the appellant.

3. In the written statement of the respondent No.3, it is stated that he purchased the aforesaid house along with the disputed wall. The appellant does not have

any right or title over such wall. The same was constructed 20 years ago by one Kashi Ram Sahu thereafter on such wall, an open courtyard is constructed by him. The appellant did not have any legal right to file the aforesaid suit for the relief as prayed.

4. After framing the issues by the trial court, the evidence was recorded. On appreciation of the same, the suit of the appellant was decreed by trial court in part holding the disputed wall to be the common wall of the plaintiff and defendant No.4 (respondent No.3 herein) with further declaration that the appellant is the owner of half portion of the width of such wall and taking into consideration that the disputed wall was a common wall, by referring the prayer of perpetual injunction, as prayed, the respondent No.3 was only restrained from causing any injury to the disputed wall at the side of the appellant.

5. Against partly dismissal of the suit, the appellant approached the Subordinate appellate court with a prayer to decree his entire suit. On consideration, the appeal was dismissed by holding that even on assuming that the disputed wall is belonging to the appellant, the respondent No.3 had a right to easement of necessity over such wall as per provision of Section 13(a) and its illustration (j) of the Easement Act, on which, the appellant has preferred this second appeal.

6. The appeal was admitted vide order dated 8.9.94 on the following substantial question of law :-

> "Whether the lower appellate Court committed an error in granting relief basing on easement of necessity without basis for such a claim in the pleadings or evidence ?"

7. Shri B.P.Sharma, learned counsel for the appellant assailed the impugned judgment on the aforesaid question, saying that no case with respect of easementry right was putforth by the respondents in the courts below. In the lack of, such pleadings in the written statement or, any evidence in that regard, specially when no counter claim or cross appeal was filed by respondent No.3 then, in the suit or appeal of the appellant, the appellate court did not have any jurisdiction to grant any relief or make any observation on the basis of easementry right in favour of respondent No.3. In such premises, he said that the appellate court committed error in holding right to easement of necessity in favour of respondent No.3. In such premises, such approach of the appellate court is not sustainable and prayed to answer the aforesaid question in his favour, by allowing his appeal.

8. On the other hand, Ms Nirmala Raikwar, learned counsel for the respondents, responded the aforesaid arguments saying that the findings of the appellate court with respect of the easement is based on appreciation of the evidence led by the parties and also is in conformity with law. It does not require any interference at this stage. She further said that the findings of the appellate court regarding dismissal of the suit being concurrent findings of both the courts on facts, the

aforesaid question is not covered under Section 100(4) of the CPC and in such premises, she prayed for dismissal of this appeal. However, after perusing the written statement, she fairly conceded that neither the pleadings regarding easement of necessity with respect of the disputed wall has been specifically pleaded nor any counter appeal or cross objection in that regard was preferred by respondent No.3.

9. Having heard the counsel, after perusing the record along with the judgment of the courts below, I am of the considered view that this appeal deserves to be allowed and the findings of the appellate court holding the right of easement in favour of respondent No.3 is liable to be set aside.

10. After holding the disputed wall to be the common wall of the appellant and the respondent NO.3 by the trial court, each of them was declared to be the owner of half of its width of their side, on which, the appellant preferred the appeal with a prayer to decree his entire suit declaring him to be the owner of entire wall and also for perpetual injunction restraining the respondents from any interference in his right of wall. Such findings of the trial court are based on different sale-deeds filed by the parties to prove their respective title and the pleadings. I have not found any pleading with respect of right to easement of necessity, either in the plaint or the written statement. In such premises, it is apparent that it was nobody's case that any question of right of easement was involved in the case tried by the trial court. It is noted that in any of the sale deeds produced by the parties and marked on the record, I have not found the averments showing that either of the party was the exclusive owner of such disputed wall. It appears that considering such sale deeds and, in the light of the available evidence, the trial court concluded the matter by declaring the wall to be common wall of the parties and they have equal right of ownership in it.

11. On filing the appeal, the same pleadings of the parties were before the appeal court and neither party has amended their pleadings in pendency of the appeal. In such premises, the appellate court was bound to decide the appeal on the basis of the pleadings and the evidence available in the record. Beyond the pleadings of either of the parties, the appellate court did not have any jurisdiction to consider and decide the matter. It is undisputed fact on record that neither party has pleaded the case of easement or claimed any right on such ground, therefore, in the lack of such claim or prayer, the appellate court could not have decided the case by making some observations on such grounds. It is settled preposition of the law that in the absence of the pleadings even if the evidence is adduced on record then such evidence could not be looked into for giving any relief to either of the parties. Contrary to this principle, the appellate court has committed grave error in granting the relief to the respondent No.3 on the ground of easementry right. Such question is answered by the Apex Court in the matter of *Ravinder Singh Vs. Janmeja Singh and others*-(2000) 8 SCC 191 in which it was held as under :-

7. "The election petition is.....It is an established proposition that no evidence can be led on a plea not raised in the pleadings and that no amount of evidence can cure defect in the pleadings."

12. In the aforesaid premises, the approach of the appellate court holding right of easement in favour of respondent No.3, is apparently contrary to, and also, against the settled proposition of law. The same is not sustainable, therefore, the aforesaid question is answered accordingly holding that the appellate court has committed grave error in granting the relief on the ground of easement of necessity in favour of respondent No.3.

13. So far the other question raised by the respondents' counsel that the aforesaid question is not covered by Section 100(4) of the CPC hence the same could not be treated to be a substantial question of law is concerned, it is suffice to say that the case which was neither placed before the trial court nor appellate court by either of the parties and was also not the case of any of the parties even then if such relief is granted in favour of the respondents, contrary to record and under violation of the existing law then such question could not be treated to be the question of fact. It being purely substantial question of law is covered under Section 100(4) of the CPC.

14. In view of the aforesaid answer of the substantial question of law, this appeal is allowed and the observation and the findings given, by the appellate court with respect of the right to easement of necessity in favour of respondent No.3 are hereby set aside, while, in the available circumstances, the other findings of the appellate court regarding dismissal of the Appeal are hereby affirmed. In pursuance of it, the impugned judgment and decree passed by the appellate court is hereby modified till the aforesaid extent while the other findings of it are hereby affirmed. In the facts and circumstances of the case, there shall be no order as to costs. Decree be drawn-up accordingly.

15. The appeal is allowed as indicated above.

*Appeal allowed.*

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I.L.R. [2009] M. P., 1726
APPELLATE CIVIL
*Before Mr. Justice Abhay M. Naik*
17 April, 2009*

MADHYA PRADESH ELECTRICITY BOARD,
RAMPUR, JABALPUR ... Appellant
Vs.
BHANDARI BUILDERS PVT. LTD. ... Respondent

**Arbitration Act (10 of 1940), Section 2(a) & 20 -** ***Arbitration Agreement - Dispute referred to one man committee - Committee authorized Chief Engineer to hear the dispute on his behalf and decision of committee was described as report and placed before the MPEB for final decision - Held - Arbitration clause contained in the agreement is found to have neither substituted nor replaced by the correspondence - In terms of agreement, the dispute intended to be referred should be determined in quasi judicial manner - Member of committee was not appointed as arbitrator - Dispute was not decided by committee in a quasi judicial manner - Reference of dispute to arbitration in terms of agreement by trial Court valid - Appeal dismissed.***
(Paras 14 to 16)

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

**Cases referred :**
AIR 1999 SC 899, AIR 1998 SC 1297.

*M.L. Jaiswal* with *Manoj Kushwaha*, for the appellant.
*Virendra Verma*, for the respondent.

**ORDER**

**Abhay M. Naik, J.** :–Short facts relevant for the purposes of this appeal are that a contract was entered into between the appellant and respondent on 18.2.1975 for civil construction work in Satpura Thermal Power Station, Sarni. There was an arbitration Clause in the contract to the following effect :-

"26. All question relating to the meaning of the

*M.A. No.128/1984 (Jabalpur)

specification, designs, drawings and instructions issued under this contract and as to the quality of workmanship of materials used on the work or as any other question claim, right, matter or think whatsoever, in any way arising out of relating to the contract, design, drawings, specifications, estimate, instructions orders or the conditions or otherwise concerning works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the arbitration of the Superintending Engineer (Civil), M.P. Electricity Board of the Circle under whose jurisdiction the site of work is situated the time when such reference is made and the decision of the Superintending Engineer (Civil) shall be final and binding on all parties to the contract."

2. There arose certain disputes during execution of work and two members Committee was constituted by Deputy Chief Engineer (Civil) of M.P. Electricity Board and General Manager of M.P. Electricity Board on 23/26.8.1976. It was agreed that if there remains an unresolved portion of dispute or if there arises a new issue, it would be referred to one man Committee. Two members Committee after granting opportunity to both the parties, gave certain findings on 24.12.1976. Remaining dispute was referred to one man Committee constituted by Shri S.B. Mehta, Member T & D. He was removed and the matter was referred to one man Committee constituted by Shri D.J. Ramrakhyani, Member Generation. Shri Ramrakhyani rendered the decision as an award on 25.7.1979. This was placed before the Board for consideration as revealed in the Board's letter dated 12.3.1979. Vide letter dated 21.4.1979 (Ex.P/6), it was intimated that the decision of one man Committee was finalised. Thereafter, the alleged award dated 25.7.1979 was made which was challenged on the ground that it did not amount to award of arbitration. Proceedings of one man Committee headed by Shri Ramrakhyani was purely of administrative and advisory nature. Accordingly, an application was submitted by the respondent before the Court of District judge, Jabalpur, under Section 20 of the Arbitration Act, 1940, with a prayer that Arbitrator as per clause 26 may be appointed.

3. Defendant/appellant submitted its reply stating therein that two members Committee and thereafter one member committee were constituted and appointed with the consent of both the parties as arbitrator. This being so, the application of the respondent was liable to be dismissed.

4. Learned Addl. Judge to the Court of District Judge, Jabalpur, vide his order dated 4.1.1984 found that there was an arbitration clause in the contract between the parties and the same was not substituted or replaced. Accordingly, it was held that proceedings of two members Committee and one member Committee were of the advisory nature. Moreover, the Committee constituted by Shri Ramrakhyani

did not follow the procedure required to be adopted in the matter of arbitration. Accordingly, the application was allowed and the matter was directed to be referred to the Superintending Engineer (Civil) for arbitration.

5. Aggrieved by the aforesaid, the present appeal has been preferred.

6. Shri Jaiswal, learned Senior Advocate appearing for the appellant and Shri Virendra Verma, learned counsel appearing for the respondent, made their submissions which have been considered duly.

7. Admittedly, there was a clause for arbitration in the contract executed between the parties as stated hereinabove in paragraph-1 of this order. It is to be now examined that whether the clause of arbitration as contained in clause 26 (supra) was substituted and/or replaced and did correspondence between the parties amount to substitution of arbitration by the one man Committee constituted by Shri DJ. Ramrakhyani, Member Generation. When a contract containing an arbitration clause is substituted by a new contract solely governing the rights and liabilities of the parties, arbitration agreement under the original contract ceases to exist.

8. Shri Jaiswal, learned senior counsel submitted that the respondent submitted itself to the sole arbitration of the one member Committee headed by Shri D.J. Ramrakhyani, Member Generation who entered into the arbitration, received the evidence, heard the parties and finally decided the dispute as a sole arbitrator which does not suffer from any error or illegality. This being so, it is contended that the same is binding on the parties as a decision of arbitrator and the learned District Judge has acted with illegality in setting it aside and referring the matter again to the arbitration of the Superintending Engineer (Civil). He referred to various documents which are now being examined to determine that whether the decision was taken in the capacity of a sole arbitrator.

9. From the letter dated 4.11.1977 (Ex./P-la) issued by the Chief Engineer (Civil), Sarni it was informed to the respondent that the Board has constituted one man Committee of Member, T & D to settle the outstanding issues of claims. Since, it was not possible for the Member T & D to be present for this purpose, the Member T & D has authorised the Chief Engineer, (Civil) Sarni to hear the case on his behalf (paper book page-75). The respondent vide its letter dated 4.11.1977 (Ex./P-lb) expressed its agony that it had to wait for 15 months to obtain a fair settlement. However, it was mentioned in this letter that the matter may be heard by the two men Committee constituted by the Chief Engineer (paper book page-75a). A telex message was sent on 4.6.1979 vide Ex./P-2 by G. Jagatpati, Chairman, M.P.E.B., Jabalpur requiring the respondent to assure that the matter would be settled expeditiously. Chief Engineer (Civil) by telex message Ex./P-3 (paper book page-77) informed that the Committee's report is under consideration of the Board and final decision was expected to be communicated

very shortly. Again, vide a telex message, Ex./P-4 dated 14.7.1979, it was informed by the Chief Engineer (Civil) that one man Committee's report was under consideration of the Board (paper book page-78). Again, Chief Engineer vide letter dated 12.3.1979 (Ex./P-5) informed the respondent that the decision of one man Committee was under consideration of the Board and the said decision was likely to be referred shortly. Vide letter dated 21.4.1979 (Ex./P-6) (paper book page-80), it was informed that one man Committee was appointed for settling the differences and disputes relating to the contract with the respondent and the Committee had alone finalised its report. Deputy Chief Engineer (Civil) vide his letter 24.12.1976 sent a copy of the decision taken by the two men Committee constituting of Chief Manager, MPEB, Sarni and Dy. Chief Engineer (Civil) and invited personal representation (Ex./P-8) (paper book page-82). In turn, the respondent forwarded a list of pending claims with brief description to the two men Committee constituted-by the Chief Manager, MPEB, Sarni and Dy. Chief Engineer (Civil) and that the respondent No. I intended to take up the issues during the meeting fixed for the said purpose (Ex./P-9) (paper book page-83). Needless to say that Annexure/A containing the disputes was enclosed to Annexure/P-9.



10 From the aforesaid documents on record, it seems that the respondent was quite co-operative and in order to minimise the disputes participated in the proceedings before the said Committee. Undisputably, the Committee was headed by an expert who could have by his expertise reduced the disputes by resolving them amicably. There is a difference between the expert determination and arbitration. S.K. Chawla in the Law of Arbitration and Conciliation at Page 164 states as follows :-

> "Arbitration agreement to be distinguished from agreement for decision by an engineer or expert, contracts may contain a clause that on certain questions the decision of an engineer, architect or another expert shall be final. The decision given in such cases by the engineer etc., is not an award. As pointed out by Bernstein, such a person is under no obligation, unless the contract otherwise provides, to receive evidence or submissions and is entitled to arrive at his decision solely upon the results of his own procedure involved is not arbitration, and the Arbitration Act does not apply to it. The primary material on which such person acts is his own knowledge and experience, supplemented if he thinks fit by (i) his own investigations; and/or (ii) material (which need not conform to rules of 'evidence') put up before him by either party. An arbitrator on the other hand, acts primarily on material put before him by the parties. The determination by an engineer or an expert would involve a

> less thorough investigation. Only one mind will be brought to bear on the problem. There will be no discovery of documents, there will not normally be any oral 'evidence' or oral submissions."

11. In order to substitute an operative clause of arbitration, it must be clearly reflected from the correspondence that the earlier arbitration clause is superseded by the parties. Such an intention is to be reflected necessarily from the correspondence. Respondent is not shown to have asked for substitution of Shri D.J. Ramrakhyani, Member Generation for Superintending Engineer (Civil) as provided under clause 26 of the contract. One man Committee headed by Shri D.J. Ramrakhyani, Member Generation was not vested expressly or with necessary implication with the powers of arbitrator.There is no by parte document on record to establish that Shri DJ. Ramrakhyani, Member Generation was vested with such powers or that the parties intended to empower Shri Ramrakhyani as an arbitrator. No doubt that at the request of the Chief Engineer (Civil) of the appellant, the respondent did participate in the proceedings for resolving the disputes. But it is difficult to spell out any intention of the parties from the correspondence on record to leave any dispute to the adjudication of one man Committee headed by Shri D.J. Ramrakhyani as an arbitrator.

12. Supreme Court of India in the case of *Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation Ltd., Kanpur* AIR 1999 SC 899 has discussed the difference between the decision by an expert and a decision of an arbitrator and has observed :-

> "In the present case the Managing Director is more in the category of an expert who will decide claims, rights, or matters in any way pertaining to the contract. The intention appears to be more to avoid disputes than to decide formulated disputes in a quasi-judicial manner."

13. Likewise, Supreme Court of India in the case of *K.K. Modi Vs. K.N. Modi and others* AIR 1998 SC 1297 has observed:-

> "Undoubtedly, in the course of correspondence exchanged by various members of Groups A and B with the Chairman, IFCI, some of the members have used the words "arbitration" in connection with Clause 9. That by itself, however, is not conclusive. The intention of the parties was not to have any judicial determination on the basis of evidence led before the Chairman, IFCI. Nor was the Chairman, IFCI required to base his decision only on the material placed before him by the parties and their submissions. He was free to make his own inquiries. He had to apply his own mind and use his own expertise for the purpose. He was free to take the help of other experts. He was required to

decide the question of valuation and the division of assets as an expert and not as an arbitrator. He has been authorised to nominate another in his place. But the contract indicates that he has to nominate an expert. The fact that submissions were made before the Chairman, IFCI, would not turn the decision-making process into an arbitration."

14. Section 2(a) of the Arbitration Act, 1940 defines "arbitration agreement" to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". Undisputably, clause 26 contained in the contract fulfills the requirement of the said definition. The correspondence placed on record does not contain any express arbitration agreement, nor can such an agreement be spelled out from the terms of correspondence by implication. On the other hand, the purpose of the correspondence clearly appears to be to minimise the disputes by resolving them in amicable manner. This is also reflected from the letter dated 4.11.1977 whereby it was informed that the Member, T & D could not take up the matter for unavoidable circumstances and Chief Engineer (Civil) was authorised by the Member, T & D to hear the case in his behalf. Had there been an arbitration by virtue of the correspondence, there would not have any authorisation by the Member, T & D. Secondly, the decision of the arbitrator becomes final subject to challenge to it in accordance with law. In the present case, the decision of one man Committee has been described as report by the Chief Engineer (Civil) himself in his letter dated 14.7.1979. It was further placed before the Board for consideration as revealed in the above said letter. It was also informed that the final decision was expected after such consideration. There would not have been any intervention by the Board, if the one man Committee was vested with the powers of arbitrator.

15. One of the essential ingredients of the arbitration agreement is that the parties who intend that the dispute intended to be referred should be determined in a quasi judicial manner. If it is not to be so determined, the agreement does not amount to an arbitration agreement and the person who decided the dispute is not an arbitrator. It is neither reflected from the correspondence available on record nor spelt out from the language of the correspondence that the disputes raised by the respondent were to be decided by Shri D.J. Ramrakhyani, Member Generation in a quasi judicial manner. It is further not reflected from the correspondence that the existing arbitration clause contained in clause 26 of the contract was substituted by the terms and conditions of the correspondence and ceases to be operative due to such correspondence. Thus, the arbitration clause contained in the contract is found to have neither substituted nor replaced by the correspondence.

16. Thus, after examining the correspondence, I am of the considered view that Shri D.J. Ramrakhyani, Member Generation was not appointed as an arbitrator,

but was entrusted with the responsibility of minimising the disputes being an expert and the job performed by him was more in a supervisory and advisory nature. Arbitration by him was neither contemplated nor intended by the parties and the learned District Judge is not found to have committed any error in passing the impugned order.

17. Resultantly, I hold that the appeal has no force and the same is hereby dismissed, however, without order as to costs.

*Appeal dismissed.*

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**I.L.R. [2009] M. P., 1732**
**APPELLATE CIVIL**
***Before Mr. Justice Shantanu Kemkar***
23 April, 2009*

JAMA ... Appellant
Vs.
KHALIL & ors. ... Respondents

**Transfer of Property Act (4 of 1882), Section 58(c)** - *Whether transaction is outright sale or mortgage by conditional sale - Registered sale deed not containing any condition regarding conditional sale - Alleged unregistered agreement of reconveyance executed after five months of sale - Held - Sale deed can not be held to be a mortgage by conditional sale - Suit dismissed - Appeal allowed.* (Paras 9 to 11)

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

**Cases referred :**

AIR (33) 1946 Madras 456, AIR 1953 Punjab 292, AIR 1958 MP 295, AIR 1954 SC 345, AIR 1957 MP 207, AIR 1960 SC 301.

*Shailendra Mukati*, for the appellant.
*R.L. Patidar*, for the respondent Nos.1 to 4.
*S.D. Bohra*, for the respondent No.5.

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

SHANTANU KEMKAR, J. :–Appellant/Defendant no.1 has filed this second appeal against the judgment and decree dt.28.01.06 passed by II Additional District Judge, Mandsaur in Civil Regular Appeal No.42-A/05, reversing the judgment and decree dt.04.04.05 passed by Civil Judge, Class-II, Mandsaur in Civil Suit No.277-A/02.

*S.A. No.124/2006 (Indore)

2. This second appeal was admitted on 15.02.08 on following substantial questions of law:

(a) Whether in the facts and circumstances of the case the learned lower appellate Court was right in holding that the transaction in question was mortgaged and not a sale outright sale ?

(b) Whether the impugned judgment and decree as passed by the learned lower appellate Court suffer from perversity ?

3. Briefly stated, the plaintiff respondent no.1 Khalil filed a suit against the appellant no.1 for redemption of land bearing survey no. old 82, new no.350, 0.4 hectare situated at village Bajkhedi, Tehsil Mandsaur. It was averred by the plaintiff that his father Mohinuddin had mortgaged the said land by an agreement dt.10.12.1980 for Rs.1300/- with the appellant/defendant no.1. As per the terms of the said agreement dt. 10.12.1980 the plaintiff's father Mohinuddin was to return the said amount to the defendant no.1 within four years and the defendant no.1 was not required to act upon the sale deed dt. 10.07.1980 executed in respect of the said land by Mohinuddin in his favour. According to the plaintiff prior to the death of his father, his father Mohinuddin had filed a suit against the defendant no.1 but the same was dismissed for non appearance of the plaintiff. He stated that on 03.10.02 he offered Rs.1300/- to the defendant no.1 appellant and requested to the appellant defendant no.1 for release of the mortgaged land but the appellant defendant no.1 refused to release the said land and deliver its possession. In the circumstances he had to file the suit claiming redemption of the mortgage and possession of the suit land.

4. The defendant no.1 filed written statement and denied the claim of the plaintiff. The Trial Court framed issues and after recording evidence dismissed the plaintiff's suit vide judgment dt.04.04.05 holding the sale deed dt.10.07.1980 to be an outright sale of the suit land and not a mortgage by conditional sale. It held that the burden to prove that the sale deed is not an outright sale but a conditional sale was on the plaintiff which he failed to discharge. It also held that the agreement dt.10.12.1980 on the basis of which the plaintiff is claiming redemption being an unregistered document the same is inadmissible in evidence in view of S.59 of the Transfer of Property Act. It also held that the property sold by a registered sale deed 10.12.1980 cannot be redeemed on the basis of an unregistered agreement dt.10.12.1980 entered into after more than five months of the execution of the registered sale deed.

5. In the appeal the first appellate Court without adverting to the registered sale deed dt.10.07.1980 (Ex.D/1) allowed the plaintiff's appeal and decreed the suit placing reliance on the agreement dt. 10.12.1980 (Ex.P/1).

6. Shri Shailendra Mukati learned counsel for the appellant defendant no.1

has argued that vide registered sale deed dt.10.07.1980 (Ex.D/1) the suit property was out rightly sold by the plaintiff's father to the defendant no.1 appellant. In the circumstances the unregistered agreement dt.10.12.1980 (Ex.P/1) was rightly discarded by the trial Court holding it to be inadmissible in evidence. He argued that the sale deed dt.10.07.1980 (Ex.D/1) does not contain condition of mortgage or reconveyance, on the other hand on its plain reading it is very clear that it is an out and out sale. He submits that from the testimony of Jama (D.W. 1) corroborated by the sale deed (Ex.D/1) it has been proved that the possession of the land was also handed over by the plaintiff's father to Jama defendant no.1. He argued that the agreement dt.10.12.1980 (Ex. P/1) being an unregistered document it has rightly been held to be inadmissible in evidence by the trial Court. He further argued that for a transaction to be a mortgage by conditional sale the condition is required to be embodied in the document which effects or purports to effect the same in view of the provision contained in S.58 (c) of the Transfer of Property Act. In support he placed reliance on various judgments including *Kasturi Venkata Subbarao v. Bikkina Veeraswami* [AIR(33) 1946 Madras 456], *Pt.Soshil Kumar v. Madan Gopal* [AIR 1953 Punjab 292], *Pt. Krishna Chandra Sharma and others v. Pt. Ramgulam and another* [AIR 1958 MP 295(DB)], *Chunchun Jha v. Ebadat Ali and another* [AIR 1954 SC 345], *M.A.Bashir and another v. Mrs. Ethel and others* [AIR 1957 MP 207], *Bhaskar Waman Joshi and others v. Shrinarayan Rambilas Agarwal and others* [AIR 1960 SC 301].

7. Shri R.L.Patidar learned counsel appearing for the plaintiff respondent no.1 supported the impugned judgment of the first appellate Court and has argued that in view of the agreement dt.10.12.1980 (Ex.P/1) in which the entire circumstances for entering into the agreement after execution of the sale deed (Es.D/1)has been clearly spelled out, the finding recorded by the first appellate Court need not to be interfered into.

8. In the case of *Kasturi Venkata Subbarao v. Bikkina Veeraswami* (supra) it has been held by the Madras High Court that an ostensible sale with a stipulation for repurchase shall not be regarded as a mortgage unless the stipulation is contained in the same document which effects the sale. It is held that the effect and object of proviso to S.58(c) of the Transfer of Property Act is to shut out an enquiry whether a sale with a stipulation for retransfer is a mortgage where the stipulation is not embodied in the same document. In *Soshil Kumar v. Madan Gopal* (supra) a Division Bench of Punjab High Court has observed that a sale deed which undoubtedly require registration u/S.17 of the Registration Act, and if it was sought to be modified in respect of terms of the sale deed by later agreement the document embodying those terms would also require registration. In *Pt. Krishna Chandra Sharma and others v. Pt. Ramgulam and another* a Division Bench of Madhya Pradesh High Court while considering proviso to Section 58(c) has held that the sale and agreement to reconvey if not embodied in same document

the transaction cannot be recorded as mortgage by conditional sale and the seller is precluded from showing that transaction was not an out and out sale but was something between mortgage and sale. In *Chunchun Jha v. Ebadat Ali and another* (supra) the Supreme Court has held :

> "Under the Proviso to S.58(c), T.P. Act, if the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. It the condition of repurchase is embodied in the document the effects or purports to effect the sale, then it is a matter for construction which was meant. The legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages, therefore, it is reasonable to suppose that persons who, after the amendment choose not to use two documents, do not intent the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of S.58(c) are fulfilled, then the deed should be construed as a mortgage."

In *M.A.Bashir and another v. Mrs. Ethel and others* (supra) this Court laid down the tests which have been to be applied for determining whether the transaction between the parties is mortgage by conditional sale or an absolute sale coupled with a condition of repurchase and has observed thus:

> "It the purchasers do not desire that their transaction should be interpreted as a mortgage by conditional sale, they must insist on two separate documents which can never be construed as a mortgage under the law. If, however, they choose to incorporate the condition of repurchase in the same document, they must insist that clear and express words excluding the mortgage are incorporated in the same document. If they do not insist on these two things, and the condition of repurchase is in the same document, then, however ostensible the first part conveying absolute tile to the purchase may be, Courts will hold that a mortgage was intended and they will got to the surrounding circumstances only if there be ambiguity, but not otherwise : AIR 1954 SC 345 explained; AIR 1955 Nag 272 held currently decided and rel. on. Case law ref. To and discussed."

In *Bhaskar Waman Joshi and others v. Shrinarayan Rambilas Agarwal and others* (supra) it has been held that:

"If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may be law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance; but evidence as to subsequent conduct of the parties is inadmissible."

9. Applying the ratio of the judgments cited by the learned counsel for the appellant I have examined the sale deed dt.10.07.1980 (Ex. D/1) and the agreement dt.10.12.1980 (Ex. P/1). Having gone through the sale deed (Ex.D/1) I find that no condition has been embodied in the registered sale deed to hold that the transaction is mortgage by conditional sale. Section 58(c) clearly provides that where the mortgagor ostensibly sells the mortgage property on a condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale. [emphasis supplied]. The registered sale deed (Ex.D/1) is not containing any such condition. In the light of the various judgments referred to above the sale deed (Ex.D/1) cannot be held to be a mortgage by conditional sale. The agreement (Ex.P/1) which has been executed after more than five months cannot be treated to be an agreement of incorporating such condition in the registered sale deed (Ex. D/1). It has been held in the case of *Kasturi Venkata Subbarao v. Bikkina Veeraswami* (supra) stipulation for repurchase requires to be contained in the same document which effects the sale and an enquiry as to whether a sale with a stipulation for retransfer is a mortgage has been shut when the stipulation is not embodied in the same document. As mentioned, herein before, no such condition finds place in sale deed (Ex.D/1). The agreement (Ex.P/1) is not a registered document. The conditions of the registered sale deed Ex.D/1 cannot be modified by an unregistered document agreement (Ex.P/1).

10. The trial Court has rightly dealt with the issue and has rightly held the agreement (Ex.P/1) to be inadmissible in evidence being not registered. The

appellate Court has wrongly relied the agreement and committed error in treating the same to be admissible in evidence. The agreement of mortgage to change the conditions of registered sale deed was required to be registered but the same was not registered and in the circumstances it could not have been treated by the appellate Court to be a document admissible in evidence. It is also pertinent to mention the the trial Court disbelieved the plaintiff's version that the amount of Rs.1300/- was ever tendered by the father of the plaintiff or by plaintiff within four years time as stipulated in the agreement dt.10.12.1980 (Ex.P/1).

11. Having regard to the aforesaid discussion I am of the view that the judgment and decree passed by the first appellate Court is liable to be set aside as it has totally ignored the sale deed (Ex.D/1) and has misinterpreted and has wrongly placed reliance on the agreement (EX.P/1) which was inadmissible in the evidence. The first appellate Court on the basis of evidence could not have held that the transaction in question was mortgage and not out right sale. The impugned judgment passed by the first appellate Court suffers from perversity and as such the same is set aside.

12. Accordingly the appeal is allowed. The judgment and the decree of the first appellate Court is set aside and the judgment and decree passed by the trial Court is restored. The plaintiff's suit is dismissed. Parties to bear their own costs.

*Appeal allowed.*

June-09 (First)

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**I.L.R. [2009] M. P., 1737**
**APPELLATE CIVIL**
*Before Mr. Justice S.K. Gangele*
7 May, 2009*

VIMAL MISHRA (SMT.) ... Appellant
Vs.
KRISHNA GOPAL SHARMA ... Respondent

**Words & Phrases - Will** - *Facts required to be taken into consideration by the Court for the purposes of proof of Will - Law reiterated.*

(Paras 8 to 11)

शब्द और वाक्यांश – वसीयत – तथ्य जिन्हें वसीयत के सबूत के प्रयोजन के लिए न्यायालय द्वारा विचार में लिया जाना आवश्यक है – विधि दोहराई गई।

**Cases referred :**

(2009) 3 SCC 687, (2007) 7 SCC 91, (2007) SCC 225, AIR 1959 SC 443, (2006) 9 SCC 515, (2006) 13 SCC 433, (2005) 2 SCC 784, (2005) 8 SCC 67, (2005) 1 SCC 280, 2007 (1) MPLJ 499.

*K.N. Gupta* with *Prakhar Dhengula,* for the appellant.
*P.K. Patni,* for the respondent.

*M.A. No.363/2002 (Gwalior)

ORDER

S.K. GANGELE, J.:- Appellant/non applicant has filed this appeal against the order dated 08.03.2002, passed by IIIrd Additional District Judge, Shivpuri in Probate Case No.7/2000. Applicant filed an application for probate under Sections 218 and 254 of the Indian Succession Act. He pleaded that his uncle Chhotelal Sharma executed a "Will" on 16.03.1995 and by the aforesaid "Will" he had bequeathed ad-measuring 1.89 hectare of land situated at village Kota, Pargana and District Shivpuri in favour of the applicant because the applicant had been living with his uncle. It is an admitted fact that the non applicant is the daughter of the deceased. Non applicant resisted the claim of the applicant. She further stated that her father has not executed any "Will" in favour of the applicant. The said "Will" (Ex-P/1) is a forged one. After considering the evidence on record of the case, the trial Court granted probate in favour of the applicant by holding that 'Will' executed in favour of the applicant is proper.

2. Learned senior counsel on behalf of the appellant/non-applicant has submitted that the trial Court has committed an error of law in granting probate in favour of the respondent. The 'Will' is not genuine and the respondent has failed to prove genuineness of the 'Will'. In support of his contentions, learned counsel relied on the following judgments:-

(i) *Bharpur Singh and Others Vs. Shamsher Singh* reported in 2009 (3) Supreme Court Cases 687.

(ii) *Apoline D' Souza Vs. John D' Souza* 2007 (7) SCC 91 and 225.

(iii) *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others* reported in AIR 1959 pg 443

(iv) *Joseph Antony Lazarus (Dead) by LR.s Vs. A.J Francis* 2006 (9) SCC 515.

(v) *Niranjan Umeshchandra Joshi Vs. Mrudula Jyoti Rao and Others* 2006 (13) SCC 433.

3. Contrary to this, learned counsel for the respondent has submitted that the trial Court has considered all the evidence on record and passed proper order. 'Will' executed by the deceased is in accordance with law. Hence, probate has rightly been granted in favour of the respondent/applicant. In support of his contentions, learned counsel relied on the following judgments:-

(i) *Sridevi and Others Vs. Jayaraja Shetty and Others* 2005 (2) SCC 784.

(ii) *Pentakota Satyanarayana and Others Vs. Pentakota Seetharatnam and Others* 2005 (8) SCC 67.

(iii) *Meenakshiammal (Dead) Through LR.s and Others Vs. Chandrasekaran and another* 2005 (1) SCC 280.

(iv) *Keshav Prasad S/o Chhotelal and another Vs. Smt. Bhuwani Bai and another* 2007 (1) MPLJ 499.

4. Applicant/respondent clearly stated in his application that the deceased was his uncle. He had been living with him, hence he executed the 'Will' in his favour with regard to land situated at village Kota, Pargana District Shivpuri. Copy of the 'Will' has been filed as Ex.P/1. In his evidence the applicant deposed that deceased Chhotelal was his real uncle and he died on 11.05.1995. The appellant is only daughter of the deceased. She got married in the year 1981. The respondent/ applicant used to look after the deceased and thereafter deceased executed the 'Will' Ex.P/1 in favour of the respondent/applicant. He got the 'Will' typed at the residence of Mr. Ashok Agrawal, Advocate at the instance of Chhotelal. Thereafter he took the 'Will' to Kota where deceased Chhotelal signed over the 'Will' alongwith witnesses namely Mr. Uday Singh and Karan Singh. Before execution of the 'Will' some property had been given to the appellant/non applicant. At the time of execution of 'Will' the deceased was quite well and healthy. He dictated the 'Will' Ex.P/1 and it was typed at the residence of Mr. Ashok Agrawal, Advocate. He further admitted the fact that Chhotelal had came to the Court to attend the case and he died on 11.05.1999 due to heart attack. He also came to Shivpuri Court on 13.03.1995, 10.05.1995, 05.05.1995 and 01.05.1995.

5. Uday Singh witness No.2, in his evidence, stated that Chhotelal executed the 'Will' and signed the 'Will'. At that time, Karan Singh was also present and he also signed the 'Will'. He further admitted in his cross examination that he could not read the newspaper and he could not read what has been written in Ex.P/1. However, Mr. Chhotelal read over the contents of Ex.P/1 and told him that he had been giving Â½ of his land to Krishna Gopal and except this he did not tell any thing to him. He further stated that he signed over the 'Will' on the request of Chhotelal.

6. Non applicant i.e the present appellant in her evidence stated that she is only daughter of his father Chhotelal. She has no other sisters and brothers and his father had two brothers. One is Thakurlal who had three sons and two daughters. Krishna Gopal is one of the son of Thakurlal. At the time of death of her father he was healthy and he attended the Shivpuri Court on 10.05.1995 a day before his death. She received information of death of his father on telephone. Thereafter she went to Kota where last rites of her father had been performed by Mr. Krishna Gopal Sharma. She further stated that she had no knowledge about the 'Will'. She filed application before the appropriate authority for mutation of her name over the land than she came to know about execution of 'Will'. She won the case in Tahsil. She further stated that she has been cultivating the land and house of

Shivpuri was also in her possession. Except these witnesses nobody has been examined on behalf of the applicant and non applicant. Copy of the 'Will' has been filed as Ex.P/1. It has been mentioned in the 'Will' by Chhotelal that he was old-aged person and he could not move freely and look after his affairs. Hence, he is executing the 'Will' with regard to agricultural land, house, plot and other properties. It has been stated in the 'Will' that Chhotelal had only one daughter, namely, Smt. Vimal Mishra who got married in the year 1981 and 1.78 hectare land had already been given to her by way of registered sale deed. It has also been mentioned that health condition of Chottelal was not good. He instructed the respondent to prepare a 'Will' and Krishna Gopal Sharma got prepared the 'Will' on his instructions.

7. From perusal of the 'Will' Ex.P/1, it is clear that testator of the 'Will' has mentioned that he was ill and he was not able to walk and bequeathed all his properties including agricultural land, plot and house in favour of the respondent. However, the present probate application has been filed by the respondent with regard to agricultural land situated at village Kota, Pargana District Shivpuri ad-measuring 1.89 hectare. He admitted in his evidence that apart from agricultural land Chhotelal had a house at District Shivpuri and at village Kota also out one house situated at Shivpuri was in dilapidated condition.

8. Hon'ble Supreme Court in the matter of *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others* reported in AIR 1959 pg 443 with regard to the facts, which have to be taken into consideration by the Court for the purpose of proof of a 'Will' has held as under:-

> *"The party propounding a 'Will' or otherwise making a claim under a 'Will' is no doubt seeking to prove a document and, in deciding how it is to be proved, reference must inevitably be made to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under S. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law.*

*Similarly, Ss. 59 and 63 of the Indian Succession Act are also relevant. Thus the question as to whether the 'Will' set up by the propounder is proved to be the last 'Will' of the testator has to be decided in the light of these provisions. It would prima facie be true to say that the 'Will' has to be proved like any other document except as to the special requirements of attestation prescribed by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of 'Will's it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.* (Para 18)

*However, there is one important feature which distinguishes 'Will' from other documents. Unlike other documents the 'Will' speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his 'Will' or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last 'Will' and testament of the departed testator. Even so, in dealing with the proof of 'Will's the Court 'Will' start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the 'Will' was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free 'Will'. Ordinarily when the evidence adduced in support of the 'Will' is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.*

(Para 19)

*There may, however, be cases in which the execution of the 'Will' may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator*

*may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the 'Will' may appear to be unnatural, improbable or unfair in the light of relevant circumstances, or, the 'Will' may otherwise indicate that the said dispositions may not be the result of the testator's free 'Will' and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last 'Will' of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last 'Will' of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the 'Will' propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free 'Will' in executing the 'Will', and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.* (Para 20)

*Apart from the suspicious circumstances above referred to in some cases the 'Will's propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the 'Will's which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the 'Will' and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the 'Will' and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with 'Will's that present such suspicious circumstances that decision of English Courts often mention the test of the satisfaction of judicial conscience. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last 'Will' of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.* (Para 21)

*It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on 'Will's, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the 'Will' has to prove the due and valid execution of the 'Will' and that if there are any suspicious circumstances surrounding the execution of the 'Will' the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties : AIR 1946 P C 156, Rel. on.* (Para 22)

*It is no doubt true that on the proof of the signature of the deceased or his acknowledgment that he has signed the 'Will' he 'Will' be presumed to have known the provisions of the instrument he has signed; but the said presumption is liable to be rebutted by proof of suspicious circumstances. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. That inevitably would be a question of fact in each case"*

June-09 (First)

9. Hon'ble Supreme Court in the matter of *Bharpur Singh and Others Vs. Shamsher Singh* reported in 2009 (3) Supreme Court Cases 687 has considered most of the previous judgments of the Hon'ble Supreme Court with regard to proof of 'Will' and held as under:-

*"14. The legal principles in regard to proof of a 'Will' are no longer resintegra. A 'Will' must be proved having regard to the provisions contained in clause (c ) of Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872, in terms whereof the propounder of a 'Will' must prove its execution by examining one or more attesting witnesses. Where, however, the validity of the 'Will' is challenged on the ground of fraud, coercion or under influence, the burden of proof would be on the caveator. In a case where the 'Will' is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator.*

*15. This Court In H. Venkatachala Iyengar Vs. B.N Thimmajamma opined that the fact that the propounder took interest in execution of the 'Will' is one of the factors which*

*should be taken into consideration for determination of due execution of the 'Will'. It was also held that (AIR p 451, para 19)*

*one of the important features which distinguishes a 'Will' from other documents is that the 'Will' speaks from the date of death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his 'Will' or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last 'Will' and testament of the departed testator.*

*16. In H. Venkatachala case, it was also held that the propounder of a 'Will' must prove:*

*(i) that the 'Will' was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free 'Will', and*

*(ii) when the evidence adduced in support of the 'Will' is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder, and*

*(iii) if a 'Will' is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein.*

*It was moreover held: (H. Venkatachala case, AIR p 452, para 20)*

*"20. There may, however, be cases in which the execution of the 'Will' be surrounded by suspicious circumstance. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental*

*capacity of the testator; the dispositions made in the 'Will' may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the 'Will' may otherwise indicate that the said dispositions may not be the result of the testator's free 'Will' and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last 'Will' of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, Court would be reluctant to treat the document as the last 'Will' of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the 'Will' propounded, such pleas may have to be proved by the caveators, but, even without such please circumstances may raise a doubt as to whether the testator was acting of his own free 'Will' in executing the 'Will', and in such circumstances, it would be part of the initial onus to remove any such legitimate doubts in the matter."*

17. This Court in *Niranjan Umeschandra Joshi Vs. Mrudula Jyoti Rao* held (SCC pp 447-48, paras 33-34)

*"33. The burden of proof that the 'Will' has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the 'Will' and that he had put his signature out of his own free 'Will' having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of 'Will', a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion of undue influence is raised, the burden would be on the caveator. (See Madhukar D. Shende V. Tarabai Aba Shedage and Sridevi V Jayaraja Shetty) Subject to above, proof of a 'Will' does not ordinarily differ from that of proving any other document.*

*34. There are several circumstances which would have been held to be described (sic) by this Court as suspicious circumstances;*

*(i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the 'Will';*

*(ii) when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;*

*where propounder himself takes prominent part in the execution of 'Will' which confers on him substantial benefit."*

10. In the present case, it is an admitted fact that the respondent/applicant propounder has taken prominent part in the execution of 'Will' as per his evidence and got the 'Will' typed at the residence of Mr. Ashok Agrawal, Advocate and thereafter Mr. Chhotelal signed the 'Will'. It has been mentioned in the 'Will' that due to ill health condition Mr. Chhotelal was not able to move and his health was not good. However, it is clear from the admission of the respondent/applicant himself that before the death of Mr. Chhotelal on 10.05.1995 he attend the proceedings of the Court at Shivpuri and died on the next date i.e 11.05.1995. He also attended the Court proceedings on 13.03.1995, 10.05.1995, 05.05.1995 and 01.05.1995. The 'Will' Ex.P/1 is said to have been executed on 16.03.1995. After near about one and ½ month of the execution of 'Will' Mr. Chhotelal attended the Court proceedings on various dates then why he had not prepared the 'Will' on his own instance, why it has been mentioned that he was not able to walk. It is a suspicious circumstance. Attesting witnesses No.2 of the 'Will' Uday Singh in his evidence stated that Chhotelal had told him that he had giving only ½ of his land to the respondent/applicant, however in the 'Will' it has been mentioned that alongwith agricultural land his other movable and immovable properties have been given to the respondent/applicant. This fact is contrary to the statement of Uday Singh who is one of the attesting witnesses of the 'Will' examined before the Court other attesting witness has not been examined. In such circumstances, it could not be held that attesting witness has deposed in accordance with law in favour of the execution of 'Will'. Apart from this, after perusal of the 'Will' the name of the propounder Krishna Gopal Sharma appears after applying whitener.

11. Looking to the aforesaid facts of the case and the law laid down by the Hon'ble Supreme Court in various judgments as stated hereinabove it could not be held that the respondent/applicant has proved the execution of 'Will' Ex.P/1 in accordance with law. Hence, the trial Court has committed an error of law in granting probate in favour of the respondent/applicant.

12. Consequently, appeal of the appellant/non-applicant is hereby allowed and impugned order is hereby set-aside. No order as to cost.

*Appeal allowed.*

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I.L.R. [2009] M. P., 1747
APPELLATE CIVIL
*Before Mr. Justice S.K. Gangele*
12 May, 2009*

MAHILA BHANWARI BAI ... Appellant
Vs.
KASHMIR SINGH & ors. ... Respondents

**Legal Services Authorities Act (39 of 1987), Section 21** - *Void Award - Remedy - Any order obtained by parties by playing fraud is a nullity and it can be challenged in any collateral proceedings even at the stage of execution and appeal is maintainable u/s 96 of CPC against void order of Lok Adalat.* (Para 14)

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

**Cases referred :**

(1992) 1 SCC 31, (2003) 11 SCC 372, AIR 2005 SC 3575, 1993 MPLJ 469, (2004) 1 SCC 287, (2008) 2 SCC 660, AIR 2007 SC 1546, (2006) 3 SCC 605.

*D.D. Bansal,* for the appellant.
*N.K. Gupta,* for the respondent Nos.1 & 2.
*Tajuddin Khan,* for the respondent No.5.
*None,* for other respondents, as they are proforma parties.

**ORDER**

**S.K. Gangele, J.**:–The appellant has filed this appeal under Order 43 Rule 1 (u) of the Code of Civil Procedure 1908, against the judgment and decree dated 29.9.2006, passed by the IInd Additional District Judge (Fast Track), Sheopur, in Civil Miscellaneous Appeal No.31-A/2006, quashing the compromise order dated 10.9.2000 passed by the Lok Adalat in Case No.1/2000 in Civil Suit No.186-A/1998.

2. The plaintiffs Kashmir Singh, Ummed Singh, Sarvan Kumar Singh and Ramkrishna Singh filed a suit for declaration and permanent injunction. In the aforesaid suit initially the State of Madhya Pradesh, Tahsildar, one Sundara and Mahila Bhanwari Bai were defendants. Mahila Bhanwari Bai was the defendant No.4. Subsequently, the name of defendant No.3-Sundara, S/o Keshara, has been deleted. The plaintiffs pleaded in the suit that father of the plaintiffs Kalyan Singh had been in possession of the suit land and his possession was recorded upto Samvat 2027. He was died on 6th June, 1991 and thereafter name of Devalya @

*M.A. No.987/2006 (Gwalior)

Douja has been recorded as Bhumiswami of the land from Samvat 2026-2030. Devalya sold the land by a Registered Sale Deed dated 22.2.1969 in favour of Sundara. The name of Sundara was also got mutated as Bhumiswami over the land vide order dated 13.9.1982, however, the father of the plaintiffs and Devalya had been in possession of the land and thereafter the plaintiffs had been in possession of the land. The Tahsildar, Sheopurkala, District Morena- defendant No.2 issued a proclamation with regard to auction of the land on 31.8.1991. On the basis of aforesaid pleadings, the plaintiffs claimed a relief for declaration and permanent injunction. On behalf of defendants No.1and 2, State of Madhya Pradesh, through Collector and Tahsildar, a separate written statement has been filed before the court. In the aforesaid written statement, it has been pleaded that the name of Devalya @ Douja was recorded as Bhumiswami of the land from Samvat 2026-2030, however, thereafter the defendant No.4 has been recorded as Bhumiswami of the land in the revenue record. It has further been denied that the plaintiffs and father of the plaintiffs had been in possession over the land. It has further been stated that after Devalya, the land was acquired by the State Government and it had been given to the Krishi Upaj Mandi Samiti, Sheopur and the land was also auctioned for agriculture purpose by the Tahsildar. The defendant No.4 filed a separate written statement and she pleaded that the plaintiffs have no right over the land. The matter was listed before the Lok Adalat for compromise. The issues have also been framed by the trial Court and one of the issue was that whether the plaintiffs and father of the plaintiffs were in possession over the suit land? or whether they are the owner of the suit land? In the Lok Adalat the case was compromised between the plaintiffs and defendant No.4-Mahila Bhanwari Bai and as per the aforesaid compromise, the Lok Adalat passed an order dated 10.9.2000. As per the aforesaid order, the suit filed by the plaintiffs was rejected. The defendant No.4 Mahila Bhanwari Bai has been declared as owner of the suit land and it has also been declared that she was entitled to have mutation in her favour of the land and a further order was passed that nobody would interfere in her possession.

3. After passing of the order, appellants No.1, 2 & 3, who are plaintiffs No.1, 3 & 4, filed an appeal before the appellate Court against the order of compromise of the Lok Adalat, which was presided by one Civil Judge. It has been mentioned in the appeal that the appellants did not authorize the Advocate to sign the compromise application before the Lok Adalat. The land was sold to Sundara by Registered Sale Deed and the defendant No.4 was never in possession over the land, hence, the order and compromise of the Lok Adalat is void and illegal. The learned appellate Court vide impugned judgment and decree set aside the order passed by the Lok Adalat.

4. The learned counsel for the appellant has submitted that the judgment and decree passed by the first appellate court is bad in law and the first appeal is not

maintainable against the order of compromise passed by the Lok Adalat and the Advocate, who entered into compromise on behalf of the plaintiffs was authorized to enter into a compromise, hence, the compromise was valid. In support of his contentions, learned counsel for the appellant relied on the following judgments :-

1. 1992 (1) SCC 31 *( Byram Pestonji Gariwala Vs. Union Bank of India and others);*

2. (2003) 11 SCC 372 *(Jineshwardas (D) by LRs. And Others Vs. Jagrani (Smt.) and another* and;

3. A.I.R. 2005 SC 3575 *(P.T.Thomas Vs. Thomas Job).*

5. Contrary to this, learned counsel for the respondents No.1 & 2 has submitted that the judgment and decree passed by the lower appellate court is as per law. The order passed by the Lok Adalat is void ab initio and an appeal is maintainable against the aforesaid order. The respondents have never instructed the counsel to enter into compromise and the compromise is void ab initio and against the law. In support of his contentions, learned counsel relied on the following judgments :-

1. 1993 M.P.L.J. 469*[Banwari Lal Vs. Smt. Chando Devi(Through L.R.) and another];*

2. (2004) 1 SCC 287 *[Rafique Bibi (Dead) by LRs. Vs. Sayed Waliuddin (Dead) by LRs. And others]* and;

3. (2008) 2 SCC 660 *(State of Punjab & Another Vs. Jalour Singh & Others).*

6. As is stated above in the order, the plaintiffs themselves in the plaint stated that Devalya @ Douja sold the suit land vide Registered Sale Deed dated 22.2.1969 in favour of Sundara S/o Keshara and the name of Sundara had also been recorded in the revenue record vide order dated 13.9.1982. The plaintiffs further pleaded that Tahsildar issued a notice on 31.8.1991 with regard to auction of the land. The defendants No.1 & 2 in the written statement specifically pleaded that the land was acquired by the State Government and it has been given to Krishi Upaj Mandi Samiti, Sheopur and thereafter the land was auctioned for agriculture.

7. From the aforesaid pleadings, it is clear that the defendant No.4-Bhanwari Bai, prima facie, has no right of ownership over the suit land even plaintiffs have claimed their rights on the basis of adverse possession. In such circumstances, the plaintiffs and defendant No.4 have no right to enter into a compromise before the Lok Adalat with regard to ownership of the suit land, hence, the compromise was illegal. Apart from this, it is also a fact that the compromise application has been signed by Advocate of the plaintiffs. The appellants in the present appeal have specifically stated that they did not authorize the Advocate to enter into a compromise.

8. Order 23 Rule 3 of Civil Procedure Code prescribes procedure with regard to compromise of the suit which is as under :-

"**Order XXIII, Rule 3.Compromise of suit.-** Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit]:

[Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]

[Explanation.- An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.]

[**3-A. Bar to suit.-** No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

**3-B. No agreement or compromise to be entered in a representative suit without leave of Court.-** (1) No agreement or compromise in a representative suit shall be entered into without the leave of the Court expressly recorded in the proceedings; and any such agreement or compromise entered into without the leave of the Court so recorded shall be void."

9. The Hon'ble Supreme Court in the case of *Rafique Bibi (Dead) by LRs. Vs. Sayed Waliuddin (Dead) by LRs. And Others*, reported in (2004) 1 SCC 287, has held as under with regard to the word "void" :-

"What is "void" has to be clearly understood. A decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. A distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordance with the procedure laid down by law."

(Paras 6 & 8)

10. From the above principle of law laid down by the Hon'ble Supreme Court it

is clear that if the Court passing the decree has usurped a jurisdiction which it did not have; that order or decree is void and nullity. In the present case, the compromise was not lawful because it is stated earlier that the plaintiffs and defendant No.4-Mahila Bhanwari Bai, who entered into a compromise, had no legal rights to compromise the matter. Apart from this, the appellants did not authorize the Advocate to enter into a compromise, hence, in such circumstances, the compromise order passed by the Lok Adalat is void ab initio.

11. The Hon'ble Supreme Court in the case of *Byram Pestonji Gariwala Vs. Union Bank of India and others;* reported in 1992 (1) SCC 31 held as under with regard to compromise which is not binding :-

> "11. A compromise is, however, not binding and is liable to be set aside in circumstances which would invalidate agreements between the parties:
>
> "A compromise by counsel will not bind the client, if counsel is not apprised of facts the knowledge of which is essential in reference to the question on which he has to exercise his discretion, for example that the terms accepted had already been rejected by the client. Where counsel enters into a compromise in intended pursuance of terms agreed upon between the clients, and, owing to a misunderstanding, the compromise fails to carry out the intentions of one side, the compromise does not bind the client, and the court will allow the consent to be withdrawn. Where, acting upon instructions to compromise, counsel consents under a misunderstanding to certain terms which do not carry into effect the intentions of counsel and the terms are thought by one party to be more extensive than the other party intends them to be, there is no agreement on the subject-matter of the compromise, and the court will set it aside. But a person who has consented to a compromise will not be allowed to withdraw his consent because he subsequently discovers that he has a good ground of defence."

12. The Hon'ble Supreme Court further in the case of *Byram Pestonji Gariwala* (supra) cautioned the lawyer not to act on implied authority which is as under :-

> "37. We may, however, hasten to add that it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of suit by agreement or compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such

contingencies in order that neither his authority nor integrity is ever doubted. This essential precaution will safeguard the personal reputation of counsel as well as uphold the prestige and dignity of the legal profession."

Hence, in my opinion, the compromise was null and void.

13. The next question for determination before this Court is that whether an appeal is maintainable under Section 96 of Civil Procedure Code against the void order of Lok Adalat? Admittedly, before the Lok Adalat, the compromise has been entered between the parties under Order 23 Rule 3 of Civil Procedure Code.

14. Section 21 of the Legal Service Authority Act, 1987 which is as follows with regard to the award of Lok Adalat :-

"21. AWARD OF LOK ADALAT.- [(1) Every award of the Lok Adalat shall be deemed to be a decree of a Civil Court or, as the case may be, an order of any other Court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred on it under sub-section (1) of Section 20, the court fee paid in such cases shall be refunded; in the manner provided under the Court-fees Act, 1870 (7 of 1870)].

(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any Court against the award."

This Section prohibits the appeal against the award of the Lok Adalat, if the award has been passed by the authorities legally. The intention of legislature in prohibiting an appeal against the award of Lok Adalat is to give finality to the award so unnecessary further litigation could be saved, however, when the award is void ab initio, the parties who entered into compromise had no power to enter into the compromise and the compromise has been entered by playing a fraud, in such circumstances, that award could be said to be a void and, admittedly, the compromise has been entered before the Lok Adalat in accordance with the provisions of Civil Procedure Code and when the order was void in that circumstances, an appeal could be maintainable under Section 96 of the Civil Procedure Code.

15. As per the judgment of the Hon'ble Supreme Court in the case of *Banwari Lal Vs. Smt. Chando Devi (Through L.R.) and another*, reported in 1993 MPLJ 469, where the Hon'ble Supreme court has held as under :-

"9. Section 96(3) of the Code says that no appeal shall lie from a decree passed by the Court with the consent of the parties. Rule 1A(2) has been introduced saying that against a decr5ee passed in a suit after recording a compromise, it shall be open to

the appellant to contest the decree on the ground that the compromise should not have been recorded. When section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. One such remedy available was by filing the appeal under Order 43, Rule 1 (m). If the order recording the compromise was set aside, there was no necessity or occasion to file an appeal against the decree. Similarly a suit used to be filed for setting aside such decree on the ground that the decree is based on an invalid and illegal compromise not binding on the plaintiff of the second suit. But after the amendments which have been introduced, neither an appeal against the order recording the compromise nor remedy by way of filing suit is available in cases covered by Rule 3 A of Order 23. As such a right has been given under Rule 1 A (2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. Section 96 (3) of the Code shall not be a bar to such an appeal because section 96 (3) is applicable to cases where the factum of compromise or agreement is not in dispute."

16. In the present case, there was no compromise at all, because the compromise has been entered between the so-called parties by playing fraud, hence, the award passed by the Lok Adalat on the basis of compromise could not be said to be a settlement arrived at between the parties as held by the Hon'ble Supreme Court in the case of *State of Punjab and another Vs. Jalour Singh and Others*, reported in (2008) (2) SCC 660, where the Hon'ble Supreme Court has held as under :-

"12. It is true that where an award is made by the Lok Adalat in terms of a settlement arrived at between the parties (which is duly signed by parties and annexed to the award of the Lok Adalat), it becomes final land binding on the parties to the settlement and becomes executable as if it is a decree of a civil court, and no appeal lies against it to any court. If any party wants to challenge such an award based on settlement, it can be done only by filing a petition under Article 226 and/or Article 227 of the Constitution, that too on very limited grounds. But where no compromise or settlement is signed by the parties and the order of the Lok Adalat does not refer to any settlement, but directs the respondent to either make payment if it agrees to the order, or approach the High Court for disposal of appeal on merits, if it does not agree, is not an award of the Lok Adalat. The question of challenging such an order in a petition under Article 227 does not arise. As already noticed, in such a situation, the High Court

ought to have heard and disposed of the appeal on merits."

In such circumstances, the appeal is maintainable under Section 96 of the Code of Civil Procedure.

17. It is also settled principle of law that any order obtained by the parties by playing fraud, is a nullity and it can be challenged in any collateral proceedings even at the stage of execution. The Hon'ble Supreme Court in the case of *A.V.Papayya Sastry & Ors. Vs. Government of A.P. & Ors*, reported in AIR 2007 SC 1546, has held as under :-

> "22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings."

18. The Hon'ble Supreme Court further in the case of *N. Khosla Vs. Rajlakshmi (Dead) And Others,* reported in (2006) 3 SCC 605, has held as under :-

> "The respondents fraudulently obtained a mutation in the land records on 22-1-1977. Fraud cloaks everything. Fraud avoids all judicial acts. A decree obtained by playing fraud is a nullity and it can be challenged in any court, even in collateral proceedings. Hence, it is open to the appellant to file a suit challenging the said fraudulent mutation against the legal heirs of the respondent, whose appeal has been abated. If the suit is filed within two months from today, it shall not be dismissed as being barred by limitation."

19. Hence, looking to the facts of the case, in my opinion, the appeal is maintainable and the appellate Court has rightly entertained the appeal. The judgments cited by the learned counsel for the respondents are not applicable in the present facts and circumstances of the case because in the present case, the so-called compromise has been entered by playing a fraud. The Presiding Civil Judge of the Lok Adalat completely ignored the legal provisions and permitted the parties to enter into the compromise which was beyond their power.

20. Consequently, I do not find any merit in this appeal, it is hereby dismissed. No order as to cost.

*Appeal dismissed.*

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I.L.R. [2009] M. P., 1755
APPELLATE CRIMINAL
*Before Mr. Justice A.K. Shrivastava*
1 September, 2008*

HIFAZATULLAH @ NASIRULLAH ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. **Prevention of Corruption Act (2 of 1947), Section 5(1)(d) r/w Section 5(2)** - *Evidence of complainant about making demand of bribe and its acceptance should be corroborated by independent evidence in order to ascertain what actually transpired between complainant and accused at the time of handing over the money.* (Para 10)

क. भ्रष्टाचार निवारण अधिनियम (1947 का 2), धारा 5(1)(डी) सहपठित धारा 5(2) – रिश्वत की माँग करने और इसकी स्वीकृति के बारे में परिवादी की साक्ष्य की स्वतंत्र साक्ष्य से सम्पुष्टि होनी चाहिए यह पता लगाने के लिए कि रुपये सुपुर्द किये जाते समय परिवादी और अभियुक्त के मध्य वास्तव में क्या प्रकट हुआ।

B. **Criminal Procedure Code, 1973 (2 of 1974), Section 313, Prevention of Corruption Act, 1947, Section 5(1)(d) r/w Section 5(2)** - *Case of prosecution that Rs.200 was demanded by accused towards bribe and the amount of Rs.200 was given by complainant - Defence of accused is that complainant took Rs.150 towards loan from him and Rs.200 were given for repayment of loan - Rs.50 was returned by accused immediately - Trap witness stated that accused was saying that he has taken money towards re-payment of loan, Rs.50 received from complainant - The defence appears to be probable and due weightage should be given.* (Para 9 & 11)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313, भ्रष्टाचार निवारण अधिनियम, 1947, धारा 5(1)(डी) सहपठित धारा 5(2) – अभियोजन का मामला कि अभियुक्त द्वारा 200 रुपये रिश्वत की माँग की गई और परिवादी द्वारा 200 रुपये की राशि दी गई – अभियुक्त का बचाव यह है कि परिवादी ने उससे 150 रुपये ऋण लिया और 200 रुपये ऋण के प्रतिसंदाय के लिए दिये गये थे – अभियुक्त द्वारा 50 रुपये तुरन्त वापस कर दिए – पकड़ने के साक्षी ने कथित किया कि अभियुक्त यह कह रहा था कि उसने ऋण के प्रतिसंदाय के लिए रुपये लिए हैं, परिवादी से 50 रुपये प्राप्त किये – प्रतिरक्षा अधिसंभाव्य प्रतीत होती है और सम्यक् वरीयता दी जानी चाहिए।

C. **Criminal Procedure Code, 1973 (2 of 1974), Section 313** - *Probable defence taken by accused should not be compared with that of prosecution where the prosecution is obliged to prove its case beyond doubt.* (Para 11)

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

*Cr.A. No.433/1996 (Jabalpur)

**D. Penal Code (45 of 1860), Section 161, Prevention of Corruption Act, 1947, Section 5(1)(d) r/w Section 5(2). -** *Accused was not having any motive to make any demand of bribe - Offence not made out.* (Para 15)

घ. दण्ड संहिता (1860 का 45), धारा 161, भ्रष्टाचार निवारण अधिनियम, 1947, धारा 5(1)(डी) सहपठित धारा 5(2) – अभियुक्त का रिश्वत की कोई माँग करने का कोई हेतु नही था – अपराध नही बनता।

**E. Prevention of Corruption Act (2 of 1947), Section 5(1)(d) r/w Section 5(2) -** *Complainant died before he could be examined - Charge can be proved by other evidence.* (Para 8)

ङ. भ्रष्टाचार निवारण अधिनियम (1947 का 2), धारा 5(1)(डी) सहपठित धारा 5(2) – परिवादी की परीक्षा किये जाने के पूर्व उसकी मृत्यु हो गयी – आरोप अन्य साक्ष्य से साबित किया जा सकता है।

**Case referred :**

AIR 2000 SC 3377.

*Ahadullah Usmani,* for the appellant.

*Aseem Dixit, P.P.,* for the respondent/State.

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

**A.K. Shrivastava, J. :**–Feeling aggrieved by the judgment of conviction and order of sentence dated 28/2/1996 passed by learned V Additional Sessions Judge, Bhopal in Special Case No.2/88 convicting appellant under Section 161 of IPC and also under Sections 5(1)(d) read with Section 5(2) of Prevention of Corruption Act, 1947 (in short 'the Act') and sentencing him to suffer RI of one year and fine Rs.100/- for each offence, in default, further R.I. of 30 days for each offence with a further stipulation that all the sentences shall run concurrently, the appellant has knocked the door of this court by preferring this appeal under Section 374 (2) of Code of Criminal Procedure, 1973.

2. In brief, the case of prosecution is that on 22/9/1986 Kailash Singh (hereinafter referred to as 'the complainant') submitted an application before the Special Police Establishment that on 19.9.1986 appellant in order to facilitate in obtaining the amount of Rs.1500/- being a Bhopal gas victim, made demand of bribe of Rs.200/-. This fact was stated by the complainant to Prabhulal and Prahlad Das. On the basis of the complaint made by the complainant a trap was arranged. On submitting one currency note of Rs.100/- and two currency notes having denomination of Rs.50/- each by the complainant, their numbers were noted down in the pre-trap Panchnama. These currency notes were treated by phenolphthalein powder and were kept in the pocket of the complainant.

3. The trap party proceeded to the office of the appellant but by the time it could reach there, the office was already closed. On the next day, again complainant went to the office of appellant along with the members of the trap party. The

complainant was sent inside the office of the appellant and it is said that the treated currency notes were handed over by the complainant to the appellant and out of these treated currency notes, one treated currency note of Rs.50/- was returned back by the appellant to complainant.

4. It is the further case of prosecution that on receiving the signal given by the complainant, the members of the trap party entered inside the office and on being pointed out by the complainant, Constable Jagdish and Head Constable Ram Khilawan caught hold of hands of the appellant from the wrist. Thereafter, phenolphthalein powder test was conducted on the fingers of the hands of the appellant and on dipping his fingers in the solution of sodium carbonate the colour of the chemical solution changed to pink which was collected in a separate sealed bottles.

5. After the investigation was over, a charge sheet was submitted before the learned Special Judge who framed charges punishable under Section 5(1)(d) read with Section 5(2) of the Act as well as under Section 161 of IPC. Needless to emphasize the appellant abjured his guilt and pleaded complete innocence. The defence of appellant is that complainant took loan of Rs.150/- from him and that amount of loan was repaid by the complainant to him.

6. The prosecution thereafter examined 14 witnesses and proved Ex.P/1 to P/26 the documents on record.

7. The learned Special Judge found charges framed against appellant to be proved and eventually convicted appellant and passed the sentences which I have mentioned herein above. In this manner the present appeal has been filed by the appellant assailing his judgment of conviction and order of sentence.

8. In the present case, the complainant Kailash died before he could be examined. But merely he had died it would not mean that the guilt cannot be proved if it is proved by other evidence.

9. In the present case, written complaint (Ex.P/1) of the complainant had been proved by M.A.Ansari (PW-1) who is a trap witness and was summoned by the Special Police Establishment. According to this witness, a written complaint was read over to him in presence of the complainant which the complainant admitted and this witness put his endorsement on the complaint (Ex.P/1). On going through the complainant (Ex.P/1) it is revealed that Babu (Clerk) Nasirullah made demand of bribe of Rs.200/- from the complainant. This witness specifically admitted during the cross-examination in para 24 that the amount of bribe was not required to be given to the appellant but it was to be given to one Nasirullah. According to this witness, the treated currency notes were given by complainant to the appellant. In para 23 of his cross-examination, this trap witness has specifically admitted that when appellant was caught, he told that Rs.150/- has been given by complainant to him towards the re-payment of loan which he gave to him. Further this witness

has admitted that the complainant handed over the treated currency notes to the appellant by saying that he is paying the loan. This witness is an altogether independent witness and is an officer and, therefore, due credence should be given to his testimony. On scanning the evidence of this witness, it is clear that complaint was made by the complainant against one Nasirullah and not against the appellant Hifazatullah. True the finding of learned Special Judge on the basis of evidence of Naib Tehsildar Sunil Raj (PW-9) is that in the office there is no person by the name of Nasirullah. But looking to the evidence of independent witness PW-1, M.A.Ansari that when appellant was caught he was saying that complainant has repaid the loan amount to him. Thus, the first version of the appellant when he was caught is that he has received the amount towards the re-payment of the loan which the complainant took from him. The said defence of appellant cannot be said to be afterthought because it was stated at the spot only when he was caught.

10. On further scanning the testimony of this independent trap witness (PW-1), para 25, it is gathered that what actually transpired between appellant and complainant at the time of handing over the treated currency notes, he was unable to overhear. The Supreme Court in the case of Smt. Meena Balwant Hemke vs State of Maharashtra AIR 2000 SC 3377 in para 9 has specifically held that in trap case the corroboration is essentially required in order to ascertain that what actually transpired between accused and complainant at the time of acceptance of the bribe. In the case of Smt. Meena Balwant Hemke (supra) what actually transpired between the accused and the complainant of that case was wanting and in the present case also this fact is wanting. Apart from this, in examination-in-chief para 8 this witness has categorically stated that out of the amount of Rs.200/-, one treated currency note of Rs.50/- was returned by the appellant to the complainant before he was caught. Thus, it raises a doubt about the truthfulness of the story of prosecution because if the demand of Rs.200/- was made by the appellant, why he would return Rs.50/- back to him. The act of appellant returning Rs.50/- back to the complainant corroborates the probable defence which he has taken that the money which was given by the complainant to him was towards the repayment of loan and this fact also corroborates from the testimony of this independent witness.

11. Even for the sake of argument if it is assumed that alias of appellant is Nasirullah. However, since it is borne out from the evidence of independent trap witness that appellant was saying, when he was caught, that the amount of loan has been repaid by the complainant and because as per prosecution's own case Rs.50/- was returned by the appellant to the complainant, the defence which has been taken by him appears to be quite probable. The Supreme Court in *Punjabrao vs State of Maharashtra* AIR 2002 SC 486 and also in *V.Venkata Subbarao vs State* represented by Inspector of Police, A.P. AIR 2007 SC 489 in para 25 has

held that if the defence is found to be probable due credence should be given and it should not be compared with that of the case of prosecution where the prosecution is obliged to prove its case beyond doubt.

12. Prabhulal (PW-2) to whom it is said that complainant told him that appellant is making demand of bribe has not supported the case of prosecution and was declared hostile. So far as the other witness Prahalad (PW-3) to whom also it is said that complainant told that appellant is making demand of bribe has not named the appellant but only stated that complainant told him that one clerk of Municipal Corporation is making demand of bribe. Hence it cannot be said that the appellant is the same clerk.

13. Constable Jagdish who caught hold the hands of appellant has also admitted in para 12 of his cross-examination that Rs.200/- were not found in the possession of the appellant. This also proves the probable defence of appellant that there was a loan transaction of Rs.150/- between complainant and appellant and the treated currency notes of Rs.200/- were given to appellant by complainant by saying that he is repaying the loan amount of Rs.150/- and this is the reason why appellant returned Rs.50/- immediately to the complainant.

14. Naib Tehsildar Sunil Raj (PW-9) in his cross-examination is also saying that when appellant was caught, he was saying that complainant has returned the loan amount of Rs.150/- and thus the defence which the appellant took at the first instance is also corroborated from the testimony of Sunil Raj.

15. The Dy. Superintendent of Police, Lokayukta has been examined as PW-12 and this witness was also present when the trap was conducted. This witness has categorically stated in para 14 of his cross-examination that appellant was not the Incharge of the Gas Relief Cell and it was obligatory on the part of Naib Tehsildar Sunil Raj to prepare and issue slip for the distribution of the amount of gas relief to the gas victims. The Panchnama etc and the necessary information was required to be collected by Naib Tehsildar only. Thus, the appellant was not having any motive to make demand of bribe as envisaged under Section 161 IPC.

16. Another Dy. Superintendent of Police V.K.Singh (PW-13) who prepared the Panchnama etc. at the spot has admitted in para 10 of his cross-examination that neither he nor any member of the trap party did see the actual transaction of giving and taking of the bribe. He has further admitted that complainant Kailash did not tell him that he has received Rs.50/- back. According to this witness this fact came to his knowledge only when Rs.150/- was seized from the appellant. On the basis of above said evidence it can safely be said that the defence which the appellant has taken during the cross-examination of prosecution witnesses as well as in his statement under Section 313 Cr.P.C. is probable. Hence, the impugned judgment passed by learned Special Judge convicting and sentencing the appellant cannot be sustained.

16. Resultantly, this appeal is allowed and appellant is acquitted from all the charges. The appellant is on bail, his bail bonds are discharged. The amount of fine, if deposited, be refunded to him.

*Appeal allowed.*

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**I.L.R. [2009] M. P., 1760**
**APPELLATE CRIMINAL**
***Before Mrs. Justice Sushma Shrivastava***
21 November, 2008*

HARAKH CHAND ... Appellant
Vs.
STATE OF M.P. ... Respondent

**Penal Code (45 of 1860), Section 376 -** ***Rape - Conviction on the sole testimony of the prosecutrix challenged in appeal - Held - Prosecutrix had tried to resist the act of the appellant and also shouted for help and had a scuffle with him - Some of her bangles had broken, but she did not sustain any injury - Mere fact, that prosecutrix did not sustain any injury in the incident would not ipso facto mean that she did not resist or was a consenting party - Evidence of the prosecutrix is found to be cogent, natural and trustworthy, which also stood corroborated by the promptly lodged FIR as well as by the evidence of a witness to whom the incident was narrated by her - It was thus established beyond periphery of doubt that appellant committed rape - Appeal dismissed.*** (Paras 13 & 15)

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

**Cases referred :**

(2005) 8 SCC 122, AIR 2000 SC 1812, AIR 2004 SC 2884, 2005 AIR SCW 6009.

*Rajeshwar Rao,* for the appellant.

*Vikram Singh, Panel Lawyer,* for the respondent/State.

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*Cr.A. No.1369/1994 (Jabalpur)

**HARAKH CHAND Vs. STATE OF M.P.**

## JUDGMENT

SUSHMA SHRIVASTAVA, J. :–Appellant has preferred this appeal challenging his conviction and order of sentence passed by Sessions Judge, Khandwa in S.T. No.228/92, decided on 1.10.94.

2. Appellant has been convicted under Section 376 of IPC and sentenced to rigorous imprisonment for three years with fine of Rs.500/-, in default further rigorous imprisonment for fifteen days, by the impugned judgment.

3. According to prosecution, on 31.8.90 about 11 'O'clock in the morning at village Moondi, prosecutrix had gone towards the colony road for grazing her cattle. Her goats, while grazing, had gone towards the appellant's field. Appellant was also grazing his cattle in his field. When prosecutrix went to the field of appellant to bring back her goats, appellant came to her, caught hold of her hands, fell her on the ground and forcibly committed sexual intercourse with her. Prosecutrix shouted for help, but nobody came to her rescue, as none was present there. After committing sexual intercourse, appellant threatened and intimidated the prosecutrix not to disclose the incident to anyone. Prosecutrix somehow came back to her house and narrated the whole incident to her father and other family members. Her father took her to the Police Station to lodge the report. On the basis of her report, an offence was registered at Police Station Moondi against the appellant and was investigated. Prosecutrix was sent for medical examination. She was also sent for radiological examination for confirmation of her age. On being arrested, appellant was also sent for medical examination. The petticoat and vaginal slide of the prosecutrix and underwear and seminal slide of the appellant collected during medical examination were seized by the Police and sent for forensic examination. After due investigation, appellant was prosecuted under Section 376, 506 of IPC and was put to trial.

4. Appellant abjured the guilt and pleaded false implication. According to the appellant, he prevented the prosecutrix from grazing cattle in his field, so she lodged a false report.

5. Learned Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, found the appellant guilty under Section 376 of IPC, convicted and sentenced him as aforesaid by the impugned judgment. Hence, this appeal.

6. Learned counsel for the appellant submitted that the trial court erroneously convicted the appellant on the basis of sole testimony of the prosecutrix without their being any medical evidence on record and failed to consider that the prosecutrix was a major lady and a consenting party, as there were no injuries on her person.

7. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellant.

8. Perused the evidence on record. Prosecutrix (P.W-1) categorically deposed in her evidence that on the day of occurrence she was grazing her goats on the Colony Road at village Moondi and some of her goats had gone to appellant's field where he was grazing his cattle; prosecutrix went to take back her goats, appellant caught hold of her hand, forcibly fell her down, sat upon her and forcibly committed sexual intercourse with her. Prosecutrix shouted for help, but none was present there to come to her rescue. Prosecutrix then went to her house and narrated the incident to her parents and lodged the FIR (Ex.P-1) at the Police Station.

9. The evidence of the prosecutrix also stood corroborated by the testimony of her sister-in-law Sukhai Bai (P.W-2), to whom she narrated the incident. Sukhai Bai (P.W-2) deposed in her evidence that prosecutrix had gone to jungle to graze the goats and she came back weeping and narrated that appellant had sexually assaulted her; then the matter was reported to the Police. The FIR (Ex.P-1) was lodged same day.

10. Despite extensive cross-examination of the prosecutrix (P.W-1), nothing has been elicited so as to disbelieve or distrust her version. There is nothing in her evidence to indicate that appellant was falsely implicated. Prosecutrix refuted the suggestion made in her cross-examination that appellant had slapped her when her cattle trespassed into his field or she had quarreled with him. It does not appeal to reason that on account of so called quarrel over cattle trespass, prosecutrix (P.W-1) would lodge a false report of rape against the appellant at the cost of her dignity, honour and reputation. In fact upon close and careful scrutiny of the evidence of the prosecutrix (P.W-1), her evidence is found cogent, trustworthy and it inspires confidence.

11. Learned counsel for the appellant submitted that there was no medical evidence on record to suggest that the prosecutrix was raped and she admittedly did not sustain any injuries, therefore, the possibility of her being a consenting party could not be ruled out.

12. Although the prosecution did not examine the doctor, who had medically examined the prosecutrix after the incident, but that cannot be a reason to discard the version made by her against the appellant, which remained virtually unimpeached. The Apex Court in the case of *State of M.P. Vs. Dayal Sahu* reported in (2005) 8 Supreme Court Cases page 122 has held that non-examination of the doctor and non-production of the doctor's report would not be fatal to the prosecution case if the statement of the prosecutrix and other prosecution witnesses inspire confidence.

13. Moreover, prosecutrix (P.W-1) has explained in her cross-examination that appellant fell her on the grass and mud, therefore, she did not sustain any abrasion. Prosecutrix (P.W-1) stated in her cross-examination that she had tried to resist the act of the appellant and also shouted for help and had a scuffle with him; in

the scuffle some of her bangles had broken, but she did not sustain any injury. Thus, it does not appear that the prosecutrix was a consenting party. The mere fact, that prosecutrix (P.W-1) did not sustain any injury in the incident, would not ipso facto mean that she did not resist or was a consenting party. The Apex Court in the case of *State of Rajasthan Vs. N.K.* reported in AIR 2000.SC Page 1812 has held that the absence of visible mark of injuries on the person of prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had not offered any resistance at the time of commission of crime; and absence of injuries on the person of prosecutrix is not necessarily an evidence of falsity of allegation or an evidence of consent on the part of prosecutrix. It was also reiterated by the Apex Court in the case of *Dastagir Sab and another Vs. State of Karnataka* reported in AIR 2004 SC page 2884, that the absence of injury on the person of prosecutrix would not by itself be sufficient to discard the prosecution case.

14. It is also well settled, as reiterated by the Apex Court in the case of *State of Himachal Pradesh Vs. Asha Ram* reported in 2005 AIR SCW page 6009 that conviction can be founded on the testimony of the prosecutrix alone, if her testimony inspires confidence and is found to be reliable.

15. In the instant case, as already said, the evidence of the prosecutrix (P.W-1) is found to be cogent, natural and trustworthy, which also stood corroborated by the promptly lodged FIR (Ex.P-1) as well as by the evidence of Sukhai Bai (P.W-2) to whom the incident was narrated by her. It was thus established from the evidence on record beyond periphery of doubt that appellant committed rape on the prosecutrix (P.W-1).

16. In view of the aforesaid, the conviction of the appellant under Section 376 of IPC, as recorded by the trial court, does not call for any interference in this appeal.

17. As regards the sentence, the impugned sentence of rigorous imprisonment for three years, which was already less than the minimum prescribed under Section 376(1) of IPC, also does not warrant any interference.

18. Consequently, appeal being bereft of any merit is hereby dismissed.

19. Appellant is on bail. He shall forthwith surrender to his bail bonds to serve out the remaining part of sentence.

*Appeal dismissed.*

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**I.L.R. [2009] M. P., 1764**

**APPELLATE CRIMINAL**

*Before Mr. Justice S.L. Kochar & Mrs. Justice Manjusha P. Namjoshi*

9 January, 2009*

ASLAM & ors. .... Appellants

Vs.

STATE OF M.P. ... Respondent

**Penal Code (45 of 1860), Sections 302, 323, Evidence Act, 1872, Section 32 - *Dying declaration - In FIR and report of doctor, no statement was given by the deceased in regard to cause of his death or as to any of the circumstances which resulted in his death - Statement not admissible as dying declaration - Conviction and sentence u/s 302 IPC set-aside and u/s 323, 324 maintained - Appeal partly allowed.*** (Paras 7, 9 & 11)

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

**Cases referred :**

1994 MPLJ 862, (2008) 2 SCC (Cri) 666, 2007 CrLJ 1329, 2007 CrLJ 207.

*A.S. Rathore*, 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.** :–The appellants No.2 Rajjak and No.3 Sheju have challeng their conviction, by filing this appeal, under Section 302 of the IPC and appellants No. I and 4 have challenged their conviction, by filing this appeal under Section 302 read with Section 34 of the IPC and sentence of R.I for life and fine of Rs.500/- each, in default of payment of fine additional R.I. for 2 months each and all appellants have been convicted under Section 506 of the IPC 3 months R.I. each and appellant No.4 Munna has been convicted under Section 323 of the IPC 3 months R.I. by judgment passed by learned Sessions Judge, Mandsaur, District Mandsaur in Sessions Trial No.226/1998 dated 8th October, 1999.

2. According to the prosecution case, deceased Shama was resident of Village Tigriya, District Mandsaur and was having joint family house in Nayapura, Mandsaur town. In the said house, electric connection was in the name of brother Salamuddin. Deceased Shama had given electric connection to appellant Abdul

*Cr.A. No.1454/1999 (Indore)

Rajjak but Abdul Rajjak was not paying electric bill because of which deceased disconnected electric connection. On 06.09.1998, in the morning at 8.00 a.m., deceased Shama was sitting in front of his house situated in village Tigriya, at that moment appellants reached over there having sword, dhariya and lathis. They all started abusing Shama and also assaulted him by their respective weapons. Deceased was rescued by PW-4 Nahar Khan and PW-10 Akbar Khan. PW-2 Raisa Bi, wife of deceased Shama also sustained injury while saving her husband. Nahar Khan and Akbar Khan took deceased Shama to Police Station where he lodged report Ex.P/24. Shama was sent to Govt. hospital, Mandsaur where he remained hospitalized for 10 days and died on 16.09.1994. Head Constable PW-12 Rambaran Singh commenced investigation and seized blood stained clothes of deceased. He prepared spot map and also arrested the appellants. On disclosure statement made by appellants, dhariya, knife, sword and lathi were seized. Patwari Jaysingh Tomar also prepared spot map Ex.P/17. Assistant Sub Inspector R.C.Sharma, PW-13 obtained certificate about electric connection Ex.P/20 from PW-11 Sadanand, employee of M.P. Electricity Board. He also seized bed head ticket of deceased Shama. First MLC was performed by PW-9 Dr.S.K.Jain videEx.P/18. Dr.Jain also recorded dying declaration Ex.P/19. Postmortem on the body of deceased was performed by PW-5 Dr.Verma, the report is Ex.P/4. Eye witness PW-2 Raisa Bi was medically examined by PW-14 Dr.S.K. Mehta, her medical report is Ex.P/28. On completion of Investigation, all the 4 appellants were chargesheeted for commission of offence under Sections 294, 506, 302, 302/34 and 323 of the IPC.

3. Appellants denied the charges, therefore, put to trial. Appellants have not examined any witness in defence whereas prosecution has examined in all 14 witnesses and adduced 28 documents in evidence. Learned trial court, finding the appellants guilty, convicted and sentence them as indicated here-in-above.

4. Having heard learned counsel for the parties and after perusing the entire record, this court is of the view that prosecution has failed to establish important ingredient as defined under Section 299 of the IPC and thereafter murder as defined under Section 300 of the IPC.

5. There is overwhelming evidence against the appellants for assaulting the deceased and causing injuries by sharp cutting object. The First Information Report Ex.P/24 was lodged by the deceased in which names of all the appellants are mentioned clearly coupled with their participation in beating of deceased, but this report cannot be considered as dying declaration as defined under Section 32(1) of the Evidence Act which reads as under :-

> "Section 32 ;- Cases in which statement of relevant fact by person who is dead or cannot be found etc. is relevant - Statements, written or verbal, of relevant facts made by a person who is dead,

or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :-

(1) When it relates to cause of death– When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

6. In case of *Imran Khan V/s. State of M.P.* (1994 MPLJ 862) the Division Bench of this High Court has also observed in this regard as under :-

"that the conviction and sentence recorded against the accused was liable to be set aside as the prosecution had failed to establish any case against the accused. Death had not been shown by a chain of causes and effects to be the proximate consequence of the act attributed to the accused. The original injury itself was not of a fatal nature. The casual connection was too remote and the injury on the skull had not been shown to have caused death. Therefore, the statement of the deceased made to her relatives cannot be said to be a statement as to cause of death or as to any of the circumstances which resulted in her death. The evidence of the relatives in that behalf was hearsay and was not relevant under Section 32(1) of the Evidence Act. Since the prosecution had failed to prove causal connection between the injury and death the alleged dying declaration was not relevant under Section 32 of the Evidence Act. It is fundamental to the provision in Section 32 of the Evidenee Act that there must be death. The statement must relate to cause of death or to any of the circumstances of the transaction which resulted in death when the cause of death comes into question. If the deceased is not proved to have died as a result of the injuries received in the incident propounded by the prosecution, her statement can-not be said to be statement as to cause of her death or to any of the circumstances which resulted in her death.

7. PW-5 Dr.S.L.Verma proved postmortem report Ex.P/4 and gave specific

opinion that deceased died because of Hepatitis, he has no where stated in his statement in court as well as in postmortem report that healed injuries found on the person of deceased in any way directly or indirectly contributed for death of deceased. The prosecution has failed to establish that deceased died because of 4 incised injuries caused to him by appellants or these injuries in any way contributed for death of deceased. Deceased died only because of damage to the liver because of disease Hepatitis(B). The prosecution has filed report Ex.P/23 proved by PW-13 Assistant Sub Inspector R.C.Sharma. This is the report given by Dr.Ashok Sharma, Junior Forensic Specialist, Medico Legal Institute, Bhopal and in the report clear opinion has been given that injuries were not the cause of death. He also opined that during hospitalization, patient had developed some ailment which was not elicited or rectified timely and same culminated into death. Bed head ticket of deceased Shama proved by PW-9 Dr.S.K.Jain is also containing pathology test report wherein hepatitis report was positive i.e. HbsAg (Australia Antigen).

8. Medico Legal Certificate of injuries sustained by deceased proved by PW-9 Dr.S.K.Jain vide Ex.P/18. Dr.Jain found 4 incised injuries on the person of deceased on right side of skull, left shoulder and left fore arm. No opinion was given by Dr.Jain about nature of injuries. Dr.Jain referred for X-Ray examination of deceased for skull injury and in X-Ray, no bony injury was found, rest 3 injuries were simple in nature as opined by Dr.Jain. Dr. Jain proved dying declaration of deceased vide Ex.P/19. In this statement, deceased has mentioned the names of the appellants who assaulted him by sharp edged weapons. The identity of the appellants is fully established on the basis of dying declaration Ex.P/19, First Information Report Ex.P/24 and eye witnesses account given by PW-2 Raisa Bi, PW-3 Babloo, PW-4 Nahar Khan and PW-10 Akbar Khan. As discussed here-in-above, statement recorded by PW-9 Dr.Jain Ex.P/19 can not be considered as dying declaration (See *Imran Khan V/s. State of M.P.* 1994 MPLJ 862).

9. First Information Report Ex.P/24 can not be considered as substantive piece of evidence. It is well settled legal position that FIR can be used only to contradict its author in court and to corroborate the statement given in court and statement recorded by Dr. Jain Ex.P/19 could be used at the most For impeaching the credibility of the statement if deceased would have alive and appeared in court as a witness. Since deceased Shama died because of hepatitis and could not appear in Court forgiving statement, both documents Ex.P/24 FIR and Ex.P/19 statements recorded by Dr. Jain are not at all useful in favour of the prosecution.

In both documents no statement was given by the deceased in regard to the cause of his death or as to any of the circumstances of transaction which resulted in his death, therefore, same are not admissible as dying declaration under Section 32(1) of the Evidence Act. (See Supreme Court Cases 2008 Vol.2 SCC (Cri.) 666 *Vinay V/s. State of Rajasthan,* 2007 Cri.L.J. 1329 *Kailash V/s.*

*State of M.P.*, 2007 Cri. L.J. 207 *Ganesh V/s. State of M.P.*).

10 Now the core question for us to decide is as to for which offence appellants would be liable. In view of the injured eye witness PW-2 Raisa Bi and other witnesses PW-3 Babloo PW-4 Nahar Khan and PW-10 Akbar Khan it is proved beyond reasonable doubt that all appellants came together and gave beating to deceased causing 4 incised injuries. As discussed here-in-above all the 4 injuries were simple in nature, therefore, in the opinion of this court appellants would be liable for causing simple injuries by dangerous weapon, punishable under Section 324/34 of the IPC. Appellant Munna would also be liable for conviction under Section 323 of the IPC, for causing simple injury by hard and blunt object to PW-2 Raisa Bi. MLC report Ex.P/28 of this witness has also been proved by PW-14 Dr. S.K.Mehta.

11. In the result, this appeal is allowed in part, conviction and sentence of the appellants under Section 302, 302/34 of the IPC are hereby set aside, instead thereof they are convicted under Section 324/34 of the IPC and sentenced to the period already undergone (6 months) and fine of Rs.2,500/- to each of the appellants. Conviction and .sentence of appellant No.4 Munna under Section 323 of the IPC and all appellants under Section 506 of the IPC are hereby maintained. All the jail sentences shall run concurrently. Appellants are present in person, they are directed to appear before the trial court on 31st March.2009 and deposit the fine amount. On realization of fine amount, Rs.8,000/- be paid as compensation to PW-2 Raisa Bi, wife of deceased. On failure of the appellants to appear on a given date and deposit the fine amount, the Trial Court is directed to take suitable action against them and their surety/sureties, under intimation to this Court. It is made clear that if appellants have already deposited imposed fine of Rs.500/-, that may be deducted from fine amount of Rs.2,500/- and each shall deposit only Rs.2,000/-. Office .is directed to send copy of this judgment alongwith the record to the Trial Court.

*Appeal partly allowed.*

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**I.L.R. [2009] M. P., 1769**

**APPELLATE CRIMINAL**

*Before Mr. Justice R.C. Mishra*

20 January, 2009*

SHEIKH SULTAN & anr. ... Appellants

Vs.

STATE OF M.P. ... Respondent

**A. Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Sections 326, 304 Part I, 34 - *Appreciation of evidence - Partisan witness - Reliability - Testimony of an injured witness to the incident has its own efficacy and relevancy - His presence at the spot could not be doubted as, in the same transaction he had also sustained grievous injuries - His statement recorded after a month when he became conscious - No motive to falsely implicate the appellants was alleged against him - His straight forward deposition drew ample support from the recovery of bloodstained earth from the place of occurrence - The infirmities in the statement of the first informant and the eye witnesses also had no bearing on the credence of his testimony.*** (Para 12)

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

**B. Criminal Procedure Code, 1973 (2 of 1974), Section 156 - *Delay in forwarding the FIR to the Magistrate - Effect - Held - Mere delay in dispatch of FIR to the Magistrate was not sufficient to throw out the prosecution case in its entirety simply because the veracity of the incident was not disputed - At the most, it could be taken as an infirmity in the investigation.*** (Para 13)

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

*Cr.A. No.2/1994 (Jabalpur)

**SHEIKH SULTAN Vs. STATE OF M.P.**

**Case referred :**

AIR 2002 SC 3279.

*S.C. Datt with G.P. Patel,* for the appellants.

*Pankaj Dixit, 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-dated 29.12.1993 passed by Additional Sessions Judge, Gadarwara Distt. Narsinghpur in S.T. No.255/1992 whereby the appellants were convicted and sentenced as under with the direction that the custodial sentences shall run concurrently-

| Convicted under Section | Sentenced to |
|---|---|
| 304 Part I read with S.34 of the IPC | undergo R.I. for 7 years and fine of Rs.5000/-and in default, to suffer R.I. for 1 year. |
| 326 read with S.34 of the IPC | undergo R.I. for 4 years and fine of Rs.3000/-and in default to suffer R.I. for 7 months. |

2. The prosecution story, in short, may be narrated as under–

(a) On 30.08.1992, at the time when the appellant no.2 Hakam Khan (for short 'A2') was taking the cattle through the land in occupation of Hemraj (since deceased), a quarrel ensued that led to animosity between them.

(b) On the following day i.e. 31.08.1992 only, at about 8 a.m., while returning home from their fields, Hemraj and his nephew Raja Bhaiya (PW11) were jointly attacked by the appellants and co-accused Naseer, Munni Bi, Sakina Bi, Kadori Bi, Mitthu, Sheikh Ramjan, Sheikh Muddin and Chamru @ Hasrat. The appellant no.1 Sheikh Sultan (for brevity 'A1') and A2 were armed with axes and amongst their companions, Naseer was equipped with a knife; Ramjan & Mitthu were carrying lathies and the women named above were also having lathies like Kholias. To save themselves, both Hemraj and Raja Bhaiya rushed towards the house of Chamru. But, pursuing them, the appellants and their associates were able to surround them in the courtyard of Chamru where they were brutally assaulted with the respective weapons. Sustaining injuries, Hemraj died instantaneously whereas Raja Bhaiya was rendered unconscious.

(c) Upon information as to what was termed as the communal

violence, the police force was deployed in the village. At the instance of one of the eyewitnesses namely Dev Baksh (PW9), ASI Deviprasad Pandey (PW13) recorded the details of incident in the Dehati Nalishi (Ex.P-19) and, accordingly, registered a case, under Sections 147, 148, 307 and 302 read with S.149, of the IPC.

(d) The injured & unconscious Raja Bhaiya was immediately sent to District Hospital at Narsinghpur. Dr. S.K. Maheshwari (PW6), after a preliminary examination, admitted him to the hospital and, thereafter, he was referred to Medical College & Hospital, Jabalpur for further examination and necessary treatment.

(e) After inquest proceedings, dead body of Hemraj was sent for post-mortem. Autopsy Surgeon Dr. M.R. Khan (PW7) opined that Hemraj's death was caused due to coma as a result of injury to the brain.

(f) During investigation, ordinary as well as bloodstained earth collected from the spot, a piece of Sari found tied on the head of Hemraj were seized and respective weapons were recovered from the possession of the appellants and the co-accused. The seized articles were forwarded to FSL, Sagar for forensic examination.

3. On being charged with the offences punishable under Sections 147, 148, 302 and 307 read with S.149 of the IPC, the appellants abjured the guilt and pleaded false implication due to prevailing animosity. In their examination, under Section 313 of the Code of Criminal Procedure (for short 'the Code'), they also submitted written statements to the following effect :

(i) On the previous day of the incident in question, while driving cattle to the grazing field, A2 noticed that Hemraj had obstructed their way by putting Jarenta (branches of thorny tree). As he removed the obstruction, Hemraj also picked up a quarrel with him.

(ii) On the fateful day, while proceeding towards the house of co-accused Chamru, they were surrounded by Hemraj and Raja Bhaiya who, being armed with lathis, were ready to beat them. To save themselves, they ran into the house. However, they were followed by Hemraj and Raja Bhaiya, who having trespassed into Chamru's house, jointly attacked them and in defence, they also inflicted injuries to Hemraj and Raja Bhaiya.

4. The prosecution examined as many as 13 witnesses including Amol Singh (PW1), Ram Shankar (PW2) and Dev Baksh (PW9) whereas three witnesses namely Tikaram (DW1), I.S. Patel (DW2) and Jagdish (DW3) were produced in defence.

5. On a critical appraisal of the entire evidence on record and the probabilities in the light of the plea of right of private defence, learned trial Judge came to the conclusion that injuries found on the bodies of Hemraj and Raja Bhaiya were attributable to the appellants only. Accordingly, he proceeded to acquit the other eight accused of the offences charged with. However, for the reasons recorded in Paragraphs 42 to 46 of the impugned judgment, he further determined that the appellants had exceeded limits of the right of private defence. Both of them, therefore, convicted and sentenced as indicated hereinabove.

6. Legality and propriety of the convictions under challenge have been assailed mainly on the following grounds :

(i) Even after holding that the evidence of so-called eyewitnesses viz. Amol Singh (PW1), Ram Shankar (PW2) and Dev Baksh (PW9) was not reliable, learned trial Judge erred in placing reliance upon the testimony of Raja Bhaiya, who was the most interested witness.

(ii) The evidence of Raja Bhaiya was also not trustworthy due to the fact that his previous statement was not available for impeaching his credit.

(iii) The first information report (Ex.P-20) was not forwarded to the Magistrate within reasonable period.

In response, learned Panel Lawyer, while inviting attention to the corresponding incriminating pieces of evidence, has submitted that the convictions in question are well-merited.

7. In order to appreciate the merits of the rival contentions in proper perspective, it is necessary to first advert to the medical evidence available on record.

8. The following were injuries noticed by Dr. M.R. Khan (PW7) on the body of Hemraj–

(i) Incised wound over frontal bone size 3" x ½" x bone deep, 2½" above the left eyebrow.

(ii) Incised wound on left parietal bone size 3" x 1½" x communicating with brain cavity.

(iii) Incised wound on left ear size 1" x 1" x bone deep, cutting the right ear lobe and part of root of right ear.

(iv) Incised wound on right side of face size ¾" x ¼" x ¼".

(v) Incised wound spindle shaped ¾" x ¾" connecting with the abdominal cavity 1½" to umbilicus on left of abdominal.

(vi) Bruise on left shoulder and arm size 4" x 1½", anterior aspect.

(vii) Bruise on left shoulder and arm size 3" x 1½", lateral aspect.

9. No dispute was raised as to his opinion, as recorded in the post-mortem report (Ex.P-23) that death of Hemraj, as a result of injury to the brain, was homicidal in nature.

10. Existence of injuries on the person of Raja Bhaiya, as described in the report (Ex.P-22), was proved Dr. S.K. Maheshwari (PW6). According to him, he had found that on 31.08.1992, Raja Bhaiya had sustained an incised wound measuring 1" x 1" with cutting of bone and brain matter on scalp over left frontal and parietal region and another incised wound measuring 1½" x ¼" x ¼" on right hand over thenar eminence. In his opinion, the injuries were caused by hard and sharp cutting weapon and the injury on left frontal and parietal region was dangerous to life.

11. Raja Bhaiya (PW11) is the key witness. He substantially corroborated the prosecution version as against the appellants. His statement that both the appellants had assaulted him and his uncle Hemraj with axes was not subjected to a serious dispute. Even otherwise, his presence at the spot could not be doubted as, in the same transaction, he had also sustained grievous injuries. He candidly admitted that the incident resulting into death of Hemraj had taken place in the courtyard of Chamru, the grandfather of the appellants. The factum of a previous quarrel between Hemraj and A2 over the Bari (hedge of thorns) was also not denied by him. It also came in his evidence recorded on 22.09.1993 that he could regain consciousness only a month before. In these circumstances, the grievance that his statement, that could be made to the police under Section 161 of the Code was not available, does not assume any significance as apparently no prejudice was caused to the defence.

12. The testimony of Raja Bhaiya (PW11) as an injured witness to the incident has its own efficacy and relevancy (*Mohar vs. State of U.P.* AIR 2002 SC 3279 referred to). Further, no motive to falsely implicate the appellants was alleged against him. His straight forward deposition drew ample support from the recovery of bloodstained earth from the place of occurrence. The infirmities in the statement of the first informant and the eyewitnesses also had no bearing on the credence of the testimony of Raja Bhiaya.

13. From the evidence of Tikaram (DW1) Head Constable and Court Reader I.S. Patel (DW2), it was clearly proved that the FIR (Ex.P-20) recorded on 31.08.1992 was forwarded to the Magistrate on 03.09.1992. However, mere delay in dispatch of FIR to the Magistrate was not sufficient to throw out the prosecution case in its entirety simply because the veracity of the incident was not disputed. At the most, it could be taken as an infirmity in the investigation.

14. For these reasons, none of the contentions raised on behalf of the appellants against legality of the convictions deserves acceptance.

15. Adverting to the plea of right of private defence, it may be observed that the corresponding finding in absence of appeal by the State, has already attained finality. However, the fact of the matter is that none of the accused persons had received any injury. The presence of Hemraj and Raja Bhaiya in the courtyard of Chamru, could only amount to criminal trespass. In such a situation, the appellants were not justified in causing death of Hemraj and injuries, one of which was dangerous to life, to Raja Bhaiya by using axes. On these facts, learned trial Judge did not commit any illegality in holding that the appellants had exceeded the limits of the right of private defence.

16. To sum up, even on a re-appreciation of the evidence on record, no interference would be called for with the findings of guilt recorded against the appellants. Their convictions, therefore, deserve to be affirmed as well-merited. However, taking into consideration the fact that more than 16 years has already elapsed after the unfortunate incident, the interest of justice would be met if the custodial sentences for the offences under Sections 304 Part I read with S.34 and 326 read with S.34 of the IPC are reduced to 5 years and 3 years respectively.

17. Consequently, the appeal is partly allowed. The impugned convictions of the appellants for the offences under Sections 304 Part I read with S.34 and 326 read with S.34 of the IPC and the consequent sentence of fine are hereby affirmed but the term of custodial sentences are reduced from 7 years to 5 years and 4 years to 3 years respectively. The direction that the jail sentences shall run concurrently is also maintained.

18. The appellants are on bail. They are directed to surrender to their bail bonds for undergoing remaining part of sentences.

Appeal partly allowed.

*Appeal partly allowed.*

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**I.L.R. [2009] M. P., 1774**
**APPELLATE CRIMINAL**

*Before Mr. Justice S.L. Kochar & Mrs. Justice Manjusha P. Namjoshi*

21 January, 2009*

MUKESH ... Appellant
Vs.
STATE OF M.P. ... Respondent

**Evidence Act (1 of 1872), Sections 32 & 114(g) - *Dying declaration* -** *Dying declaration implicating appellant recorded by Naib Tahsildar* -

*Cr.A. No.420/2005 (Indore)

*However, written suicide note recovered from the pocket of the deceased not produced by prosecution - It must have to be held that suicide note was unfavourable to prosecution - Investigating agency found two sets of contradictory evidence during investigation - Evidence or interpretation favouring accused must relied upon -.Dying declaration not relied - Appeal allowed - Appellant acquitted of charge u/s 302 IPC.* (Paras 14 & 15)

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

**Cases referred :**

AIR 1974 SC 344.

*Jaisingh with Chouhan,* for the appellant.

*G. Desai, Dy.A.G.,* for the respondent/State.

June-09 (First)

## J U D G M E N T

The Judgment of the Court was delivered by **S.L. Kochar, J. :**–THE appellant has preferred this appeal against the Judgment and order dated 29/3/2005 passed in S.T No.97/2004 by learned III Addl. Sessions Judge, Ratlam whereby convicted the appellant U/S.302 of the IPC and sentenced to life imprisonment and to pay fine of Rs.1000/-; in default of payment of fine to further undergo six months RI.

2. According to the prosecution case, complainant Iswarlal (PW.4), brother of deceased Santosh was informed on 27/1/2004 in the noon at 2.00 pm by his brother-in-law Bherulal (PW.7) that Santosh was lying unconscious in a field situated by the side of triangle of the road. On this information, Iswarlal, Bherulal and son of Bherulal, Rajesh (PW.5) reached on the spot. They found Santosh in unconscious condition. Bherulal had gone to bring Tempo Trax Jeep as directed by Iswarlal. Deceased was having injuries on his both the hands and legs and same were bleeding. Iswarlal asked Santosh as to who assaulted him on which Santosh disclosed that he was called by his brother-in-law for some work at triangle of road where appellant and his three companions were present. They all called him for taking tea. After taking tea, he was taken in a field through Lasudia Road and he was caught by two persons and other two caused him injury by knife and appellant caused him injury by knife and also administered medicine, after mixing some tablet. After disclosing these facts, again he became unconscious. Deceased was taken in Tempo Trax to police station where FIR was lodged by

Iswarlal (PW.4). On the basis of report, Crime No.33/2004 for the offence U/Ss.307, 323/34 and 328 of the IPC vide Ex.P.6 was registered. Spot map (Ex.P.12) was also prepared and Santosh was sent to Primary Health Centre, Taal where from he was referred for further treatment to Jaora Civil Hospital. In Jaora hospital Santosh died. Before death of Santosh, his dying declaration (Ex.P.21) was recorded by Naib Tehsildar Anil Bhana (PW.20). On receiving information of death of deceased. Jaora police registered inquest report (Ex. P-25) as per provision U/S.174 of the Cr.P.C and sent information to this effect to P.S. Taal. Before death of Santosh, his statement was also recorded by police along with statements of other witnesses. On search of Santosh, a search memorandum (Ex.P.15) was prepared and from his pocket, a notebook containing letter and other things were seized. The seizure memo is Ex.P.7. From the house of deceased Santosh, two pocket diaries and one piece of paper were seized through seizure memo (Ex.P.2). Iswarlal and Urmila, the wife of deceased Santosh identified the handwriting of deceased on seized letters. The identification memo (Ex.P.3) of handwriting of deceased by these witnesses was prepared. The letter and other sealed packets containing clothes and viscera of deceased were also seized through seizure memo (Ex.P.5.). Appellant was arrested vide arrest memo (Ex.P.26). Seized articles were sent to FSL and its report is Ex.P.28. According to FSL report, viscera of the deceased was containing pesticides (Aluminium Phosphate) i.e Sulfas. After receiving report, charge sheet was filed against the appellant U/Ss.302, 306 and 328/34 of the IPC.

3. The appellant denied the charges and pleaded his innocence as well as false implication on account of dispute over a shop between him, deceased and his brother. The appellant has not examined any witness in defence. Learned trial Court, after recording statements of the prosecution witnesses and hearing both the parties, convicted and sentenced the appellant as shown herein above.

4. Learned counsel for appellant has submitted that conviction of the appellant is based on written dying declaration (Ex.P.21) recorded by Naib Tehsildar Anil Bhane (PW.20) and evidence of oral dying declaration of Iswar (PW.4), Rajesh (PW.5) and Bherulal (PW.7) but according to Rajesh (PW.5), deceased was unconscious and this witness Rajesh has not deposed anything about oral dying declaration or disclosure of anything to him by deceased against the appellant and for his cause of death. This witness was declared hostile. Learned counsel has also submitted that through seizure memo (Ex.P.7) a letter was seized from the pocket of deceased wherein he mentioned that he committed suicide by consuming poison because appellant was having illicit relation with his wife and harassed him by this act, but the original letter along with the diary and other piece of papers seized from the house of deceased in presence of his wife and witnesses were not produced in the Court which all were sent to handwriting expert. According to learned counsel, all these documents were withheld

deliberately by the prosecution because contents of letter was contrary to the dying declaration (Ex.P.21) and evidence of Iswar (PW.4) and Bherulal (PW.7) regarding oral dying declaration.

5. On the other hand, learned counsel for State has supported the impugned judgment and finding given by the learned trial Court.

6. Having heard the learned counsel for parties and after perusing the entire record carefully, we are of the opinion that conviction of the appellant is not sustainable on the basis of dying declaration (Ex.P.21) and evidence of Iswar (PW.4) and Bherulal (PW.7), brother and brother-in-law respectively of the deceased.

7. Dr. Arivind Kumar Verma (PW.1) proved the postmortem report of deceased (Ex.P.1) and he found superficial skin deep incised injuries on both hands, legs and toe and deceased died because of cardio respiratory failure. He preserved viscera for examination by FSL and in FSL report (Ex.P.28) pesticide Aluminium Phosphate was found.

8. The Investigating Officer Sub Inspector M.K. Tripathi (PW.25) has deposed that on 8/2/2004 he seized two pocket diary and piece of paper containing handwriting of deceased Santosh submitted by his wife Urmila vide seizure memo (Ex.P.2) carrying signature of Smt. Urmila. He also prepared memorandum (Ex.P.3) to tally the handwriting of documents seized through seizure memo (Ex.P.7). Through seizure memo (Ex.P.7) he seized letter written by deceased found in the pocket of clothes worn by deceased at the time of incident. He also stated in para seven that seized letter through seizure memo (Ex.P.7) was sent along with standard handwriting of deceased, on two pocket diary and piece of papers produced by his wife Smt. Urmila. It is clear from the record that report of handwriting expert and seized letter were not produced in the Court. In cross examination para 8 Shri Tripathi has admitted that the seized letter through seizure memo (Ex.P.7) was sent separately with letter of S.P. The further say of this witness is that after investigation, he was of the opinion that offence U/S.302 of the IPC was not made out on the basis of contradictory evidence found during the course of investigation regarding dying declaration of deceased. It is also stated by him that when case diary was received by him for investigation, the dying declaration recorded by Naib Tehsildar, Jaora was in the case diary but he could not come to the final conclusion whether deceased consumed poison or administered poison by somebody because of contradictory evidence. The statement of Shri Tripathi is duly corroborated by the contents of seizure memo (Ex.P.7) wherein in column No. 12 the contents of letter were, verbatim reproduced and substance is that deceased committed suicide because appellant was having closeness with his wife and whenever he was coming to his house his wife was obeying his command and because of appellant he was having unhappy married

life. In the letter, it is not mentioned clearly that appellant was having any illicit relation with wife of the deceased but it is clear that he was perturbed because of conduct of appellant with his wife and visit at his house. It is mentioned by the deceased that all the property papers were lying with his sister Chanda and house and land must be mutated in the name of his children. The seizure memo is bearing signature at "A to A" portion of Iswarlal (PW.4) who admitted his signature on this document.

9. Urmila (PW.2), wife of deceased has deposed in para three of her statement that the dispute was going on between her brother-in-law Iswarlal (PW.4) and husband of sister-in-law named Bherulal (PW.7) for a big plot. In cross examination, she has stated that her brother-in-law Iswarlal (PW.4) was having dispute with her husband and he wanted to grab their land. In her whole statement, she has not stated anything about the appellant and she denied about any kind of relation with him, on the contrary she stated that Iswarlal (PW.4) was defaming her and assassinating her character by saying that she was having illicit relation with appellant Mukesh. According to her, she was defamed by Iswarlal so that he may take possession of all ancestral property. This witness Urmila was declared hostile by the prosecution.

10. Iswarlal (PW.4) has deposed that on 27/1 /2004 in the noon between 1.30 and 1.45 her brother-in-law Bherulal (PW.7) came to him and disclosed about lying of deceased Santosh in injured condition in a field situated near triangle of the road and he along with his brother-in-law Bherulal (PW.7) and nephew Rajesh (PW.5) reached in the field and found Santosh in injured condition. On enquiry, he disclosed that he was called by Bherulal (PW.7) for some work and when he reached at triangle of the road, appellant met him accompanied with three persons, they asked him to take tea and after taking tea he was taken about 300 feet away from the road in a field where a poisonous substance was administered to him. This version of Iswarlal is not corroborated by Rajesh (PW.5).

11. According to Rajesh when they reached in the field near Santosh, he was unconscious. He has no where stated about any kind of disclosure by deceased.

12. Bherulal (PW.7) has stated that when he reached in the field, Santosh was unconscious and also trying to stand but fell down on the ground. Under this condition, he stated that appellant and other three persons compelled him to drink something thereafter he fell down on the ground. After this, he approached Iswarlal and they all three reached again on the spot. At that time deceased did not disclose anything and they took deceased to hospital where one officer recorded his statement, thereafter deceased died. Rajesh (PW.5) and Bherulal (PW.7) have been declared hostile by the prosecution. Both have given contradictory statements about oral dying declaration of deceased before Iswarlal.

13. Looking to the contradictory statements of all the three witnesses, no

reliance can be placed on their testimony about oral disclosure by deceased to them against the appellant.

14. The dying declaration (Ex.P.21) recorded by Naib Tehsildar is also doubtful in view of the written letter found by the police from the person of deceased wherein he had mentioned regarding commission of suicide by consuming poisonous substance and he held appellant responsible for his suicide because his wife was under influence of appellant. The prosecution has not filed this letter and other documents seized from the house of the deceased which were sent for comparison of handwriting to handwriting expert. The prosecution has not assigned any reason as to why these documents and handwriting expert report could not be filed along with the charge sheet or even during the course of trial till Final judgment. We presume as per provision U/S. 114(g) of the Evidence Act that the seized letter and handwriting expert report has not bee produced by the prosecution because it must be unfavourable to the prosecution case because of which same has been withheld. It is obvious that contents of letter were contradictory to the prosecution case based on oral statement of Iswarlal and dying declaration (Ex.P.21). The Investigating Officer M.K.Tripathi (PW.25) was also not relying upon dying declaration because during investigation, two contradictory story and evidence found by him. Bherulal (PW.7) was confronted with his case diary statement (Ex.P.13) wherein it is not mentioned that somebody administered tablet or liquid to deceased. Shri Tripathi also admitted that other three persons could not be traced out and there is nothing mentioned in the case diary for those three persons.

15. Resultantly, in the wake of aforesaid discussion, it is clear that during investigation, investigating agency found two sets of evidence, each one of which contradicts the other regarding death of deceased. It is trite law that when there are two sets of evidence or interpretation, one in favour of the prosecution, another in favour of the accused, then the evidence or interpretation favouring the accused must be relied upon.

16. Following this principle and Supreme Court judgment passed in case of *Harchand Singh and another Vs. State of Haryana* [AIR 1974 SC 344], we allow this appeal. The conviction and sentence passed by the learned trial Court are hereby set aside. Learned trial Court is directed to release the appellant forthwith if not wanted in any other criminal case. Office is directed to send copy of this judgment along with the record to the trial Court.

*Appeal allowed.*

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**BABLOO Vs. STATE OF M.P.**

**I.L.R. [2009] M. P., 1780**

**APPELLATE CRIMINAL**

*Before Mr. Justice S. Samvatsar & Mr. Justice A.P. Shrivastava*

10 February, 2009*

BABLOO ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. **Evidence Act (1 of 1872), Section 9** - *Test identification parade -Accused not kept Baparda - Delay in conducting test identification parade - Effect - Held - Identification by witness is doubtful because there is no evidence to indicate that the accused was kept Baparda and there is delay of nine months in conducting the said identification parade.* (Para 20)

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

B. **Evidence Act (1 of 1872), Section 27** - *Recovery of the body and other material at the behest of accused - Effect - Held - Evidence about recovery of dead body at the instance of appellants as well as recovery of ornaments is doubtful because the police was already aware of the fact that the dead body is lying in the well - At the same time, the witness to the recovery of the ornaments has not supported the case of the prosecution.* (Para 20)

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

C. **Penal Code (45 of 1860), Section 302** - *Murder - Homicidal death - Held - Until the prosecution proves that a person dies of a homicidal death, an offence u/s 302 cannot be made out, but that alone cannot be a ground for acquittal of the accused and High Court will have to consider other aspects of the matter.* (Para 7)

ग. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – मानव वध संबंधी मृत्यु – अभिनिर्धारित – जब तक अभियोजन यह साबित नही कर देता कि व्यक्ति की मृत्यु मानव वध संबंधी मृत्यु से हुई, धारा 302 के अधीन कोई अपराध नही बनता, किन्तु केवल यह, अभियुक्त की दोषमुक्ति का आधार नही हो सकता और उच्च न्यायालय को मामले के अन्य पहलूओं पर विचार करना होगा।

D. **Circumstantial Evidence** - *Held - Circumstance put forward must*

*Cr.A. No.127/2000 (Gwalior)

*be satisfactorily proved and those circumstances should be consistent only with the hypothesis of the guilt of the accused - Again those circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved - In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.* (Para 19)

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

**Cases referred :**

AIR 1956 SC 217, 2001(2) JLJ 192, (1994) 5 SCC 152, (1997) 6 SCC 171, AIR 1998 CrLJ 1588, 2001(2) JLJ 161, AIR 2007 SC 1729, (2008) 1 SCC (Cri.) 241, AIR 2000 SC 160, AIR 1984 SC 1622, AIR 1971 SC 2016.

*R.K. Sharma,* for the appellant.

*D.R. Sihare, Panel Lawyer,* for the respondent.

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

The Judgment of the Court was delivered by **S. SAMVATSAR, J.**:-This judgment shall govern the disposal of the aforesaid three appeals, as they are arising out of the common judgment dated 30/1/2000 passed by the First Addl. Sessions Judge,Ashoknagar, district Guna in S.T.No.173/97, whereby the Sessions Court has convicted all the three appellants-accused for commission of offences under Sections 364-A, 302, 397 and 201 of I.P.C., and sentenced them to undergo imprisonment for life with fine of Rs.2,000/- each for commission of offence under Section 302 of I.P.C.and on failure to deposit fine amount to undergo another term of one year's R.I., they are also sentenced for imprisonment of life with fine of Rs.2,000/- each for commission of offence under Section 364-A of I.P.C, and on failure to deposit fine amount to undergo one year's R.I., again seven years R.I. for commission of offence under Section 397 of I.P.C., and five years R.I. with fine of Rs.1,000/-each,for commission of offence under Section 201 of I.P.C. and on failure to deposit fine amount to undergo another period of six month's R.I. All the sentences were directed to run concurrently.

2. As per the prosecution case, a minor girl named Juhi aged around two and half years d/o Jinedra Jain (PW-3) was playing in front of her house on 12/2/96

and thereafter she was missing and not found. PW-1 Sunil Kumar Jain, uncle of Juhi lodged the complaint at P.S. Shadora at about 11-30 p.m on the same day which is Ex.P/1. On 13/2/96, a telephonic message was received by the parents of Juhi demanding a sum of Rs.50,000/- towards ransom and stating that the letter is kept near the well and the action be taken in accordance with the contents of the said letter. When this information was given to the police, the police registered Crime No.18/96 for commission of offence under Section 365 of I.P.C. The letter was seized from the well (Ex.P/3), as per the seizure-memo (Ex.P/2). The police after investigation could not trace the accused and hence FR was submitted on 15/11/96.

3. On 23/2/97 some informant gave an information to the police and investigation was again re-started. All the three accused were arrested on 8/3/97. During the investigation, these three accused admitted that they have committed murder of Juhi by throttling her neck and stated that they have thrown her dead-body in the well owned by Mohan Singh Raghuvanshi. On the basis of the information given by the accused, the memorandums under Section 27 of the Evidence Act were prepared vide Ex.P/9, P/10 and P/11 on 8/3/97 at 12-10, 12-05 and 12-00 p.m,respectively. On the basis of these memorandums, the well of Mohan Singh was searched and some bones were recovered from the well. These bones were of a young child. A Pajeb (silver ornaments) which was worn by the child was recovered from one of the accused named Raju. After seizure of the bones and the said ornaments, the police registered the case against all the three accused for commission of offences under Sections 365, 302,397,and 201 of I.P.C.,and filed challan against them. The matter was committed to the court of Sessions. The Sessions Court framed charges against the accused-appellants for the alleged offences under Sections 364-A in the alternative 365, 302,397 and 201 of I.P.C. The Sessions Court after framing charges and after recording of the evidence, convicted the present appellants as stated above. Aggrieved by their conviction and sentence as mentioned herein above, all the three appellants have preferred these appeals.

4. Shri R.K.Sharma and Shri M.M.Tripathi, learned counsel appearing on behalf of the appellants contended that the findings of conviction arrived at by the Sessions Court are not based on any legal evidence and thus the conviction of the appellants cannot be sustained in the eyes of law, in view of the evidence on record. Shri D.R.Sihare, learned P.L., representing the State-respondent, on the other hand, supported the judgment of the Sessions court and contended that the findings of the Sessions court are based on sound reasonings, supported by cogent and reliable evidence, hence no interference in the judgment is called for.

5. In the present case the prosecution to prove its case had examined as many as fifteen witnesses while the accused in their evidence had examined five witnesses. Having gone through the evidence on record, we find that in the present case there is no eye-witness to the alleged incident of kidnapping and the case is

totally based on the circumstantial evidence. From perusal of the impugned judgment of the Sessions court, we find that the Sessions has found the evidence proved on the basis of the following circumstances which are extracted below:-

(i) that, the letter addressed to the father of Juhi was written by accused Babloo;

(ii) that, Babloo has telephoned father of the girl for demanding money;

(iii) that the dead-body of Juhi was recovered at the instance of accused; and

(iv) that the silver ornaments were recovered at the instance of accused.

6. Learned counsel appearing for the appellants contended that none of the said circumstances are legally proved by the prosecution. It is submitted that the prosecution has failed to prove that the bones recovered by the police from the well were of abductee Juhi. He invited attention of this court to the statement of PW-14 Dr. D.K.Satpathi, who says that on 27/8/97, he was working in the department of Medico Legal Institute, Bhopal. He stated that the bones were sent by the police Guna to him for examination in connection with Crime No.18/96 alongwith the letter. In para 2 of his statement he stated that the bones were of a small child and the age of the child must be between 2 ½ to 3 years, but it was not possible for the doctor to ascertain the sex of the body and therefore from the statement of this doctor it is not proved that the bones were of a female child. The cause of death could not be opined by the doctor, hence learned counsel for the appellants contended that the prosecution has failed to prove that it was homicidal death. Therefore, according to the counsel for the appellants the offence under Section 302 of I.P.C., is not made out.

7. It is true that unless and until the prosecution proves that a person dies of a homicidal death, an offence under Section 302 cannot be made out, but that alone cannot be a ground for acquittal of the accused and this court will have to consider other aspects of the matter. The most important evidence in the present case is that of recovery of dead body of abductee and silver ornaments at the instance of the accused vide memorandums Ex.P/9, P/10 and P/11. From perusal of the aforesaid memorandums, it appears that these memorandums have been prepared by the police at 12, 12-05 and 12-10 p.m. and the Panchnama (Ex.P/12) for search of the well was prepared at 12-40 pm, on 8/3/97. The contention of the learned counsel for the appellants is that this evidence is not admissible because from the evidence it is clear that before recovery of the dead-body and the ornaments, number of persons including the police were aware of the fact that the dead-body was lying in the well of Mohan Singh. In support of his argument, learned counsel for the appellants invited attention of this court to the statement of PW-3

Jinesh Kumar who is complainant in the instant case and father of deceased Juhi. In para 6 of his statement he stated that at about 10-11 o' clock on 8/3/97 the police informed him that the killers of his daughter are arrested and they have thrown the dead-body of his daughter in the well of Mohan Singh in village Shadora. Thereafter, the well was made empty by the police and the bones were recovered. The said bones were seized by the police. From the statement of this witness it appears that the police at least two hours before the preparation of the aforesaid memorandums under Section 27 of the Evidence Act, was aware of the fact that the dead-body is lying in the well of Mohan Singh. Learned counsel for the appellants has also referred to para 20 of the statement of PW-5 Shabbir. In para 20 of his statement, this witness deposed that in village Shadora the news was spread that the kidnappers of girl Juhi are arrested by the police, but it was not known by that time that the dead-body of Juhi was lying in the well and the police has not recorded any of his statement in that respect. In para 22, this witness has stated that only one memorandum under Section 27 was prepared by the police and he has singed that memorandum. He states about 15-20 minutes were spent in preparing the said memorandum and thereafter all of them went to the well. In para 27 this witness says that he knows accused Raju. He admits that prior to 8/3/97 he is facing trial for commission of theft which was initiated on the basis of the report lodged by Bhagwat Singh. Then he resiled from his earlier version and said that the report against him was not lodged by Bhagwat Singh but it was lodged by Amar Singh. He denies that in that case Raju was also witness and therefore he is in inimical terms. In para 31 it is stated by him that at about 10 in the morning he was at his house and the police constable had come to him and told that the dead-body of Juhi is thrown by the accused and the dead-body was to be recovered from the well and the police asked him to be witness to the said recovery. He says that the constable told him that the accused have admitted their guilt and asked him to come to the police station. Thus, from perusal of para 31 of the statement of this witness it appears that at about 10 in the morning, the police had informed him that the dead-body of Juhi is lying in the well.

8. PW-7 Mohan is another witness in the present case. In para 7 of his statement he states that the well is situated at a motor stand and anyone can have access to the said well He denies that any skeleton was recovered from the well. The most important witness in this connection is PW-13, i.e. the Investigating Officer Sunil Kumar Khemariya, who says that the memorandums Ex.P/9, P/10 and P/11 were prepared at the instance of accused by him and thereafter they went to the well and the well was made empty with the assistance of 3-4 persons and thereafter the dead-body was found in the well. In para 14 of his statement he states that after arrest of the accused the proceedings were completed by videography near the well and in the videography his higher officials were shown to be present. He says that on 8th of this month in the morning he informed his

superiors that the accused are arrested and they have admitted the guilt. On this information, his higher officers reached the well at about 9-10 o' clock in the morning. This information was also given to the SDO about the videography in which the photographs of his higher officials were taken. In para 15 this witness deposed that the public was aware of this action and at around 9 in the morning about 1000-500 people were collected near the well. They were residents of village Shadora. In para 16 he states that he has not called the owner of the well and his son Rajendra. He asked Rajesh s/o Mohan Singh to keep the well empty and he got the well empty with the help of engine. He further says that the memorandum under Section 27 of the Evidence Act was recorded in the presence of the public and two witnesses have signed the said memorandum. He further says that he took about 5-6 hrs. for getting the well empty. In para 21 he has stated about the forms of recovery.

9. From reading of the statement of this witness particularly para 14, it is clear that information about lying of dead-body in the well was available with the police at about 8 in the morning when higher officers were informed that the accused have admitted their guilt and admitted the fact that they have thrown the dead-body in the well. The villagers were also aware of this fact and about 1000-500 people collected near the well at about 9 while from the memorandums (Ex.P/9, P/10 and P/11) it appears that these memorandums were recorded after 12 o' clock.

10. In a case of *Raja Khima Vs. State of Saurashtra* (AIR 1956 SC 217) the Apex Court has considered the admissibility of the evidence under Section 27 and in para 20 held that the discovery of incriminating articles alleged to have been recovered by the accused is inadmissible in evidence if the police already knew where they were hidden. Thus, as per the aforesaid judgment of the Apex Court if the police already knows about the place where the articles are hidden then the evidence about the recovery under Section 27 of the Evidence Act at the instance of the accused is not admissible.

11. The next judgment relied on by the learned counsel for the appellants is in the case of *Ram Gopal Vs. State of M.P.* 2001 (2) JLJ 192 wherein this court has held that once the fact is discovered from the other sources there can be no fresh discovery even if relevant information is extracted from the accused and the court has to be watchful that the protection of sections 25 and 26 of the Evidence Act is not whittled down. There must be a recovery in pursuance of the information furnished by the accused and that information should not have been previously known to the police. The discovery of hidden incriminating articles said to have been recovered by the accused is inadmissible in evidence if the police already knew where they were hidden. If the information is received from a witness to whom the accused had made an extra-judicial confession, then discovery of such hidden incriminating articles under Section 27 is immaterial. The same

proposition has been laid down by the Apex Court in the case of *Sukhvinder Singh Vs. State of Punjab* (1994)5 SCC 152 and in case of *Vijender Vs. State of Delhi* (1997)6 SCC 171. Thus, it is settled law that if the police is already aware about the hidden of incriminating articles then discovery of those articles under Section 27 of the Evidence Act is immaterial and cannot be relied upon for convicting the accused.

12. So far as recovery of ornaments from accused Raju is concerned, the witness to the said recovery is not examined by the prosecution. The said witness Chhotu is examined by the defence as DW-4, who says that the Station Officer Khemariya has not seized any articles in his presence. Thus, the recovery of the alleged articles is also not proved in the present case.

13. Now, the next circumstance is about the identification of the accused by PW-10 namely Sharafat Khan. This witness has identified accused Babloo in the test identification parade conducted by the police. This witness was relied upon by the Sessions Court on the ground that 15 days after the kidnapping the sketch of accused Babloo was drawn up at the instance of this witness which is Ex.P/28. This witness in the court has deposed that on 4/12/97 he went to the jail for identification of the accused. The identification parade was conducted by the Tehsildar in which 20 persons were included and he was asked to identify the accused and he has identified Babloo alias Mangeri alias Rajan. He also identified accused Babloo in the doc. This witness has no where stated that the sketch (Ex.P/28) was prepared at his instance. Apart from that the person who has prepared the said sketch on computer is also not examined by the prosecution. Therefore, the Sessions court has committed an error in holding that the said sketch was drawn up at the instance of this witness merely because the Investigating Officer in his statement has stated that this sketch was drawn up at the instance of PW-10 Sharafat Khan. From perusal of his entire statement of this witness it is clear that this witness has no where stated that the sketch was prepared at his instance. So far as test identification parade is concerned, the said TIP was conducted in the jail on 4/12/97 when the accused were arrested on 8/3/97. Thus, the identification parade was conducted after lapse of nine months.

14. Now, this court has to consider as to what is the impact of belated identification. Apart from that from perusal of the statement of PW-10 Sharafat Khan and the I.O. Sunil Khemariya (PW-13) it is clear that there is no evidence whatsoever to show that the face of the accused was covered till identification. In a case of *Rajveer Vs. State of U.P.* (AIR 1998 CRI.L.J.1588) the Apex Court has held that when there is no explanation or any witness is produced to state that the accused is kept baparda after first remand, then the identification cannot be relied upon. In a case of *State of M.P. Vs. Chamru alias Bhagwandas* 2001(2)JLJ 161 this court has considered the evidence of identification parade and held that if the accused is not kept baparda after his first remand, then the identification

proceedings conducted during investigation by the police stands vitiated. In this case, the Apex court held that the gravity of the offence would not relax the standard of proof required for conviction, the standard being that the evidence should prove beyond any reasonable doubt that this accused was the author of the crime. It was further held that in the instant case, the standard has not been achieved and for the reasons stated earlier the evidence of the three child witnesses does not establish that they had identified the assailant that night. Ultimately it was held that the identification held during investigation was useless and the evidence about recovery of blood stained articles too is of no consequence.

15. Again, in a case of *Ravi @ Ravichandran Vs. State Rep.by Inspector of Police* (AIR 2007 SC 1729), the Apex Court has held that it is no doubt true that the substantive evidence of identification of an accused is the one made in the court. A judgment of conviction can be arrived at even if no test identification parade has been held. But when a First Information Report has been lodged against unknown persons, a test identification parade in terms of Section 9 is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him. Such test identification parade is required to be held as early as possible so as to exclude possibility of the accused being identified either at the police station or at some other place by the concerned witnesses or with reference to the photographs published in the newspaper. In that case, the Apex court has discarded the evidence of test identification on the ground that it was conducted after lapse of time.

16. In a case of *Acharaparambath Pradeepan & another Vs. State of Kerala* (2008)1 SCC (Cri)241, the Apex Court has discarded the evidence of test identification on the ground that it was held after two months of the arrest of the accused. In the present case also, the test identification is held after nine months. In a case of *Rajesh Govind Jagesha Vs. State of Maharashtra* (AIR 2000 SC 160), the Apex court has discarded the evidence of test identification parade on the ground that it was conducted after inordinate delay of about five weeks from arrest of the accused. In the present case we find that there is absolutely no satisfactory explanation tendered by the prosecution as to why the identification parade was conducted after lapse of nine months and there is no evidence on record to show that the accused was kept baparda. In such circumstances, the Sessions court has committed an illegality in relying upon the statement of PW-10 Sharafat Khan on the ground that at his instance the sketch of the accused was drawn up. Therefore, if identification parade is belated such can not be relied upon for basing conviction of the accused. As already stated above, PW-10 Sharafat Khan in his entire statement has no where stated that the alleged sketch was issued at his instance.

17. Now, the only circumstance which remains is the only statement of Hand Writing Expert, i.e. PW-15 O.P.Bilgaiya. This witness is examined by the

prosecution to prove for hand writing of the accused in the letter (Ex.P/3). In para 4 of his statement he says that the report prepared by him was examined by the State Examiner Shri Tomar and no separate examination report was prepared for that purpose. He states that his job is only to prepare report. He does not possess the record of the report. He admits that the job of Hand Writing Expert is to examine the line quality of hand writing and pen-pressure is one of most important factors, but when the document is prepared by ball pen the pen-pressure looses its importance. He admits that in his report he has not used the work of line quality. He also admitted that he has not given any report about the pen-pressure as the document is written by ball pen. He admits that the shading of hand-writing is also other important factor, but he has not referred anything about shading in his report. He has also not made any mention about the exact size of the words used in his report.

18. Even assuming that the letter (Ex.P/3) is written by the accused the said letter was seized by the police on 12/2/96 and was sent to the Hand Writing Expert on 17/3/97 i.e. after more than one year. The accused were arrested on 8/3/97. Thus, it is every possibility that the said letter was prepared by the police after the accused were arrested. The Apex court in a case of *Sharad Birdhichand Sarda Vs. State of Maharashtra* (AIR 1984 SC 1622) based on circumstantial evidence has laid down the following conditions :-

> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (3) the circumstances should be of conclusive nature and tendency;
>
> (4) they should exclude every possible hypothesis except the one to be proved and;
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human prob ability the act must have been done by the accused.

19. The Apex Court in a case of *Bakshish Singh Vs. State of Punjab* (AIR 1971 SC 2016) has considered and held that where in a case the dead-body was recovered from the river by the police on the information given by the accused and on the bank of the river there were broken teeth and parts of human body lying, it was held that anybody who saw those parts could have inferred that the dead body must have been thrown into the river near about that place. The accused

persons even if were not party to the murder could have come to know the place where the dead body had been thrown. The Apex Court has held that in a case resting on circumstantial evidence the circumstance put forward must be satisfactorily proved and those circumstances should be consistent only with the hypothesis of the guilt of the accused. Again those circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. In that case, the Apex court found that the guilt of the accused is not satisfactorily established from the available evidence on record and hence acquitted him.

20. As discussed above, in the present case, the evidence about recovery of dead-body at the instance of present appellants as well as recovery of ornaments is doubtful because the police was already aware of the fact that the dead-body is lying in the well. At the same time, the witness to the recovery of the ornaments has not supported the case of the prosecution. The identification by witness Sharafat Khan(PW-10) is also doubtful because there is no evidence to indicate that the accused was kept baparda and there is delay of nine months in conducting the said identification parade. There is also possibility that the letter (Ex.P/3) was forcibly got written by the police when the accused remained in custody. Thus, for the reasons mentioned above, we find that the trial court has committed an illegality in convicting the accused. Accordingly, by reversing the judgment of the Sessions court, the conviction of the appellants for the alleged offences and sentence thereon is set aside.

21. Resultantly, all the three appeals are allowed acquitting the appellants from the charges levelled against them. The appellants be set at liberty if not required in any other criminal case.

*Appeal allowed.*

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**I.L.R. [2009] M. P., 1789**
**APPELLATE CRIMINAL**
***Before Mr. Justice Rakesh Saksena & Mr. Justice K.S. Chauhan***
17 April, 2009*

ASHOK MEHRA ... Appellant
Vs.
STATE OF M.P. ... Respondent

**Penal Code (45 of 1860), Sections 302, 304 Part II - *Murder or culpable homicide not amounting to murder - Accused travelling in a bus***

*Cr.A. No.2148/2004 (Jabalpur).

*and deceased was driver of bus - Accused insisted that he will pay the concessional fare - Deceased on hearing altercation reached there and asked accused to pay full fare - Accused took out a knife and assaulted the deceased - Held - Accused in impulse inflicted a blow of knife on his chest - Intention for the offence cannot be attributed to accused - Accused guilty under Section 304 Part II as he had knowledge that he was likely to cause injury which likely to cause death - Accused sentenced to 5 years rigorous imprisonment - Appeal partly allowed.* (Paras 9 & 10)

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

**Cases referred :**

(1984) 2 SCC 133, (2007) 1 SCC (Cri) 66.

*Ajay Kumar Jain,* for the appellant.

*T.K. Modh,Dy. A. G.,* for the respondent/State.

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

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :–Appellant has filed this appeal against the judgment dated 15.10.2004 passed by the Additional Sessions Judge, Gadarwara, District Narsinghpur in Sessions Trial No. 159/2001, convicting him under Section 302 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs. 1,000/- with default stipulation.

2. The prosecution case as unfolded by the first information report is that on 6.6.2001, complainant Devendra Singh, who was the conductor of "Maa Narmada Bus", was going back on his passengers bus from Mehragaon to Gadarwara. Jai Raj Singh (deceased) was the driver of the bus. At about 2-2.30 P.M., they reached at bus stand Banvari. Ashok Mehra (accused) who had boarded the bus from Saikheda and had obtained three tickets, did not agree to pay Rs. 15/- for the said tickets and instead wanted to pay Rs. 3/- only saying that he would pay only at concessional rate and alighted from the bus. Driver of the bus viz. Jai Raj Singh hearing the altercation reached there and asked the accused to pay the fare. Being annoyed, accused took out a knife from the pocket of his pants and suddenly inflicted a blow with it on the left side of his chest and ran away. Jai Raj Singh

was taken to hospital, but he expired. First Information Report Ex. P1-C was lodged by Devendra Singh (PW6) at police station Gadarwara, whereupon a case under Section 302 of the Indian Penal Code was registered against the accused. The dead body of Jai Raj Singh was sent to Civil Hospital, Gadarwara for postmortem examination. PW-11 Dr. K.S.Rajput performed the postmortem examination of the body and vide his report Ex. P/17 found one incised wound on anterolateral aspect of the chest wall, situated at a distance of about 3 ½" downwards and laterally from left nipple, measuring 1-1/2"x 1/2 "x pleural cavity deep. Wound was situated at the level of of fifth inter-coastal space (left). On probing direction of the wound was found transversely going towards heart. There were corresponding cuts over the clothings of the deceased. On internal examination he found his left lung pale and hemothorex. There was also an incised wound on pericardium on left side, corresponding to measurement of the external wound. Internal length of wound was 5-1/2". In the opinion of the doctor, the injury was antimortem and homidical in nature and was caused by sharp penetrating object. The cause of death was the shock resulted by the aforesaid stab injury on the chest.

3. After the requisite investigation, the accused was arrested and charge sheet was filed before the Court of Magistrate. The case was then committed for trial.

4. On charge being framed under Section 302 of the Indian Penal Code, accused abjured his guilt and under Section 313 of Code of Criminal Procedure pleaded that he was falsely implicated by witness Devendra Singh with whom he was on inimical terms. Devendra Singh(PW6) had threatened him to implicate in some case.

5. Before the trial Court prosecution examined eleven witnesses. PW-3 Bhura Nai, PW-4 Satish Sharma and PW-6 Devendra Singh Rajput were examined as eye-witnesses of the incident. PW-11 Dr. K.S. Rajput was examined to prove the injuries found on the body of deceased. PW3-Bhura Nai and PW4-Satish Sharma did not support the prosecution case at the trial. They were declared hostile. However, relying on the evidence of Devendra Singh (PW6), learned trial Judge held the accused guilty and convicted and sentenced him as mentioned earlier.

6. Learned counsel for the appellant did not seriously challenge the complicity of the accused in the crime. However, he submitted that in the facts and circumstances of the case, the conviction of the accused under Section 302 of the Indian Penal Code was bad. At the most, he could have been held liable under Section 304-Part-II of the Indian Penal Code. He also pointed out that the accused was continuously in custody since 20.9.2003 and thus had undergone about 5 ½ years of the sentence. On the other hand, learned counsel for the State submitted that the trial Court was justified in holding the appellant guilty under Section 302 of the Indian Penal Code and sentencing him to imprisonment for life.

7. It is not disputed that Jai Raj Singh died a homicidal death by the injury caused by a knife on the left side of his chest. It has been testified by PW6-Devendra Singh Rajput that on the day of incident he was the conductor on "Maa Narmada Bus" and Jai Raj Singh was its driver. Accused Ashok Mehra along with Omkar and another boy boarded the bus from Saikheda. When he demanded Rs. 15/- for three passengers, accused paid only Rs. 3/-. Because bus was getting late, they proceeded to village Banvari. When he demanded remaining amount from the accused, he did not pay. When driver Jai Raj Singh insisted Ashok Mehra to pay Rs. 15/-, he took out a knife and inflicted a blow by it on his chest and ran away. Jai Raj Singh was taken to hospital at Gadarwara, but he was declared dead. Devendra Singh (PW6) went to police station, Gadarwara and lodged report Ex. P/1-C. Despite lengthy and roving cross examination nothing could be brought out to indicate that Devendra Singh (PW6) was not telling truth. His evidence further stands corroborated by the first information report Ex. P/1-C, lodged by him soon after the occurrence and also by the evidence of Dr. K.S.Rajput (PW11) who found a stab injury on the left side of the chest of Jai Raj Singh in postmortem examination. In our opinion, the evidence of Devendra Singh (PW6) is clear, cogent and trustworthy. By his evidence, it has been clearly established that it was the accused who had caused the knife injury on the left side of the chest of deceased.

8. The next question before us is whether in the facts and circumstances of the case, the conviction of the accused/appellant under Section 302 of the IPC was justified.

9. The prosecution case as unfolded by the first information report is that when the accused along with two other persons boarded the bus, he did not pay the prescribed fare and instead indulged in altercation with the conductor of the bus. When the driver of the bus (deceased) came to intervene and remonstrated with the accused, he, suddenly, in an impulse inflicted a blow of knife on his chest and ran away. In these circumstances, there appear no motive or intention on the part of the accused to cause the death of the deceased.

10. In *Tholan Vs. State of Tamil Nadu*- (1984) 2 SCC 133- when accused was shouting infront of the house of deceased, he asked him to go away. Accused in turn abused the deceased. Deceased came out of his house and cautioned the accused not to indulge in abusive language, as the ladies were present there and asked him to go away. The accused questioned the authority of deceased to ask him to go. While both were remonstrating each other, accused took out a knife from his waist and stabbed deceased on his chest and ran away. Deceased succumbed to his injury. In the course of postmortem examination a gaping incised wound on the right side of the chest was found. On internal examination, fracture of fifth and sixth ribs were noticed. The depth of the wound was probed up to middle lobe of the right lung and proceeding up to right atrial cavity. The cause of

death was stated to be shock and haemorrhage on account of stab injury and the corresponding internal injury to vital organs like the heart and the lung. In the opinion of Medical Officer, this injury was sufficient in the ordinary course of nature to cause death. The Apex Court considering the facts that the presence of deceased was wholly accidental; altercation of the accused with deceased was on the spur of the moment and there had arisen a situation in which accused probably misguided by his own egocentric nature objected as to why the deceased should ask him to leave the place and in that background accused gave one blow with a knife which landed on the right side of the chest of the deceased and proved fatal, held that the requisite intention for the offence under Section 300 of the IPC could not be attributed to accused, but in the aforesaid circumstances, since accused wielded a weapon like a knife, he could be attributed with the knowledge that he was likely to cause an injury which was likely to cause death, held the accused guilty of committing of an offence under Section 304-Part-II of the IPC. In similar factual situation, the Apex Court in *Bunnilal Chaudhary Vs. State of Bihar*-(2007) 1 SCC (Cri) 66 held that the case fell within the third part of Section 299 IPC and the accused was punishable under the second part of Section 304 of the IPC as culpable homicide not amounting to murder.

11. In the instant case also the incident was not premeditated, it had resulted due to sudden quarrel on the spur of the moment, in which the accused suddenly on intervention by the deceased, inflicted a single blow on his chest and ran away. In these circumstances, we are of the opinion that exception 4 to Section 300 of the IPC is attracted and the conviction of accused/appellant under Section 302 of the IPC deserves to be set aside and instead appellant deserves to be convicted under Section 304-Part-II of the IPC.

12. Accordingly, the conviction of the appellant under Section 302 IPC and the sentence of life imprisonment are set aside, instead he is convicted for having committed an offence under Section 304-part II of the IPC and he is sentenced to suffer rigorous imprisonment for five years. The appeal is allowed to the extent herein indicated. If the appellant has served out the aforesaid sentence, he shall be released forthwith if not required in any other case.

*Appeal partly allowed.*

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**I.L.R. [2009] M. P., 1794**
**CIVIL REVISION**
*Before Mr. Justice Shantanu Kemkar*
7 May, 2009*

OMPRAKASH ... Applicant
Vs.
KRISHNALAL ... Non-applicant

**Limitation Act (36 of 1963), Articles 19 & 28** - *By agreement, money was lent for one year and was to be repaid within one year with interest - Held - Article 28 will be applicable for suit for recovery - Cause of action to file suit accrued after expiry of one year of money lent - Suit could be filed within 3 years of cause of action - Judgment and decree dismissing suit as barred by limitation set-aside - Revision allowed.* (Paras 12 & 13)

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

**Cases referred :**
1977 MPLJ 290, 1967 MPLJ SN 48.

*G.M. Agrawal,* for the applicant.
*Lokesh Mehta,* for the non-applicant.

**O R D E R**

SHANTANU KEMKAR, J. :–This revision has been filed by the plaintiff under Section 115 of the Code of Civil Procedure challenging the judgment and decree dated 5.12.2008 passed by First Additional District Judge, Khargone in Regular Civil Appeal No.7-B/08 setting aside the judgment and decree dated 9.5.2008 passed by Civil Judge Class-II in Civil Suit No.2-B/06.

2. On 6.1.2006 the applicant/plaintiff filed a suit against the non-applicant/ defendant for recovery of Rs.20,000/- with interest on the basis of 'Kararnama' dated 10.12.2002 (Ex.P/1) executed between the plaintiff and the defendant.

3. As per the plaint averments and the condition of the Kararnama (Ex.P/1) amount of Rs.20,000/- was lent by the plaintiff to the defendant for his personal needs for a period of one year and the amount was to be repaid with interest @ 24% per annum by the defendant within one year. However as the amount was not repaid by the defendant inspite of demand, the suit as aforesaid was filed.

*C.R. No.19/2009 (Indore)

4. The suit was contested by the defendant. The Trial Court framed issues and after appreciation of the evidence led by the parties decreed the plaintiff's suit with interest at the rate of 12 % per annum from the date of filing of the suit till judgment, with further interest at the rate of 6% per annum from the date of judgment and decree till payment.

5. The aforesaid judgment and decree passed by the Trial Court was challenged by the defendant in regular Civil Appeal No.7-B/08. The Appellate Court though affirmed the findings recorded by the Trial Court on merits with modification in regard to the rate of interest awarded by the Trial Court, but allowed the defendant's appeal and dismissed the plaintiff's suit on the ground of limitation holding that the suit was barred by limitation. The Appellate Court held that in view of the Article 19 of the Limitation Act, 1963 the suit was required to be filed within 3 years from 10.12.2002 on which date the 'Kararnama' (Ex.P/1) was executed. The Appellate Court held that the suit could have been filed upto 10.12.2005 and the same having been filed on 6.1.2006 is barred by limitation.

6. Aggrieved by the aforesaid judgment and decree passed by the First Appellate Court the plaintiff has filed this revision as the subject matter of the original suit is for recovery of money not exceeding Twenty Five Thousand Rupees and Section 102 of the C.P.C. puts bar of filing second appeal in the matter.

7. Shri G.M.Agrawal, learned counsel appearing for the applicant/plaintiff has argued that the First Appellate Court has acted with material irregularity and committed jurisdictional error in applying Article 19 of the Limitation Act, 1963. According to him in view of the Kararnama dated 10.12.2002 (Ex.P/1) in which it was specifically mentioned that the loan is taken for a period of one year, no suit could have been filed by the plaintiff prior to expiry of the period of one year from 10.12.2002. He argued that the cause of action to file the suit accrued to the plaintiff only after the expiry of one year from the date of execution of document Ex.P/1 in the circumstances the suit which was filed on 6.1.2006 was within limitation in view of Article 28 of the Limitation Act, 1963 which applies to the facts of the case.

8. Shri Lokesh Mehta, learned counsel appearing for the non-applicant on the other hand supported the impugned judgment and decree passed by the First Appellate Court and submitted that the First Appellate Court has rightly allowed the defendant's appeal and has rightly dismissed the plaintiff's suit holding it to be barred by limitation in view of Article 19 of the Limitation Act.

9. In order to appreciate the rival contentions it would be appropriate to consider Article 19 and Article 28 of the Limitation Act which reads thus :-

| Description of suit | Period of limitation | Time from which period beings to run |
|---|---|---|
| For money payable for money lent. | Three years. | When the loan is made. |
| On a single bond, where a day is specified for payment. | Three years. | The day so specified |

10. In the case of *BhagwantRao Deorao Patil Vs. Mohammad Khan Asgar Khan* (1977 MPLJ 290) in Para 7 & 8 it has been held by this Court as under :-

> "7. On a careful examination of the contents of bond Ex.P.1, I find that the right to recover the whole amount of the bond accrued to the plaintiff only upon default of payment of all the instalments and he could not have brought the suit for the recovery of the whole amount before the expiry of ten months from the date of the bond. The present is not a suit for recovery of instalments having fallen due and, therefore, time could not run from the date on which each instalment fell due. It would not be reasonable to hold from the terms of the bond that the creditor after having acquired the right to recover the whole amount waited till the date of the last instalment nor it is a case of there being an option to the creditor to bring the suit for the whole amount of default of payment of any one or more instalments.
>
> 8. The principle laid down in A.I.R. 1959 Mad. 82 relied upon by the learned counsel for the non-petitioner has no application to the fact and circumstances of the present case as there is no provision in the suit document in the nature of extension of the period of contract. On the other hand, in my opinion, the plaintiff had no right to bring the suit for the whole amount or a part of it before the expiry of ten months from the date of demand. In this view of the matter the cause of action accrued to the plaintiff after the expiry of ten months from 18.9.1966 that is on 18.7.1967 and the suit has been brought within limitation on 17th July 1970."

11. In the case of *Gannu Vs. Ramcharan* 1967 MPLJ Short Note 48 this Court considering Article 66 of the Limitation Act, 1908 corresponding to Article 28 of the Limitation Act, 1963 has held that it applies to a suit on a single bond where the date is specified. It has been observed that the expression "date is specified" cannot be too strictly construed. The Article applies where a period is fixed or when repayment of the loan is to be made on the happening of an event which was in the contemplation of both the parties when the bond was executed. In a

case where it was quite clear that the loan was to be repaid in the next harvesting season Article 66 would be applicable.

12. On going through the pleadings and evidence on record it is revealed that the execution of Kararnama dated 10.12.2002 (Ex.P/1) is not in dispute. It is clear from the said document Ex.P/1 that the loan was taken by the defendant for one year and it was to be repaid within one year. In the circumstances when the period of one year was fixed to repay the loan amount, the plaintiff could not have filed the suit before the expiry of one year from the date of execution of the said document Ex.P/1. Having regard to the aforesaid, the First Appellate Court has wrongly applied Article 19. When the amount was lent for one year and was to be repaid with interest within one year Article 28 would have application to the suit filed by the plaintiff and not Article 19. The period for which the loan was advanced vide 'Kararnama' dated 10.12.2002 (Ex.P/1) expired on 10.12.2003 in the circumstances the suit could have been filed on or before 10.12.2006. Therefore, the plaintiff's suit filed on 6.1.2006 cannot be held to be barred by limitation. The cause of action to file suit accrued in favour of the plaintiff accrued on 10.12.2003 after expiry of one year from 10.12.2002, therefore, the plaintiff's suit filed on 6.1.2006 was well within limitation.

13. In view of the aforesaid in my considered view the judgment and decree passed by the Appellate Court holding the plaintiff's suit to be barred by limitation cannot be sustained. The finding recorded by the Appellate Court so far as it relates to interest part is also not sustainable. The Trial Court while decreeing the plaintiff's suit has rightly awarded interest at the rate of 12% from the date of suit to the date of decree holding the same to be reasonable and has rightly awarded interest at the rate of 6% per annum from the date of decree to the date of payment having regard to Section 34 of the Code of Civil Procedure.

14. Accordingly, the revision is allowed. The judgment and decree passed by the First Appellate Court is set aside and that of the Trial Court is maintained. The plaintiff's suit is decreed with cost. Counsel fees as per Schedule if certified.

*Revision allowed.*

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**I.L.R. [2009] M. P., 1798**
**CIVIL REVISION**
*Before Mr. Justice P.K. Jaiswal*
9 April, 2009*

RATILAL LAD ... Applicant
Vs.
RASIKLAL & anr. ... Non-applicants

**Chartered Accountants Act (38 of 1949), Section 22-A(2), Second Schedule Part I Clause 4 & 5, Chartered Accountants Regulation, 1988, Regulation 12(11)(i) - *Misconduct - Speaking order - While taking a decision by Council on a complaint regarding professional misconduct, the principle of recording of reasons for arriving at a finding of guilt shall also equally apply to a case where a member is not found to be guilty - High Court while exercising revisional jurisdiction has power u/s 22A(2) of the Act to reverse or modify the order or pass any other order, as it deemed fit in the circumstances of the case.*** (Para 19)

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

*Imtiaz Husain*, for the applicant.
*None*, for the non-applicant No.1, though served.
*Virendra Verma*, for the non-applicant No.2.

**O R D E R**

**P.K. JAISWAL, J.** :–The petitioner has preferred this revision petition under section 22-A (2) of the Chartered Accountants Act, 1949 (in short 'the Act')against an order dated 21/10/2004, passed by the respondent no.2 in Ref. No.25-CA(229)/02 exonerating the respondent no. 1, a Chartered Accountant and a member of the Institute of Chartered Accountants of India of the charges levelled against him by the petitioner in his complaint dated 25/4/2002 (Annex.P-3).

2. The material facts leading to this revision petition are that Shri Gokul Chandramaji Mandir Trust, Burhanpur is a registered public trust. In the year 1969-70 the respondent no. 1 was appointed as Auditor and auditing the accounts of the said Trust. On 17/2/1991 he was appointed as Trustee of the said Trust.

*C.R. No.769/2004 (Jabalpur)

Shri Gokul Chandramaji Mandir Trust is registered under the M.P. Public Trust Act, 1951 and its registration number is 62. The respondent no. 1 was auditing the accounts of the said Trust since 1969-70. The Trust was registered in the year 1955 having exclusively object of religious and charitable purpose. Since 1970 its accounts are audited and reports are being submitted regularly to the Sub-Registrar of Public Trust, Burhanpur. On 18/7/1994 respondent no. 1 received a sum of Rs.1,000/- for auditing the accounts of 1990-91 to 1993-94 (four years).

3. The petitioner on 25/4/2002 lodged a complaint against the respondent no. 1 before the respondent no. 2 for professional misconduct alleging therein that :-

(i) respondent no. 1 is auditing the accounts of the Trust and also getting fees where he himself is a Trustee, and thus he is guilty of professional misconduct under Clause (4) of Part-I of Second Schedule framed under sections 21 (4) and 22 of the Act, and

(ii) the respondent no. 1 knowingly failed to show the fixed deposit receipts in the financial statement worth Rs.6,00,000-00 of the Dena Bank, City Branch, Burhanpur and thus was guilty of professional misconduct under Clause (5) of Part-I of Second Schedule of the Act.

A copy of the complaint was sent to the respondent no. 1 to submit his reply vide Annex.P/10. Thereafter the petitioner on 28/6/2002 lodged an additional complaint vide Annex.P/6 which was replied by the respondent no. 1 in the shape of rejoinder vide Annex.P/11. The respondent no. 2 considered the complaint in accordance with the provisions of Regulation 12 (11) (i) of the Chartered Accountants Regulations, 1988 (in short **'the Regulations'**). The Council was prima facie of the opinion that the respondent no. 1 is not guilty of any professional or other misconduct and as such the papers relating to the case have been filed. The said decision dated 21/10/2004 was communicated to the parties vide Annex.P/1. After receipt of Annex.P/1 dated 21/10/2004 the petitioner wrote a letter to the respondent no. 2 to furnish him with a copy of the detailed grounds on which the respondent no. 2 did not find the respondent no. 1 prima facie guilty of professional misconduct. The respondent no. 2 vide communication dated 2/11/2004 (Annex. P/19) intimated him that the deliberations of the Council are confidential and only the decision of the Council is to be conveyed to the parties as required under Regulation (11). The petitioner is aggrieved by the communication dated 21/10/ 2004 and filed this revision petition on the ground that reason is must and contended that as per the Act and Regulations, the respondent no. 2 is bound to disclose the reasons by passing a speaking order. In the present case no reason has been assigned and, therefore, the impugned order is bad in law.

4. Clause 4 and 5 of Part I of Second Schedule of the Act reads as under :-

"(4) expresses his opinion on financial statements of any business or any enterprise in which he, his firm or a partner in his firm has a substantial interest, unless he discloses the interest also in his report;

(5) fails to disclose a material fact known to him which is not disclosed in a financial statement; but disclosure of which is necessary to make the financial statement not misleading;"

5. In spite of service of notice to the respondent no. 1 no reply has been filed by him. The respondent no. 2 has filed its detailed reply and raised a preliminary objection regarding the maintainability of this revision petition on the ground that under the Act there is no provision to file revision under section 22-A(2) of the Act. The present revision filed by the petitioner is not maintainable and prayed for its dismissal.

6. Section 22A of the Act reads as under :-

"Section 22A Appeals

(1) Any member of the Institute aggrieved by any order of the Council imposing on him any of the penalties referred to in sub-section (4) of Section 21, may within thirty days of the date on which the order is communicated to him, prefer an appeal to the High Court.

Provided that the High Court may entertain any such appeal after the expiry of the said period of thirty days, if it is satisfied that the member was prevented by sufficient cause from filing the appeal in time.

(2) The High Court may, on its own motion or otherwise, after calling for the records of any case, revise any order made by the Council under sub-section (2) or sub-section (4) of Section 21 and may:-

(a) Confirm, modify or set aside the order;

(b) impose any penalty or set aside, reduce, confirm, or enhance the penalty imposed by the order;

(c) remit the case to the Council for such further inquiry as the High Court considers proper in the circumstances of the case; or

(d) pass such other order as the High Court thinks fit;

Provided that no order of the Council shall be modified or set aside unless the Council has been given an opportunity of being heard and no order imposing or enhancing a penalty shall be passed

unless the person concerned has also been given an opportunity of being heard.

Explanation :- In this section "High Court" and "member of the Institute" have the same meanings as in Section 21."

7. A right of appeal is provided to the High Court under section 22-A(1) of the Act. Besides the High Court has also suo motu powers as well under section 22-A(2) of the Act to examine the correctness of the order of the Council vis-a-vis its allegation of misconduct. As such it is not as if the party aggrieved, is left with no remedy to ventilate his grievances. Thus, it cannot be said that the revision filed by the petitioner is not maintainable. Remedy of revision is provided under section 22-A(2) of the Act. Therefore, I am of the considered view that the present revision petition filed by the petitioner is maintainable.

8. The Chartered Accountants Act, 1949 has been brought on Statute Book with the object of developing and establishing a system in which the Accountants will, in autonomous association of themselves, largely assume responsibilities involved in the discharge of their public duties by securing maintenance of the requisite standards of professional qualifications, discipline and conduct. That the control of the Central Government shall be confined to a very few specified mattes. Preamble of the Act makes it clear that it is expedient to make provision for the regulation of profession of Chartered Accountants. Section 2 (1)(e) of the Act defines 'Institute' to mean the Institute of Chartered Accountants of India constituted under the Act. Section 3 provides for incorporation of the Institute and takes within its fold all persons whose names are entered in the Register under the provisions of the Act so as to constitute a body corporate with perpetual succession and common seal. Section 9 of the Act provides for constitution of the Council of the Institute which will manage the affairs of the Institute and discharge the functions assigned to it under the Act. Section 15 of the Act lays down the functions of the Council and under sub-section (2) of Section 15 of the Act in particular without prejudice to the generality of the foregoing power under sub-section (1) - the duties of the Council shall include various items denoted from (a) to (l). Section 17 of the Act empowers the Council to constitute from amongst its members the Standing Committees namely (1) Executive Committee, (ii) Examining Committee, (iii) Disciplinary Committee. Sub-section (3) of Section 17 specifies the composition of each of such Standing Committees, namely, the President and the Vice-President, ex officio, and three other members of the Council elected by the Council; but the Proviso under sub-section (3) specifies that out of such three other members of the Council, elected by the Council, two shall be elected by the Council and the third shall be nominated by the Central Government, from amongst the persons nominated to the Council by Central Government under Section 9 of the Act. Therefore, the legislature has advisedly, to remove the charge of bias, provided by virtue of Section 9 and 17(3) of the Act, nomination of certain members by Central Government.

9. Chapter V of the Act deals with 'MISCONDUCT'. Section 21 provides for procedure in inquiries relating to misconduct of members of Institute. Sub-section (1) of Section 21 states that Council shall refer a case to the Disciplinary Committee where the Council is in receipt of information or is in receipt of a complaint and is of prima facie opinion that any members of the Institute in regard to whom the information or complaint has been received, has been guilty of any professional or 'other misconduct'. Upon such reference being made the Disciplinary Committee shall hold inquiry in the manner prescribed and shall report the result of the inquiry to the Council. Sub-section (2) of Section 21 provides that if the Council on receipt of such report finds that the member is not guilty of any professional or other misconduct it shall record such a finding accordingly and direct the proceeding to be filed or the complaint to be dismissed. Sub-section (3) of Section 17 of the Act lays down that upon receipt of the report of the Disciplinary Committee if the Council finds the member guilty of any professional or other misconduct, it shall proceed in the manner laid down in the succeeding sub-sections. Sub-section (4) of Section 21 of the Act specifies that where the Council finds a member guilty of professional misconduct specified in First Schedule, the Council shall afford an opportunity of hearing to the member before an order is passed against such member and the orders that may be passed shall be any one of the following :-

(a) reprimand the order;

(b) remove the name of the member from the Register for such period not exceeding five years, as the Council thinks fit.

10. It is further provided by way of proviso thereunder that where the Council thinks it fit that the case is one in which the name of the member ought to be removed from the register either permanently or for a period exceeding five years, no order under Clause (a) or Clause (b) referred above shall be made, but the case shall be forwarded with the recommendation of the Council to the High Court. Similarly under sub-clause (5) of Section 21 of the Act, where the Council finds a member guilty of misconduct other than misconduct as it referred to in sub-section (4), the Council shall forward the case to the High Court with the recommendation of the Council.

11. Upon receipt of a case either under Section 21(4) or 21(5) of the Act, the High Court, after calling upon the parties specified in sub-section (6) of Section 21 of the Act, may make any of the following orders, namely,

"(a) direct that the proceeding be filed, or dismiss the complaint, as the case may be ;

(b) reprimand the member ;

(c) remove him from membership of the Institute either permanently or for such period as the High Court thinks fit ;

(d) refer the case to the Council for further inquiry and report."

Section 22 of the Act defines 'professional misconduct'.

12. Section 30 of the Act grants power to the Council to make regulations which shall be published by Notification in the Gazette of India, and Section 30B of the Act provides that every regulation made under the Act shall be laid before each House of Parliament. Thus, Chartered Accounts Regulations, 1988 have been duly framed by virtue of the aforesaid power and have the force of a statute.

13. The Chartered Accounts Regulations, 1988 provide for various procedural requirements in relation to members, Examinations, Article Clerks and Audit Clerks, etc. Regulation 12 which falls in Chapter II (dealing with MEMBERS) pertains to complaints and enquiries relating to misconduct of members. Regulation 12 (1) provides that a complaint against a member under Section 21 of the Act shall be investigated and all other inquiries relating to the misconduct alleged shall be held by the Disciplinary Committee. Sub-regulations (2) and (3) provide for modality and the form in which the complaint shall be made, while sub-regulation (4) provides for payment of the requisite fees accompanying the complaint. In case of failure to comply with the requirements of sub-regulations (2), (3) or (4) the Secretary is required to return the complaint as provided in sub-regulation (5). A copy of the complaint is required to be sent to the Secretary to the Member against whom such a complaint is made, ordinarily within a period of 60 days. Sub-regulation (7) provides that written statement of defence shall be forwarded to the Secretary to the member against whom such complaint is made within a period of 14 days from the date of service of the copy of the complaint under sub-section (6). The written statement is then forwarded by the Secretary to the complainant and the complainant is entitled to forward in triplicate, his rejoinder to the written statement within a period of 14 days from the receipt of the written statement. On receipt of such rejoinder from the complainant a copy thereof is to be forwarded to the member and the member is entitled to offer his comments again within a period of 14 days from the date of service of the copy of the rejoinder. Thereafter, papers are placed before the President and upon consideration of the complaint, written statement, rejoinder and the comments thereon it will be open to the President to President to call for such additional particulars or documents from either of the parties, if it is considered to be expedient. Otherwise, or after receipt of such additional particulars or documents, the papers are placed before the Council, and where the Council is, prima facie of the opinion that the member is guilty of professional and/or other misconduct, the Council shall cause an inquiry to be made in the matter by Disciplinary Committee. It is also open to the Council to arrive at a prima facie opinion that the members is not guilty of the misconduct alleged in the complaint and in such an eventuality the complaint shall be filed and both the parties be informed accordingly. It is pertinent to note that sub-regulation

(12) provides for the mode of service of notice and the procedure to be adopted in case of notice being returned unserved.

14. Regulation 17 provides for procedure in a hearing before the Council. As per sub-regulation (1) of Regulation 17, if the Council, in light of its finding arrives at an opinion that an order under Section 21 (4) of the Act is required to be passed, the Council shall furnish to the delinquent member a copy of its findings and give him notice calling upon him to appear before the Council on specified date, or in the alternative, if no personal hearing is requested send within a specified time such representation in writing in connection with the order that may be passed against him under Section 21(4) of the Act. Sub-regulation (2) of Regulation 17 specifically provides for the scope of hearing or the written representation and lays down that the same shall be restricted to the order to be passed under Section 21 (4) of the Act. It will be open to the Council after hearing the delinquent member or after considering his representation to pass such orders as the Council thinks fit, and such order passed by the Council is required to be communicated to the complainant and the delinquent member.

15. It is apparent that in the scheme incorporated in Section 21 of the Act there are separate functionaries, the Disciplinary Committee, The Council and, in certain cases, the High Court. The controlling authority is the Council, which is only logical, for the Council is the governing body of the Institute. When the Council receives information or a complaint alleging that a member of the Institute is guilty of misconduct, and it is prima facie of the opinion that there is substance in the allegations it refers the case to the Disciplinary Committee. Here in the present case after receiving the reply and rejoinder from the respondent no. 1 the matter was considered by the Council under Regulation 12 (11) at its 245th meeting held in September, 2004. After considering the entire material, the Council was prima facie of the opinion that the respondent no. 1 was not guilty of any professional and/or other misconduct. This opinion of the Council was conveyed to the petitioner. The respondent no. 1 in his written statement took a categorical plea that he was not having any substantial interest in the Trust in question, namely, Shri Gokul Chandramaji Mandir Trust and said Trust was a religious and charitable Trust and was not engaged in any business or enterprises. He also categorically pleaded in his reply that he was having no interest in the Trust. It is submitted by learned counsel for the respondent no. 2 that Clause (4) of Part-I of Second Schedule of the Act was not attracted in the present case. The respondent no. 1 is auditing accounts of the Trust since 1969-70 and in the year 1989-90 he was unanimously appointed as Trustee of the said Trust. The fees charged by the respondent no. 1 is very nominal @ Rs.250/ per annum and that too only for typing charges and other sundry expenses and, therefore, it cannot be said that he was guilty of professional misconduct under the provisions of the Act and Regulations framed therein.

16. In respect of fixed deposit amount of Rs.6,00,000-00 it is submitted that fixed deposit is in the name of Ramcharit Manas Gyan Yagya, which is an independent Unit and Shri Chhaganlal Agrawal was appointed as President and other office bearers are Vinodbhai Kapadia, Rajendra Khadiwal and Girish Lad. They have maintained independent records and Book of Accounts and have separate independent bank account etc. and its audit was done by M/s. Pankaj Somaiya & Associates, Chartered Accountants, Burhanpur. It is further submitted that petitioner suppressed the fact that amount of rupees six lacs is lying in Dena Bank in the name of Ramcharit Manas Gyan Yagya and said information was disclosed by auditor in his statement duly signed by Chartered Accountant Shri Pankaj Somaiya. It is lastly submitted that the matter was considered by the respondent no. 2 under Regulation 12 (11) of the Regulations, the Council also examined the complaint, written statement, rejoinder and comments of the petitioner and on examining the above documents Council was prima facie of the opinion that no case of professional or other misconduct is made out against the respondent no. 1. The action of respondent no. 2 is just, proper and as per the provisions of the Act and regulations framed thereunder.

17. It is not in dispute that no reasons have been assigned by the Council in its communication dated 21/10/2004. In fairness and justice, the complainant is entitled to know why respondent no. 1 has not been found guilty. To exercise his right of revision/appeal effectively, he must know the basis on which the Council has not found him guilty. In the impugned communication no reason has been assigned. Therefore, I am of the considered opinion that the Council must, state reasons for its finding and the said finding must be by a speaking order. It is just and fair that when the Council records findings it should support its findings with reasons. The Council being a statutory body exercising quasi-judicial functions, must record its reasons in support of the order it makes, which is a basic rule of natural justice. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice, which must inform every quasi judicial process, which must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.

18. Necessity to give reasons for recording finding that a member of the Institute is guilty of misconduct was considered by the Apex Court in the case of *Institute of Chartered Accountants of India Vs. L.K. Ratna*, AIR 1987 SC 71, wherein after considering the provisions of Sections 21 and 22 of the Act, while dealing with the point whether the Council is obliged to give reasons for its finding that the member is guilty of misconduct, it observed in para 30 :

> "In fairness and justice, the member is entitled to know why he has been found guilty. The case can be so serious that it can attract the harsh penalties provided by the Act. Moreover, the member has been given a right of appeal to the High Court under

S.22A of the Act. To exercise his right of appeal effectively he must know the basis on which the Council has found him guilty. We have already pointed out that a finding by the Council is the first determinative finding on the guilt of the member. It is a finding by a Tribunal of first instance. The conclusion of the Disciplinary Committee does not enjoy the status of a "finding". Moreover, the reasons contained in the report by the Disciplinary Committee for its conclusion may or may not constitute the basis of the finding rendered by the Council. The Council must, therefore, state the reasons for its finding."

19. The principle of recording of reasons for arriving at a finding of guilt shall also equally apply to a case where a member is not found to be guilty, because the High Court while exercising revisional jurisdiction has power under Section 22A(2) of the Act to; (a) confirm, modify or set aside the order; (b) impose any penalty or set aside, reduce, confirm, or enhance the penalty imposed by the order; (c) remit the case to the Council for such further inquiry as the High Court considers proper in the circumstances of the case; or (d) pass such other order as the High Court thinks fit. Of course, before passing an order falling in any of the clauses (a) to (d) of Section 22A, the Council and the person concerned have to be afforded an opportunity of hearing. Therefore, when the order of the Council can be reversed or modified, or any other order can be passed by the High Court, as it deemed fit in the circumstances of the case, the basic principle of recording finding supported by reasons must be observed to appreciate the finding recorded by the Council. As alluded, the finding recorded by the Council is slip-shod without giving any reasons and, hence, is liable to be set aside.

20. For the above mentioned reasons, the impugned order/communication dated 21/10/2004 (Annex.P/1) is hereby set aside. The matter is remitted to the respondent no. 2-Council to pass a speaking order under the provisions of the Act and Regulations framed therein and communicate the same to the parties expeditiously, as early as possible within a period of six months from the date of receipt of copy of the order.

21. In the result, the revision petition is allowed and disposed of in the manner aforesaid, but without any order as to costs.

*Petition allowed.*

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**I.L.R. [2009] M. P., 1807**
**CRIMINAL REFERENCE**
*Before Mr. Justice Rakesh Saksena & Mr. Justice K.S. Chauhan*
18 April, 2009*

IN REFERENCE ... Applicant
Vs.
SHEIKH ARIF ... Non-applicant

**Criminal Procedure Code, 1973 (2 of 1974), Section 354, Penal Code, 1860, Section 302** - *Death Penalty - Rarest of Rare - Appellant No.1 along with other appellants killed his father and two step brothers on a land dispute - Although act of appellant No.1 was apparently quite brutal and heinous but was not committed for satisfying any kind of lust, greed or in pursuance of any antisocial activity - Appellant No.1 cannot be described as menace to society - Case does not fall in the category of rarest of rare case - Death penalty set-aside and sentenced to imprisonment for life u/s 302 IPC on all three counts - Reference answered accordingly.* (Paras 39 & 41)

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

**Cases referred :**

AIR 2006 SC 2500, (2002) 9 SCC 147, (2003) 1 SCC 465, (2007) 9 SCC 513, AIR 2002 SC 2807, (2002) 4 SCC 679, AIR 1989 SC 1456.

*S.K.P. Verma* with *Smita Verma*, for the applicant.
*T.K. Modh, Dy.A.G.*, for the non-applicant.

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

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :–Since the aforesaid Criminal Reference and the Criminal Appeal arise out of the common impugned judgment passed by the trial Court, they are being disposed of by this common judgment.

1. This Criminal Reference No. 1/2009, under Section 366 of the Code of Criminal Procedure, has been made by the Additional Sessions Judge, Sihora, in Judgment

*Cr.Ref. No.1/2009 (Jabalpur)

dated 10.10.2008, passed by him in Sessions Trial No. 38/2007, whereby he has convicted accused Sheikh Arif under Section 302 of the Indian Penal Code and sentenced him to death.

2. All the three appellants have filed Criminal Appeal No. 2311/2008 against the judgment dated 10.10.2008, passed by the Additional Sessions Judge, Sihora, in Sessions Trial No. 38/2007, convicting them under Sections 302 and 307/34 of the Indian Penal Code. Appellant Sheikh Arif has been sentenced to death for causing death of Sheikh Munna, Sheikh Alam and Sheikh Shahid and has also been directed to pay fine of Rs. 10,000/- on each count. He has also been sentenced to imprisonment for life with fine of Rs.10,000/- under Section 307/34 of the Indian Penal Code.

3. Appellants Sheikh Anwar and Sheikh Saleem have also been convicted under Section 302 of the Indian Penal Code on three counts and sentenced to imprisonment for life with fine of Rs.10,000/-on each count. They have further been convicted under Section 307/34 of the Indian Penal Code and sentenced to rigorous imprisonment for 10 years with fine of Rs.10,000/-.

4. Facts of the case, as alleged by the prosecution, are that accused Sheikh Arif is the son of Sheikh Munna (deceased). Accused Sheikh Anwar is the son of accused Sheikh Arif. Another accused Sonu @ Asgar (Juvenile) is also the son of accused Sheikh Arif. Accused Sheikh Saleem is the sister's son of accused Sheikh Arif. Kaneeza Bi (injured) is the fifth or sixth wife of deceased Sheikh Munna. Sheikh Alam (deceased) was the son of Kaneeza Bi and Sheikh Munna and Sheikh Shahid (deceased) was the son of Kaneeza Bi from her former husband. Sheikh Munna, Sheikh Alam (aged about 3 years) and Sheikh Shahid are the deceased persons of the present case.

5. According to prosecution, on 23.10.2006, at about 2-3 p.m. Sheikh Munna (deceased), Kaneeza Bi (PW-24), Sheikh Alam (deceased) and Sheikh Shahid (deceased) went to plough their "Paterawala" field, situated in village Mudkuru, by their tractor. A dispute in respect of the said field existed between Sheikh Munna and his son Sheikh Arif (accused). Accused persons armed with spear and sword reached there and Sheikh Arif asked them not to plough the field. Sheikh Munna told them that since the land was in the name of minor Sheikh Anwar and he was his 'Bali' (guardian), he would plough the field. Sheikh Arif then assaulted him with a spear, as a result he fell down. Sheikh Saleem, Sonu and Sheikh Anwar caught hold of him and Sheikh Arif chopped of his neck by the sword. Sheikh Arif then tried to hit Kaneeza Bi by the spear, but the blow lended at her son Sheikh Alam, who also died. Thereafter, all the four accused persons caught Sheikh Shahid and assaulted him, when Kaneeja Bi tried to run away, she was also beaten. The accused persons then ran away taking the tractor of Sheikh Munna. Kaneeza Bi, in order to save herself, ran from there and went at the road.

When police reached there, she narrated the incident to D.S. Thakur, A.S.I.. On the basis of information furnished by her, D.S. Thakur (PW-21) recorded Dehati Nalishi (Ex. P/35) and three Murg Reports . He sent Kaneeza Bi for the treatment and the medical examination. From the spot, he seized a spear, sword, blood stained earth, a country made bomb, slippers and broken bangles. Blood stained articles were sent for examination to Forensic Science Laboratory. On the basis of Dehati Murg Intimations, regular Murg Intimations and the first information report (Ex. P/22) were recorded at Police Station Majhauli. Dead bodies of Sheikh Munna, Sheikh Alam and Sheikh Shahid were sent for postmortem examination.

6. After investigation, charge sheet against the accused persons was filed and the case was committed for trial.

7. Trial Court framed charges under Sections 302 and 307 read with Section 34 of the Indian Penal Code.

8. Accused persons abjured their guilt and pleaded false implication due to enmity. The defence of the accused Sheikh Arif, as reflected from his statement under Section 313 of the Code of Criminal Procedure, was that Kaneeza Bi was his father's sixth wife. She herself got his father murdered. At about 3.00 O'clock on the same day, his son Sheikh Anwar had gone to lodge report with the police that 3-4 unknown persons were assaulting his father, but Inspector Dharmendra Singh noted it on a rough paper and asked Sheikh Anwar to come at the spot. On way when he found Kaneeza Bi on the road, he arrested Anwar. Similar defence was taken by accused Sheikh Anwar and Sheikh Saleem.

9. During trial, prosecution examined 25 witnesses and exhibited 47 documents.

10. Accused persons, before the trial Court, though prayed to adduce defence evidence and to examine accused Sheikh Arif under Section 315 of the Code of Criminal Procedure, but did not produce any evidence. However, they exhibited 6 documents (Ex. D/1 to D/6).

11. Trial Court relying on the evidence of solitary eyewitness Kaneeza Bi (PW-24) and other circumstantial evidence held the accused persons guilty and convicted and sentenced them as mentioned earlier.

12. Shri S.K.P. Verma, learned counsel for the accused/appellants, submitted that the trial Court committed grave error in holding the appellants guilty on the basis of evidence of solitary eyewitness Kaneeza Bi (PW-24). Other eyewitnesses viz. Devi Singh (PW-3), Kishan Singh (PW-4) and Murat Singh (PW-5) did not support the prosecution case. The evidence of Kaneeza Bi (PW-24) was discrepant and contradictory. She made material improvements in her evidence before the Court, therefore, she was not a reliable witness. The investigation done by Sub Inspector D.S. Thakur (PW21) was not fair and was wholly unreliable. There had been no motive for the accused persons to kill Sheikh Munna, who happened

to be the father of appellant Sheikh Arif. He also submitted that the incident had occurred in a sudden quarrel, therefore, no offence under Section 302 of the Indian Penal Code was made out and further that from the facts and circumstances of the case, the present was not a rarest of rare case in which the death penalty should have been imposed on accused Sheikh Arif.

13. On the other hand, Shri T.K. Modh, learned Dy. Advocate General for the State, submitted that the testimony of Kaneeza Bi was wholly reliable. Even if there had been some discrepancies in her evidence, they did not discredit her from being a reliable witness, because in the occurrence she too was badly injured and had suffered grievous injuries. Her two sons and her husband had been brutally killed. In such a situation, minor discrepancies, which occurred in her testimony could not be held to be deliberate. According to him, in a case of triple murder, the investigating officer has to take care and look after many steps in the investigation at the same time, which may result in the occurrence of some mistakes and discrepancies, but no much importance can be attached to them if the evidence of investigating officer is otherwise reliable. He submitted that there was sufficient material on record to indicate that accused Sheikh Arif was annoyed and aggrieved by the interference of Sheikh Munna in the land, which stood in the name of his minor son Sheikh Anwar. He submitted that the trial Court was fully justified in convicting the appellants and imposing death penalty on Sheikh Arif for committing the brutal murders.

14. We have heard the learned counsel for appellants and learned counsel for the State and have carefully considered the evidence, circumstances and probabilities of the case. We have also gone through the judgment under appeal with the help of both the counsel.

15. It is not disputed that the deceased persons viz. Sheikh Munna, Sheikh Alam and Sheikh Shahid had died homicidal deaths. Dr. C.P. Tiwari (PW-1) had performed the postmortem examinations of the dead bodies. He found following injuries on the body of Sheikh Munna:

> (1) Extensively lacerated wound (cut throat & neck injury). Whole neck was cut through and through including all vital structure with muscle, nerves artery, vein and spine at the level of cervical vertebrae C2-C3. Only the head was attached with the body by posterior tendon of trepezius muscle and skin flap. Size of injury was 13"x5"x deep posterior up to muscle. At various places the sign of chopping also present. Margins at some places were fine and at some places irregular.
>
> (2) Lacerated wound-right anterior pectoral region 3 ½" x 3" x Muscle deep. Margins were slightly lacerated not very fine.

All injuries were ante mortem in nature. Injury No. 1 was caused by sharp edged heavy cutting object and Injury No. 2 was caused by blunt edged sharp object. In his opinion, the death was caused by respiratory and circulatory failure caused by several powerful blows on the anterior part of neck. Cutting all the vital structures of neck through and through. The postmortem report is Ex. P/1.

16. Dr. C.P. Tiwari (PW-1) found following injuries on the body of Sheikh Alam son of Sheikh Munna:

(1) Contusion 1"x1" on right forehead.

(2) Contusion 2"x1" in right upper lid. Diffused swelling present.

(3) Contusion just above occipital protuberence 3"x2" on palpating fracture of occipital bone. Consistency of the place is fleby.

(4) Contusion 3"x1 1/3" on anterior part of neck over thyroid.

(5) Contusion 1 ½"x1" over medial and shaft of left clavicle bone.

(6) Contusion 4"x2 ½" on the right side of jaw.

All injuries were caused by hard and blunt object and were ante mortem. On internal examination, his occipital bone was found fractured and broken into three pieces. Beneath the bone, large amount of blood clot was formed forming a big haematoma. Brain was congested with laceration on the posterior part. In his opinion the cause of death was acute neurogenic shock caused by heavy blow on the posterior part of skull resulting fracture of bone and acute neuro circulatory failure due to brain attack. His postmortem report is Ex. P/2.

17. On postmortem examination of the body of Sheikh Shahid, Dr. C.P. Tiwari (PW-1) found following injuries on his body:

(1) Incised wound 2 ¼" x 1" x Bone deep. Frontal bone of skull at the middle above forehead slightly curved.

(2) Incised wound 2 ¼" x 1" x Bone deep oblique posterior to bregma towards left parietal bone. Sharp everted cut margins.

(3) Incised wound 2"x1"x Bone deep, oblique, right temporal parietal region, posterior part. Cut margins sharp everted.

(4) Incised wound 2 ¾"x3/4x bone deep left occipito parietal region oblique. Cut margins.

(5) Contusion 5"x4" on right shoulder posterior.

(6) Contusion 3"x2" bluish black on right triceps region.

(7) Contusion 2"x2" rounded bluish black just above right elbow posterior.

(8) Contusion 2"x1" on left arm. Middle & lateral aspect.

(9) Contusion 1 ½x1" just above left elbow joint posterior aspect.

(10) Contusion 8"x4" Big Bluish Black right flank upper abdomen, slight posterior side.

(11) Contusion 3"x2 ½ " diffused, bluish black, posterior on right hand.

Injuries No. 1,2,3 and 4 (Incised wounds) were caused by sharp cutting heavy object. Injuries No. 5,6,7,8,9,10 and 11 were caused by hard and blunt objects. All injuries were ante mortem in nature. On internal examination, one crack fracture of skull on right temporo parietal region, zigzag was seen. In his opinion, death was caused by acute neuro circulatory failure due to injury to brain.

18. Dr. S.S. Thakur (PW-2), Medical Officer, Community Health Centre, Majhauli examined the injuries of injured Kaneeza Bi. He, vide his injury report Ex. P/4, found following injuries on her body:

(1) One lacerated wound present on scalp over frontal region antero posterior in direction size 3"x1" and bone deep. Irregular margin.

(2) One contusion over right forearm at middle 1/3rd region size 4"x3" transverse in position. Deformity and bony crepitation present. Unable to move the limb.

(3) Contusion over middle 1/3rd on left hand. Size 4"x3". Transverse in position. Bony crepitation present with deformity.

(4) One contusion present over left wrist joint. Size 3"x3". Bony crepitation present.

(5) One contusion over back of left forearm.

In his opinion, all the injuries were caused by hard and blunt object.

19. Kaneeja Bi (PW-24) stated that the accused persons assaulted her and to Sheikh Munna, Sheikh Alam and Sheikh Shahid by spear, sword and Lathi when they were at their Paterawala field. As a result of injuries Sheikh Munna, Sheikh Alam and Sheikh Shahid died at the spot. Investigating Officer, ASI, D.S. Thakur (PW-21) went at the spot and found the dead bodies of deceased persons lying in the field in village Mudkuru. There were injuries on their bodies. He prepared inquest memorandums Ex. P/15, Ex. P/16 and Ex. P/17 at the spot and sent the bodies for postmortem examination. From this evidence and the evidence of Dr.

C.P. Tiwari (PW1), it is clearly established that Sheikh Munna, Sheikh Alam and Sheikh Shahid died homicidal deaths. Besides, it has not been disputed by the accused persons that the death of deceased had taken place in any other manner.

20. The prosecution case rests only on the evidence of solitary eyewitness Kaneeza Bi (PW-24). Though the prosecution examined Devi Singh (PW-3), Kishan (PW-4) and Murat Singh (PW-5) also as eyewitnesses, but they did not support the prosecution case and totally denied their presence at the spot. Though they were declared hostile and were cross-examined by the prosecutor, but, in our opinion, their evidence was of no use for the prosecution or for the accused persons.

21. Kaneeza Bi (PW-24) stated that Sheikh Munna was her husband, Sheikh Alam and Sheikh Shahid were her sons. They had gone to their 'Paterawala field' for sowing seeds. At about 2.00 p.m., while Sheikh Shahid was sowing seeds by the tractor, Sheikh Arif, Sheikh Anwar, Sheikh Saleem and Sonu (Juvenile) came there armed. Sheikh Anwar and Sheikh Saleem had Lathis with spear-head and Sheikh Arif had a sword. They objected by saying that they should not sow the field. When Sheikh Munna told Sheikh Arif that he was the 'Bali' (guardian), therefore, he will sow the field, Sheikh Saleem gave a Lathi blow on the head of Sheikh Munna, due to which he fell down and Sheikh Arif chopped of his neck. Thereafter they mercilessly assaulted Sheikh Shahid by their weapons and ran after her to kill. She had child Sheikh Alam in her lap. When they assaulted her by Lathi, Sheikh Alam slipped out of her hands, then they assaulted Sheikh Alam by the Lathis with the spear head. They also assaulted her, due to which her both the hands were broken. Sheikh Arif assaulted her by the Lathi having spear head.

22. Learned counsel for the appellants submitted that there were many contradictions in the statement of Kaneeza Bi. She had improved over her earlier versions given in Ex. P/35, Dehati Nalishi and Ex. D/1 statement recorded under Section 161 of the Code of Criminal Procedure. Her evidence was unnatural and unreliable and since she was the sole eyewitness of the incident, her evidence was liable to be disbelieved, as she was not a wholly reliable witness. According to him, Dehati Nalishi (Ex. P/35) and other reports were made ante-timed. All the documents were fabricated by investigating officer D.S. Thakur, as Kaneeza Bi had already been sent to hospital for the treatment. He submitted that Kaneeza Bi deliberately implicated the accused persons as she knew that after the death of Sheikh Munna and the exclusion of accused Sheikh Arif and Sheikh Anwar, she alone would get the property of Sheikh Munna. He placed reliance on *Budh Singh & Ors v. State of U.P.*-AIR 2006 SC 2500, wherein it has been held that when it is found that the first information report is ante-timed and ante-dated and exact time of occurrence has not been proved, injuries on the persons of eyewitness were doubtful and the evidence of other eyewitness, who are chance witnesses is not reliable and the prosecution case is not supported by the medical evidence, the acquittal of the accused persons by trial Court cannot be set aside.

23. On perusal of the evidence of Kaneeza Bi, it is apparent that she is absolutely illiterate. On being questioned in the cross-examination about the period when she was married to deceased Sheikh Munna, she gave some discrepant answers. At one place she stated that her former husband Sabir Ali had died about 11 years back and at another place she said that he died about 8-9 years ago and she married to Sheikh Munna about 7 years back, whereas in her police statement (Ex. D/11) she mentioned that she had married to Sheikh Munna about 6 years ago. She stated that she remained as widow for about two years. Thereafter, she said that she was married to Sheikh Munna only two years after the death of Sabir Ali. The trial court made a specific note that this witness was absolutely illiterate. In our opinion, these discrepancies in her statement were not in respect of any material aspect. Learned counsel for the appellants drew our attention to para-24 of her statement where she was confronted with Dehati Nalishi Report Ex.P/35 wherein she did not mention that accused Annu and Saleem had Lathis mounted with spear heads. She also did not mention in the said report that Sheikh Arif had a sword and Sheikh Saleem assaulted Sheikh Munna with Lathi on his head. She denied of having mentioned in the said report that Sheikh Arif had assaulted Sheikh Munna by spear. Certain other contradictions pertaining to assault by 'Ballam' (spear) to Sheikh Alam and assault on Shahid were pointed out. These contradictions were considered by the trial Court and were discussed in its judgment in detail. It was found that on the day of occurrence Kaneeza Bi was observing Roza (Fast). She was badly injured in the incident. Her both hands were fractured. Her husband and two sons were mercilessly and brutally killed. In these circumstances, in our opinion, if the aforesaid inconsistencies about the manner of the assault on the victims were found in her testimony, it cannot be given much weight and her evidence cannot be discarded only on that count. It cannot be assumed that she would spare the real culprits and falsely implicate the accused persons only for the purpose of getting property of the deceased, especially when, in the attack, besides her husband, her two sons were also killed and she too was badly injured.

24. Learned counsel for the appellant pointed out that there was inconsistency between the evidence of Kaneeza Bi and the medical evidence. He submitted that though Kaneeza Bi stated that Annu and Saleem were armed with Lathis with spear heads, but on postmortem examination by Dr.C.P.Tiwari (PW-1), no injury on the body of child Sheikh Alam was found to have been caused by any sharp edged or pointed weapon. The doctor had found only contusions on his body. There were four incised injuries on the body of deceased Sheikh Shahid, but there were seven injuries by hard and blunt object. Similarly, Kaneeza Bi was also found to have four injuries by hard and blunt object. It is true that there appeared some inconsistency between the evidence of this witness and medical evidence, but on careful examination of her evidence, it is seen that though she stated that

the accused persons had come at the spot armed with spears and sword but she did not say that the spear head Lathi was used as a piercing weapon, which is clear from Dehati Nalishi (Ex. P/35) in which it was mentioned that *"Tab Sheikh Arif Ne Sheikh Munna Ko Ballam Kheench Kar Mara to Wah Gir Gaya"*.It is also true that she denied before the Court of having mentioned this fact in Ex. P/35, but, at the same time, she explained that at that time her condition was very bad, therefore she could not say as to what she told to police. In Para-25 of her statement, she stated that she was observing 'Roza', she had injury on her head, her both the hands were broken and that since she was on 'Roza', she had spoken truth to police. She firmly stated that she was ready to tell this truth even after taking ' Qoran' in her hands. She categorically stated that when the report was recorded there was nobody to prompt her, therefore whatever was mentioned by her in Ex. P/35 was correct and was written on her saying. The Apex Court in *Bijoy Singh and another vs. State of Bihar* (2002) 9 SCC 147 observed that:

> "The fact of the state of mental agony of the person making the FIR who generally is the victim himself, if not dead, or the relations or associates of the deceased victim apparently under the shock of the occurrence reported has always to be kept in mind."

In our view the evidence of Kaneeza Bi (PW-24), in the light of her suffering at the time of occurrence, appears natural, cogent, convincing and wholly reliable despite inconsistencies and discrepancies occurring in her statement.

25. The trial Judge rightly observed that it was not possible for Kaneeza Bi to implicate the accused persons falsely with any ulterior motive. Since she mentioned the names of assailants in Dehati Nalishi (Ex. P/35) immediately after the occurrence even when she was in seriously injured condition, it was beyond imagination that in such a situation she would have exonerated the real culprits and instead implicated others. It is also significant that the trial Judge himself inspected the spear, which was seized from the spot vide memo Ex. P/18. He found that the blade of the spear was broken and its end was blunt. The blade and the stick were separate. Edges of blade and spear were also not very sharp. The fact that the spear head had already separated or broken from the stick is also apparent from the crime detail map Ex. P/36, prepared at the spot by the Investigating Officer. In this situation, in our opinion, the trial Court rightly held that after breaking of the blade, the spear would have become like a Lathi and therefore the inconsistency pointed out by the learned counsel for the appellants between the evidence of Kaneza Bi and the medical evidence cannot be regarded material so as to render the evidence of Kaneeza Bi unreliable.

26 Placing reliance on *Joseph vs. State of Kerala*-(2003) 1 Supreme Court Cases 465, learned counsel for the appellants submitted that when the prosecution

case is based on the evidence of solitary eyewitness, his evidence must be wholly reliable. Even if the witness was an injured witness and his presence at the time and place of occurrence was not doubtful, but his evidence was found in conflict with other evidence, it would be unsafe to convict the accused solely on the basis of evidence of said witness. It has been held by the Apex Court in the case of *Joseph* (supra) that it is permissible for a court to record and sustain a conviction on the evidence of a solitary eyewitness. But, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence. In the case of *Joseph* (supra) the trial Court did not find it safe to rely on the evidence of solitary eyewitness and after giving cogent reasons acquitted the accused, but the High Court interfered with the same in the appeal against acquittal preferred by the State. In the present case, the trial Court, after appreciating and evaluating the evidence of Kaneeza Bi came to conclusion that her evidence was cogent, reliable and inspired implicit confidence. The facts of the case of *Anil Prakash Shukla vs. Arvind Shukla*-(2007) 9 SCC 513, cited by the learned counsel for the appellants, are different. In this case the evidence of sole eyewitness was disbelieved by the High Court as the said witness was not a natural witness and he had animosity against the accused. His presence at the scene of occurrence was by a sheer chance. In the light of above circumstances, his evidence was disbelieved because of the inconsistency between the version given by him in the first information and the statement before the trial Court. In *Toran Singh vs. State of Madhya Pradesh*-AIR 2002 SC 2807, the Apex Court found the conduct of the only eyewitness highly unnatural and improbable. When the father of this witness was assaulted with axe, he did not make hue and cry; he did not try to rescue him despite the fact that accused had only one hand. It was doubtful that the accused could have assaulted the deceased with his one hand causing so many injuries on the body of the deceased in the manner stated by the witness. There was delay in lodging the complaint and, apart from it, there were material contradictions and omissions in his statement. In our opinion, ratio of these precedents is not applicable to the facts of the case in hand.

27. Learned counsel for the appellants next submitted that the appellants were falsely implicated. They had no motive to cause death of the deceased persons, especially when Sheikh Munna was the father of accused Sheikh Arif. He argued that some other persons had assaulted the deceased persons and Sheikh Arif had sent accused Sheikh Anwar to police to inform about the said incident, but subsequently police arrested Sheikh Anwar. Iqrar (PW-7) stated that he had entered into an agreement with accused Sheikh Anwar to take his three acres of land for Rs.1 lakh. It was agreed that when money would be returned, he would return the land. The agreement was written on stamp (Ex. P/10). After the agreement he ploughed the land and after some time he relinquished it. According

to him, it was not an agreement for sale. This witness was declared hostile. On perusal of agreement Ex. P/10, it is seen that it was a document of agreement for sale in respect of the land which belonged to Sheikh Anwar in Survey No. 169 of village Patera (wrongly recorded as 'Paura'). Out of 1.63 hectare, 1.20 hectare of land was agreed to be sold. It was mentioned in the document that the land was to be sold for Rs.1,50,000/-. Rs.1 lakh was received by Sheikh Anwar on 21.3.2005 and rest of the money was to be paid at the time of registration within one year. The possession of the land was given to Iqrar. Another witness Ashraf Khan (PW-6) stated that he purchased .88 hectare of land from Sheikh Anwar out of survey No. 169 for rupees one lakh. A sale deed was executed in the office of Sub Registrar, Jabalpur. According to him, it was orally agreed that the possession of the land would be delivered in April 2007. He admitted that he had paid full amount to Sheikh Anwar. According to him, accused Sheikh Arif had told him that this land was given by him on lease to Tante Sarpanch. The Sale deed Ex. P/47 was executed by Sheikh Anwar, and his father Sheikh Arif had consented for the same and had also signed it. From the evidence of Ashraf Khan, it is found that the land bearing Survey No. 169 was alienated by Anwar. However, from Ex. P/46, a certified copy of the order passed by the Additional District Judge, Sihora in GA-2/03 deciding an application filed by accused Sheikh Arif under Section 7 of the Guardian and Wards Act against Sheikh Munna (deceased), it is revealed that Sheikh Anwar was minor son of Arif and Sheikh Munna, his grand father had purchased immovable properties in the name of Sheikh Anwar. Sheikh Munna was recorded as guardian of the minor sons of Sheikh Arif. Since Sheikh Arif wanted to sell out the property, which stood in the name of Sheikh Anwar, he filed the said application in the Court for his appointment as guardian in place of Sheikh Munna. The contention of Sheikh Arif in the said application was that his father Sheikh Munna was "Aiyyash " (debauch) and he had sold some land of Sheikh Anwar, therefore he was not a fit person to be the guardian of his minor son. By order dated 10.7.2006, the Additional District Judge held that the property of minor Anwar was safe in the hands of Sheikh Munna (Deceased) and the application filed by Sheikh Arif was dismissed. In view of this evidence, in our opinion, accused Sheikh Arif entertained grudge against his father Sheikh Munna, who had married Kaneeza Bi.

28. From the evidence of Kaneeza Bi (PW-24) also it seems that the land, which was sold to Sheikh Ashraf was the place on which Sheikh Munna was killed. Sheikh Arif had agreed to sell this land to two persons and had obtained Rs.1 lakh. Kaneeja Bi asked Ikku (Iqrar) son of Rafiq to not to sow the land and assured him that she would pay him Rs.1 lakh and Ikku agreed for that. Since there is absolutely no evidence on record to show that the land, which was the cause of dispute, was in possession of any other person, it cannot be presumed that anybody else had any grudge against Sheikh Munna. On the other hand, it is

apparent that Sheikh Arif had obtained money by getting the disputed land sold to Ashraf. Sheikh Arif must have knowledge that the sale deed executed by Sheikh Anwar (minor) could have been set aside in the absence of consent of guardian Sheikh Munna. Since the aforesaid land was being cultivated by Kaneeza Bi and her son Sheikh Shahid, he must have grudge against them. The finding recorded by the trial Court that the accused Sheikh Arif had motive for committing the offence, therefore, is justified.

29. The next criticism made by the learned counsel for the appellants is that the investigation conducted by D.S. Thakur (PW-21) was not fair; the first information report was made ante-timed; it was not possible for him to have recorded the Dehati Nalishi (Ex. P/35) at 4.30 p.m. as according to Ex.P/4, MLC report of Kaneeza Bi, her medical examination was done at 5.00 p.m. at the hospital. He submitted that according to prosecution the inquest proceedings of the dead bodies of Sheikh Munna, Sheikh Alam and Sheikh Shahid were conducted at about 3-3.15 p.m., whereas PW-21 had received a telephonic intimation about the quarrel at 3.10 p.m. as revealed from Ex.D/4, copy of the Rojnamcha (daily diary) dated 23.10.2006. He further submitted that it is also doubtful that the Murg Intimation under Section 157 of the Code of Criminal Procedure was at all sent to Magistrate. Non-mentioning of the names of accused persons in the inquest memorandums and the requisitions sent to doctor for the postmortem examination also indicate that the first information report was made ante-timed.

30. In *Bijoy Singh and another vs. State of Bihar* (2002) 9 SCC 147 the Apex Court observed that:

> "Sending the copy of special report to the Magistrate as required under Section 157 of the Criminal Procedure Code is the only external check on the working of the police agency, imposed by law which is required to be strictly followed. The delay in sending the copy of the FIR may by itself not render the whole of the case of the prosecution as doubtful but shall put the court on guard to find out as to whether the version as stated in the court was the same version as earlier reported in the FIR or was a result of deliberation involving some other persons who were actually not involved in the commission of the crime. Immediate sending of the report mentioned in Section 157 of the Code of Criminal Procedure is the mandate of law. Delay wherever found is required to be explained by the prosecution. If the delay is reasonably explained, no adverse inference can be drawn but failure to explain the delay would require the court to minutely examine the prosecution version for ensuring itself as to whether any innocent person has been implicated in the crime or not."

31. Investigating Officer D.S. Thakur (PW-21) testified that on 23.10.2006 he was Assistant Sub Inspector at Police Station Majhauli. He received an information by telephone that some quarrel was going on between Sheikh Arif and Sheikh Munna in respect of Agricultural land in village Mudkuru. On this information, he proceeded for the spot in a jeep. Near a pond, by the side of main road, he found Kaneeza Bi, who narrated the incident to him. On the aforesaid information, he recorded Dehati Murg Intimations (Ex. P/32, P/33 and Ex. P/34) and *Dehati Nalishi* (Ex. P/35) and obtained her thumb impression on it. Thereafter he conducted inquest proceedings and recorded memorandums (Ex. P/15, P/16 and Ex. P/17). He sent the aforesaid Dehati Nalishi to Police Station, Majhauli by the hands of Constable Patiram and sent the dead bodies for the postmortem examination. He seized spear and sword from the field. According to him, Ex. D/2, copy of the first information report, was sent to the concerned Magistrate. Its receipt was Ex. D/3. On perusal of Ex. D/2 and Ex. D/3, it seems that the intimation report under Section 157 of the Code of Criminal Procedure was sent to Magistrate on 24.10.2006 i.e. on the next day of the incident. Head Constable Ugra Sen (PW-12) testified that on 23.10.2006 dehati Nalishi of the incident was brought by Constable Patiram to Police Station, Majhauli. This *Dehati Nalishi* purported to have been recorded at 4.30 p.m. and the time of the incident was shown to be 2-3 p.m.. It was in the handwriting of Assistant Sub Inspector D.S. Thakur. On the basis of Dehati Nalishi he had registered Crime No. 210/06 under Sections 302 and 307/34 of the Indian Penal Code by recording first information report (Ex. P/22). He had also received Dehati Murg Intimations about the death of Sheikh Munna, Sheikh Alam and Sheikh Shahid. D.S. Thakur (PW-21) though at one place in cross-examination stated that the copy of the intimation report was sent to Magistrate on 23.10.2006 itself, but at another place he stated that carbon copy of the first information report was sent to Magistrate on 24.10.2006, which was Ex. D/2. It can be assumed that the Investigating Officer, who apparently, after the occurrence, was under mental pressure and was involved in various steps of investigation pertaining to inquest, seizure, sending the dead bodies for postmortem examination etc., under some confusion, stated that the aforesaid intimation was sent on 23.10.2006. However, from the record, it is established that the said intimation was sent on 24.10.2006. From the copy of the Rojnamcha, which was recorded at 1.10 O'clock in the night intervening between 23/24.10.2006, it is revealed that the Investigating Officer remained busy till night. Under these circumstances, sending of intimation report to the Magistrate on the next day of the occurrence cannot be said to be delayed.

32. On perusal of *Dehati Nalishi* (Ex. P/35) and inquest memorandums (Ex. P/15, P/16 and Ex. P/17) it appears that there were discrepancies in respect to the time of recording the aforesaid documents and no names of accused persons were mentioned therein. The time mentioned in the inquest memorandum was

around 3.00 p.m. whereas *Dehati Nalishi,* which was recorded on the basis of information furnished by Kaneeza Bi shows its time as 4.30 p.m.. According to the medical examination report of Kaneeza Bi (Ex. P/4) the time of her examination was 5.00 p.m.. It is apparent that there are inconsistencies in respect of timings mentioned on the aforesaid documents, but, in our opinion, in a case where three murders had taken place and Kaneeza Bi, who gave the information about the occurrence was also seriously injured, the mental pressure and anxiety of the Investigating Officer should be taken into account. Other persons of staff of the police were also involved in different parts of the investigation. Investigating Officer D.S. Thakur himself was a junior officer being only an Assistant Sub Inspector. In this factual situation, the mistakes in respect of timings of various documents and the mistake of non-mentioning the names of accused persons on the inquest documents were possible. No adverse inference can be drawn on account of it. Statement of the Investigating Officer was recorded after about one year, that too in parts and on different dates. The examination chief was recorded on 13.4.2007; cross-examination was done on 1.9.2007, 6.10.2007 and 21.5.2008. In tedious investigation within short span of time in respect of triple murders, the occurrence of mistake in respect of timing cannot be said to be unnatural, especially when there appears no ulterior motive or malafide on the part of Investigating Officer. In *Dharmendrasinh Alias Mansing Ratansinh vs. State of Gujrat*- (2002) 4 SCC 679, the Apex Court while considering the similar questions, observed:

> "There is definitely a contradiction about the lodging of the FIR but the effect of such contradiction or discrepancy may have to be viewed in the light of the facts and circumstances of each case. There may be cases where such a discrepancy may prove fatal to the prosecution case whereas in other cases it may not have the same effect. The consequences of such discrepancies or defective or doubtful investigation is not necessarily only one leading to discredit the main prosecution case if the prosecution evidence inspires confidence and circumstances lead to such a conclusion and the prosecution story rings true. No doubt in that event it would be necessary to evaluate as to what extent such faulty investigation or discrepant statement on certain facts relating thereto, shall cause damage to the prosecution case as a whole. The trial court and the High Court have rightly placed implicit reliance upon the statement of PW 3 despite the infirmities which crept in due to careless investigation and contradiction regarding the place of lodging of the report."
>
> "..... The chances of making some embellishment here and there in the statement are not ruled out even in cases of otherwise truthful and reliable witnesses. The concept of *falsus in uno and*

> *falsus in omnibus* has been discarded long ago. Therefore, in such circumstances the court may have to scrutinize the matter a bit more closely and carefully to find out as to how far and to what extent the prosecution story as a whole is demolished or it is rendered unreliable. For this purpose the statement of the witnesses will have to be considered along with other corroborating evidence and independent circumstances so as to come to a conclusion that the contradiction in the statement of a witness could be considered as an embellishment by the witness under one or the other belief or notion or it is of a nature that the whole statement of the witness becomes untrustworthy affecting the prosecution case as a whole. The same principle will apply to a faulty or tainted investigation. Other relevant facts and circumstances cannot be totally ignored altogether. While appreciating the matter, one of the relevant considerations would be that chances of false implication are totally eliminated and the prosecution story as a whole rings true and inspires confidence. In such circumstances, despite the contradictions of the defective or tainted investigation, a conviction can safely be recorded."



From Ex. D/4 itself, it is apparent that a vague information in respect of quarrel between Sheikh Munna and Sheikh Arif was received at 3.10 p.m.. On the basis of the said information, Investigating Officer had proceeded to the spot. On way he found Kaneeza Bi and recorded *Dehati Nalishi* (Ex. P/35) on her information. Though she was in injured condition, but on her showing the spot he prepared spot map. Mere absence of her thumb impression on the spot map (Ex. P/36) cannot create doubt about the veracity of the investigation. The argument advanced by the learned counsel for the appellants that since the Investigating Officer did not take steps for obtaining the finger prints which could have been found on the weapons of the offence seized from the spot, the investigation was unfair, cannot be accepted in view of the explanation furnished by D.S. Thakur (PW-21) that he could not pay attention on this aspect, as the constable who could have taken the finger prints, was not available at that time.

33. The investigation conducted by D.S. Thakur (PW-21) , in the facts and circumstances of the case, in our opinion, cannot be discarded altogether. Even if some mistakes are detected in various steps of investigation, merely on that basis the truthfulness of the investigation cannot be doubted.

34. The contention made by the learned counsel for the appellants that Kaneeza Bi (PW-24) did not know that the land on which the incident occurred had already been sold out to Ashraf, therefore, she had gone to plough the same along with Sheikh Munna and Sheikh Shahid and it is quite possible that men of Tante and

shraf might have assaulted her and the deceased persons and that accused Sheikh Anwar had gone to inform the police about the incident of assault over Sheikh Munna at about 2.00 p.m., in our opinion, is not acceptable. Except the statement of accused under Section 313 of the Code of Criminal Procedure, there is no material on record to support this contention. In para-20 Kaneeza Bi admitted that the said land had been sold by Sheikh Anwar to Ashraf and a case in respect of that land had been won by Sheikh Munna. Accused Sheikh Arif had obtained money in respect of the said land from two persons, but she had requested Ikku and Rafiq that she would pay Rs.1 lakh to them and they should not go on the land. According to her, they had agreed for that. She denied the suggestion of defence that accused Sheikh Anwar had given the said land on lease for one year to Tante, son of Rafiq. She denied that the land was in possession of Tante for one year. She categorically stated that being 'Bali' (guardian) of Sheikh Anwar, Sheikh Munna had been in possession, but, since, the land was purchased by Sheikh Munna in the name of Sheikh Anwar (minor), it stood in the name of Anwar. The contention that accused Sheikh Anwar had gone to inform the police about the "Mar-Peet" of Sheikh Munna, does not appear natural and probable. It seems highly unnatural that accused Sheikh Anwar, who was son of Sheikh Munna, instead of saving his father and raising hue and cry to attract the attention of the people, would simply go to police station, which is said to be about 10 Kms. away from the spot to inform the police. Similarly, the statement of Sheikh Arif under Section 313 of the Code of Criminal Procedure that Kaneeza Bi herself got murdered the deceased persons, is also unacceptable. In the same incident Kaneeza Bi herself suffered severe injuries and her two sons were brutally killed. It cannot even be imagined that with a view to get the property of Sheikh Munna she would have gone to the extent of getting her sons killed and herself suffered serious injuries.

35. We are also not in agreement with the arguments of Shri S.K.P. Verma, learned counsel appearing on behalf of appellants, that Kaneeza Bi being closely related to deceased persons was interested in the prosecution of the sons of Sheikh Munna. In our opinion, merely being relative of the deceased makes out no ground to reject the testimony of Kaneeza Bi, which is otherwise found trustworthy and reliable. We also find no merit in his submission that the instant case would be a case of sudden quarrel between the two parties for the reason that there is absolutely no evidence or material on record to even remotely indicate that the deceased persons indulged in any kind of altercation or quarrel with the accused persons.

36. In the light of what we have stated above, we find the presence of prosecution witness Kaneeza Bi (PW-24) established on the spot. Despite the inconsistencies and discrepancies to be found in her evidence, we feel that her testimony is cogent, convincing and truthful and inspires confidence to hold the accused/appellants guilty of the commission of the crime. Similar is the situation

with the evidence of Investigating Officer D.S. Thakur (PW-21). It has been proved beyond any shadow of doubt that accused/appellant Sheikh Arif, Sheikh Anwar and Sheikh Saleem had come on the spot armed with spear and sword and had assaulted Sheikh Munna, Sheikh Alam, Sheikh Shahid and Kaneeza Bi (PW-24) with the said weapons, as a consequence of which Sheikh Munna, Sheikh Alam and Sheikh Shahid died on the spot and Kaneeza Bi (PW-24) suffered grievous injuries. The case of the prosecution cannot be discarded and none of the accused is entitled to be acquitted. Their conviction recorded by the trial Court under Section 302 and 307/34 of the Indian Penal Code are, therefore, affirmed.

37. The question now remains is whether the appellant No. 1 Sheikh Arif has rightly been sentenced to the extreme penalty of capital punishment. Learned counsel for the appellants submitted that the trial Court committed error in not properly adverting to the mitigating circumstances existing in the case. According to him, there were no aggravating circumstances, which would have persuaded the trial Court to award death sentence to appellant Sheikh Arif. On the other hand, learned Dy. Advocate General submitted that in the incident the main assaults to deceased persons were given by accused Sheikh Arif. He brutally chopped of the neck of his father and also killed his two step brothers, one of whom viz. Sheikh Alam was an innocent child of about 3 years age only. He justified the order of death sentence passed by the trial Court.

June-09 (First)

38. In *Allaudiniya vs. State of Bihar*-AIR 1989 SC 1456 the Apex Court observed that :

> "Unless the nature of crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the court ordinarily impose the lesser punishment and not the extreme punishment of death, which should be reserved for exceptional cases only and that in cases in which the crime is so brutal diabolical and revolting as to shock the collective conscience of the community. It would be permissible to award the death sentence. The mere fact that infants are killed, without more, is not sufficient to bring the case within the category of "rarest of rare" cases."

In *Dharmendrasinh alias Mansing Ratansinh vs. State of Gujrat*-(2002)4 SCC 679, Supreme Court, after considering in detail number of other cases decided by itself, reiterated:

> "Every murder is a heinous crime. Apart from personal implications, it is also a crime against the society but in every case of murder death penalty is not to be awarded. Under the present legal position, imprisonment for life is the normal rule for punishing crime of murder and sentence of death would be awarded only in

the rarest of rare cases. A number of factors are to be taken into account namely, the motive of the crime, the manner of the assault, the impact of the crime on the society as a whole, the personality of the accused, circumstances and facts of the case as to whether the crime committed, has been committed for satisfying any kind of lust, greed or in pursuance of anti-social activity or by way of organized crime, drug trafficking or the like. Chances of inflicting the society with a similar criminal act that is to say vulnerability of the members of the society at the hands of the accused in future and ultimately, mitigating and aggravating circumstances of each case have to be considered and a balance has to be struck."

39. Considering the facts of the present case, we take note of the fact that the cause of incident was the dispute about the land, which stood in the name of Sheikh Anwar, who was minor son of accused Sheikh Arif. Sheikh Munna (deceased), who was the father of Sheikh Arif had purchased the land and properties in the name of minor Sheikh Anwar. Though the lands were owned by Sheikh Anwar, but Sheikh Munna did not permit Sheikh Arif to sell out the said lands. Sheikh Arif though applied before the Court of Additional Sessions Judge under Section 7 of the Guardian and Wards Act for his appointment as guardian in respect of property of his sons including Sheikh Anwar in place of his father Sheikh Munna, yet the said application was dismissed by the Court holding that the property of minor was more secure and safe in the hands of Sheikh Munna. It is on record that accused Sheikh Arif had tried to get the property of minor Sheikh Anwar alienated through agreement of sale dated 21.3.2005 and sale deed dated 19.5.2006 in favour of Ikrar Khan and Ashraf Khan respectively. In view of the order passed by the court in respect of guardianship of Anwar against Sheikh Arif, he could have been compelled to return the money received by him or his son for the said transactions. It is also on record that Sheikh Munna had married fifth time to Kaneeza Bi, who already had children from her former husband and who also gave birth to Sheikh Alam after being married to Sheikh Munna. The conduct of deceased would have naturally hurt Shiekh Arif, as not only the property, but also the love and affection of Sheikh Munna towards the family was parted. Though the act of killing of Sheikh Munna, Sheikh Alam and Sheikh Shahid by accused Sheikh Arif was apparently quite brutal and heinous, yet it was not committed for satisfying any kind of lust, greed or in pursuance of any antisocial activity or by way of an organized crime. Chances of repetition of such a criminal act at his hands are also not present. He has no previous criminal record and he cannot be described as a menace to society.

40. For the above reasons, in our opinion, it cannot be said that the case against accused Sheikh Arif falls in the category of 'rarest of rare cases' making him liable for the extreme penalty of death. Though his act is condemnable, however,

in our view, the normal sentence of life imprisonment for the offence under Section 302 of the Indian Penal Code would meet the ends of justice.

41. In the result, appeal of appellant Sheikh Arif is partly allowed. Death sentence awarded to him by the trial Court is set aside and instead he is sentenced to imprisonment for life under Section 302 of the Indian Penal Code on all the three counts. The conviction and sentences of other two appellants viz Sheikh Anwar and Sheikh Saleem under Section 302 of the Indian Penal Code are upheld. The sentence of imprisonment for life awarded to appellant Sheikh Arif and sentence of rigorous imprisonment for 10 years awarded to other appellants, by the trial Court, under Section 307 of the Indian Penal Code is however reduced to the rigorous imprisonment for seven years. Accordingly, appeals are partly allowed.

42. Criminal Reference No.1/09 under Section 366 of the Code of Criminal Procedure made by the learned Additional Sessions Judge, for confirmation of the death sentence of accused Sheikh Arif is rejected.

43. A copy of this judgment be kept in the record of Criminal Appeal No.2311/2008.

*Order accordingly.*

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**I.L.R. [2009] M. P., 1825**
**ARBITRATION CASE**
***Before Mr. Justice Rajendra Menon***
14 May, 2009*

LALIT OSWAL ... Applicant
Vs.
A.K. TRIVEDI & anr. ... Non-applicant

**A. Arbitration and Conciliation Act (26 of 1996), Section 2(e) -** ***Court - Only a principal civil court of original jurisdiction and a High Court which exercises ordinary original civil jurisdiction falls within the purview of Court - Chief Justice or his nominee exercising power u/s 11(6) do not fall in the category of Court.*** (Para 20)

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

**B. Arbitration and Conciliation Act (26 of 1996), Sections 12, 14 & 15 -** ***Appeal - Any person aggrieved by failure to challenge made u/s 12, is required to wait till award is pronounced and can challenge the rejection of his challenge only after the final award is made u/s 13(4).*** (Para 25)

*Arbitration Case No.3/2007 (Jabalpur)

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

**Cases referred :**

(2005) 8 SCC 618, (2007) 4 SCC 451, AIR 1987 SC 2386, (2002) 7 SCC 736, 2000(1) Arb.LJ 39 (AP), 2001(1) Kar.LJ 17, (2002) 2 SCC 388, AIR 2007 SC 465, (2008) 6 SCC 741.

*V.R. Rao, Alok Aradhe* with *Shravan Rao & Jaideep Sirpurkar,* for the applicant.

*Ashish Shroti & S.K. Shrivastava,* for the non-applicant.

**O R D E R**

RAJENDRA MENON, J. :–As common questions of law are involved in both these applications, they are being considered and decided by this common order.

2. Arbitration Case No.3/2007 is filed under section 11(6) read with sections 14 and 15 of the Arbitration and Conciliation Act, 1966 (hereinafter referred to as the 'Act'); whereas Arbitration Case No.14/2007 is filed under section 11(6) read with section 15 of the Act.

3. In Arbitration Case No.3/2007, applicant Lalit Oswal is Managing Partner of M/s Lalit Construction Company, a Partnership Firm having its office at Durg, District Chhatisgarh. The Firm is engaged in the business of execution of Civil Works, which mainly includes construction of bridges. Respondent No.2 M/s Keti Constructions Limited is a Company registered under the provisions of Companies Act and has its office at Indore. This Company is also engaged in the business and execution of civil contracts.

4. It is stated that in the year 1999, Government of Maharashtra gave a contract to respondent No.2 for construction of a bridge alongwith approach road and culverts at Koyana River, Satara, Maharashtra. The aforesaid work was awarded to respondent No.2 under Built, Operate and Transfer Scheme. It is averred that applicant was appointed as Sub Contractor by respondent No.2 for the purpose of executing some of the work allotted to respondent No.2 by the Government of Maharashtra. Accordingly, for the work assigned to the applicant by respondent No.2 - Agreement A/1 was entered into on 24.9.1999. Clause 13 of the aforesaid Agreement contained an arbitration clause for resolution of all disputes or differences by reference to a sole arbitrator. It seems that certain dispute arose between the parties i.e.. respondent No.2 and the present applicant in the matter of execution of work and, therefore, the matter was referred to one Shri S.S. Patwardhan, who was named as the sole arbitrator in the Agreement in question , alongwith supplementary Agreement – Annexure A/2 dated 18.12.2000. When

the sole arbitrator named in the Agreement expressed his inability to function as an arbitrator, with the consent of the applicant and respondent No.2, respondent No.1 Mr. A.K. Trivedi, a retired Chief Engineer, Public Works Department, MP was appointed as an Arbitrator. The Arbitrator commenced his proceedings and it is the case of the applicant that the Arbitrator did not disclose all the material facts, which were relevant to be informed under section 12 of the Act. It is stated that initially a declaration was made by the arbitrator that he has no interest in the matter, but subsequently it transpired that certain criminal cases were pending against him, he belongs to Indore city where respondents are residing and there was possibility of common friendship. It is further stated that when issues were to be framed, the arbitrator did not frame proper issues, application were filed for framing proper issues, which were not properly considered and finally adjournments on certain dates were also refused without any justification. Contending that the Arbitrator has committed breach, which is a ground for challenge under section 12 of the Act and he has also committed certain acts due to which he can be removed under section 13, challenge was made to the procedure of Arbitration and when the Arbitrator rejected the challenge, this application is filed under section 11(6) read with sections 14 and 15, for termination of mandate and substitution of arbitrator. All the documents pertaining to the Agreement, the proceedings held by the Arbitrator, the criminal case in which he was involved and other relevant documents are available on record and if required, shall be referred to in detail subsequently.

5. As far as Arbitration Case No.14/2007 is concerned, applicant was granted a contract by respondent Railway Administration for supply of 65 mm stone Ballast at Sleemnabad Depot vide Contract Agreement dated 3.3.2004. Clause 66 of the Agreement contemplated an arbitration provision. Dispute arose between the parties and, therefore, on 17.10.2005, the applicant invoked the arbitration clause and in accordance to the terms and conditions, requested the General Manager to constitute an Arbitration Tribunal. When the request was not acceded to an application under section 11(6) of the Act was filed before this Court, being MCC No.525/2006. It is stated that the Arbitrator was appointed, but as the Arbitrator was not proceeding in the matter within time and as the matter is being delayed, prayer made is to terminate the mandate of the Arbitrator and nominate a person to constitute the Arbitration Tribunal by this Court. Accordingly, in Case No.14/2007, on the ground of delay being caused by the Arbitrator, prayer made is to terminate the mandate and to appoint another Arbitrator under section 11(6) of the Act.

6. Shri V.R. Rao and Shri Alok Aradhe, learned Senior Advocates, referred to the provisions of Sections 11, 12, 13, 14 and 15 of the Act and submitted that when the ground of challenge contemplated under sections 12 and 13 are available and when the Arbitrator acts in a manner, resulting in failure or impossibility to

act, a mandate for termination of the Arbitrator contemplated under section 14 can be sought for and a prayer can be made under section 15 to terminate the mandate and substitute the Arbitrator. Taking me through the facts that have come on record evidencing the irregularity/illegality said to have been committed by the Arbitrator, both the learned Senior Advocates submitted that it is a fit case where the directions as sought for can be issued.

7. Shri Alok Aradhe, learned Senior Advocate, during the course of hearing submitted that even though under sub-section (4) of Section 13, after the challenge is rejected by the Arbitrator, the aggrieved party has to wait till the final award is made to challenge the order. It is his contention that in a case falling under section 14(1), the application can be filed directly before this Court. It was emphasized by him that the conduct of the Arbitrator in the matter of not disclosing the correct facts with regard to pendency of the criminal case against him and various other factors, creates a situation where the Arbitrator becomes ***de jure*** unable to perform his function and, therefore, it is argued by him that this Court exercising power under section 14 can terminate the mandate. It was argued by both the learned Senior Advocates that the termination of the mandate by applying to the Court contemplated under sub-section (2) of Section 14 means the Court, which has appointed the Arbitrator or the Court, which has jurisdiction to appoint the Arbitrator under section 11. According to learned counsel, an application under section 14(2) would lie before this Court and it was emphasized by them that the definition of 'Court' appearing in section 2(e), so far as it relates to proceeding under section 14, would include the Court empowered to appoint the Arbitrator under section 11, of the Act.

8. Inviting attention of this Court to the principles laid by a Constitution Bench of the Supreme Court, in the cases of *S.B.P. & Company Vs. Patel Engineering Limited and Another,* (2005) 8 SCC 618; and, by another Bench in the case of *National Thermal Power Corporation Limited Vs. Siemens Atkeingesellschaft,* (2007) 4 SCC 451; Shri Alok Aradhe, learned Senior Advocate emphasized that the Court referred to in Section 14 would be this Court and the jurisdiction to proceed in the matter is available only to this Court. By referring to the observations made by the Supreme Court, in paragraph 7 and 18 in the case of *Patel Engineering* (supra) and the principles laid down in the said judgment, Shri Aradhe emphasized that when the mandate of the Arbitrator is required to be terminated for the grounds contemplated in the Act, this Court can pass appropriate orders. Shri V.R. Rao, learned Senior Advocate, supported the aforesaid contention and added that when the Arbitrator is appointed by the High Court or the Supreme Court as the case may be under section 11, it cannot be conceived that the Arbitrator can be removed by terminating his mandate by an inferior court i.e.. the District Court. Accordingly emphasizing that the 'Court' defined under section 2(e) of the Act for the purposes of sections 12, 13, 14 and 15 would

mean the same Court, which has power to appoint the Arbitrator under section 11 or the High Court, both the learned Senior Advocates argued that this Court has jurisdiction to entertain the application. That apart, pointing out bias and misconduct committed by the Arbitrator, both learned Senior Advocates argued that it is a fit case where interference should be made and the mandate terminated.

9. In support of the contention with regard to bias and misconduct by the Arbitrator, Shri Alok Aradhe, learned Senior Advocate, invited attention of this Court to judgment of the Supreme Court in the case of *Ranjit Thakur Vs. Union of India and Others*, AIR 1987 SC 2386.

10. Refuting the aforesaid contention and placing reliance on the judgments of the Supreme Court in the case of *Grid Corporation of Orissa Limited Vs. AES Corporation and others*, (2002) 7 SCC 736; *M. Mohan Reddy Vs. Union of India and others*, 2000(1) Arb. LJ 39 (AP); *R.K. Agrawal and another Vs. B.P.K. Johri and others*, 2001(1) Kar.LJ 17; and referring to the definition of 'Court' as contemplated under section 2(e) of the Act, Shri Ashish Shroti and Shri Sudhir Shrivastava argued that the 'Court' referred to in Section 14 would mean the principal Civil Court or the High Court having original civil jurisdiction and not the Chief Justice or his nominee as envisaged under section 11 or the High Court. It was argued by learned counsel for the respondents that the applications filed are not maintainable and the applicants, if aggrieved by rejection of their objection for termination of mandate are required to wait till passing of the final award and thereafter they can challenge the rejection in accordance to the procedure contemplated under section 34 read with section 37. It is argued by learned counsel for the respondents that the 'Courts' referred to in the Act will not include the Chief Justice or his nominee contemplated under section 11 and, therefore, at this stage the application before this Court, which is only empowered to exercise jurisdiction under section 11 is not maintainable. Accordingly, learned counsel for the respondents pray for rejection of this application.

11. I have heard learned counsel for the parties at length and perused the record. At this stage, before entering into the merits of the allegations levelled against the Arbitration Tribunal's and the grounds and reasons, which have been placed on record seeking termination of the mandate, it is necessary first to address the question of jurisdiction.

12. The Act of 1996 is a comprehensive legislation intended to resolve international and commercial dispute by Arbitration and Conciliation in a speedy manner. It is an Act to consolidate and amend the law relating to international commercial arbitration and domestic arbitration. The preamble of the Act clearly indicates that after the modern law for commercial arbitration was adopted by the General Assembly of the United Nations through the United Nations Commission on International Trade Law (UNCITRAL), the recommendation was to consider the Model Law and to establish a unified legal frame work for fair, effective and

early settlement of dispute arising in international and commercial activities. It is because of the aforesaid reason that the Arbitration Act of 1940 was replaced by the present Act and if the Scheme of the present Act is scanned, it would be seen that the Scheme contemplates a detailed procedure for speedy and effective disposal of arbitration in the manner contemplated under the Act. Section 11 of the Act contemplates a procedure for appointment of Arbitrator. Under the said scheme pertaining to appointment of Arbitrator, it is the Chief Justice of a State, his nominee (i.e. any person) or the institute designated by him, which is empowered to appoint an Arbitrator for domestic arbitration and with regard to international arbitration it is the Chief Justice of India or the person or institute designated by him, which is to perform the function of arbitration. A perusal of Section 11 would indicate that the power to appoint an arbitrator is not conferred on any Court. Section 11 speaks about Chief Justice or any person or institute designated by him.

13. Sub-section 2(e) of the Act defines a 'Court' and the same reads as under:

> "2. (e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes." (Emphasis supplied)

Section 12 contemplates the grounds of challenge to the person appointed as Arbitrator and mandates the Arbitrator appointed to disclose any disqualification, which he may have. Sub-section (3) of this section entitles the parties to challenge the Arbitrator. The procedure for challenge contemplated under section 12 is provided for in section 13, whereas section 14 deals with matters arising due to failure or impossibility for an Arbitrator to Act. Section 15 provides detailed procedure for termination of the mandate of the Arbitrator and substitution by another Arbitrator. Section 16, which is provided in Chapter IV, deals with jurisdiction of the Arbitral Tribunal and competency of the Tribunal to decide objections on its jurisdiction. On a perusal of the various provisions, particularly sections 13 and 16, it would be seen that in the event of failure of challenge or rejection of objection, the aggrieved person has to wait until the final award is made and the decision on the objection to jurisdiction can only be challenged in an appeal in accordance to Section 34 of the Act. However, certain matters, which include objection with regard to acceptance of jurisdiction, can be challenged under section 37 of the Act.

14. The same being the Scheme of the Act, it would be appropriate at this stage to consider the objection raised by the respondents with regard to tenability of the applications before this Court.

15. For the purpose of considering the objection raised by the respondents, meaning of the term 'Court' defined under section 2(1)(e) and indicated in Sections 14, 34 and 37 would become relevant. In the present cases meaning of the word 'Court' referred to in section 14 may only be relevant, but as the word 'Court' is used in other sections also i.e.. under sections 34 and 37, it is appropriate to consider the same also.

16. A perusal of the definition of 'Court' as provided in Clause 2(1)(e) would indicate that a 'Court' means the 'the principal Civil Court of original jurisdiction in a district and it includes the High Court, which exercises original civil jurisdiction and having jurisdiction to decide questions forming the subject-matter of arbitration in case the same has been subject-matter of a suit'.

17. Admittedly, this Court is presently exercising jurisdiction as a person designated by the Chief Justice under section 11(5) read with section 11(6) of the Act. The question, therefore, would be as to whether the Chief Justice or his nominee or the institute designated by the Chief Justice under section 11 would be a Court for the purposes of section 14(2) also.

18. Shri Alok Aradhe, learned Senior Advocate, placing reliance on the principles laid down by the Constitutional Bench in the case of *Patel Engineering* (supra) emphasized, that over-ruling an earlier judgment of the Supreme Court in the case of *Konkan Railway Corporation Limited Vs. Rani Construction (P) Limited,* 2002 (2) SCC 388, the Constitutional Bench has held that the orders passed by the Chief Justice or his nominee exercising jurisdiction under section 11 are not administrative in nature, but they are judicial orders passed exercising judicial powers and, therefore, it is submitted by him that the word 'Court' indicated in the Act and defined in section 2(e) would include this Court while exercising powers under section 11(6).

19. The question is as to whether the aforesaid contention of Shri V.R. Rao and Shri Alok Aradhe, learned Senior Advocates, are correct or not? Answer to the aforesaid question can be found if the principles laid down by the Supreme Court in paragraph 13, in the case of *Patel Engineering* (supra) is scanned. In paragraph 13, it has been so held by the Supreme Court:

> "13. It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration, but at the same time, it has made some departures from the model law. Section 11 is in the place of Article 11 of the Model Law. The Model Law provides for the making of a request under Article 11 to "the court or other authority specified in Article 6 to take the necessary measure". The words in Section 11 of the Act are "the Chief Justice or the person or institution designated by him". The fact that instead of the court, the powers are conferred on the

Chief Justice, has to be appreciated in the context of the statute. 'Court' is defined in the Act to be the principal civil court of original jurisdiction of the district and includes the High Court in exercise of its ordinary original civil jurisdiction. The Principal Civil Court of original jurisdiction is normally the District Court. The High Courts in India exercising ordinary original civil jurisdiction are not too many. So in most of the States the court concerned would be the District Court. Obviously, Parliament did not want to confer the power on the District Court, to entertain a request for appointing an arbitrator or for constituting an Arbitral Tribunal under Section 11 of the Act. It has to be noted that under Section 9 of the Act, the District Court or the High Court exercising original jurisdiction, has the power to make interim orders prior to, during or even post arbitration. It has also the power to entertain a challenge to the award that may ultimately be made. The framers of the statute must certainly be taken to have been conscious of the definition of 'court' in the Act. It is easily possible to contemplate that they did not want the power under Section 11 to be conferred on the District Court or the High Court exercising original jurisdiction. The intention apparently was to confer the power on the highest judicial authority in the State and in the country, on Chief Justices of High Courts and on the Chief Justice of India. Such a provision is necessarily intended to add the greatest credibility to the arbitral process. The argument that the power thus conferred on the Chief Justice could not even be delegated to any other Judge of the High Court or of the Supreme Court, stands negatived only because of the power given to designate another. The intention of the legislature appears to be clear that it wanted to ensure that the power under Section 11(6) of the Act was exercised by the highest judicial authority in the concerned State or in the country. This is to ensure the utmost authority to the process of constituting the Arbitral Tribunal."

(Emphasis supplied)

Thereafter, in paragraph 18, it is held as under:

"18. It is true that the power under Section 11(6) of the Act is not conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of India or the Chief Justice of the High Court. One possible reason for specifying the authority as the Chief Justice, could be that if it were merely the conferment of the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including

the right of appeal and the Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by Courts in the arbitral process. Therefore, the power was conferred on the highest judicial authority in the country and in the State in their capacities as Chief Justices. They have been conferred the power or the right to pass an order contemplated by Section 11 of the Act. We have already seen that it is not possible to envisage that the power is conferred on the Chief Justice as persona designata. Therefore, the fact that the power is conferred on the Chief Justice, and not on the court presided over by him is not sufficient to hold that the power thus conferred is merely an administrative power and is not a judicial power."

(Emphasis supplied)

20, It is clear from the aforesaid enunciation of law and Scheme of the Act that it is only a principal Civil Court of original jurisdiction, which is normally the District Court and a High Court which exercises ordinary original civil jurisdiction that fall within the purview of Courts as defined under section 2(e) and the Chief Justice or his nominee exercising power under section 11(6) do not fall in the category of 'Court' defined under section 2(e). This aspect of the matter is evident from the principles laid down by the Supreme Court in paragraph 13, reproduced hereinabove, particularly with regard to the highlighted portion and when the observations made in paragraphs 19 and 20 are considered. The purpose of the Act, the reasons for empowering the Chief Justice to nominate an Arbitrator and various other factors, which are considered by the Supreme Court in the aforesaid case clearly indicates that the contention of Shri V.R. Rao and Shri Alok Aradhe, learned Senior Advocates, is not tenable.

21. Further reference in this regard may be made to the observations and the principles laid down by the Supreme Court in paragraphs 40 and 41 of the said judgment. It may also be relevant to refer to Clause (vi) and the conclusion made by the Constitution Bench in paragraph 47 of the said judgment, which reads as under:

"(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act." (Emphasis supplied)

22. In the case of *Grid Corporation of Orissa Limited* (supra) relied upon by Shri Shroti, even though it is held that the Chief Justice or his designate exercising power under section 11(6) is not a Court and, therefore, a conjoint application

under section 11(6) read with section 14 would not lie, but the said judgment is mainly passed on the principle that the Chief Justice or his designate Judge does not discharge judicial functions in view of the law laid down in the case of *Konkan Railway Corporation Limited* (supra), which judgment has been over-ruled by the Constitution Bench in the case of *Patel Engineering* (supra).

23. However, the Supreme Court has again considered the meaning of the word 'Court' as contained in Clause 2(1)(e), in the case of *M/s Pandey & Co. Builders Private Limited Vs. State of Bihar and another,* AIR 2007 SC 465, and in paragraphs 16 and 17, the matter is so dealt with:

> "16. Unlike the 1940 Act, the Arbitrator is entitled to determine his own jurisdiction. In the event, the Arbitrator opines that he has jurisdiction in the matter, he may proceed therewith, which order can be challenged along with the award in terms of Section 34 of the 1996 Act. If the Arbitrator opines that he has no jurisdiction to hear the matter, an appeal lies before the court. 'Court' has been defined in Section 2(1)(e) of the 1996 Act in the following terms:
>
> "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;"
>
> 17. It is not disputed before us that the Patna High Court does not exercise any original civil jurisdiction. The definition of "court" as noticed hereinbefore means the Principal Civil Court of original jurisdiction in a district and includes the High Court which exercises the original civil jurisdiction. If a High Court does not exercise the original civil jurisdiction, it would not be a 'court' within the meaning of the said provision. Constitution of the courts vis-à-vis the hierarchy thereof is governed by the 1857 Act, Section 3 whereof reads as under:
>
> "3. Classes of Courts - There shall be the following classes of Civil Courts under this Act, namely: -
>
> (a) The Court of the District Judge;
>
> (b) The Court of the Additional Judge;
>
> (c) The Court of the Subordinate Judge; and,
>
> (d) The Court of the Munsif."
>
> (Emphasis supplied)

Finally, the following observations are made in paragraph 25, after taking note of the law laid down in the case of *Patel Engineering* (supra).

> "25. An order passed by a Chief Justice or his nominee under sub-section (6) of Section 11 of the 1996 Act may be a judicial order, as has been held by a Seven-Judge Bench of this Court in *SBP & Company Vs. Patel Engineering Ltd and another* (supra) but the same does not take away the effect of the appellate jurisdiction to be exercised by a court under sub-section (2) of Section 37 of the 1996 Act."

In the case of *Bharat Coking Coal Limited Vs. Annapurna Construction,* (2008) 6 SCC 732, the judgment in the case of *Patel Engineering* (supra) is again considered and the principle reiterated.

The question is again considered in *Garhwal Mandal Vikas Nigam Limited Vs. Krishna Travel Agency,* (2008) 6 SCC 741, and the matter is so dealt with in paragraph 9:

> "9. There is another facet of the problem. The party will be deprived of the right to file an appeal under section 37(1)(b) of the Arbitration and Conciliation Act. This means that a valuable right of appeal will be lost. Therefore, in the scheme of things, the submission of the learned counsel cannot be accepted. Taking this argument to a further logical conclusion, when the appointment is made by the High Court under Section 11(6) of the Arbitration and Conciliation Act, then in that case, in every appointment made by the High Court in exercise of its power under Section 11(6), the High Court will become the Principal Civil Court of Original Jurisdiction, as defined in Section 2(1)(e) of the 1996 Act. That is certainly not the intention of the legislature. Once an arbitrator is appointed then the appropriate forum for filing the award and for challenging the same, will be the Principal Civil Court of Original Jurisdiction. Thus, the parties will have the right to move under section 34 of the 1996 Act and to appeal under section 37 of the 1996 Act. Therefore, in the scheme of things, if appointment is made by the High Court or by this Court, the Principal Civil Court of Original Jurisdiction remains the same as contemplated under section 2(1)(e) of the 1996 Act."
>
> (Emphasis supplied)

24. A conjoint reading of the judgments in the cases referred to hereinabove would clearly indicate that it is only a High Court that exercises original civil jurisdiction, which would come within the meaning of the word 'Court' as defined under section 2(e) and as the High Court of Madhya Pradesh does not exercise

any original civil jurisdiction, it would not be a 'Court' for the purpose of Section 2(1)(e) of the Act. The legislative intent and various other factors that are apparent on going through the judgments of the Supreme Court, in the cases referred to hereinabove, would clearly indicate that the Chief Justice or his nominee (i.e.. any person) or the institute designated by the Chief Justice is not a 'Court' envisaged under section 2(1)(e) and it is only those High Court's which exercise original civil jurisdiction that come within the purview of 'Court' defined in the Act.

25. In that view of the matter, this Court finds much substance in the objection raised by the respondents with regard to maintainability of the applications under section 14 and 15, this Court only exercises jurisdiction under section 11(6) of the Act and, therefore, is not a 'Court' within the meaning of Section 2(1)(e). That apart, it may further be taken note of that under the Scheme of the Act of 1996, any aggrieved person, who is aggrieved by failure to the challenge made under section 12, is required to wait till the award is pronounced and can challenge the rejection of his challenge only after the final award is made under section 13(4). It is only the orders contemplated under section 37, which are appealable, and in such cases the appeal would lie to a Court authorized by law to hear appeals from an original decree of the Court passing the order.

26. Considering the totality of the circumstances and the material available on record, I am of the considered view that the present application filed under section 11 read with sections 14 and 15 is not maintainable and, therefore, finding substance in the objection raised by the respondents, both these applications have to be rejected.

27. In view of the aforesaid, it is not appropriate to go into the merits of the matter argued by Shri V.R. Rao and Shri Alok Aradhe, learned Senior Advocates, now in these applications.

28. Accordingly, the applications are rejected.

*Application rejected.*

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**I.L.R. [2009] M. P., 1836**
**MISCELLANEOUS CRIMINAL CASE**
***Before Mr. Justice N.K. Mody***
25 February, 2009*

ABHILASHA AGNIHOTRI ... Applicant
Vs.
DILIP ... Non-applicant

**Negotiable Instruments Act (26 of 1881), Sections 138 & 145** - *Complaint for dishonor of cheque - On the basis of evidence of complainant on affidavit, cognizance was taken by the Court - Petition for quashment of criminal case on the ground that statement of complainant was not recorded*

*M.Cr.C. No.3944/2008 (Indore)

*and against which liability cheque was issued not mentioned in complaint - Held - U/s 145 evidence of complainant can be recorded on affidavit and Court can on the application of the prosecution or the accused summon and examine any person giving evidence on affidavit - Since cheque was issued and the amount was unpaid despite demand notice, no illegality has been committed by the Court in taking cognizance against applicant on the ground that complainant failed to mention in the complaint that cheque was against which liability - Complaint can not be dismissed - Petition dismissed.*

(Paras 6 to 8)

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

**Cases referred :**

2008(2) DCR 164, 1995 CrLJ 715.

*S.K. Onkar,* for the applicant.

*Amit Sisodiya,* for the non-applicant.

**ORDER**

**N.K. Mody, J.** :–Prayer in this petition is for quashment of criminal case No.37/3008 pending in the Court of JMFC, Kannod, District-Dewas whereby cognizance was taken by the learned Court below against the petitioner under Section 138 of Negotiable Instruments Act, 1881 (which shall be referred hereinafter as "NI Act").

2. Short facts of the case are that respondent filed a complaint against the petitioner under Section 138 of NI Act in the month of January, 2008 alleging that a cheque of Rs.45,00,000/- was issued by the petitioner in favour of respondent. Upon presentation the said cheque was dishonoured and the amount was not paid by the petitioner inspite of notice of demand. It was alleged that petitioner has committed the offence which is punishable under Section 138 of NI Act. After filing of the complaint cognizance was taken by the learned Court below against which the present petition has been filed.

3. Learned counsel for the petitioner argued at length and submits that the

impugned order passed by learned Court below is illegal and deserves to be set-aside. It is submitted that since no statement of respondent was recorded under Section 200 and 202 of Cr.P.C., therefore, the complaint filed by the respondent deserves to be dismissed. It is submitted that it is no where stated in the complaint that the amount of Rs.45,00,000/- was against which liability. Learned counsel for the petitioner placed reliance on a decision of Bombay High Court in the matter of *Roy Joseph Creado Vs. SK Tamisuddin* 2008 (2) DCR 164 wherein Bombay High Court has observed that *"verification of the complaint U/s 200 of the Cr.P.C. is necessary. The purpose of such verification is to determine prima facie truth into the allegations made in the complaint. The verification of complaint is essential U/s 200 of the Cr.P.C. before taking cognizance of the offence not only with a view to find out prima facie truth but also in order to identify the person who, in case the prosecution is found to be frivolous or mala fide, would be liable to answer the charge of perjury or to indemnify the accused persons."* On the strength of aforesaid decision learned counsel for the petitioner submits that the petition filed by the petitioner be allowed and the proceedings initiated against the petitioner be quashed.

4. Learned counsel for the respondent submits that since cognizance has been taken by the learned Court below, therefore, the petition is not maintainable at this stage. So far as statement of respondent under Section 200 of Cr.P.C. is concerned, learned counsel submits that in view of Section 145 of NI Act it is not necessary to record the statement of complainant under Section 200 of Cr.P.C. It is submitted that for the purpose of constituting the offence under Section 138 of NI Act sufficient facts are on record. It is submitted that even if, it is assumed that the statement of respondent has not been recorded under Section 200 and 202 of Cr.P.C, then too, no prejudice has been caused to the petitioner. For this contention reliance is placed on a decision of Karnataka High Court in the matter of *Mallapa Sangapa Desai Vs. Laxmanappa Basappa Whoti* 1995 CRI.L.J. 715 wherein Karnataka High Court in the matter where complaint under Section 138 of NI Act was filed, held that *"though this procedure adopted by the Magistrate is in violation of the provisions of Section 200 Cr.P.C. and is therefore an irregularity, the question that would arise for consideration is whether on account of the improper examination of the complainant the order issuing process could be set aside at the instance of the accused petitioner. It was further observed that as no prejudice is caused to the accused on account of the above irregularity the defect gets cured under Section 465 Cr.P.C. and that the order cannot be set aside on that score."* On the strength of aforesaid decision learned counsel for the respondent submits that the order passed by learned Court below is just and proper and the petition filed by the petitioner be dismissed.

5. Section 145 of NI Act which has come in force by the Act No.455/2002 with effect from 06/02/2003 reads as under :-

**145. Evidence on affidavit.** - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

6. From perusal of aforesaid Section, it is evident that the evidence of the complainant can be recorded on affidavit and as per sub-section (2) of section 145 of NI Act the Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

7. In the present case affidavit has been filed by the respondent. So far as law laid down by Bombay High Court in the matter of *Roy Joseph Creado* (Supra) is concerned, the case is not applicable in the present case because in that case the cheque was dated 20/06/2001 and the complaint was also filed under Section 138 of NI Act in the year 2001 while Section 145 has been inserted in the NI Act in Chapter 17 on 06/02/2003. So far as another submission made by learned counsel for the petitioner that it is no where stated by the respondent that cheque amount of Rs.45,00,000/- was against which liability is concerned, Section 138 NI Act lays down that any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability. Since the cheque was issued by the petitioner and the same was unpaid inspite of demand of notice, this Court is of the opinion that no illegality has been committed by learned Court below in taking the cognizance against the petitioner.

8. In the opinion of this Court at this stage, the complaint cannot be dismissed or charges cannot be quashed only on the account that respondent has failed to mention in the complaint that the cheque was against which liability. However, it is made clear that in evidence petitioner is at liberty to demonstrate that the cheque was against no liability by cross-examining the complainant and other witnesses who shall be examined by the respondent and also by leading the defence evidence. In view of this, petition filed by the petitioner stands dismissed. C.C. as per rules.

*Petition dismissed.*

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**I.L.R. [2009] M. P., 1840**
**MISCELLANEOUS CRIMINAL CASE**
*Before Mr. Justice N.K. Mody*
18 March, 2009*

SHAFIQ ... Applicant
Vs.
STATE OF M.P. & anr. ... Non-applicants

**Criminal Procedure Code (2 of 1974), Section 427** - *Applicant convicted in two complaints u/s 138 of Negotiable Instruments Act, 1881 - Appeals also decided simultaneously - Application for direction to run sentences concurrently - Held - Two complaints were filed by non-applicants against applicant - Trial and appeals were decided simultaneously - Sentence awarded in both the cases should run concurrently - Petition allowed.* (Para 9)

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

**Cases referred :**
2007(1) Crimes 50(50), AIR 1988 SC 2143, 1989 MPLJ 116, 2004 CrLJ 2945, 2007 CrLJ 591, AIR 1988 SC 2143.

*M.S. Chouhan*, for the applicant.
*C.R. Karnik, Dy.G.A.*, for the non-applicant No.1.

**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 sentence awarded to the petitioner in Cr.A. Nos.167/07 and 168/07 decided on 22/01/08 by XVIIIth Additional Sessions Judge, Indore whereby petitioner was convicted U/s 138 of Negotiable Instruments Act (which shall be referred hereinafter as an Act) for a period of one year and fine of Rs.75,000/-and in default further conviction of three months, be directed to run concurrently.

2. Mr.MS. Chouhan. learned counsel for petitioner argued at length and submits that upon filing private complaints case was registered against the petitioner and petitioner was convicted U/s 138 of the Act for a period of one year with fine in each of the case. It is submitted that the conviction was maintained in Cr.A. No. 167/07 & 168/07 vide judgment dated 22/01/08 by XVIII ASJ, Indore. It is submitted

*M.Cr.C. No.1598/2009 (Indore)

that the revision petition filed by the petitioner before this Court which was numbered as Cr.R. No.903/08 was dismissed vide judgment dated 23/09/08. It is submitted that in both the cases the nature of offence was one and in both the cases the complainant was respondent No.2. It is submitted that since there were two cheques, therefore, the petitioner was prosecuted separately and the order of conviction was also passed separately. It is submitted that the petition filed by the petitioner be allowed.

3. Learned counsel for respondent No. 1 submits that since the petitioner has not prayed that the conviction be directed to run concurrently at the time of trial and also in appeal, therefore, at this stage the petition filed by the petitioner is not maintainable and deserves to be dismissed. Learned counsel placed reliance on a decision in the matter of *MR. Kudva Vs. State of Andhra Pradesh.* Reported in 2007(1) Crimes 50(50). It is submitted that petition filed by the petitioner 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 while 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 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 as 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 was filed before the 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, Akthar 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 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 respondent No.2 initiated two criminal complaints U/s 138 of the Act against the petitioner and in both the cases the allegation was that the cheque of Rs.50,000/- in each of the case issued by the petitioner was dishonoured. Both the criminal cases were numbered as Cr.Case Nos. 3539/07 and 3540/07 and both the cases was decided by the learned JMFC on 17/02/07. and in both the cases the appeal filed were numbered as Cr.A. Nos. 167/07 and 168/07 and both the appeals were simultaneously decided vide judgment dated 22/12/08. In the facts and circumstances of the case and also keeping in view the nature of offence and also the fact that in both the cases petitioner was prosecuted upon the complaint of respondent No.2, this Court is of the view that in the interest of justice it is necessary to direct that the sentence awarded in both the cases should run concurrently. In view of this petition filed by the petitioner is allowed and it is directed that the sentence awarded to the petitioner in Criminal Case Nos-3539/07 and 3540/07 by JMFC, Indore vide judgment dated 17/02/07 whereby the petitioner was directed to be sentenced for a period of one year with fine. shall run concurrently.

With the aforesaid observations, petition stands disposed of.

C.C. as per rules.

*Petition allowed.*

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**I.L.R. [2009] M. P., 1843**

**MISCELLANEOUS CRIMINAL CASE**

***Before Mr. Justice A.P. Shrivastava***

12 May, 2009*

BHEEM SINGH BHADORIYA ... Applicant

Vs.

STATE OF M.P. ... Non-applicant

**Criminal Procedure Code, 1973 (2 of 1974), Section 438** - ***Anticipatory Bail - Maintainability - Applicant granted bail - Bail bonds cancelled and non-bailable warrant of arrest issued as he failed to appear before trial Court - Held - Anticipatory bail application not maintainable - He has remedy to approach the Court for recalling the order.*** (Para 14)

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

*M.Cr.C. No.2371/2009 (Gwalior

**Cases referred :**

1995 MPLJ 296, 2000(1) MPHT 409, 2001(4) MPLJ 449, 2004(3) MPLJ 40, 1998 CrLJ 1762, AIR 2005 SC 1057.

*Anil Mishra,* for the applicant.

*S.P. Bhatnagar, P.L.,* for the non-applicant/State.

**ORDER**

**A.P. SHRIVASTAVA, J.** :–This is first application under Section 438 of Cr.P.C. filed by the applicant against the order dated 28.02.2009 passed by the Additional Judge to the Court of First Additional Sessions Judge, Gwalior, in ST No. 210/08.

2. The applicant, earlier, was arrested by Police Station Hujrat Kotwali, under Sections 420, 467, 468, 469, 471 of IPC and was enlarged on bail. By the impugned order, one application filed on behalf of the applicant for exempting the appearance. before the court was rejected. The court observed that the witness was present and on the last date also the applicant was not present. The presence of the applicant was required for identification of the victim, therefore, the application for exemption was rejected and the court forfeited the bail bonds of the applicant and issued non-bailable warrant.

3. The question for consideration arose whether in such circumstances the benefit of provision of Section 438 of Cr.P.C. can be extended to the applicant ?

4. It is submitted by the counsel for the applicant that due to accident, the applicant could not appear before the court and as the non-bailable warrant has been issued by the court, therefore, there is apprehension of arrest. In support of his contention, he relied on various citations out of which full bench decision of this Court is referred in the case of *Nirbhay Singh and another Vs. State of M.P.* reported in 1995 MPLJ 296 in which the ratio is decided in para 14 and 15 which are as follow:

> "14. In our opinion, the conflict between an order of anticipatory bail and non-bailable warrant has to be met in a pragmatic manner striking a balance between individual's right to personal freedom and the invocation of right of the police and the procedure required to be followed by a Magistrate. Where an order of anticipatory bail is passed after issue of non-bailable warrant of arrest by a Magistrate, the duty of the police officer entrusted with execution of the warrant would be to arrest the person and produce him before the Magistrate who thereupon shall deal with the accused as required by the order of anticipatory bail.
>
> 15. In view of what we have indicated above, we are in respectful agreement with the view taken by the High Court of Punjab and Haryana that an application under Section 438, Criminal

Procedure Code would be maintainable even after the Magistrate issued process under Section 204 or at the stage of committal of the case to the Sessions Court or even at a subsequent stage, if circumstances justify the invocation of the provision. This is not to say that the jurisdiction under Section 438 of the Code is to be freely exercised without reference to the nature and gravity of the offence alleged, the possible sentence which may be ultimately imposed, the possibility of inference with the investigation or the witnesses and public interest. With great respect, we are unable to agree with the view taken by the High Court of Rajasthan."

5. He has also relied on *Yogendra Singh Vs. State of M.P. through P.S. Ucchehara, Distt. Satna* reported in 2000 (1) MPHT 409 and *Arun Kumar Vs. State of M.P.* reported in 2001(4) MPLJ 449. It is submitted that both these judgments are of the same Bench.

6. He also relied on *Yuvraj Gaud Vs. State of M.P. and another* reported in 2004(3) MPLJ 40. In case of *Yuvraj Gaud* (supra) the point for issue was different. In that case, the accused charged under sections 420, 467, 468, 471 and 120-B, Indian Penal Code, seeking anticipatory bail. The accused was summoned initially through bailable warrant in a private complaint case and subsequently by a warrant of arrest. Accused was a Government servant. Looking to the allegations in the private complaint, second application for grant of anticipatory bail allowed on certain conditions.

7. Now, I will discuss the case of *Yogendra Singh* (supra) and *Arun Kumar* (Supra). In the case of *Yogendra Singh* (supra), it was observed by this court that an application for anticipatory bail in respect of accusation of a non-bailable offence, by a person who was already released on bail or anticipatory bail in respect of accusation of that very non-bailable offence, is not maintainable, when warrant of arrest is issued by a Court against him as he defaulted in appearance while on bail or anticipatory bail. Such person may take steps under Section 70(2) of Cr.P.C. for recall/cancellation of warrant or he may assail the order issuing warrant against him before the higher courts.

8. In the case of *Yogendra Singh* (supra), the full bench decision of this court reported in *Nirbhay Singh* (supra) has also been discussed in detail in para 3, 7, and 8. The court also observed that there are stages wherein an accused can apprehend arrest. These would conceptually engulf 'subsequent stages' but would not cover a stage where an accused, who has availed the privilege of anticipatory bail or regular bail and fails to appear before the Court on the dates fixed for trial and in a way abuses his liberty. Regarding the stage, in case of *Natturasu and others v. The State* reported in 1998 Cr.L.J. 1762 (Madras High Court) in which it is observed as under:

92. The above five contingencies involve different stages. As seen earlier, once the person accused of is released on anticipatory bail or on bail at one stage, the operation of the bail continues till the conclusion of trial. Therefore, the person, who is already on bail or anticipatory bail, cannot be entitled to apply for a fresh anticipatory bail in respect of the same accusation, in other stages.

93. For instance, if a person, who is already on bail, did not appear before the Court and that therefore, the Court issues warrant of arrest, then the said person will certainly have the apprehension of arrest.

94. But, in such a situation, the accused is not entitled to file an application for anticipatory bail, because he is already on bail or anticipatory bail in respect of the accusation of non-bailable offence. He shall, in such circumstance, have to take steps to recall the warrant.

95. Therefore, the application for anticipatory bail would not deal with the situation, wherein the accused had appeared before the Court, in relation to the case in which he already obtained the bail.

96. In other words, the application under Section 438, Cr. P.C. being dealt with only relates to the apprehension of arrest for the accusation of non-bailable offence only one.

9. In case of *Arun Kumar* (supra), the matter was different. It was observed that when Magistrate takes cognizance in respect of non-bailable warrant and even issues summons, the accused would be entitled to move competent court for grant of anticipatory bail and the same application would be maintainable.

10. In *Adri Dharan Das v. State of W.B.* reported in AIR 2005 SC 1057, it was observed by the Apex Court that the object which is sought to be achieved by S. 438. The power exercisable under S. 438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty then power is to be exercised under S. 438. The use of expression 'reason to believe' showing that the apprehension that he may be arrested must be founded on reasonable grounds. Such grounds must be capable of being examined

11. There is a difference that a person is apprehending arrest in a case when an offence is registered by a police station or cognizance is taken by the court and in case of breach of terms of bond and in lieu of that a non-bailable warrant has been issued.

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, Mcrc stands dismissed accordingly.

*Petition dismissed.*

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