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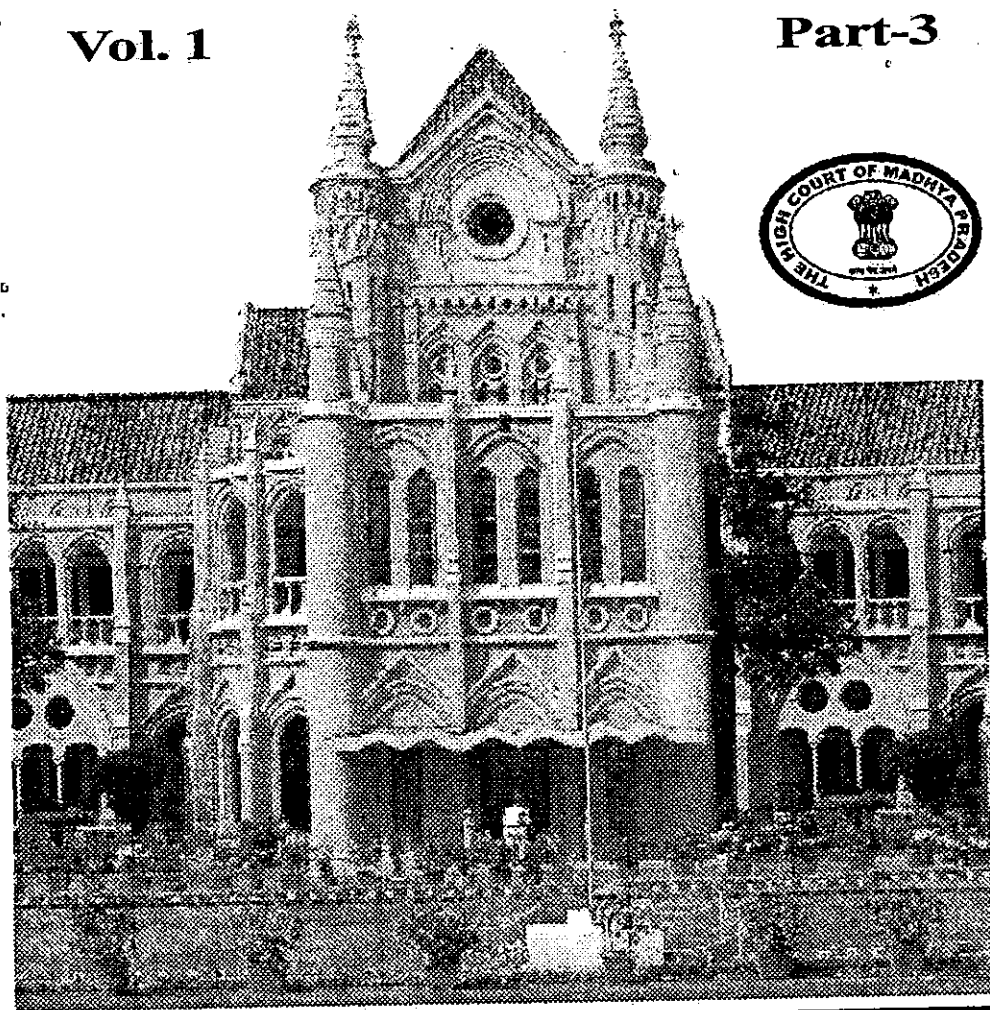
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सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र. 1961, नियम 8(6) व 12(4)
— प्रारम्भिक नियुक्ति की तारीख से वरिष्ठता प्रदान किया जाना — नियुक्ति आदेश स्पष्ट रूप से शर्त लगाता है कि याची को केन्द्रीय प्रशिक्षण संस्थान से 3 वर्ष की कालावधि के भीतर आवश्यक परीक्षा उत्तीर्ण करनी है — याची उक्त परीक्षा 3 वर्ष के भीतर उत्तीर्ण नहीं कर सके — अभिनिर्धारित — याची प्रारम्भिक नियुक्ति की तारीख से वरिष्ठता के हकदार नहीं — दोनों याचियों ने उक्त शर्त स्वीकार की — उक्त शर्त को किसी चुनौती के अभाव में अन्यथा भी वरिष्ठता की गणना करने के प्रयोजन के लिए तदर्थ कालावधि के लाम का दावा करने से विबंधित हैं — याचिका खारिज। (राकेश मिश्रा वि. म.प्र. राज्य) ...757

Coal Bearing Areas (Acquisition and Development) Act (20 of 1957), Section 14, Land Acquisition Act, 1894, Section 11 - Central Government acquired right to mine u/s 9 of the Act of 1957 but instead of issuing notice of intention to acquire land u/s 7 of the Act of 1957; requested the Collector to acquire under Act of 1894 - State Government issued notification and initiated proceedings u/s 9 of the 1894 Act and the Collector made the award determining the compensation u/s 11 of the 1894 Act - Held - 1894 Act was a general Act whereas 1957 Act was a special Act for acquisition of land and 1957 Act has partially repealed 1894 Act - Land owners, whose lands were acquired, were deprived of determination of compensation by agreement or failing such agreement by tribunal u/s 14 of Act of 1957 - Considering the public interest vis-à-vis private interest, instead of quashing acquisition proceeding, Central Government directed to proceed under Act of 1957 and determine compensation - Petition allowed. [Naresh Singh v. Union of India] ...730

Constitution, Article 14 - Equality - Negative equality - Merely on a wrong done by the State will not confer any right on the petitioners - It is a case of negative equality and a wrong benefit conferred shall not carry any right in favour of other person to claim the same relief by applying the concept of negative equality. [Rakesh Mishra v. State of M.P.] ...757

Constitution, Article 14 - State Government's notification dated 27.09.2003 prescribes the age of superannuation of 62 years of class IV employees of the Municipalities including Safai Kamgar - Held - Article 14 forbids class legislation - However, it permits reasonable classification - Two classes of IVth class employees of Municipalities have been created - One class of employees is who have been retired between the period of 1998-2003 and other class of employees who have been retired after the notification - The second class of employees have been given the benefit of the notification but the earlier class of employees have been denied the benefit - However, the benefit of retirement at par with the State Government employees have been given to the members of M.P. State Municipal Service - No reasons have been assigned by the State Government as to why the class IV employees of the Municipalities have not been given the benefit of age of superannuation from the same date i.e. 26.09.1998 as has been given to the members of M.P. State Municipal Service - Petition allowed with the direction to give the benefit to petitioner. [Mathuro (Smt.) v. State of M.P.] ...765

Constitution, Articles 19(1)(g), (6) & 47 and Schedule VII List II Entry 8 - Trade or business in intoxicating liquor - No citizen has fundamental right to trade in liquor, the nature of right which is transferred in favour of a person to deal in the trade of liquor is only a privilege. [Sivanand Damahe v. State of M.P.] ...653

कोयला धारक क्षेत्र (अर्जन और विकास) अधिनियम (1957 का 20), धारा 14, भूमि अर्जन अधिनियम, 1894, धारा 11 — केन्द्रीय सरकार ने 1957 के अधिनियम की धारा 9 के अधीन खान का अधिकार अर्जित किया किन्तु 1957 के अधिनियम की धारा 7 के अधीन भूमि अर्जित करने के आशय का सूचनापत्र जारी करने के बजाय कलेक्टर से 1894 के अधिनियम के अधीन अर्जन करने का निवेदन किया — राज्य सरकार ने अधिसूचना जारी की और 1894 के अधिनियम की धारा 9 के अधीन कार्यवाही प्रारम्भ की और कलेक्टर ने 1894 के अधिनियम की धारा 11 के अधीन प्रतिकर अवधारित करते हुए अधिनिर्णय किया — अभिनिर्धारित — भूमि के अर्जन के लिए 1894 का अधिनियम सामान्य अधिनियम था जबकि 1957 का अधिनियम विशेष अधिनियम था और 1957 के अधिनियम ने 1894 के अधिनियम को आंशिक रूप से निरसित कर दिया — भूमिस्वामी, जिनकी भूमियाँ अर्जित की गईं, अनुबन्ध द्वारा या ऐसे अनुबन्ध के विफल होने पर 1957 के अधिनियम की धारा 14 के अधीन अधिकरण द्वारा प्रतिकर के अवधारण से वंचित कर दिये गये — निजी हित की तुलना में लोकहित का विचार करते हुए अर्जन कार्यवाही अभिखण्डित करने के बजाय केन्द्रीय सरकार को 1957 के अधिनियम के अधीन कार्यवाही करने और प्रतिकर अवधारित करने का निदेश दिया गया — याचिका मंजूर। (नरेश सिंह वि. यूनियन ऑफ इंडिया) ...730

संविधान, अनुच्छेद 14. — समानता — नकारात्मक समानता — राज्य द्वारा केवल गलत सम्पादन पर याचियों को कोई अधिकार प्रदान नहीं किया जायेगा — यह नकारात्मक समानता का मामला है और प्रदान किया गया कोई गलत लाभ नकारात्मक समानता की संकल्पना लागू कर उसी अनुतोष का दावा करने के लिए अन्य व्यक्ति के पक्ष में कोई अधिकार संचारित नहीं करता। (राकेश मिश्रा वि. म.प्र. राज्य) ...757

संविधान, अनुच्छेद 14. — राज्य सरकार की अधिसूचना तारीख 27.09.2003 सफाई कामगार को सम्मिलित करते हुए नगरपालिका के चतुर्थ श्रेणी के कर्मचारियों की सेवानिवृत्ति की आयु 62 वर्ष विहित करती है — अभिनिर्धारित — अनुच्छेद 14 वर्ग विधायन का निषेध करता है — तथापि, वह युक्तियुक्त वर्गीकरण अनुज्ञात करता है — नगरपालिका के चतुर्थ श्रेणी कर्मचारियों के दो वर्ग सृजित किये गये हैं — कर्मचारियों का एक वर्ग वह है जो 1998-2003 की कालावधि में सेवानिवृत्त हुए हैं और कर्मचारियों का अन्य वर्ग वह है जो अधिसूचना जारी होने के बाद सेवानिवृत्त हुए हैं — द्वितीय वर्ग के कर्मचारियों को अधिसूचना का लाभ दिया गया किन्तु पहले वर्ग के कर्मचारियों को लाभ देने से इंकार किया — तथापि, राज्य सरकार के कर्मचारियों के समकक्ष सेवानिवृत्ति का लाभ म.प्र. राज्य नगरपालिका सेवा के सदस्यों को दिया गया — राज्य सरकार द्वारा कोई कारण नहीं बताया गया कि क्यों नगरपालिका के चतुर्थ श्रेणी कर्मचारियों को सेवानिवृत्ति की आयु का लाभ उसी तारीख अर्थात् 26.09.1998 से नहीं दिया गया जैसा कि म.प्र. राज्य नगरपालिका सेवा के सदस्यों को दिया गया है — याची को लाभ देने के निदेश के साथ याचिका मंजूर की गई। (मथुरा (श्रीमति) वि. म.प्र. राज्य) ...765

संविधान, अनुच्छेद 19(1)(जी), (6) व 47 और अनुसूची VII सूची II प्रविष्टी 8 — नशीली शराब का व्यापार या कारोबार — किसी नागरिक को शराब का व्यापार करने का मूलभूत अधिकार नहीं है, अधिकार, जो किसी व्यक्ति के पक्ष में शराब का व्यापार करने के लिए हस्तांतरित किया गया है, की प्रकृति केवल एक विशेषाधिकार है। (शिवानंद दोमहे वि. म.प्र. राज्य) ...653

Constitution, Article 21 - Protection of life and personal liberty - Writ petition before High Court seeking a direction to set the petitioner at liberty and paying him adequate compensation on the ground that Arjun Singh who was alleged to have been killed by the petitioner is still alive - Held - It is clear that no person can be deprived of his life except according to the procedure established by law - Petitioner is kept under the custody after following the procedure established by law and, therefore, it cannot be said that his rights guaranteed by Article 21 are violated. [Ramesh v. State of M.P.] ...636

Constitution, Article 136 - See - Penal Code, 1860, Section 302 [Dadan v. State of M.P.] SC...615

Constitution, Article 226 - Allotment of Kerosene/LDO Dealership - Petitioner was selected and letter of intent was issued for Kerosene/LDO dealership - Subsequently, selection and letter of intent were cancelled - Cancellation was based on complaints - Complaints were investigated by the Director General, Anti Adulteration Cell, Govt. of India - Cancellation order challenged in Writ Petition - Held - Director General, Anti Adulteration Cell was competent to recommend the cancellation of selection of dealers - After receiving the orders about abolition of Dealers Selection Board, the Board ought to have rescued itself from the entire selection process but it proceeded with selection process and even declared a panel of selection - Recommendations by a non-existing body of persons cannot be termed as recommendations in the eyes of law - No mandamus can be issued for implementation of such recommendations - Petition dismissed. [Anil Agrawal v. Union of India] ...700

Constitution, Article 226 - Alternative remedy - Compensation - Civil Suit - Whether compensation can be awarded in a writ petition when petitioner has alternative remedy of filing civil suit - Held - Petitioner can certainly claim compensation by filing a civil suit, however, in the light of various judgments passed by High Court granting compensation in identical facts and circumstances of the case, - Compensation awarded. [Aradhana Singh (Ku.) v. Board of Secondary Education, M.P.] ...785

Constitution, Article 226 - Compensation - Petitioner is a bright young student having excellent academic record, appeared in 12th class examination as a regular student - Her result declared after two years and she has lost two valuable academic years - In the facts and circumstances of the case, petitioner entitled for compensation of Rs.50,000 and costs of writ petition Rs.5,000. [Aradhana Singh (Ku.) v. Board of Secondary Education, M.P.] ...785

Constitution, Article 226 - Damages - Can not be ascertained in exercise of writ jurisdiction. [Mohammad Sageer Manihari Wale v. State of M.P.] ...681

संविधान, अनुच्छेद 21 — प्राण एवं दैहिक स्वतंत्रता का संरक्षण — याची को स्वतंत्र किये जाने और उसे समुचित प्रतिकर अदा करने के निदेश के लिए उच्च न्यायालय के समक्ष रिट याचिका इस आधार पर कि अर्जुन सिंह, जिसे कथित रूप से याची द्वारा मारा गया था, अब तक जीवित है — अभिनिर्धारित — यह स्पष्ट है कि विधि द्वारा स्थापित प्रक्रिया के सिवाय किसी व्यक्ति को उसके जीने के अधिकार से वंचित नहीं किया जा सकता — याची को विधि द्वारा स्थापित प्रक्रिया का पालन करने के बाद अभिरक्षा में रखा गया इसलिए यह नहीं कहा जा सकता कि अनुच्छेद 21 द्वारा प्रत्याभूत उसके अधिकारों का उल्लंघन हुआ। (रमेश वि. म.प्र. राज्य) ...636

संविधान, अनुच्छेद 136 — देखें — दण्ड संहिता, 1860, धारा 302, (ददन वि. म.प्र. राज्य) SC...615

संविधान, अनुच्छेद 226 — केरोसीन/एलडीओ डीलरशिप — केरोसीन/एलडीओ डीलरशिप के लिए याची का चयन किया गया और लेटर ऑफ इन्टेंट जारी किया गया — तत्पश्चात् चयन और लेटर ऑफ इन्टेंट रद्द किये गये — रद्दकरण शिकायतों पर आधारित था — शिकायतों की महानिदेशक, अपमिश्रण निरोध प्रकोष्ठ, भारत सरकार द्वारा जाँच की गई — रद्दकरण आदेश को रिट याचिका में चुनौती दी गई — अभिनिर्धारित — महानिदेशक, अपमिश्रण निरोध प्रकोष्ठ डीलरों के चयन के रद्दकरण की अनुशंसा करने के लिए सक्षम था — डीलर चयन बोर्ड के समापन के बारे में आदेश प्राप्त करने के बाद बोर्ड को समग्र चयन प्रक्रिया से स्वयं को बचाना चाहिए था किन्तु उसने चयन प्रक्रिया में आगे कार्यवाही की और चयन का एक पेनल भी घोषित किया — व्यक्तियों के अस्तित्वहीन निकाय द्वारा अनुशंसाएँ विधि की दृष्टि में अनुशंसाएँ नहीं मानी जा सकतीं — ऐसी अनुशंसाओं को लागू करने के लिए कोई परमादेश जारी नहीं किया जा सकता — याचिका खारिज। (अनिल अग्रवाल वि. यूनियन ऑफ इंडिया) ...700

संविधान, अनुच्छेद 226 — वैकल्पिक उपचार — प्रतिकर — सिविल वाद — क्या रिट याचिका में प्रतिकर अधिनिर्णीत किया जा सकता है जबकि याची के पास सिविल वाद पेश करने का वैकल्पिक उपचार उपलब्ध हो — अभिनिर्धारित — याची निश्चित रूप से सिविल वाद पेश करके प्रतिकर का दावा कर सकती है, तथापि उच्च न्यायालय द्वारा समान तथ्यों और परिस्थितियों वाले मामलों में पारित प्रतिकर दिलाने के विभिन्न निर्णयों के आलोक में प्रतिकर अधिनिर्णीत किया गया। (अराधना सिंह (कु.) वि. बोर्ड ऑफ सेकंडरी एजुकेशन, म.प्र.) ...785

संविधान, अनुच्छेद 226 — प्रतिकर — याची, जो श्रेष्ठ शैक्षणिक रिकॉर्ड के साथ एक प्रतिभाशाली युवा छात्रा है कक्षा 12 की परीक्षा में नियमित छात्रा के रूप में सम्मिलित हुई — उसका परिणाम दो वर्ष बाद घोषित किया गया और उसने दो मूल्यवान शैक्षणिक सत्र खो दिये — मामले के तथ्यों और परिस्थितियों में याची 50,000 रुपये प्रतिकर और 5,000 रुपये रिट याचिका के खर्च प्राप्त करने की हकदार। (अराधना सिंह (कु.) वि. बोर्ड ऑफ सेकंडरी एजुकेशन, म.प्र.) ...785

संविधान, अनुच्छेद 226 — नुकसानी — रिट अधिकारिता के प्रयोग में अभिनिश्चित नहीं की जा सकती। (मोहम्मद सगीर मनिहारी वाले वि. म.प्र. राज्य) ...681

Constitution, Article 226 - Demolition of shops while removing encroachment - Claim for rehabilitation on same place - Temporary lease in favour of petitioner expired prior to demolition - Respondents offered alternate site for rehabilitation - In the master plan area earmarked for parking of vehicles - Held - Rehabilitation at old place can not be granted as that would run counter to the interest of general public - Petition dismissed. [Mohammad Sageer Manihari Wale v. State of M.P.] ...681

Constitution, Article 226 - Judicial Review - Natural Justice - Instrumentalities of State are under obligation to discharge their functions in a fair and just manner, even when such discharge of duty is an administrative or a quasi-judicial power. [Anil Agrawal v. Union of India]...700

Constitution, Article 226 - Transfer - Appellant, a non-executive in service of a subsidiary of Coal India Limited, transferred to another subsidiary - Competency of Director (P & IR) to transfer from one subsidiary to another - Held - Delegation of power in favour of Director (P & IR) by Board of Director in exercise of power under the Articles and Memorandum of Association subject to conformity with Ruels - Transfer policy does not specify that Director (P & IR) can exercise power of transfer of a non-executive from one subsidiary to another -Order of transfer by Director (P & IR) without authority, hence, set-aside - However, President, Coal India can transfer appellant in case the administrative exigency so demand from one subsidiary to another subsidiary - Appeal allowed. [Subash Roy v. Coal India Ltd.] ...618

Constitution, Article 226 - Writ petition challenging acquisition of land for coal company - Court will have to weigh the public interest vis-à-vis the private interest while exercising the power under Article 226 - And even if it finds that the acquisition was vitiated on account of non-compliance of some legal requirement or that the persons interested are entitled to particular amount of compensation - Court should appropriately mould the relief and redress the wrong instead of quashing the acquisition proceedings. [Naresh Singh v. Union of India] ...730

Constitution, Articles 226 & 227 - High Court exercising powers under Article 226/227 can not set-aside a judgment of a competent criminal Court which has attained finality. [Ramesh v. State of M.P.] ...636

Constitution, Article 234, Lower Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994, Rule 5(1) - Minimum eligibility for reserved candidate - Petitioner belonging to ST category - Applied for the post of Civil Judge Class II - Not selected because could not secure 35% marks in the aggregate - Petition filed on the ground that High Court could not have prescribed the condition of minimum of 35% marks - Held - In view of the proviso to sub-rule (1) to Rule 5, the final decision that reserved

संविधान, अनुच्छेद 226 - अतिक्रमण हटाते समय दुकानों का गिराया जाना - इसी स्थान पर पुनर्वास के लिए दावा - याची के पक्ष में अस्थायी पट्टे का दुकान गिराने के पूर्व अवसान हो गया - प्रत्यर्थियों ने पुनर्वास के लिए वैकल्पिक स्थल प्रस्तावित किया - मास्टर प्लान में क्षेत्र वाहनों की पार्किंग के लिए चिन्हित किया गया - अभिनिर्धारित - पुराने स्थान पर पुनर्वास प्रदान नहीं किया जा सकता क्योंकि वह आम जनता के हित के विरुद्ध होगा - याचिका खारिज। (मोहम्मद सगीर मनिहारी वाले वि. म.प्र. राज्य) ...681

संविधान, अनुच्छेद 226 - न्यायिक पुनर्विलोकन - नैसर्गिक न्याय - राज्य के माध्यम उनके कार्यों का निर्वहन ऋजु और न्यायसंगत ढंग में करने के आभार के अधीन हैं, जब कर्तव्य का ऐसा निर्वहन प्रशासनिक या अर्धन्यायिक शक्ति भी हो। (अनिल अग्रवाल वि. यूनियन ऑफ इंडिया) ...700

संविधान, अनुच्छेद 226 - स्थानांतरण - अपीलार्थी सेवा में गैर कार्यकारी था, को कोल इंडिया लिमिटेड की एक सहायक कम्पनी से दूसरी सहायक कम्पनी में स्थानांतरित किया गया - निदेशक (पी एण्ड आईआर) की एक सहायक कम्पनी से दूसरी सहायक कम्पनी में स्थानांतरित करने की सक्षमता - अभिनिर्धारित - निदेशक मंडल द्वारा निदेशक (पी एण्ड आईआर) के पक्ष में शक्ति का प्रत्यायोजन आर्टिकल्स और मेमोरेण्डम ऑफ एसोसियेशन के अध्यक्ष शक्ति के प्रयोग में नियमों से अनुरूप - स्थानांतरण पॉलिसी यह विनिर्दिष्ट नहीं करती कि निदेशक (पी एण्ड आईआर) किसी गैर कार्यकारी का एक सहायक कम्पनी से दूसरी सहायक कम्पनी में स्थानांतरण करने की शक्ति का प्रयोग कर सकता है - निदेशक (पी एण्ड आईआर) द्वारा स्थानांतरण का आदेश बिना किसी प्राधिकार के, इसलिए अपास्त किया गया - तथापि, यदि प्रशासनिक अत्यावश्यकता की ऐसी मांग हो तो अध्यक्ष, कोल इंडिया अपीलार्थी को एक सहायक कम्पनी से दूसरी सहायक कम्पनी में स्थानांतरित कर सकता है - अपील मंजूर। (सुभाष रॉय वि. कोल इंडिया लि.) ...618

संविधान, अनुच्छेद 226 - रिट याचिका में कोयला कम्पनी के लिए भूमि के अर्जन को चुनौती - न्यायालय को अनुच्छेद 226 के अन्तर्गत शक्ति का प्रयोग करते समय लोक हित व निजी हित को आमने-सामने रखकर तोलना होगा - और यदि यह भी पाया जाए कि अर्जन कुछ विधिक अपेक्षाओं के अननुपालन के कारण दूषित हो गया या कि हितबद्ध व्यक्ति प्रतिकार की विशिष्ट राशि के हकदार हैं - न्यायालय को अर्जन कार्यवाहियों को अभिखण्डित करने के बजाय अनुतोष को समुचित रूप से परिवर्तित करना चाहिए और गलती सुधारनी चाहिए। (नरेश सिंह वि. यूनियन ऑफ इंडिया) ...730

संविधान, अनुच्छेद 226 व 227 - उच्च न्यायालय अनुच्छेद 226/227 के अधीन शक्तियों का प्रयोग कर सक्षम दण्डिक न्यायालय के निर्णय, जो अंतिम हो गया है, को अपास्त नहीं कर सकता। (रमेश वि. म.प्र. राज्य) ...636

संविधान, अनुच्छेद 234, निम्नतर न्यायिक सेवा (भर्ती और सेवा की शर्तें) नियम, म.प्र. 1994, नियम 5(1) - आरक्षित अम्बर्थी के लिए न्यूनतम पात्रता - याची अनुसूचित जनजाति श्रेणी से सम्बन्धित - सिविल न्यायाधीश वर्ग-2 के पद हेतु आवेदन किया - चयनित नहीं हुआ क्योंकि कुल अंकों में से 35 प्रतिशत अंक प्राप्त नहीं कर सका - याचिका इस आधार पर पेश की गई कि उच्च न्यायालय न्यूनतम 35 प्रतिशत अंकों की शर्त विहित नहीं कर सकता था - अभिनिर्धारित - नियम 5 के उपनियम (1) के परन्तुक को देखते हुए, अंतिम निर्णय, कि आरक्षित

category candidates must secure a minimum of 35% marks in the aggregate was that of the M.P.P.S.C. though that decision was in the consultation with the High Court and the State Government - Petition dismissed. [Ashok Narayan Kale v. State of M.P.] ...643

Constitution, Article 244, Schedule V - Land required for mining of coal located in scheduled areas and owned by tribals - Any project which deprives the tribals in scheduled areas of their land by acquisition must ensure that such tribals are rehabilitated and resettled with alternate source of living in accordance with policy of appropriate Government. [Naresh Singh v. Union of India] ...730

Constitution, Articles 329(b) & 226, Election Symbols (Reservation and Allotment) Order, 1968; Order 13 - Bar to interference by Court in electoral matter - Petitioner candidate for election of State Legislative Assembly - Failed to file declaration in Form A & B of Recognized National Political Party, till last date of filing nomination - Nomination form rejected by Returning Officer - Writ Petition - Held - Filing of nomination form, its scrutiny and acceptance or rejection is part of process which is to be gone through to return a candidate, hence, covered within meaning of election - Order rejecting nomination paper is to be challenged in election petition - Writ can not be entertained - Petition dismissed. [Jaswant Singh v. Chief Election Commission] ...717

Criminal Procedure Code, 1973 (2 of 1974), Sections 6 & 20 - See - Narcotics Drugs and Psychotropic Substances Act, 1985, Section 52-A [Nirmal v. State of M.P.] ...848

Criminal Procedure Code, 1973 (2 of 1974), Section 71 - Double punishment - Appellant No.2 convicted u/s 323 as well as u/s 323/34 IPC for causing injury to one person - Held - Section 71 prohibits double punishment for same offence - Conviction of appellant No.2 u/s 323/34 IPC not legal. [Beniram v. State of M.P.] ...885

Criminal Procedure Code, 1973 (2 of 1974), Section 154 - See - Penal Code 1860, Section 376(2)(g) [Kummer Singh v. State of M.P.] ...*20

Criminal Procedure Code, 1973 (2 of 1974), Section 391 - Application to submit additional documents filed in appeal after dismissal of complaint - Contented that documents were in possession of previous counsel who did not file before trial court - Held - On previous occasion also on the same ground appellant was permitted to submit documents - Provision is not to fill up lacuna but to subserve the ends of justice - Application dismissed. [Daccan Lubes Terfe (M/s) v. M/s. Chakradhar Construction] ...870

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Ayurvigyan Parishad Adhiniyam, M.P. 1987, Section 24 - Quashing of charges -

श्रेणी के अभ्यर्थियों को कुल अंकों में से न्यूनतम 35 प्रतिशत अंक प्राप्त करने होंगे, म.प्र. लोक सेवा आयोग का था यद्यपि उक्त निर्णय उच्च न्यायालय और राज्य सरकार के परामर्श से था - याचिका खारिज। (अशोक नारायण काले वि. म.प्र. राज्य) ...643

संविधान, अनुच्छेद 244, अनुसूची V - कोयले के खनन के लिए अपेक्षित भूमि अनुसूचित क्षेत्रों में स्थित और जनजातियों के स्वामित्वाधीन - कोई परियोजना जो अर्जन द्वारा अधिसूचित क्षेत्रों में जनजातियों को उनकी भूमि से वंचित करती है को यह सुनिश्चित करना चाहिए कि ऐसी जनजातियों को समुचित सरकार की नीति के अनुसार जीवन निर्वाह के वैकल्पिक स्रोत के साथ पुनर्वासित और पुनःस्थापित किया जाए। (नरेश सिंह वि. यूनियन ऑफ इंडिया) ...730

संविधान, अनुच्छेद 329(बी) व 226, चुनाव चिन्ह (आरक्षण एवं आवंटन) आदेश, 1968, आदेश 13 - निर्वाचन संबंधी मामले में न्यायालय द्वारा हस्तक्षेप पर रोक - याची राज्य विधान सभा के निर्वाचन के लिए उम्मीदवार - नामांकन पेश करने की अंतिम तारीख तक प्ररूप ए व बी में मान्यता प्राप्त राष्ट्रीय राजनीतिक दल की घोषणा पेश करने में असफल रहा - निर्वाचन अधिकारी द्वारा नामांकन पत्र खारिज किया गया - रिट याचिका - अभिनिर्धारित - नामांकन पत्र पेश करना, उसकी जाँच और स्वीकृति या खारिजी प्रक्रिया का भाग है जिसकी किसी उम्मीदवार को निर्वाचित करने के लिए सावधानीपूर्वक जाँच करनी चाहिए, इसलिए निर्वाचन के अर्थ के अन्तर्गत आती है - नामांकन पत्र खारिज करने के आदेश को निर्वाचन याचिका में चुनौती दी जानी चाहिए - रिट ग्रहण नहीं की जा सकती - याचिका खारिज। (जसवंत सिंह वि. चीफ इलेक्शन कमीशन) ...717

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 6 व 20 - देखें - स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम, 1985, धारा 52-ए, (निर्मल वि. म.प्र. राज्य) ...848

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 71 - दोहरा दण्ड - अपीलार्थी क्र. 2 को एक व्यक्ति को क्षति कारित करने के लिए भा.द.सं. की धारा 323 के अन्तर्गत और धारा 323/34 के अन्तर्गत भी दण्डित किया - अभिनिर्धारित - धारा 71 एक ही अपराध के लिए दोहरे दण्ड का प्रतिषेध करती है - अपीलार्थी क्र. 2 की भा.द.सं. की धारा 323/34 के अन्तर्गत दोषसिद्धि वैध नहीं। (बेनीराम वि. म.प्र. राज्य) ...885

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 - देखें - दण्ड संहिता, 1860, धारा 376(2)(जी), (कुम्भर सिंह वि. म.प्र. राज्य) ...*20

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 391 - अतिरिक्त दस्तावेज पेश करने के लिए आवेदन परिवाद की खारिजी के बाद अपील में पेश - यह प्रतिवादित किया गया कि दस्तावेज पूर्ववर्ती वकील के कब्जे में थे जिसने विचारण न्यायालय के समक्ष पेश नहीं किये - अभिनिर्धारित - पूर्ववर्ती अवसर पर भी इसी आधार पर अपीलार्थी को दस्तावेज पेश करने के लिए अनुज्ञात किया गया - उपबंध कमी को पूरा करने के लिए नहीं है बल्कि न्याय के उद्देश्य का हित साधन करने के लिए है - आवेदन खारिज। (डेक्कन ल्यूबस तर्फ (मे.) वि. मे. चक्रधर कंसट्रक्सन) ...870

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, आयुर्विज्ञान परिषद अधिनियम, म.प्र. 1987, धारा 24 - आरोपों का अभिखण्डन - अपीलार्थी के पास

Applicant is having BAMS degree - Allopathic injection found in his clinic - Case u/s. 24 of Adhiniyam and Section 420 of IPC registered against him and charge-sheet filed - Held - State Government issued Gazette notification wherein authorized all registered medical practitioners who are having BAMS degree to use allopathic medicine - For having possession of some allopathic medicine, applicant can not be held guilty for contravention of Section 24 of the Adhiniyam - No fruitful purpose will be served by continuing the charge-sheet against the applicant as it will cause miscarriage of justice - Charges against applicant quashed - Application allowed. [Gordhan v. State of M.P.] ...894

Election Symbols (Reservation and Allotment) Order, 1968; Order 13 - See - Constitution, Articles 329(b) & 226, [Jaswant Singh v. Chief Election Commission] ...717

Essential Commodities Act (10 of 1955), Section 3/7 - See - Sugar Dealers Licencing Order, M.P. 1963, Clause 3(1), [Shivnath Dhobhi v. State of M.P.] ...879

*Evidence Act (1 of 1872), Section 3 - Appreciation of evidence - Attempt to rape on a minor girl - Evidence of witnesses recorded after lapse of 3-4 years, as the accused had absconded - Therefore, some discrepancy in the timing or sequence of events was natural and bound to occur due to lapse of memory and passage of time - Despite extensive cross-examination, nothing has been elicited in the evidence of witnesses so as to indicate any reason for false implication - Ordinarily parents of the victim would not concoct a false case at the stake of modesty, honour and reputation of their minor daughter of tender age. [Nandan @ Shivnandan v. State of M.P.]...*21*

*Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Section 376 r/w 511 - Appreciation of evidence - Attempt to rape on a minor girl - Evidence of child witness - Conviction challenged on the ground that it is based on tutored and fabricated evidence without any corroboration and medical evidence - Held - Prosecutrix given a vivid description of the incident and categorically stated that accused had sexually assaulted her - Her evidence does not appear to be tutored or fabricated and is found to be cogent & credible - It inspires confidence - Her evidence cannot be discarded on the score that she is a child witness - Evidence of prosecutrix also stands fortified by her medical report which remained virtually unchallenged in the cross-examination - Appeal dismissed. [Nandan @ Shivnandan v. State of M.P.] ...*21*

Evidence Act (1 of 1872), Section 3 - Related witness - Relationship is not a factor to affect credibility of witness - A relation would not conceal actual culprit and make allegations against innocent person - Foundation has to be laid if plea of false implication is made. [Ram Singh v. State of M.P.] SC...609

बीएएमएस की डिग्री — उसके चिकित्सालय में एलोपैथिक इंजेक्शन पाया गया, — उसके विरुद्ध अधिनियम की धारा 24 एवं भा.द.सं. की धारा 420 के अन्तर्गत मामला दर्ज किया गया और आरोप पत्र पेश किया गया — अभिनिर्धारित — राज्य सरकार ने गजट अधिसूचना जारी की जिसमें सभी रजिस्ट्रीकृत चिकित्सा व्यवसायियों, जिनके पास बीएएमएस की डिग्री है, को एलोपैथिक दवाइयों का प्रयोग करने के लिए प्राधिकृत किया गया — कुछ एलोपैथिक दवाइयों का कब्जा रखने के लिए आवेदक को अधिनियम की धारा 24 के उल्लंघन का दोषी नहीं ठहराया जा सकता — आवेदक के विरुद्ध आरोप पत्र जारी रखने से किसी लाभप्रद प्रयोजन की पूर्ति नहीं होगी बल्कि यह न्याय की विफलता कारित करेगा — आवेदक के विरुद्ध आरोप अभिखण्डित — आवेदन मंजूर। (गोरधन वि. म.प्र. राज्य)

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चुनाव चिन्ह (आरक्षण एवं आवंटन) आदेश, 1968, आदेश 13 — देखें — संविधान, अनुच्छेद 329(बी) व 226, (जसवंत सिंह वि. चीफ इलेक्शन कमीशन)

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आवश्यक वस्तु अधिनियम, (1955 का 10), धारा 3/7 — देखें — शक्कर व्यापारी लायसेंस आदेश, म.प्र. 1963, खण्ड 3(1), (शिवनाथ धोबी वि. म.प्र. राज्य)

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साक्ष्य अधिनियम (1872 का 1), धारा 3 — साक्ष्य का अधिमूल्यन — अप्राप्तवय बालिका के साथ बलात्संग का प्रयत्न — साक्षियों की साक्ष्य 3-4 वर्ष व्यतीत होने के बाद अभिलिखित की गई क्योंकि अभियुक्त फरार हो गया था — इसलिए याददाश्त क्षीण होने एवं समय बीतने के कारण समय या घटनाओं के क्रम में कुछ विसंगति आना स्वभाविक ही था — विस्तृत प्रतिपरीक्षा के बावजूद साक्षियों की साक्ष्य में कुछ भी प्राप्त नहीं हुआ जिससे मिथ्या फँसाने के लिए कोई कारण उपदर्शित होता हो — साधारणतः पीड़ित के माता-पिता उनकी कम उम्र की अप्राप्तवय पुत्री की लज्जा, सम्मान और ख्याति के दांव पर मिथ्या मामला नहीं गढ़ेंगे। (नंदन उर्फ शिवनंदन वि. म.प्र. राज्य)

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साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धारा 376 सहपठित धारा 511 — साक्ष्य का अधिमूल्यन — अप्राप्तवय बालिका के साथ बलात्संग का प्रयत्न — बालक साक्षी का साक्ष्य — दोषसिद्धि को इस आधार पर चुनौती दी गई कि यह बिना किसी सम्युष्टि और चिकित्सीय साक्ष्य के सिखायी-पढ़ाई और गढ़ी हुई साक्ष्य पर आधारित है — अभिनिर्धारित — अभियोक्त्री ने घटना का जीवन्त विवरण दिया और सुस्पष्ट रूप से कथन किया कि अभियुक्त ने उस पर लैंगिक हमला किया था — उसकी साक्ष्य सिखायी-पढ़ाई या गढ़ी हुई प्रतीत नहीं होती एवं अकाट्य और विश्वसनीय पायी गई — यह विश्वास प्रेरित करती है — उसकी साक्ष्य इस कारण अमान्य नहीं की जा सकती कि वह बालक साक्षी है — अभियोक्त्री की साक्ष्य, उसकी चिकित्सीय रिपोर्ट, जिसे वस्तुतः प्रतिपरीक्षा में चुनौती नहीं दी गई, से भी पुष्ट होती है — अपील खारिज। (नंदन उर्फ शिवनंदन वि. म.प्र. राज्य)

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साक्ष्य अधिनियम (1872 का 1), धारा 3 — रिश्तेदार साक्षी — रिश्तेदारी साक्षी की विश्वसनीयता को प्रभावित करने वाला कारक नहीं है — रिश्तेदार वास्तविक दोषी को नहीं बचायेगा और निर्दोष व्यक्ति के विरुद्ध दोषारोपण नहीं करेगा — यदि मिथ्या फँसाने का अभिवचन किया जाता है तो आधार बताने चाहिए। (राम सिंह वि. म.प्र. राज्य)

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Evidence Act (1 of 1872), Section 45 - Non-examination of Doctor - Effect - Lady Doctor, who examined the prosecutrix, could not be examined as witness as she was dead - Though her medical report was proved to be in her handwriting by her husband - Held - Non-examination of the Doctor would not be fatal to prosecution case. [Nandan @ Shivnandan v. State of M.P.] ...*21

Excise Act, M.P. (2 of 1915), Section 17, General Licence Conditions, Clause I, VI - Transfer or sub-lease of Licence - Licence was allotted to petitioner to run liquor shops for the excise year 2005-06 - Licence was renewed for the excise year 2006-07 - Petitioner transferred the contract of retail sale in favour of respondent No.4 for the excise year 2006-07 - Respondent No.4 got the licence renewed for the year 2007-08 - Respondent No.4 transferred the licence in favour of respondent No.5 - Petitioner claimed that as privilege was transferred therefore, the renewal clause was available to petitioner and not to respondent No.4 - Held - Lesser degree of right is enjoyed when a person has a privilege to deal in trade - Once, the right is relinquished by petitioner, he cannot say that he still holds back the right to trade in such privilege - Petitioner cannot be allowed to turn around and reclaim privilege - Petition dismissed. [Sivanand Damahe v. State of M.P.]...653

General Clauses Act, M.P., 1957 (30 of 1958), Section 16 - See - Service Law [Ashok Noronha v. M.A. Khan] ...662

General Licence Conditions, Clause I, VI - See - Excise Act, M.P., 1915, Section 17 [Sivanand Damahe v. State of M.P.] ...653

Gramin Dak Sewak (Conduct and Employment) Rules, 2001, Rule 4(3) - See - Service Law [Union of India v. Sidd Prakash Singh] ...714

Gramodyog Adhiniyam, M.P. 1978, Section 29 - See - Service Law [Ashok Noronha v. M.A. Khan] ...662

Interpretation of statute - Conflicting statutes - When two statutes or rules are conflicting or appear to be conflicting, the duty of Court is to find out which of the two apparent conflicting provisions is more general and which is more specific - In case of inconsistency between provisions of two enactments both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and clear intendment conveyed by language of relevant provisions therein. [State of M.P. v. Raghvendra Sohgaura] ...623

Khadi and Gramodyog Regulation, M.P. 1980 - See - Service Law [Ashok Noronha v. M.A. Khan] ...662

Land Acquisition Act (1 of 1894), Section 11 - See - Coal Bearing Areas (Acquisition and Development) Act, 1957, Section 14 [Naresh Singh v. Union of India] ...730

साक्ष्य अधिनियम (1872 का 1), धारा 45 - चिकित्सक की परीक्षा न कराना - प्रभाव - महिला चिकित्सक, जिसने अभियोक्त्री की जाँच की, की परीक्षा नहीं की जा सकती क्योंकि उसकी मृत्यु हो गई - यद्यपि उसकी चिकित्सीय रिपोर्ट उसके हस्तलेख में होना उसके पति द्वारा साबित किया गया - अभिनिर्धारित - चिकित्सक की परीक्षा न कराना अभियोजन मामले के लिए घातक नहीं होगा। (नंदन उर्फ शिवनंदन वि. म.प्र. राज्य) ...*21

आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 17, सामान्य लायसेंस शर्तें, खण्ड I, VI - लायसेंस का अंतरण या उप-पट्टा - याची को आबकारी वर्ष 2005-06 के लिए शराब की दुकान चलाने के लिए लायसेंस आवंटित किया गया - लायसेंस आबकारी वर्ष 2006-07 के लिए नवीनीकृत किया गया - याची ने आबकारी वर्ष 2006-07 के लिए खुदरा विक्रय की संविदा प्रत्यर्थी क्र. 4 के पक्ष में अंतरित की - प्रत्यर्थी क्र. 4 ने वर्ष 2007-08 के लिए लायसेंस नवीनीकृत करवाया - प्रत्यर्थी क्र. 4 ने लायसेंस प्रत्यर्थी क्र. 5 के पक्ष में अंतरित किया - याची ने दावा किया कि विशेषाधिकार अंतरित कर दिया गया है इसलिए नवीनीकरण खण्ड याची को उपलब्ध था न कि प्रत्यर्थी क्र. 4 को - अभिनिर्धारित - अधिकार की कम मात्रा का उपभोग किया जाता जब एक व्यक्ति व्यापार करने का विशेषाधिकार रखता है - एक बार जब याची द्वारा अधिकार का परित्याग कर दिया गया तब वह यह नहीं कह सकता कि उसने अब तक ऐसे विशेषाधिकार में व्यापार करने का अधिकार रोक लिया है - याची को मुकरने और विशेषाधिकार का पुनः दावा करने की अनुमति नहीं दी जा सकती - याचिका खारिज। (शिवानंद दामहे वि. म.प्र. राज्य) ...653

साधारण खण्ड अधिनियम, म.प्र. 1957 (1958 का 30), धारा 16 - देखें - सेवा विधि (अशोक नोरोन्हा वि. एम.ए. खान) ...662

सामान्य लायसेंस शर्तें, खण्ड I, VI - देखें - आबकारी अधिनियम, म.प्र., 1915, धारा 17, (शिवानंद दामहे वि. म.प्र. राज्य) ...653

ग्रामीण डाक सेवक (आचरण और रोजगार) नियम, 2001, नियम 4(3) - देखें - सेवा विधि (यूनियन ऑफ इंडिया वि. सिद्ध प्रकाश सिंह) ...714

ग्रामोद्योग अधिनियम, म.प्र. 1978, धारा 29 - देखें - सेवा विधि (अशोक नोरोन्हा वि. एम.ए. खान) ...662

कानून का निर्वचन - अन्तर्विरोधी कानून - जब दो कानून या नियम अन्तर्विरोधी हों या अन्तर्विरोधी प्रतीत होते हों तब न्यायालय का कर्तव्य यह पता लगाना है कि दो प्रकट अन्तर्विरोधी उपबंधों में से कौन सा अधिक सामान्य है और कौन सा अधिक विनिर्दिष्ट है - दो अधिनियमितियों के उपबंधों के बीच असंगति के मामले में, जिनमें से दोनों की प्रति विशिष्ट मानी जा सकती, अन्तर्विरोध का समाधान दो अधिनियमितियों में अन्तर्निहित प्रयोजन और पॉलिसी को संदर्भित करके और उनके सुसंगत उपबंधों की भाषा से सूचित स्पष्ट अर्थान्वयन करके किया जाना चाहिए। (म.प्र. राज्य वि. राघवेन्द्र सौगरा) ...623

खादी और ग्रामोद्योग विनियम, म.प्र. 1980 - देखें - सेवा विधि (अशोक नोरोन्हा वि. एम.ए. खान) ...662

मूमि अर्जन अधिनियम (1894 का 1), धारा 11 - देखें - कोयला धारक क्षेत्र (अर्जन और विकास) अधिनियम, 1957, धारा 14, (नरेश सिंह वि. यूनियन ऑफ इंडिया) ...730

Land Acquisition Act (1 of 1894), Section 23 - Matters to be considered in determining compensation - Assessment of market value - Compensation awarded on the basis of average of market price preceding 3 years of transaction recorded in Registrar Office - Held - Reference Court erred in determining compensation by averaging the price recorded in Registrar Office - Sale deeds showing market price of land in near proximity just prior to acquisition were available - Compensation should be determined on the basis of price of higher sale deed and adding 15% p.a. as appreciation of the rate of land - Appeal allowed. [Sita Bai v. State of M.P.] ...843

Land Revenue Code, M.P. (20 of 1959), Section 50 - Suo motu revision - Reasonable time - Exercise of suo motu power by Collector after a lapse of 16 years - Held - Exercise of suo motu power of revision cannot be said to be within reasonable period - Order quashed. [Ajay Singh v. State of M.P.] ...691

Land Revenue Code, M.P. (20 of 1959), Section 165(6) - Provision does not prohibit the Government to acquire and transfer any land belonging to aboriginal tribe under law - But, it applies only to the transfer of a right of Bhumiswami belonging to a tribe by way of sale, lease, mortgage to a person not belonging to aboriginal tribe. [Naresh Singh v. Union of India]...730

Lower Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994, Rule 5(1) - See - Constitution, Article 234 [Ashok Narayan Kale v. State of M.P.] ...643

Motor Vehicles Act (59 of 1988), Section 149 - Deceased was travelling in goods vehicles - Insurer exonerated by claims tribunal - Appeal against exoneration of insurer - Contented that contents of FIR could not be relied as which were contrary to evidence adduced - Held - FIR was lodged and produced by sole eye witnesses who is one of claimants - Contents of FIR and documents binding upon claimants. [Magan v. Mansukhbhai] ...806

Motor Vehicles Act (59 of 1988), Section 166 - Claim case - Appreciation of evidence - Evidentiary value - Papers of criminal case - Driver held to be rash & negligent whereas owner and insurer exonerated as the number of motorcycle was not mentioned in the FIR - Held - When unrebutted supporting evidence is available on the record then the papers of the criminal case could not be discarded lightly without considering the circumstances mentioned in such papers - After consideration and on appreciation it is held that the alleged accident was happened because of rash and negligent riding of the alleged motorcycle - Therefore, owner and insurer of alleged motorcycle are also liable jointly & severally with the driver. [Sameer Ahmed v. Adil] ...*22

Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Appellant aged 20 years suffering 40% of permanent disability due to fracture

भूमि अर्जन अधिनियम (1894 का 1), धारा 23 - प्रतिकर अवधारित करने में विचार में ली जाने वाली बातें - बाजार मूल्य का निर्धारण - रजिस्ट्रार कार्यालय में दर्ज पूर्ववर्ती 3 वर्षों के संयवहार के औसत बाजार मूल्य के आधार पर प्रतिकर अधिनिर्णीत किया गया - अभिनिर्धारित - रिफरेंस न्यायालय ने रजिस्ट्रार कार्यालय में दर्ज मूल्य का औसत करके प्रतिकर अवधारित करने में त्रुटि की - अर्जन के ठीक पूर्व निकटस्थ भूमि का बाजार मूल्य दर्शित करने वाले विक्रय विलेख उपलब्ध थे - प्रतिकर उच्चतर विक्रय विलेख के मूल्य और भूमि की दर में 15 प्रतिशत प्रतिवर्ष की वृद्धि जोड़कर अवधारित किया जाना चाहिए - अपील मंजूर। (सीता बाई वि. म.प्र. राज्य) ...843

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50 - स्वप्रेरणा से पुनरीक्षण - युक्तियुक्त समय - कलेक्टर द्वारा स्वप्रेरणाधीन शक्ति का प्रयोग 16 वर्ष व्यतीत होने के बाद - अभिनिर्धारित - पुनरीक्षण की स्वप्रेरणाधीन शक्ति का प्रयोग युक्तियुक्त समय के भीतर होना नहीं कहा जा सकता - आदेश अभिखण्डित। (अजय सिंह वि. म.प्र. राज्य) ...691

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(6) - उपबंध सरकार को आदिम जनजाति की किसी भूमि का विधि के अधीन अर्जन और अंतरण करने से निषेधित नहीं करते हैं - बल्कि, यह केवल किसी जनजाति के भूमिस्वामी के किसी अधिकार का किसी गैर आदिम जनजाति के व्यक्ति को विक्रय, पट्टा, बंधक द्वारा अन्तरण को लागू होते हैं। (नरेश सिंह वि. यूनियन ऑफ इंडिया) ...730

निम्नतर न्यायिक सेवा (भर्ती और सेवा की शर्तें) नियम, म.प्र. 1994, नियम 5(1) - देखें - संविधान, अनुच्छेद 234, (अशोक नारायण काले वि. म.प्र. राज्य) ...643

मोटर यान अधिनियम (1988 का 59), धारा 149 - मृतक मालवाहक वाहन में यात्रा कर रहा था - बीमाकर्ता को दावा अधिकरण द्वारा विमुक्त किया गया - बीमाकर्ता की विमुक्ति के विरुद्ध अपील - यह प्रतिवाद किया गया कि एफआईआर की अन्तर्वस्तु पर विश्वास नहीं किया जा सकता क्योंकि वह पेश साक्ष्य के प्रतिकूल थी - अभिनिर्धारित - एकमात्र प्रत्यक्षदर्शी साक्षी, जो दावेदारों में से एक है, के द्वारा एफआईआर दर्ज कराई गई और पेश की गई - एफआईआर और दस्तावेजों की अन्तर्वस्तु दावेदारों पर बन्धनकारी है। (मगन वि. मनसुखमाई) ...806

मोटर यान अधिनियम (1988 का 59), धारा 166 - क्लेम मामला - साक्ष्य का अधिमूल्यन - साक्ष्यिक मूल्य - दाण्डिक मामले के कागज - ड्रायवर को उतावला और उपेक्षावान ठहराया गया जबकि स्वामी और बीमाकर्ता को उन्मुक्त किया गया क्योंकि एफआईआर में मोटरसाइकिल का नम्बर उल्लिखित नहीं था - अभिनिर्धारित - जब अभिलेख पर अखण्डनीय सहायक साक्ष्य उपलब्ध हो तब दाण्डिक मामले के कागज ऐसे कागजों में वर्णित परिस्थितियों पर विचार किये बिना सरलता से अमान्य नहीं किये जा सकते - विचार करने के बाद और अधिमूल्यन करने पर यह अभिनिर्धारित किया गया कि कथित दुर्घटना कथित मोटरसाइकिल को उतावलेपन और उपेक्षापूर्वक चलाने के कारण घटित हुई - इसलिए कथित मोटरसाइकिल के स्वामी और बीमाकर्ता भी ड्रायवर के साथ संयुक्ततः और पृथक्तः दायी हैं। (समीर एहमद वि. आदिल) ...*22

मोटर यान अधिनियम (1988 का 59), धारा 166 - प्रतिकर - 20 वर्ष उम्र के अपीलार्थी को दांचे पैर की टिबिया और फिबुला हड्डी के फ्रैक्चर के कारण 40 प्रतिशत स्थायी

*of tibia & fibula bone of right leg - Tribunal awarding compensation of Rs.40,000 for loss of income, Rs.22,500 for treatment expenses and Rs.5,000 for pain & suffering - Held - Tribunal has not awarded any sum on the head of loss of income for the period of treatment and in treatment expenses only Rs.22,500 are awarded in which the expenses of attendant, special diet, travelling expenses to consult the doctor are also included - Considering overall circumstances, compensation further enhanced by Rs.30,000 along with interest @ 6% p.a. from the date of filing of claim petition. [Sameer Ahmed v. Adil] ...*22*

*Motor Vehicles Act (59 of 1988), Section 166 - Effect of non-mentioning the registration number of involved vehicle in FIR - FIR is not the encyclopedia of the incident - Thus, it could not be said that FIR relating to the road accident must have the number of the offending vehicle - In many cases, injured being illiterate or on sustaining the injury in accident does not remain in the position to see or identify the registered number of the vehicle - The same could be traced out only after holding the investigation by the police. [Sameer Ahmed v. Adil] ...*22*

Motor Vehicles Act (59 of 1988), Section 173 - Appeal against dismissal of claim on ground that name of deceased did not find in FIR - Held - There was enough evidence to show that deceased died in the said accident - Dismissal of claim set-aside - Appeal allowed. [Magan v. Mansukhbhai] ...806

Motor Vehicles Act (59 of 1988), Section 173 - Compensation - Liability of Insurance Company - Offending vehicle used for murdering the deceased - Claims Tribunal held Insurance Company liable for compensation - Held - Insurance Company is not liable for compensation because the vehicle was used contrary to the terms and conditions of the Insurance Policy - Award fixing the liability of Insurance Company set-aside - However, the liability of other non-applicants will be same as per the award - If any amount paid by Insurance Company to the claimants, it can be recovered from the owner of the vehicle - Appeal allowed. [United India Insurance Co. Ltd. v. Smt. Gayatri Yadav] ...817

Motor Vehicles Act (59 of 1988), Section 173 - Cross-objection by owner without complying mandatory provision of Section 173 whereby he is required to deposit amount towards payment of award - Held - Cross-objection not maintainable. [Magan v. Mansukhbhai] ...806

M.P. Professional Examination Board Pre MCA and MET Rules, 2008, Rule 1.4.8, Rajiv Gandhi Prodyogiki Vishwavidyalaya Bhopal Ordinance, Clause 2.1 - Admission to MCA course - After permitting petitioner to undertake examination, admission in MCA course denied on the ground that she did not have mathematics as subject either at Higher

निःशक्तता आयी - अधिकरण ने आय की हानि के लिए 40,000 रुपये, इलाज व्यय के लिए 22,500 रुपये और 5,000 रुपये कष्ट और पीड़ा के लिए प्रतिकर अधिनिर्णीत किया - अभिनिर्धारित - अधिकरण ने इलाज की कालावधि में आय की हानि शीर्ष पर कोई राशि अधिनिर्णीत नहीं की और इलाज व्यय के लिए केवल 22,500 रुपये अधिनिर्णीत किये जिसमें अटेंडेंट का व्यय, विशेष आहार, चिकित्सक से परामर्श के लिए यात्रा व्यय भी शामिल हैं - समग्र परिस्थितियों पर विचार कर प्रतिकर में 30,000 रुपये दावा याचिका पेश करने की तारीख से 6 प्रतिशत वार्षिक ब्याज सहित की वृद्धि की गई। (समीर एहमद वि. आदिल) ...*22

मोटर यान अधिनियम (1988 का 59), धारा 166 - अन्तर्गस्त वाहन के रजिस्ट्रेशन क्रमांक का एफआईआर में उल्लेख न होने का प्रभाव - एफआईआर घटना का विश्वकोष नहीं है - इस प्रकार यह नहीं कहा जा सकता कि सड़क दुर्घटना से सम्बन्धित एफआईआर में उल्लंघनकारी वाहन का नम्बर होना चाहिए - अनेक मामलों में क्षतिग्रस्त निरक्षर होने या दुर्घटना में उसे क्षति आने पर इस स्थिति में नहीं रहता कि वाहन का रजिस्टर्ड नम्बर देख या पहचान सके - इसका केवल पुलिस द्वारा अन्वेषण किये जाने के बाद पता लगाया जा सकता है। (समीर एहमद वि. आदिल) ...*22

मोटर यान अधिनियम (1988 का 59), धारा 173 - दावा खारिजी के विरुद्ध अपील इस आधार पर कि एफआईआर में मृतक का नाम नहीं पाया गया - अभिनिर्धारित - यह दर्शाने के लिए पर्याप्त साक्ष्य थी कि मृतक की मृत्यु कथित दुर्घटना में हुई - दावे की खारिजी अपास्त - अपील मंजूर। (मगन वि. मनसुख भाई) ...806

मोटर यान अधिनियम (1988 का 59), धारा 173 - प्रतिकर - बीमा कम्पनी का दायित्व - उल्लंघनकारी वाहन का प्रयोग मृतक की हत्या करने में किया गया - दावा अधिकरण ने बीमा कम्पनी को प्रतिकर के लिए दायी ठहराया - अभिनिर्धारित - बीमा कम्पनी प्रतिकर के लिए दायी नहीं है क्योंकि वाहन का प्रयोग बीमा पॉलिसी के निबंधनों और शर्तों के विपरीत किया गया - बीमा कम्पनी का दायित्व नियत करने वाला अधिनिर्णय अपास्त - तथापि, अधिनिर्णय के अनुसार अन्य अनावेदकों का दायित्व वही रहेगा - यदि बीमा कम्पनी द्वारा दावेदारों को कोई रकम अदा की गई हो तो यह वाहन के स्वामी से वसूली जा सकती है - अपील मंजूर। (यूनाईटेड इंडिया इंश्योरेंस कं. लि. वि. श्रीमति गायत्री यादव) ...817

मोटर यान अधिनियम (1988 का 59), धारा 173 - स्वामी द्वारा प्रत्याक्षेप धारा 173 के आज्ञापक उपबंध का अनुपालन किये बिना जिसके द्वारा उसे अधिनिर्णय की राशि के संदाय के लिए राशि जमा करना अपेक्षित है - अभिनिर्धारित - प्रत्याक्षेप पोषणीय नहीं। (मगन वि. मनसुख भाई) ...806

म.प्र. व्यावसायिक परीक्षा मण्डल पूर्व एमसीए और भेट नियम, 2008, नियम 1.4.8, राजीव गांधी प्रौद्योगिकी विश्वविद्यालय भोपाल अध्यादेश, खण्ड 2.1 - एमसीए पाठ्यक्रम में प्रवेश - याची को परीक्षा में बैठना अनुज्ञात करने के बाद एमसीए पाठ्यक्रम में प्रवेश से इस आधार पर इंकार किया गया कि उसका उच्चतर माध्यमिक या स्नातक स्तर पर गणित विषय

Secondary or at Graduation level - Held - Petitioner had business mathematics at Higher Secondary level as additional subject - Syllabuses and chapters of mathematics and business mathematics are quite different - Distinction was in knowledge of petitioner - Rule, ordinance and norms issued by All India Council for Technical Education prescribes minimum admission qualification for MCA course that one should have passed either Higher Secondary or Graduation with mathematics as one subject - Petitioner does not possess requisite qualification - Admission rightly denied - Petition dismissed. [Smriti Agarwal (Ku.) v. M.P. Professional Examination Board]... 747

Municipal Employees Recruitment and Conditions Rules, M.P. 1968, Rule 23 - See - Service Law [Mathuro (Smt.) v. State of M.P.] ... 765

Municipalities Act, M.P. (37 of 1961), Sections 95 & 355 - See - Service Law [Mathuro (Smt.) v. State of M.P.] ... 765

Municipality (Transfer of Immovable Property) Rules, M.P. 1996, Rule 6 - Municipal Council has imposed additional condition that the highest bidder is required to deposit 1/4 amount immediately after conclusion of the bid and in case of failure on the part of the highest bidder in depositing the balance amount 1/4 amount deposited by the bidder shall stand forfeited automatically - Held - Rule 6 empowers the Council to impose other conditions in addition to the condition mentioned in Rule 6 - Council has exercised power well within its jurisdiction - Suit for recovery of forfeited 1/4 amount was rightly dismissed by the trial court - Appeal dismissed. [Manoj v. Municipal Council, Mandsaur] ... 802

Narcotics Drugs and Psychotropic Substances Act (61 of 1985), Section 52-A, Criminal Procedure Code, 1973, Sections 6 & 20 - In the sub-section (2) of Section 52-A of the Act the word used 'any magistrate' means any executive or judicial magistrate as defined in Code u/ss 6 & 20. [Nirmal v. State of M.P.] ... 848

Narcotics Drugs and Psychotropic Substances Act (61 of 1985), Section 52-A - Disposal of seized narcotics drugs and psychotropic substances - Provision is meant for disposal of the property during the pendency of the trial - Disposal means final disposal and the property would not remain in custody of Police, Excise Department or Central Narcotics Bureau. [Nirmal v. State of M.P.] ... 848

Narcotics Drugs and Psychotropic Substances Act (61 of 1985), Section 52-A - The purpose of Section 52-A is to allow the disposal of property at the earliest point of time during the course of investigation so that same may not be vulnerable to theft, substitution, constraints of proper storage, space or any other kind of destruction, after following the procedure mentioned in sub-section (2) of Section 52-A of the Act. [Nirmal v. State of M.P.] ... 848

नहीं था - अभिनिर्धारित - याची ने उच्चतर माध्यमिक स्तर पर व्यावसायिक गणित अतिरिक्त विषय के रूप में लिया था - गणित और व्यावसायिक गणित के पाठ्यक्रम और अध्याय बिल्कुल भिन्न हैं - भिन्नता याची के ज्ञान में थी - अखिल भारतीय तकनीकी शिक्षा परिषद द्वारा जारी नियम, अध्यादेश और मानक एमसीए पाठ्यक्रम के लिए न्यूनतम प्रवेश अर्हता विहित करते हैं कि या तो उच्चतर माध्यमिक या स्नातक एक विषय के रूप में गणित के साथ उत्तीर्ण होना चाहिए - याची अपेक्षित अर्हता नहीं रखती है - प्रवेश उचित रूप से नामजूर - याचिका खारिज। (स्मृति अग्रवाल (कु.) वि. एम.पी. प्रोफेशनल एग्जामिनेशन बोर्ड)

...747

नगरपालिका कर्मचारी भर्ती और शर्तें नियम, म.प्र., 1968, नियम 23 - देखें - सेवा विधि (मथुरो (श्रीमति) वि. म.प्र. राज्य)

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नगरपालिका अधिनियम, म.प्र. (1961 का 37), धाराएँ 95 व 355 - देखें - सेवा विधि (मथुरो (श्रीमति) वि. म.प्र. राज्य)

...765

नगरपालिका (स्थावर सम्पत्ति का अंतरण), नियम, म.प्र. 1996, नियम 6 - नगरपालिका परिषद ने अतिरिक्त शर्त अधिरोपित की कि उच्चतम बोली लगाने वाले को बोली पूरी होने के तुरन्त बाद $1/4$ राशि जमा करना आवश्यक है और उच्चतम बोली लगाने वाले की ओर से शेष राशि जमा करने में असफल रहने की दशा में बोली लगाने वाले द्वारा जमा की गई $1/4$ राशि स्वतः समपहृत हो जायेगी - अभिनिर्धारित - नियम 6 परिषद को नियम 6 में उल्लिखित शर्त के अतिरिक्त अन्य शर्तें अधिरोपित करने के लिए सशक्त करता है - परिषद ने शक्ति का प्रयोग उचित रूप से अपनी अधिकारिता के भीतर किया - विचारण न्यायालय द्वारा समपहृत $1/4$ राशि की वसूली का वाद उचित रूप से खारिज किया गया - अपील खारिज। (मनोज. वि. म्यूनिसिपल काउंसिल, मंदसौर)

...802

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 52-ए, दण्ड प्रक्रिया संहिता, 1973, धाराएँ 6 व 20 - अधिनियम की धारा 52-ए की उपधारा (2) में प्रयुक्त शब्द 'कोई मजिस्ट्रेट' का अर्थ संहिता की धारा 6 व 20 में परिभाषित किसी कार्यपालक या न्यायिक मजिस्ट्रेट से है। (निर्मल वि. म.प्र. राज्य)

...848

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 52-ए- अभिग्रहीत स्वापक औषधि और मनःप्रभावी पदार्थों का व्ययन - उपबंध का अर्थ विचारण के दौरान सम्पत्ति के व्ययन से है - व्ययन का अर्थ अंतिम व्ययन है और सम्पत्ति पुलिस, आबकारी विभाग या केन्द्रीय स्वापक ब्यूरो की अभिरक्षा में नहीं रहेगी। (निर्मल वि. म.प्र. राज्य)

...848

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 52-ए - धारा 52-ए का उद्देश्य अनुसंधान के दौरान सर्वप्रथम अवसर पर अधिनियम की धारा 52-ए की उपधारा (2) में उल्लिखित प्रक्रिया का पालन करने के बाद सम्पत्ति का व्ययन अनुज्ञात करना है ताकि वह चोरी, प्रतिस्थापन, किसी प्रकार के नाश या स्थान या समुचित संग्रहण के दबाव के कारण असुरक्षित न हो सके। (निर्मल वि. म.प्र. राज्य)

...848

Narcotics Drugs and Psychotropic Substances Act (61 of 1985), Section 52-A - 23 quintal of poppy husk loaded in truck without license or permit seized from appellants - As per provisions u/s 52-A samples were drawn, inventory prepared and photographs were taken in the presence of executive magistrate, but property was not finally disposed of - Held - Neither photograph, seizure memo, inventory, packets of sample were produced before the trial court and proved as primary evidence nor original property which was not disposed of was produced before trial court - Prosecution failed to establish quantity and identity of seized property - Conviction & sentence of appellants set-aside - Appeal allowed. [Nirmal v. State of M.P.] ...848

Natural Justice - Notice to remove encroachment by publication in newspaper - Held - Since petitioners have no right to continue at the same place and there was urgency to take action in public interest - Even if notice was given to petitioners, the result would have been same - Action of respondents not faulted on the ground of non-compliance of principles of natural justice. [Mohammad Sageer Manihari Wale v. State of M.P.] ...681

Negotiable Instruments Act (26 of 1881), Section 138 - Dishonor of cheque - Alteration in date of issuance of cheque - Cheque presented for encashment even after 5 months of altered date - No explanation about revalidation of cheque and delay in presentation - Held - Complaint rightly rejected by court below - Appeal dismissed. [Daccan Lubes Terfe (M/s) v. M/s. Chakradhar Construction] ...870

Negotiable Instruments Act (26 of 1881), Section 138 - Dishonor of cheque - Complaint by partnership firm through one of partners - Held - Complaint is maintainable. [Daccan Lubes Terfe (M/s) v. M/s. Chakradhar Construction] ...870

Panchayat Karmi Yojna, Clause 3(3.4) - Appointment of Secretary - Preference - Preference to candidates of ST/SC/OBC/Female categories - If candidates of different categories are equal in merits, candidate belonging to SC/ST/OBC/Female category is to be preferred - Petitioner belonging to ST category securing 59.6% marks whereas respondent No.4 belonging to General category secured 74% marks in High School Examination - Petitioner not entitled for preference. [Lallu Kol v. State of M.P.] ...675

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 69(1), Panchayat (Resignation by Office Bearers) Rules, M.P. 1995, Rule 4 - Appointment of Secretary - Brother of respondent No.4 is Panch - He submitted his resignation before the appointment of respondent No.4 as Secretary - Brother also not participated in the meeting - Resignation of brother not accepted so far - Section 69 merely prohibits person from holding charge of Panchayat Secretary if he happens to be a relative of Panch or Sarpanch - No bar that respondent No.4 cannot be appointed as Secretary -

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम, (1985 का 61), धारा 52-ए - द्रक में लायसेंस या परमिट के बिना लदी 23 किंवदंतल पॉपी हस्क अपीलार्थियों से अभिग्रहीत - धारा 52-ए के उपबंधों के अनुसार कार्यपालक मजिस्ट्रेट की उपस्थिति में नमूने निकाले गये, माल सूची तैयार की गई और छायाचित्र लिये गये, किन्तु सम्पत्ति का अंतिम रूप से व्ययन नहीं किया गया - अभिनिर्धारित - न तो छायाचित्र, अभिग्रहण पत्र, माल सूची, नमूने के पैकेट विचारण न्यायालय के समक्ष पेश कर प्राथमिक साक्ष्य के रूप में साबित किये गये और न मूल सम्पत्ति, जो व्ययनित नहीं की गई, विचारण न्यायालय के समक्ष पेश की गई - अभियोजन अभिग्रहीत सम्पत्ति की मात्रा और पहचान साबित करने में असफल रहा - अपीलार्थियों की दोषसिद्धि और दण्डादेश अपास्त - अपील मंजूर। (निर्मल वि. म.प्र. राज्य) ...848

नैसर्गिक न्याय - समाचार पत्र में प्रकाशन द्वारा अतिक्रमण हटाने की सूचना - अभिनिर्धारित - चूंकि याचियों को एक ही स्थान पर बने रहने का कोई अधिकार नहीं है और लोक हित में कार्यवाही करने की अत्यावश्यकता थी - यदि याचियों को सूचनापत्र दिया भी जाता तो भी परिणाम वही हुआ होता - प्रत्यर्थियों का कृत्य नैसर्गिक न्याय के सिद्धांतों के अननुपालन के आधार पर त्रुटिपूर्ण नहीं। (मोहम्मद सगीर मनिहारी वाले वि. म.प्र. राज्य) ...681

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 - चेक का अनादरण - चेक जारी करने की तारीख में परिवर्तन - चेक परिवर्तित तारीख के भी 5 माह बाद भुनाने के लिए प्रस्तुत किया गया - चेक के पुनर्वैधीकरण और प्रस्तुत करने में विलम्ब के बारे में कोई स्पष्टीकरण नहीं - अभिनिर्धारित - अधीनस्थ न्यायालय ने परिवाद उचित रूप से खारिज किया - अपील खारिज। (डेक्कन ल्यूबस तर्फें (मे.) वि. मे. चक्रधर कन्सट्रक्सन) ...870

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 - चेक का अनादरण - भागीदारों में से एक भागीदार द्वारा भागीदारी फर्म की ओर से परिवाद - अभिनिर्धारित - परिवाद पोषणीय है। (डेक्कन ल्यूबस तर्फें (मे.) वि. मे. चक्रधर कन्सट्रक्सन) ...870

पंचायत कर्मी योजना, खण्ड 3(3.4) - सचिव की नियुक्ति - अधिमान - एसटी/एससी/ओबीसी/महिला श्रेणी के अभ्यर्थियों को अधिमान - यदि भिन्न श्रेणियों के अभ्यर्थी मेरिट में समान हैं तो एसटी/एससी/ओबीसी/महिला श्रेणी से सम्बन्धित अभ्यर्थी को अधिमान दिया जाना चाहिए - हाईस्कूल परीक्षा में एसटी श्रेणी के याची ने 59.6 प्रतिशत अंक अर्जित किये जबकि सामान्य श्रेणी के प्रत्यर्थी क्र. 4 ने 74 प्रतिशत अंक अर्जित किये - याची अधिमान का हकदार नहीं। (लल्लू कोल वि. म.प्र. राज्य) ...675

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 69(1), पंचायत (पदाधिकारियों द्वारा त्यागपत्र) नियम, म.प्र. 1995, नियम 4 - सचिव की नियुक्ति - प्रत्यर्थी क्र. 4 का भाई पंच - उसने प्रत्यर्थी क्र. 4 की सचिव के रूप में नियुक्ति के पूर्व अपना त्यागपत्र दिया - भाई ने बैठक में भी भाग नहीं लिया - भाई का त्यागपत्र अब तक स्वीकार नहीं किया गया - धारा 69 व्यक्ति को पंचायत सचिव का कार्यभार ग्रहण करने से प्रतिषिद्ध करती है यदि वह पंच या सरपंच का रिश्तेदार हो - कोई रोक नहीं कि प्रत्यर्थी क्र. 4 सचिव के रूप में नियुक्त नहीं किया जा सकता - तथापि, प्रत्यर्थी क्र. 4 को

However, respondent No.4 shall not be permitted to hold charge of the office of Secretary till the resignation of his brother is accepted - In case resignation is not accepted, respondent No.4 shall not be permitted to hold the charge of Secretary. [Lallu Kol v. State of M.P.] ...675

Panchayat (Resignation by Office Bearers) Rules, M.P. 1995, Rule 4 - See -Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993, Section 69(1) [Lallu Kol v. State of M.P.] ...675

Panchayat Service (Recruitment and General Conditions of Services) Rules, M.P. 1999, Rule 25 - See - Panchayat Shiksha Karmis (Recruitment and Conditions of Service) Rules, M.P. 1997, Rule 7 [State of M.P. v. Raghvendra Sohgaure] ...623

Panchayat Shiksha Karmis (Recruitment and Conditions of Service) Rules, M.P. 1997, Rule 7, Panchayat Service (Recruitment and General Conditions of Services) Rules, M.P. 1999, Rule 25 - Probation - Rules 1997 exclusively deals with appointment of Shiksha Karmis - Rules 1999 lays down recruitment and general conditions of Panchayat services - When a specific set of rule has been brought into existence to govern the terms and conditions of Shiksha Karmis, it is to be treated as special rule. [State of M.P. v. Raghvendra Sohgaure] ...623

Panchayat Shiksha Karmis (Recruitment and Conditions of Service) Rules, M.P. 1997, Rule 7 - Probation - Increment - Shiksha Karmis are not entitled to increments during their probation period in terms of Rule 7. [State of M.P. v. Raghvendra Sohgaure] ...623

Penal Code (45 of 1860), Section 96 - Private defence - When presumption that injuries have been caused by accused in exercise of his right of private defence can be drawn - Law explained. [Beniram v. State of M.P.] ...885

Penal Code (45 of 1860), Sections 201 & 302 - Murder - Life imprisonment - Cause of death throttling - Allegation that at 3 p.m. there was hot exchange of words between deceased and appellant and thereafter matter was settled - At 8 p.m. appellant along with other accused persons was seen shifting dead body of deceased from house of one accused to the house of appellant - Nail marks found on the neck of deceased - Appellant's both palms are amputated below wrist - Held - Trial court acquitted other accused persons - If there is none else who can be connected with alleged crime then it would almost be impossible for a man who does not have the palms to firstly throw an able bodied man on the ground and thereafter throttle him with the help of legs - A man without palms could not help and assist in shifting the body from one house to another - The observation of trial court in relation to nail marks caused by toe nails is not only fanciful but is absolutely perverse and shocks the human understanding and prudence -

उसके भाई का त्यागपत्र स्वीकार हो जाने तक सचिव का पदमार ग्रहण करने के लिए अनुज्ञात नहीं किया जाएगा। (लल्लू कोल वि. म.प्र. राज्य) ...675

पंचायत (पदाधिकारियों द्वारा त्यागपत्र) नियम, म.प्र. 1995; नियम 4 - देखें - पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993, धारा 69(1) (लल्लू कोल वि. म.प्र. राज्य) ...675

पंचायत सेवा (भर्ती तथा सेवा की सामान्य शर्तें) नियम, म.प्र. 1999, नियम 25 - देखें - पंचायत शिक्षा कर्मी (भर्ती तथा सेवा की शर्तें) नियम, म.प्र. 1997, नियम 7 (म.प्र. राज्य वि. राघवेन्द्र सौगरा) ...623

पंचायत शिक्षा कर्मी (भर्ती तथा सेवा की शर्तें) नियम, म.प्र. 1997, नियम 7, पंचायत सेवा (भर्ती तथा सेवा की सामान्य शर्तें) नियम, म.प्र. 1999, नियम 25 - परीक्षा - 1997 के नियम अनन्य रूप से शिक्षा कर्मियों की नियुक्ति से संबंधित हैं - 1999 के नियम पंचायत सेवाओं की भर्ती और सामान्य शर्तें अधिकथित करते हैं - जब शिक्षा कर्मियों के निबंधनों और शर्तों को शासित करने के लिए नियम का कोई विनिर्दिष्ट समूह अस्तित्व में लाया गया हो, इसे विशिष्ट नियम के रूप में मानना चाहिए। (म.प्र. राज्य वि. राघवेन्द्र सौगरा) ...623

पंचायत शिक्षा कर्मी (भर्ती तथा सेवा की शर्तें) नियम, म.प्र. 1997, नियम 7 - परीक्षा - वेतनवृद्धि - शिक्षा कर्मी नियम 7 के निबंधनों के अनुसार उनकी परीक्षा अवधि के दौरान वेतनवृद्धि के हकदार नहीं हैं। (म.प्र. राज्य वि. राघवेन्द्र सौगरा) ...623

दण्ड संहिता (1860 का 45), धारा 96 - प्राइवेट प्रतिरक्षा - कब यह उपधारणा की जा सकती है कि अभियुक्त द्वारा क्षतियों अपने प्राइवेट प्रतिरक्षा के अधिकार के प्रयोग में कारित की गई हैं - विधि स्पष्ट की गई। (बेनीराम वि. म.प्र. राज्य) ...885

दण्ड संहिता (1860 का 45), धाराएँ 201 व 302 - हत्या - आजीवन कारावास - मृत्यु का कारण गला घोटना - अभिकथन कि दोपहर 3 बजे मृतक और अपीलार्थी के मध्य उग्र शब्दों का आदान-प्रदान हुआ और उसके बाद मामला शान्त हो गया - रात 8 बजे अपीलार्थी अन्य अभियुक्तों के साथ मृतक के शव को एक अभियुक्त के घर से अपीलार्थी के घर लाते हुए देखा गया - मृतक की गर्दन पर नाखून के निशान पाये गये - अपीलार्थी की दोनों हथेलियाँ कलाई के नीचे कटी हुई हैं - अभिनिर्धारित - विचारण न्यायालय ने अन्य अभियुक्तों को दोषमुक्त किया - यदि अन्य कोई नहीं है जो कथित अपराध से संसक्त हो सकता है तब किसी व्यक्ति, जिसकी हथेलियाँ नहीं हैं, के लिए यह प्रायः असंभव होगा कि प्रथमतः किसी शारीरिक रूप से सूक्ष्म व्यक्ति को जमीन पर पटके और तत्पश्चात् पैरों की मदद से उसका गला घोंटे - हथेलियाँ विहीन व्यक्ति शरीर को एक स्थान से दूसरे स्थान पर ले जाने में मदद और सहायता नहीं कर सकता - पैर की उंगली के नाखूनों द्वारा कारित नाखून के निशान के सम्बन्ध में विचारण न्यायालय के संप्रेक्षण न केवल विचित्रतापूर्ण हैं बल्कि आत्यंतिक रूप से विपर्यस्त हैं और मानवीय-समझ एवं प्रज्ञा पर आघात

Conviction and sentence set-aside - Appellant acquitted of all charges. [Dallu Basore v. State of M.P.] ...875

Penal Code (45 of 1860), Section 300 Exception 4 - Murder or culpable homicide not amounting to murder - Appellant No.1 dealt a blow by handle of axe on the head of deceased - Deceased suffered one lacerated wound on left temporal bone, no other external injury was found - Held - Plea of right of private defence was taken by the appellant for the first time in his accused statement - Appellant failed to prove right of private defence as no report was lodged by him and no injury was caused to him - Incident occurred all of a sudden in heat of passion when deceased caught son of accused - The act of causing solitary blow on the head of deceased would fall under Clause 4 of exception of Section 300 IPC, punishable u/s 304 Part-I - Offences punishable u/s 304 Part-I and not u/s 302 IPC - Appeal partly allowed. [Karan Singh v. State of M.P.] ...859

Penal Code (45 of 1860), Section 302, Constitution, Article 136 - Scope of interference - In exercise of power under Article 136 of Constitution, Supreme Court does not reappreciate evidence, review and re-weight evidence which has been appreciated by trial Court and High Court - If Sessions Court was satisfied that witnesses are trustworthy and High Court has confirmed that part, it cannot be said that any illegality has been committed by Courts below - Appeal dismissed. [Dadan v. State of M.P.] SC...615

Penal Code (45 of 1860), Section 302 - Murder - Place of occurrence - Witnesses stating different place of occurrence - Witnesses also admitted that because of darkness none of accused persons could be identified - Respondents were rightly acquitted by High Court in view of discrepancy as regards the place of occurrence but also on several vitals aspects like non-disclosure and non-possibility of identification - Appeal dismissed. [State of M.P. v. Makhan @ Madan] SC...613

Penal Code (45 of 1860), Section 302 - Murder - Presence of witness - Deceased was assaulted inside his house - Presence of wife and son at the time of incident natural - Nothing substantial has been brought on record to discard their evidence - Appeal dismissed. [Ram Singh v. State of M.P.] SC...609

Penal Code (45 of 1860), Section 304-B - Dowry death - Prosecution case is that sister-in-law poured kerosene oil and set the deceased ablaze - Not a case that death has occurred in abnormal circumstances - No evidence that soon before her death she was subjected to cruelty - Conviction u/s 304-B set-aside - However, conviction & sentence of sister-in-law u/s 302 maintained - Appeal partly allowed. [Lakhan Singh Rajpoot v. State of M.P.]...854

Penal Code (45 of 1860), Section 324 - Simple hurt - Injury on head alleged to be caused by axe - Lacerated wound found in M.L.C. - Held - Injury could be caused by blunt side of axe - It will fall under second category

करते हैं - दोषसिद्धि और दण्डादेश अपास्त - अपीलार्थी सभी आरोपों से दोषमुक्त। (डल्लू बंसौर वि. म.प्र. राज्य) ...875

दण्ड संहिता (1860 का 45), धारा 300 अपवाद 4 - हत्या या हत्या की कोटि में न आने वाला सदोष मानव वध - अपीलार्थी क्र. 1 ने कुल्हाड़ी के हथ्थे से मृतक के सिर पर प्रहार किया - मृतक को बांधी टेम्पोरल बोन में एक कटा-फटा घाव हुआ, कोई अन्य बाह्य क्षति नहीं पायी गयी - अभिनिर्धारित - प्राइवेट प्रतिरक्षा के अधिकार का अभिवचन अपीलार्थी द्वारा प्रथम बार अभियुक्त कथन में लिया - अपीलार्थी प्राइवेट प्रतिरक्षा का अधिकार साबित करने में असफल रहा क्योंकि उसके द्वारा कोई रिपोर्ट दर्ज नहीं करायी गई और उसे कोई क्षति कारित नहीं हुई - घटना आवेश की तीव्रता में अचानक घटित हुई जब मृतक ने अभियुक्त के पुत्र को पकड़ा - मृतक के सिर पर एकमात्र प्रहार कारित करने का कृत्य भा.द.सं. की धारा 300 के अपवाद के खण्ड 4 के अन्तर्गत आयेगा, जो धारा 304 भाग I के अन्तर्गत दण्डनीय है - अपराध भा.द.सं. की धारा 304 भाग I के अन्तर्गत दण्डनीय न कि धारा 302 के - अपील अंशतः मंजूर। (करन सिंह वि. म.प्र. राज्य) ...859

दण्ड संहिता (1860 का 45), धारा 302, संविधान, अनुच्छेद 136 - हस्तक्षेप का विस्तार - संविधान के अनुच्छेद 136 के अन्तर्गत शक्तियों के प्रयोग में उच्चतम न्यायालय साक्ष्य का पुनर्मूल्यांकन, पुनर्विलोकन और पुनर्विचार नहीं करता जिसका विचारण न्यायालय एवं उच्च न्यायालय द्वारा मूल्यांकन किया जा चुका है - यदि सेशन न्यायालय का समाधान हो गया कि साक्षीगण विश्वसनीय हैं और उच्च न्यायालय ने उस भाग की पुष्टि कर दी है, यह नहीं कहा जा सकता कि अधीनस्थ न्यायालयों द्वारा कोई अवैधता की गई है - अपील खारिज। (ददन वि. म.प्र. राज्य) SC...615

दण्ड संहिता (1860 का 45), धारा 302 - हत्या - घटना का स्थान - साक्षियों ने भिन्न-भिन्न घटना स्थल बताये - साक्षियों ने यह भी स्वीकार किया कि अंधेरे के कारण किसी भी अभियुक्त को नहीं पहचाना जा सका - उच्च न्यायालय द्वारा घटना स्थल के सम्बन्ध में विसंगति को देखते हुए बल्कि कई अतिआवश्यक पहलुओं जैसे शिनाख्त का अप्रकटीकरण और शिनाख्त की असंभावना पर भी प्रत्यर्थियों को उचित रूप से दोषमुक्त किया गया - अपील खारिज। (म.प्र. राज्य वि. माखन उर्फ मदन) SC...613

दण्ड संहिता (1860 का 45), धारा 302 - हत्या - साक्षी की उपस्थिति - मृतक पर उसके घर के अन्दर हमला किया गया - घटना के समय पत्नी और पुत्र की उपस्थिति स्वाभाविक - उनकी साक्ष्य अमान्य करने के लिए अभिलेख पर सारवान कुछ नहीं लाया गया - अपील खारिज। (राम सिंह वि. म.प्र. राज्य) SC...609

दण्ड संहिता (1860 का 45), धारा 304-बी - दहेज मृत्यु - अभियोजन का मामला यह है कि ननद ने मिट्टी का तेल उड़ेली और मृतक को आग लगा दी - यह मामला नहीं कि मृत्यु असामान्य परिस्थितियों में हुई - कोई साक्ष्य नहीं कि उसकी मृत्यु से कुछ समय पहले उसके साथ क्रूरता की गई - धारा 304-बी के अधीन दोषसिद्धि अपास्त - तथापि, ननद की धारा 302 के अधीन दोषसिद्धि और दण्डादेश कायम रखे गये - अपील अंशतः मंजूर। (लाखन सिंह राजपूत वि. म.प्र. राज्य) ...854

दण्ड संहिता (1860 का 45), धारा 324 - साधारण उपहति - सिर पर क्षति कथित रूप से कुल्हाड़ी द्वारा कारित - एम.एल.सी. में कटे-फटे घाव पाये गये - अभिनिर्धारित - क्षति कुल्हाड़ी की मोथरी ओर से कारित की जा सकती थी - यह मौखिक और चिकित्सीय साक्ष्य के बीच

of conflict between oral and medical evidence as explained in Thaman Kumar's case [(2003) 6 SCC 380] - Trial Court did not commit any illegality in ignoring absence of any incised wound. [Beniram v. State of M.P.] ...885

Penal Code (45 of 1860), Section 324 r/w 34 - Appellant No.1 & 3 were convicted u/s 324/34 - Conviction challenged on ground that incident occurred all of a sudden and both the parties entered into free fight - Held - No evidence on record that appellants had pre-meeting of mind, pre-meditation and pre-plan for causing simple injury or any kind of injury to complainant party - It is true that appellants have not sustained any injury but force was used by complainant party by catching hold of appellant No.2 - Therefore, appellants would be liable for their individual act - Conviction & sentence u/s 324/34 set-aside - Appellant No.1 acquitted from the charge - However, appellant No.3 is convicted u/s 323 IPC and sentenced to period already undergone - Appeal partly allowed. [Karan Singh v. State of M.P.]...859

Penal Code (45 of 1860), Section 376 - Rape - Evidence of Prosecutrix - If evidence of prosecutrix is reliable, then conviction can be based solely on the testimony of prosecutrix - High Court found that the evidence of prosecutrix is natural, probable and reliable and further her evidence is also corroborated from the evidence of other witnesses - Conviction u/s 376(2)(g) affirmed - Appeal dismissed. [Kummer Singh v. State of M.P.] ...*20

Penal Code (45 of 1860), Section 376 - Sentence - Life imprisonment - Father continuously committed rape with his own daughter - If the protector himself becomes violator, the degree of vulnerability becomes more greater and, accordingly, leniency in passing the sentence finds no place in such a case - Appellant rightly sentenced to life imprisonment by trial court - Appeal dismissed. [Ambaram v. State of M.P.] ...866

Penal Code (45 of 1860), Section 376(2)(g), Criminal Procedure Code, 1973, Section 154 - Delay in FIR - Incident took place at 8 p.m. - FIR lodged on next day at 2.30 p.m. - Place of incident 12 kms away from Police Station - Held - Family members are required to think over matter whether the matter is to be informed to police or not - No delay in lodging FIR. [Kummer Singh v. State of M.P.] ...*20

Penal Code (45 of 1860), Section 376(2)(g), Criminal Procedure Code, 1973, Section 154 - FIR - Defence plea that FIR was not lodged by prosecutrix herself but lodged by her father - Held - Prosecutrix's father stated that report was lodged by prosecutrix herself - Sub-Inspector has stated that report was lodged by prosecutrix herself and he himself has written the report thereafter thumb impression of prosecutrix was affixed - There is presumption that the official acts are done in the regular way - Therefore, it cannot be accepted that prosecutrix herself did not lodge the report. [Kummer Singh v. State of M.P.] ...*20

विरोध की द्वितीय श्रेणी के अन्तर्गत आयेगा जैसा कि थामन कुमार के मामले [(2003) 6 SCC 380] में स्पष्ट किया गया है - विचारण न्यायालय ने किसी चिरे हुए घाव के अभाव को अनदेखा करने में कोई अवैधता नहीं की। (बेनीराम वि. म.प्र. राज्य) ...885

दण्ड संहिता (1860 का 45), धारा 324 सहपठित 34 - अपीलार्थी क्र. 1 व 3 को धारा 324/34 के अन्तर्गत दोषसिद्ध किया गया - दोषसिद्धि को इस आधार पर चुनौती दी गई कि घटना अचानक घटित हुई और दोनों पक्षकार खुली लड़ाई में शामिल हुए - अभिनिर्धारित - अभिलेख पर कोई साक्ष्य नहीं कि अपीलार्थियों का परिवादी पक्ष को साधारण क्षति या अन्य किसी प्रकार की क्षति कारित करने का मस्तिष्कों का पूर्व-मिलन, पूर्व-चिन्तन और पूर्व-योजना थी - यह सही है कि अपीलार्थी को कोई क्षति नहीं आयी किन्तु परिवादी पक्ष द्वारा अपीलार्थी क्र. 2 को पकड़कर बल का प्रयोग किया गया था - इसलिए अपीलार्थी उनके व्यक्तिगत कृत्य के लिए दायी होंगे - धारा 324/34 के अन्तर्गत दोषसिद्धि और दण्डादेश अपास्त - अपीलार्थी क्र. 1 आरोप से दोषमुक्त - तथापि, अपीलार्थी क्र. 3 को भा.द.सं. की धारा 323 के अन्तर्गत दोषसिद्ध किया गया और पहले से भुगतें जा चुके कारावास का दण्डादेश दिया - अपील अंशतः मंजूर। (करन सिंह वि. म.प्र. राज्य) ...859

दण्ड संहिता (1860 का 45), धारा 376 - बलात्संग - अभियोक्त्री की साक्ष्य - यदि अभियोक्त्री की साक्ष्य विश्वसनीय है तब दोषसिद्धि एकमात्र अभियोक्त्री के परिसाक्ष्य पर आधारित हो सकती है - उच्च न्यायालय ने पाया कि अभियोक्त्री की साक्ष्य प्राकृतिक, अधिसंभाव्य और विश्वसनीय है तथा उसके साक्ष्य की अन्य साक्षियों की साक्ष्य से भी सम्पुष्टि होती है - धारा 376(2)(जी) के अधीन दोषसिद्धि अभिपुष्ट की गई - अपील खारिज। (कुम्मेर सिंह वि. म.प्र. राज्य) ...*20

दण्ड संहिता (1860 का 45), धारा 376 - दण्डादेश - आजीवन कारावास - पिता ने अपनी स्वयं की पुत्री के साथ लगातार बलात्संग किया - यदि रक्षक स्वयं अतिक्रामक बन जाता है तो असुरक्षा की श्रेणी अधिक गुरुतर हो जाती है और तदनुसार ऐसे किसी मामले में दण्डादेश पारित करने में नरमी का कोई स्थान नहीं है - विचारण न्यायालय द्वारा अपीलार्थी को आजीवन कारावास का दण्डादेश उचित रूप से दिया गया - अपील खारिज। (अम्बाराम वि. म.प्र. राज्य) ...866

दण्ड संहिता (1860 का 45), धारा 376(2)(जी), दण्ड प्रक्रिया संहिता, 1973, धारा 154 - एफआईआर में विलम्ब - घटना रात 8 बजे हुई - एफआईआर दूसरे दिन दोपहर 2.30 बजे दर्ज करायी गई - घटनास्थल पुलिस थाने से 12 किमी दूर - अभिनिर्धारित - परिवार के सदस्यों का मामले पर विचार करना अपेक्षित है कि मामले की सूचना पुलिस को दी जाए या नहीं - एफआईआर दर्ज कराने में कोई विलम्ब नहीं। (कुम्मेर सिंह वि. म.प्र. राज्य) ...*20

दण्ड संहिता (1860 का 45), धारा 376(2)(जी), दण्ड प्रक्रिया संहिता, 1973, धारा 154 - एफआईआर - प्रतिरक्षा की दलील कि एफआईआर स्वयं अभियोक्त्री द्वारा दर्ज नहीं करायी गई बल्कि उसके पिता द्वारा दर्ज करायी गई - अभिनिर्धारित - अभियोक्त्री के पिता ने कथन किया कि रिपोर्ट स्वयं अभियोक्त्री द्वारा दर्ज करायी गई - उपनिरीक्षक ने कथन किया कि रिपोर्ट स्वयं अभियोक्त्री द्वारा दर्ज करायी गई और स्वयं उसने रिपोर्ट लिखी उसके बाद अभियोक्त्री का अंगुष्ठ चिन्ह लगाया गया - यह उपधारणा है कि पंदीय कृत्य नियमित तरीके से किये जाते हैं - इसलिए यह स्वीकार नहीं किया जा सकता कि स्वयं अभियोक्त्री ने रिपोर्ट दर्ज नहीं करायी। (कुम्मेर सिंह वि. म.प्र. राज्य) ...*20

Penal Code (45 of 1860), Section 376 r/w 511 - See - *Evidence Act, 1872, Section 3, [Nandan @ Shiv Nandan v. State of M.P.]* ...*21

Penal Code (45 of 1860), Section 498-A - *Cruelty - Deceased in her dying declaration stated that she was being harassed on account of bringing insufficient dowry articles - Offence u/s 498-A proved. [Lakhan Singh Rajpoot v. State of M.P.]* ...854

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Section 33 - See - *Service Law [Kailash Swarnkar v. State of M.P.]* ...795

Practice & procedure - Civil - *Findings recorded by the criminal Court cannot be treated as binding in the civil cases - Acquittal of the accused persons in the criminal case on account of witnesses turned hostile - It cannot be held that for the purpose of deciding the claim case, the judgment passed by the criminal Court is binding. [United India Insurance Co. Ltd. v. Smt. Gayatri Yadav]* ...817

Precedent - *Conflict between two decisions of the Apex Court - In presence of division bench decisions and larger bench decisions, the decisions of larger bench are binding on the High Court and subordinate courts - In the case of Kalyan Sundaram [(1996) 3 SCC 87], the judgment of the M.S. Sheriff [AIR 1954 SC 397] was not placed for consideration before division bench - Therefore, M.S. Sheriff's case, decided by five judges bench, being a larger bench judgment of the Apex Court - It is having a binding effect. [Ved Prakash v. Guru Granth Saheb Sthan Meerghat Town Vanaras Sarvrahi]...* 752

Provisions of the Panchayats (Extension to the Scheduled Areas) Act (40 of 1996), Section 4 - *Exception and modification to Part IX of the Constitution - Notwithstanding anything contained under Part IX of Constitution State Government shall not make any law under this part which is inconsistent with any feature mentioned in Clause 4 - Held - The embargo u/s 4 is not on Parliament but on Legislature of State - Acquisition of land for mining is under Coal Bearing Area (Acquisition and Development) Act, 1957 which is Act of Parliament - Section 4 of Act of 1996 not applicable. [Naresh Singh v. Union of India]* ...730

Rajiv Gandhi Prodyogiki Vishwavidyalaya Bhopal Ordinance, Clause 2.1 - See - *M.P. Professional Examination Board Pre MCA and MET Rules, 2008, Rule 1.4.8 [Smriti Agarwal (Ku.) v. M.P. Professional Examination Board]...* 747

Rani Durgawati Vishwavidyalay, Ordinance No.6, 7 & 8 - *Revaluation of answer books - The average of marks awarded by two of the examiners, the original examiner and the two revaluers and nearest to each other will be taken to represent correct valuation - Any other interpretation of clause would cause violence to the language and it would usher in different meaning which is not intended - Petition dismissed. [Dharamdas v. Rani Durgawati V.V., Jabalpur]* ...639

दण्ड संहिता (1860 का 45), धारा 376 सहपठित धारा 511 - देखें - साक्ष्य अधिनियम, 1872, धारा 3 (नंदन उर्फ शिव नंदन वि. म.प्र. राज्य) ...*21

दण्ड संहिता (1860 का 45), धारा 498-ए - क्रूरता - मृतक ने अपने मृत्युकालिक कथन में कथन किया कि उसे अपर्याप्त दहेज लाने के कारण परेशान किया जा रहा था - धारा 498-ए के अधीन अपराध साबित। (लाखन सिंह राजपूत वि. म.प्र. राज्य) ...854

निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धारा 33 - देखें - सेवा विधि (कैलाश स्वर्णकार वि. म.प्र. राज्य) ...795

पद्धति और प्रक्रिया - सिविल - दाण्डिक न्यायालय द्वारा अभिलिखित निष्कर्ष सिविल मामलों में बाध्यकारी नहीं माने जा सकते - दाण्डिक मामले में अभियुक्तों की दोषमुक्ति साक्षियों के पक्षद्रोही हो जाने के कारण - यह अभिनिर्धारित नहीं किया जा सकता कि क्लेम मामले को विनिश्चित करने के प्रयोजन के लिए दाण्डिक न्यायालय द्वारा पारित निर्णय बाध्यकारी है। (यूनाइटेड इंडिया इश्योरेंस कं. लि. वि. श्रीमति गायत्री यादव) ...817

पूर्वनिर्णय - शीर्ष न्यायालय के दो निर्णयों में अन्तर्विरोध - खण्ड न्यायपीठ के निर्णयों और वृहत्तर न्यायपीठ के निर्णयों की उपस्थिति में वृहत्तर न्यायपीठ के निर्णय उच्च न्यायालय और अधीनस्थ न्यायालयों पर बंधनकारी होते हैं - कल्याण सुन्दरम [(1996) 3 SCC 87] के मामले में एम.एस. शेरिफ [AIR 1954 SC 397] का निर्णय खण्ड न्यायपीठ के समक्ष विचारार्थ नहीं रखा गया - इसलिए, पाँच न्यायाधीशों की न्यायपीठ द्वारा विनिश्चित एम.एस. शेरिफ का मामला शीर्ष न्यायालय की वृहत्तर न्यायपीठ का निर्णय होने से - यह बंधनकारी प्रभाव रखता है। (वेद प्रकाश वि. गुरु ग्रन्थ साहिब स्थान मीरघाट टाउन बनारस, सर्वराही) ...752

पंचायत उपबंध (अनुसूचित क्षेत्रों पर विस्तार) अधिनियम (1996 का 40), धारा 4 - संविधान के भाग IX के अपवाद और उपांतरण - संविधान के भाग IX में कुछ भी अन्तर्विष्ट होने पर भी राज्य सरकार इस भाग के अधीन कोई विधि नहीं बनायेगी जो खण्ड 4 में वर्णित किसी विशेषता से असंगत हो - अभिनिर्धारित - धारा 4 के अधीन निषेध संसद पर नहीं है बल्कि राज्य विधायिका पर है - खनन के लिए भूमि का अर्जन कोयला धारक क्षेत्र (अर्जन और विकास) अधिनियम, 1957 के अधीन है जो संसद का अधिनियम है - 1996 के अधिनियम की धारा 4 अनुप्रयोज्य नहीं। (नरेश सिंह वि. यूनियन ऑफ इंडिया) ...730

राजीव गांधी प्रौद्योगिकी विश्वविद्यालय मोपाल अध्यादेश, खण्ड 2.1 - देखें - म.प्र. व्यावसायिक परीक्षा मण्डल पूर्व एमसीए और मेट नियम, 2008, नियम 1.4.8 (स्मृति अग्रवाल (कु.) वि. एम.पी. प्रोफेशनल एग्जामिनेशन बोर्ड) ...747

रानी दुर्गावती विश्वविद्यालय, अध्यादेश क्र. 6, 7 व 8 - उत्तर पुस्तिकाओं का पुनर्मूल्यांकन - दो परीक्षकों, मूल परीक्षक और दो पुनर्मूल्यांकनकर्ता द्वारा प्रदत्त अंकों का औसत और एक-दूसरे का निकटवर्ती सही मूल्यांकन का प्रतिनिधित्व करने के लिए लिया जाएगा - खण्ड का अन्य कोई निर्वाचन भाषा पर आघात कारित करेगा और यह भिन्न अर्थ से मेंट करायेगा जो आशयित नहीं है - याचिका खारिज। (धरमदास वि. रानी दुर्गावती वि.वि., जबलपुर) ...639

Representation of the People Act (43 of 1951), Sections 80 & 100

- *Rejection of nomination paper by Returning Officer - Held - Act provides the improper rejection of nomination paper as a ground for challenging the election in election petition - Writ petition can not be filed. [Jaswant Singh v. Chief Election Commission]* ...717

Service Law - Civil Services (Classification, Control and Appeal)

Rules, M.P. 1966 - Compulsory retirement - *Petitioner dismissed from service on being convicted u/s 302 r/w 109 IPC and Section 30 of Arms Act - Criminal appeal allowed and petitioner was acquitted from the charge u/s 302 r/w 109 IPC but conviction u/s 30 of the Arms Act was maintained - In compliance of the order passed by SAT, the petitioner was reinstated on 06.03.1999 and was again placed under suspension - Thereafter, he was compulsorily retired - Order challenged - Held - Order of compulsory retirement demonstrates total non-application of mind on the part of the disciplinary authority - No reasonable or prudent person could have recorded a finding that the petitioner was involved in the commission of a heinous crime like murder after the acquittal u/s 302 r/w 109 IPC by the High Court - Order suffers from arbitrariness and unreasonableness accordingly quashed - Petitioner has already superannuated from service, therefore, no useful purpose would be served in remitting the matter back for a fresh decision - Petitioner would be deemed to have been in service till the date of superannuation and would be entitled to revised pension and retiral benefits - As petitioner stands convicted u/s 30 of Arms Act, he shall not be entitled for back wages. [Ram Abhilash Shukla v. State of M.P.]* ...648

Service Law - Civil Services (Classification, Control and Appeal)

Rules, M.P. 1966, Rule 2(f), General Clauses Act, M.P. 1957, Section 16 - Government Servant - Suspension - Appointing Authority - *Petitioner placed under suspension by the State Government while working as Managing Director of Madhya Pradesh Khadi & Village Industries Board - Action challenged on the ground that State Government has no competence to pass the order of suspension - Held - The appointing authority of the petitioner on the post of M.D./Addl.M.D. is the State Government - By virtue of the provisions of Section 16 of the Act of 1957, the State Government being the appointing authority is empowered to suspend or dismiss the petitioner. [Ashok Noronha v. M.A. Khan]* ...662

Service Law - Civil Services (Classification, Control and Appeal)

Rules, M.P. 1966, Rule 9 & 20, Gramodyog Adhiniyam, M.P. 1978, Section 29, Khadi and Gramodyog Regulation, M.P. 1980 - Suspension - Competence - *Petitioner placed under suspension by the State Government while working as Managing Director of Madhya Pradesh Khadi & Village Industries Board - Action challenged on the ground that State Government has no competence to pass the order of suspension - Held - Rules of 1966 are applicable to the*

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएँ 80 व 100 — निर्वाचन अधिकारी द्वारा नामांकन पत्र की खारिजी — अभिनिर्धारित — अधिनियम निर्वाचन याचिका में निर्वाचन को चुनौती देने के लिए नामांकन पत्र की अनुचित खारिजी को एक आधार के रूप में उपबंधित करता है — रिट याचिका पेश नहीं की जा सकती। (जसवंत सिंह वि. चीफ इलेक्शन कमीशन) ...717

सेवा विधि — सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966 — अनिवार्य सेवानिवृत्ति — याची भा.द.सं. की धारा 302 सहपठित धारा 109 एवं आयुध अधिनियम की धारा 30 के अधीन दोषसिद्ध किये जाने से सेवा से पृथक किया गया — दाण्डिक अपील मंजूर की गई और याची को भा.द.सं. की धारा 302 सहपठित धारा 109 के आरोप से दोषमुक्त किया गया किन्तु आयुध अधिनियम की धारा 30 के अधीन दोषसिद्ध कायम रखी गई — राज्य प्रशासनिक अधिकरण द्वारा पारित आदेश के अनुपालन में, याची को 06.03.1999 को पुनर्नियुक्त किया गया और पुनः निलम्बन के अधीन रखा गया — तत्पश्चात् उसे अनिवार्य रूप से सेवानिवृत्ति कर दिया गया — आदेश को चुनौती दी गई — अभिनिर्धारित — अनिवार्य सेवानिवृत्ति का आदेश अनुशासनिक प्राधिकारी द्वारा मस्तिष्क का बिलकुल प्रयोग न करना प्रदर्शित करता है — कोई व्यक्ति युक्त और प्रज्ञावान व्यक्ति यह निष्कर्ष अभिलिखित नहीं कर सकता कि याची उच्च न्यायालय द्वारा भा.द.सं. की धारा 302 सहपठित धारा 109 के अन्तर्गत दोषमुक्त किये जाने के बाद हत्या जैसा जघन्य अपराध करने में अन्तर्गस्त हुआ — आदेश मनमानेपन और अयुक्तियुक्तता से ग्रस्त तदनुसार अभिखण्डित किया गया — याची सेवानिवृत्त हो चुका है, इसलिए नये सिरे से विनिश्चय के लिए मामला वापस भेजने से कोई उपयोगी प्रयोजन पूरा नहीं होगा — याची को सेवानिवृत्ति की तारीख तक सेवा में होना समझा जायेगा और वह पुनरीक्षित पेंशन और सेवानिवृत्ति लाभों का हकदार होगा — चूंकि याची को आयुध अधिनियम की धारा 30 के अधीन दोषसिद्ध किया गया है, वह पिछले वेतन का हकदार नहीं होगा। (राम अभिलाष शुक्ला वि. म.प्र. राज्य) ...648

सेवा विधि — सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 2(एफ), साधारण खण्ड अधिनियम, म.प्र. 1957, धारा 16 — शासकीय सेवक — निलम्बन — नियुक्ति प्राधिकारी — राज्य सरकार द्वारा याची को मध्य प्रदेश खादी और ग्रामोद्योग बोर्ड के प्रबंध निदेशक के रूप में कार्य करते समय निलम्बन के अधीन रखा गया — कृत्य को इस आधार पर चुनौती दी गई कि राज्य सरकार को निलम्बन का आदेश पारित करने की कोई सामर्थ्य नहीं है — अभिनिर्धारित — प्रबंध निदेशक/अतिरिक्त प्रबंधक निदेशक के पद पर याची का नियुक्ति प्राधिकारी राज्य सरकार है — 1957 के अधिनियम की धारा 16 के उपबंधों के आधार पर राज्य सरकार नियुक्ति प्राधिकारी होने से याची को निलम्बित या बर्खास्त करने के लिए सशक्त है। (अशोक नोरोन्हा वि. एम.ए. खान) ...662

सेवा विधि — सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9 व 20, ग्रामोद्योग अधिनियम, म.प्र. 1978, धारा 29, खादी और ग्रामोद्योग विनियम, म.प्र. 1980 — निलम्बन — सक्षमता — राज्य सरकार द्वारा याची को मध्य प्रदेश खादी और ग्रामोद्योग बोर्ड के प्रबंध निदेशक के रूप में कार्य करते समय निलम्बन के अधीन रखा गया — कृत्य को इस आधार पर चुनौती दी गई कि राज्य सरकार को निलम्बन का आदेश पारित करने की कोई सामर्थ्य नहीं है — अभिनिर्धारित — याची को 1966 के नियम लागू होते हैं तब नियम 9 के

petitioner, then the right to suspend the petitioner u/R 9 is available to the appointing authority i.e. State Government - State Government has appointed the petitioner on the post of M.D. of the Board, and the power u/R 20 entitles the borrowing department to take action in the matter - As the petitioner is on deputation to Khadi & Gramodyog Board, the Gramodyog Department being the borrowing department is empowered to take action by virtue of the powers vested in it u/R 20(1) of the Rules of 1966. [Ashok Noronha v. M.A. Khan]...662

Service Law - Correction of date of birth - *At the fag end of service when notice of superannuation is issued - Held - Such correction can be accepted only when prayer is made within a reasonable time and it is shown that the employee concerned has cogent and irrefutable proof and evidence available with him - Documents produced are mostly those which are obtained after notice of superannuation - Genuineness of documents doubtful - Correction can not be ordered - Petition dismissed. [Mirza Sharif Beg v. State of M.P.] ...778*

Service Law - Departmental enquiry and recovery of rent - *Petitioner after his transfer got relieved on the strength of forged vacation report of Govt. accommodation - Petitioner was punished in D.E. - Initiation of realization of rent from the salary of petitioner - Action challenged on ground that demand of rent amounts to double jeopardy - Held - Payment of rent was not subject matter of D.E. - Realization of rent is independent liability from submitting forged vacation report - He cannot escape liability to pay rent - Petition dismissed. [Laxminarayan Dixit v. Union of India] ...709*

Service Law - Gramin Dak Sewak (Conduct and Employment) Rules, 2001, Rule 4(3) - *Chief Postmaster General in exercise of powers u/R 4(3) issued a show cause notice as to why the service be not terminated - As per the instructions contained in letter dated 27.11.1997, it was incumbent upon the appointing authority to take sanction of higher authority for appointment of OBC category candidates in place of ST category candidates - Held - High Court, after interpreting the instructions contained in the letter dated 27.11.1997, found that sanction of higher authority was not necessary - Therefore, appointment could not be said to be illegal - Show cause notice was issued without any basis and has been rightly set-aside by the tribunal - Petition dismissed. [Union of India v. Sidd Prakash Singh] ...714*

Service Law - Municipalities Act, M.P. (37 of 1961), Sections 95 & 355, Municipal Employees Recruitment and Conditions Rules, M.P. 1968, Rule 23, Shaskiya Sevak (Adhivarshiki-Ayu) Tiritiya Sanshodhan Adhyadesh, M.P. 1998, Section 3, State Municipal Service (Executive) Rules, M.P. 1973 - *Age of retirement of municipal employees - Parity in employment - Petitioner a Safai Karamchari was retired from service on attaining age of 60 years on 28.02.1999 - Subsequently, State Government issuing notification that Safai Karamchari of Municipality entitled to continue*

अधीन याची को निलम्बित करने का अधिकार नियुक्ति प्राधिकारी अर्थात् राज्य सरकार को उपलब्ध है - राज्य सरकार ने याची को बोर्ड के प्रबंध निदेशक के पद पर नियुक्त किया और नियम 20 के अधीन शक्ति ऋणी विभाग को मामले में कार्यवाही करने का हकदार बनाता है - चूंकि याची खादी और ग्रामोद्योग बोर्ड में प्रतिनियुक्ति पर है, ग्रामोद्योग विभाग ऋणी विभाग होने से 1966 के नियम के नियम 20(1) के अधीन उसमें निहित शक्तियों के आधार पर कार्यवाही करने के लिए सशक्त है। (अशोक नोरोन्हा वि. एम.ए. खान) ...662

सेवा विधि - जन्मतिथि में सुधार - सेवा के अन्तिम छोर पर जब अधिवर्षिता का सूचनापत्र जारी किया गया - अभिनिर्धारित - ऐसा सुधार केवल तब स्वीकार किया जा सकता है जब प्रार्थना युक्तियुक्त समय के भीतर की गई हो और यह दर्शित होता हो कि सम्बन्धित कर्मचारी के पास अकादमिक और अखण्डनीय सबूत और साक्ष्य उपलब्ध है - पेश दस्तावेज अधिकांशतः वे हैं जो अधिवर्षिता के सूचनापत्र के बाद अभिप्राप्त किये गये हैं - दस्तावेजों का असली होना शंकास्पद - सुधार का आदेश नहीं दिया जा सकता - याचिका खारिज। (मिर्जा शरीफ बेग वि. म.प्र. राज्य) ...778

सेवा विधि - विभागीय जाँच और किराये की वसूली - याची उसके स्थानांतरण के बाद शासकीय आवास रिक्त करने की कूटरचित रिपोर्ट के आधार पर कार्यमुक्त हुआ - याची को विभागीय जाँच में दण्डित किया गया - याची के वेतन से किराये की वसूली प्रारम्भ - कार्यवाही को इस आधार पर चुनौती दी गई कि किराये की माँग दोहरे दण्ड की कोटि में आती है - अभिनिर्धारित - किराये की अदायगी विभागीय जाँच की विषयवस्तु नहीं थी - किराये की वसूली आवास रिक्त करने की कूटरचित रिपोर्ट प्रस्तुत करने के दायित्व से स्वतंत्र है - वह किराया अदा करने के दायित्व से नहीं बच सकता - याचिका खारिज। (लक्ष्मीनारायण दीक्षित वि. यूनियन ऑफ इंडिया) ...709

सेवा विधि - ग्रामीण डाक सेवक (आचरण और रोजगार) नियम, 2001, नियम 4(3) - मुख्य पोस्टमास्टर जनरल ने नियम 4(3) के अन्तर्गत शक्तियों के प्रयोग में कारण बताओ सूचना पत्र जारी किया कि क्यों न सेवा समाप्त की जाए - पत्र तारीख 27.11.1997 में अन्तर्विष्ट अनुदेशों के अनुसार, नियुक्ति प्राधिकारी के लिए यह आवश्यक था कि अनुसूचित जनजाति श्रेणी के अभ्यर्थियों के स्थान पर पिछड़ा वर्ग श्रेणी के अभ्यर्थियों की नियुक्ति के लिए उच्चतर प्राधिकारी का अनुमोदन ले - अभिनिर्धारित - उच्च न्यायालय ने पत्र तारीख 27.11.1997 में अन्तर्विष्ट अनुदेशों का निर्वचन करने के बाद पाया कि उच्चतर प्राधिकारी का अनुमोदन आवश्यक नहीं था - इसलिए, नियुक्ति अवैध नहीं कही जा सकती - कारण बताओ सूचना पत्र बिना किसी आधार के जारी किया गया और अधिकरण द्वारा उचित रूप से अपास्त किया गया - याचिका खारिज। (यूनियन ऑफ इंडिया वि. सिद्ध प्रकाश सिंह) ...714

सेवा विधि - नगरपालिका अधिनियम, म.प्र. (1961 का 37), धाराएँ 95 व 355, नगरपालिका कर्मचारी भर्ती और शर्तें नियम, म.प्र., 1968, नियम 23, शासकीय सेवक (अधिवर्षिकी-आयु) तृतीय संशोधन अध्यादेश, म.प्र. 1998, धारा 3, राज्य नगरपालिका सेवा (कार्यकारी) नियम, म.प्र. 1973 - नगरपालिका कर्मचारियों की सेवानिवृत्ति की तारीख - नियोजन में समानता - याची सफाई कर्मचारी 60 वर्ष की आयु पूर्ण करने पर 28.02.1999 को सेवानिवृत्त हुई - तत्पश्चात् राज्य सरकार ने अधिसूचना जारी की कि नगरपालिका का सफाई कर्मचारी 27.09.2003 से 62 वर्ष की आयु तक सेवा में बने रहने का हकदार है - तथापि, म.प्र. राज्य नगरपालिका सेवा के सदस्यों को 28.09.1998 से राज्य सरकार के कर्मचारियों के समकक्ष

upto 62 years w.e.f. 27.09.2003 - However, the members of M.P. State Municipal Service have been given the benefit of 60 years of age of retirement w.e.f. 26.09.1998 at par with the employees of State Government - Petitioner seeking parity in age of retirement with other municipal employees - Held - Petitioner was entitled to the benefit of age of 62 years on the basis of Article 14 because she has been retired at the age of 60 years when at that time the benefit of retirement of age of 62 years has been given by the State Government to its employees and same benefit has been given to the class IV municipal employees by the Government w.e.f. 27.09.2003. [Mathuro (Smt.) v. State of M.P.] ...765

Service Law - Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Section 33 - Appointment on the post of Stenographer - Reservation - Petitioner, who is a visually disabled person, claiming appointment on the post of Stenographer - Held - As per the policy of State Government, out of the total posts 6% are reserved for persons with disabilities i.e. 2% for visually disabled persons, 2% for hearing impaired persons and 2% for orthopaedically disabled persons - In the present case, 6 posts reserved for persons with disabilities - 2 posts should have been filled up by the persons belonging to visual disabled category - High Court has arrived at a conclusion that the number of posts reserved should have been 7 instead of 6 - As still one post is to be filled up from visually disabled person, the respondent/State is directed to consider the case of petitioner against this one additional post. [Kailash Swarnkar v. State of M.P.] ...795

Service Law - Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Section 33 - Appointment on the post of Stenographer - Reservation - Total number of posts of Stenographers are 110 - As per the instructions issued by the State Government dated 31.10.2003, total 6% reserved posts for the persons with disabilities - It comes to 6.6 as it is more than half it has to be counted in round figure as 7 - The total number of posts which ought to have been reserved for disabled persons should have been 7 instead of 6. [Kailash Swarnkar v. State of M.P.] ...795

Service Law - Promotion and seniority - Petitioners promoted on ad hoc basis as Head TTE - Subsequently, reverted back to post of TTE as they had failed in interview - Circular dated 25.01.1976 which provides that employees working in the posts on ad hoc basis quite satisfactorily are not declared unsuitable in interview - Circular dated 25.01.1976 has binding force - Petitioners already given promotion during pendency of petition - Seniority be accorded from the day from which their juniors were promoted - Petition allowed. [N.K. Chakrabarti v. Union of India] ...711

Service law - Recovery - Appointment of petitioner on monthly salary - After 4 years of appointment, recovery directed on the ground that appointment of petitioner in work charged and contingent establishment

60 वर्ष की सेवानिवृत्ति की आयु का लाभ दिया गया - याची ने अन्य नगरपालिका कर्मचारियों के साथ सेवानिवृत्ति की आयु में समानता चाही - अभिनिर्धारित - याची अनुच्छेद 14 के आधार पर 62 वर्ष की आयु के लाभ की हकदार थी क्योंकि वह 60 वर्ष की आयु पर उस समय सेवानिवृत्त हुई है जब राज्य सरकार द्वारा अपने कर्मचारियों को सेवानिवृत्ति की 62 वर्ष की आयु का लाभ दिया गया और वही लाभ राज्य सरकार द्वारा चतुर्थ श्रेणी के नगरपालिका कर्मचारियों को 27.09.2003 से दिया गया। (मथुरा (श्रीमति) वि. म.प्र. राज्य) ...765

सेवा विधि - निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धारा 33 - आशुलिपिक के पद पर नियुक्ति - आरक्षण - याची, जो दृष्टिबाधित व्यक्ति है, ने आशुलिपिक के पद पर नियुक्ति का दावा किया - अभिनिर्धारित - राज्य सरकार की नीति के अनुसार कुल पदों में से निःशक्त व्यक्तियों के लिए 6 प्रतिशत पद आरक्षित अर्थात् 2 प्रतिशत दृष्टिबाधित व्यक्तियों के लिए, 2 प्रतिशत श्रवण बाधित व्यक्तियों के लिए और 2 प्रतिशत अस्थिबाधित व्यक्तियों के लिए - वर्तमान मामले में निःशक्त व्यक्तियों के लिए 6 पद आरक्षित - 2 पद दृष्टिबाधित श्रेणी के व्यक्तियों से भरे जाने चाहिए थे - उच्च न्यायालय इस निष्कर्ष पर पहुंचा कि आरक्षित पदों की संख्या 6 के स्थान पर 7 होनी चाहिए थी - चूंकि अभी भी दृष्टिबाधित व्यक्ति से एक पद भरा जाना है इसलिए प्रत्यर्थी / राज्य को इस एक अतिरिक्त पद के विरुद्ध याची के मामले पर विचार करने का निदेश दिया गया। (कैलाश स्वर्णकार वि. म.प्र. राज्य) 795

सेवा विधि - निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धारा 33 - आशुलिपिक के पद पर नियुक्ति - आरक्षण - आशुलिपिक के पदों की कुल संख्या 110 - राज्य सरकार द्वारा जारी अनुदेश तारीख 31.10.2003 के अनुसार निःशक्त व्यक्तियों के लिए 6 प्रतिशत आरक्षित पद - यह 6.6 आता है चूंकि यह आधे से अधिक है इसे पूर्ण अंक 7 के रूप में गिना जाना चाहिए - पदों की कुल संख्या, जो निःशक्त व्यक्तियों के लिए आरक्षित रखी जानी चाहिए, 6 के स्थान पर 7 होनी चाहिए थी। (कैलाश स्वर्णकार वि. म.प्र. राज्य) 795

सेवा विधि - पदोन्नति और वरिष्ठता - याचियों को तदर्थ आधार पर प्रधान टीटीई के रूप में पदोन्नत किया गया - तत्पश्चात् टीटीई के पद पर पदावन्त किया गया क्योंकि वे साक्षात्कार में असफल हो गये थे - परिपत्र तारीख 25.01.1976, जो उपबंधित करता है कि तदर्थ आधार पर पद पर पूर्ण संतोषजनक ढंग से कार्यरत कर्मचारियों को साक्षात्कार में अनुपयुक्त घोषित नहीं किया जाए - परिपत्र तारीख 25.01.1976 बंधनकारी प्रभाव रखता है - याचियों को याचिका के लम्बित रहने के दौरान ही पदोन्नति दे दी गई - वरिष्ठता उस दिन से दी जाए जिस दिन से उनके कनिष्ठों को पदोन्नत किया गया - याचिका मंजूर। (एन.के. चक्रवर्ती वि. यूनियन ऑफ इंडिया) 711

सेवा विधि - वसूली - याची की नियुक्ति मासिक वेतन पर - नियुक्ति के 4 वर्ष बाद इस आधार पर वसूली का निदेश दिया गया कि याची की कार्यभारित और आकस्मिकता स्थापना में नियुक्ति कलेक्टर द्वारा नियत दर पर 3 वर्ष के लिए की जानी चाहिए थी और केवल उसके बाद

*should have been made on fixed Collector's rate for 3 years and only thereafter he became entitled for salary in regular pay scale - Held - There was no misrepresentation on the part of petitioner - Appointment on monthly salary was mistake of employer - Recovery of excess amount would cause hardship to petitioner - Order of recovery quashed on equitable grounds - Petition allowed. [Sudhir Prasad Dwivedi v. State of M.P.] ...*23*

Service Law - Recovery - Increment wrongly paid to Shiksha Karmis - It was not a payment by any kind of misrepresentation by Shiksha Karmis - It was erroneous payment by authorities - Recovery of amount not warranted. [State of M.P. v. Raghvendra Sohgaure] ...623

Service Law - Shiksha Karmis - Shiksha Karmis are not government employees. [State of M.P. v. Raghvendra Sohgaure] ...623

Service Law - Suspension - Mala fide - As serious charges leveled against the petitioner and the charges are based on complaint made by the Local MLA, the same cannot be interefered with on merit at this stage, when the enquiry is pending - If a complaint is made by the MLA and action is taken, that by itself cannot be a ground to attribute mala fides. [Ashok Noronha v. M.A. Khan]...662

Shaskiya Sevak (Adhivarshiki-Ayu) Tiritiya Sanshodhan Adhyadesh, M.P. 1998, Section 3 - See - Service Law [Mathuro (Smt.) v. State of M.P.]...765

State Municipal Service (Executive) Rules, M.P. 1973 - See - Service Law [Mathuro (Smt.) v. State of M.P.] ...765

Sugar Dealers Licencing Order, M.P. 1963, Clause 3(1), Essential Commodities Act, 1955, Section 3/7 - Dealer - 67 bags of sugar found in house of appellant - In absence of evidence, mere recovery not sufficient to raise a presumption that appellant was engaged in business of purchase, sale or storage of sugar in quantity exceeding 50 quintals at one time - Single, casual or solitary transaction of storage of sugar would not make him a dealer - Conviction & sentence u/s 3/7 of the Act set-aside - Appeal allowed. [Shivnath Dhoobi v. State of M.P.] ...879

Wild Life (Protection) Act (53 of 1972), Sections 9 & 49-A - Prohibition of hunting - To prove that accused hunted any wild animal - Merely a person is found in possession of leather of wild animal - It cannot be presumed that he hunted or killed animal especially in absence of evidence that leather was of a recently killed animal. [Rekhchand v. State of M.P.]...891

Wild Life (Protection) Act (53 of 1972), Section 39 - Possession of any animal article, without licence or making declaration to Chief Wild Life Warden, is punishable u/s 39 of the Act - No charge for that offence was framed by the trial court - It would not be just & proper to remand the case for fresh trial after about 12-13 years of the commission of the offence. [Rekhchand v. State of M.P.] ...891

वह नियमित वेतनमान में वेतन का हकदार होता — अभिनिर्धारित — याची की ओर से कोई दुर्व्यपदेशन नहीं था — मासिक वेतन पर नियुक्ति नियोक्ता की मूल थी — अतिरिक्त राशि की वसूली याची को कठिनाई कारित करेगी — वसूली का आदेश साम्यिक आधारों पर अभिखण्डित — याचिका मंजूर। (सुधीर प्रसाद द्विवेदी वि. म.प्र. राज्य) ...*23

सेवा विधि — वसूली — शिक्षा कर्मियों को वेतनवृद्धि गलती से दी गई — यह संदाय शिक्षा कर्मियों द्वारा किसी प्रकार के दुर्व्यपदेशन से नहीं था — यह प्राधिकारियों द्वारा गलत संदाय था — राशि की वसूली के लिए समुचित आधार नहीं। (म.प्र. राज्य वि. राघवेन्द्र सौगरा) ...623

सेवा विधि — शिक्षा कर्मी — शिक्षा कर्मी शासकीय कर्मचारी नहीं हैं। (म.प्र. राज्य वि. राघवेन्द्र सौगरा) ...623

सेवा विधि — निलम्बन — असदभाव — चूंकि याची के विरुद्ध गम्भीर आरोप लगाये गये और आरोप स्थानीय विधायक द्वारा की गई शिकायत पर आधारित हैं, इसलिए इसमें इस प्रक्रम पर गुणदोषों में हस्तक्षेप नहीं किया जा सकता, जब जाँच विचाराधीन हो — यदि विधायक द्वारा कोई शिकायत की जाती है और कार्यवाही की जाती है, तो वह स्वयमेव असदभाव का उपारोपण करने के लिए आधार नहीं हो सकता। (अशोक नोरोन्हा वि. एम.ए. खान) ...662

शासकीय सेवक (अधिवार्षिकी-आयु) तृतीय संशोधन अध्यादेश, म.प्र. 1998, धारा 3 — देखें — सेवा विधि (मथुरो (श्रीमति) वि. म.प्र. राज्य) ...765

राज्य नगरपालिका सेवा (कार्यकारी) नियम, म.प्र. 1973 — देखें — सेवा विधि (मथुरो (श्रीमति) वि. म.प्र. राज्य) ...765

शक्कर व्यापारी लायसेंस आदेश, म.प्र. 1963, खण्ड 3(1), आवश्यक वस्तु अधिनियम, 1955, धारा 3/7 — व्यापारी — अपीलार्थी के घर में शक्कर के 67 बोरे पाये गये — साक्ष्य के अभाव में केवल बरामदगी यह उपधारणा करने के लिए पर्याप्त नहीं कि अपीलार्थी एक समय में 50 क्विंटल से अधिक मात्रा में शक्कर के क्रय, विक्रय या संग्रह के कारोबार में रत था — शक्कर के संग्रहण का एकल, आकस्मिक या अकेला संव्यवहार उसे व्यापारी नहीं बना देता — अधिनियम की धारा 3/7 के अन्तर्गत दोषसिद्धि और दण्डादेश अपास्त — अपील मंजूर। (शिवनाथ धोबी वि. म.प्र. राज्य) ...879

वन्य जीव (संरक्षण) अधिनियम (1972 का 53), धाराएँ 9 व 49-ए — शिकार का प्रतिषेध — यह साबित करने के लिए कि अभियुक्त ने किसी वन्य पशु का शिकार किया — केवल एक व्यक्ति वन्य पशु के चमड़े के कब्जे में पाया गया — यह उपधारित नहीं किया जा सकता कि उसने पशु का शिकार किया या उसे मारा विशेषतः इस साक्ष्य के अभाव में कि चमड़ा हाल में मारे गये किसी पशु का था। (रेखचंद वि. म.प्र. राज्य) ...891

वन्य जीव (संरक्षण) अधिनियम (1972 का 53), धारा 39 — लायसेंस या मुख्य वन संरक्षक को घोषणा किये बिना किसी पशु वस्तु का कब्जा अधिनियम की धारा 39 के अन्तर्गत दण्डनीय है — विचारण न्यायालय द्वारा उस अपराध का कोई आरोप विरचित नहीं — यह न्यायसंगत एवं उचित नहीं होगा कि अपराध किये जाने के लगभग 12-13 वर्ष बाद नये सिरे से विचारण के लिए मामला प्रतिप्रेषित किया जाए। (रेखचंद वि. म.प्र. राज्य) ...891

NOTES OF CASES SECTION

Short Note

(20)

K.S. Chauhan, J

KUMMER SINGH & anr.

Vs.

STATE OF M.P.

A. Penal Code (45 of 1860), Section 376(2)(g), Criminal Procedure Code, 1973, Section 154 - FIR - Defence plea that FIR was not lodged by prosecutrix herself but lodged by her father - Held - Prosecutrix's father stated that report was lodged by prosecutrix herself - Sub-Inspector has stated that report was lodged by prosecutrix herself and he himself has written the report thereafter thumb impression of prosecutrix was affixed - There is presumption that the official acts are done in the regular way - Therefore, it cannot be accepted that prosecutrix herself did not lodge the report.

क. दण्ड संहिता (1860 का 45), धारा 376(2)(जी), दण्ड प्रक्रिया संहिता, 1973, धारा 154 - एफआईआर - प्रतिरक्षा की दलील कि एफआईआर स्वयं अभियोक्त्री द्वारा दर्ज नहीं करायी गई बल्कि उसके पिता द्वारा दर्ज करायी गई - अभिनिर्धारित - अभियोक्त्री के पिता ने कथन किया कि रिपोर्ट स्वयं अभियोक्त्री द्वारा दर्ज करायी गई - उपनिरीक्षक ने कथन किया कि रिपोर्ट स्वयं अभियोक्त्री द्वारा दर्ज करायी गई और स्वयं उसने रिपोर्ट लिखी उसके बाद अभियोक्त्री का अंगुष्ठ चिन्ह लगवाया गया - यह उपधारणा है कि पदीय कृत्य नियमित तरीके से किये जाते हैं - इसलिए यह स्वीकार नहीं किया जा सकता कि स्वयं अभियोक्त्री ने रिपोर्ट दर्ज नहीं करायी।

B. Penal Code (45 of 1860), Section 376(2)(g), Criminal Procedure Code, 1973, Section 154 - Delay in FIR - Incident took place at 8 p.m. - FIR lodged on next day at 2.30 p.m. - Place of incident 12 kms away from Police Station - Held - Family members are required to think over matter whether the matter is to be informed to police or not - No delay in lodging FIR.

ख. दण्ड संहिता (1860 का 45), धारा 376(2)(जी), दण्ड प्रक्रिया संहिता, 1973, धारा 154 - एफआईआर में विलम्ब - घटना रात 8 बजे हुई - एफआईआर दूसरे दिन दोपहर 2.30 बजे दर्ज करायी गई - घटनास्थल पुलिस थाने से 12 किमी दूर - अभिनिर्धारित - परिवार के सदस्यों का मामले पर विचार करना अपेक्षित है कि मामले की सूचना पुलिस को दी जाए या नहीं - एफआईआर दर्ज कराने में कोई विलम्ब नहीं।

C. Penal Code (45 of 1860), Section 376 - Rape - Evidence of Prosecutrix - If evidence of prosecutrix is reliable, then conviction can be based solely on the testimony of prosecutrix - High Court found that the evidence of prosecutrix is natural, probable and reliable and further her evidence is also corroborated from the evidence of other witnesses - Conviction u/s 376(2)(g) affirmed - Appeal dismissed.

ग. दण्ड संहिता (1860 का 45), धारा 376 - बलात्कार - अभियोक्त्री की साक्ष्य - यदि अभियोक्त्री की साक्ष्य विश्वसनीय है तब दोषसिद्धि एकमात्र अभियोक्त्री के परिसाक्ष्य पर आधारित हो सकती है - उच्च न्यायालय ने पाया कि अभियोक्त्री की साक्ष्य प्रा.तिक, अधिसंभाव्य

NOTES OF CASES SECTION

और विश्वसनीय है तथा उसके साक्ष्य की अन्य साक्षियों की साक्ष्य से भी सम्पुष्टि होती है - धारा 376(2)(जी) के अधीन दोषसिद्धि अभिपुष्ट की गई - अपील खारिज।

Z.M. Shah, for the appellants.

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

*Cr.A. No.780/1994 (Jabalpur), D/- 21 October, 2008.

Short Note

(21)

Mrs. Sushma Shrivastava, J

NANDAN @ SHIV NANDAN

Vs.

STATE OF M.P.

A. Evidence Act (1 of 1872), Section 3 - Appreciation of evidence - Attempt to rape on a minor girl - Evidence of witnesses recorded after lapse of 3-4 years, as the accused had absconded - Therefore, some discrepancy in the timing or sequence of events was natural and bound to occur due to lapse of memory and passage of time - Despite extensive cross-examination, nothing has been elicited in the evidence of witnesses so as to indicate any reason for false implication - Ordinarily parents of the victim would not concoct a false case at the stake of modesty, honour and reputation of their minor daughter of tender age.

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 - साक्ष्य का अधिमूल्यन - अप्राप्तवय बालिका के साथ बलात्संग का प्रयत्न - साक्षियों की साक्ष्य 3-4 वर्ष व्यतीत होने के बाद अभिलिखित की गई क्योंकि अभियुक्त फरार हो गया था - इसलिए याददाश्त क्षीण होने एवं समय बीतने के कारण समय या घटनाओं के क्रम में कुछ विसंगति आना स्वामाविक ही था - विस्तृत प्रतिपरीक्षा के बावजूद साक्षियों की साक्ष्य में कुछ भी प्राप्त नहीं हुआ जिससे मिथ्या फँसाने के लिए कोई कारण उपदर्शित होता हो - साधारणतः पीड़ित के माता-पिता उनकी कम उम्र की अप्राप्तवय पुत्री की लज्जा, सम्मान और ख्याति के दांव पर मिथ्या मामला नहीं गढ़ेंगे।

B. Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Section 376 r/w 511 - Appreciation of evidence - Attempt to rape on a minor girl - Evidence of child witness - Conviction challenged on the ground that it is based on tutored and fabricated evidence without any corroboration and medical evidence - Held - Prosecutrix given a vivid description of the incident and categorically stated that accused had sexually assaulted her - Her evidence does not appear to be tutored or fabricated and is found to be cogent & credible - It inspires confidence - Her evidence cannot be discarded on the score that she is a child witness - Evidence of prosecutrix also stands fortified by her medical report which remained virtually unchallenged in the cross-examination - Appeal dismissed. (1998) 7 SCC 117 (ref.)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धारा 376 सहपठित धारा 511 - साक्ष्य का अधिमूल्यन - अप्राप्तवय बालिका के साथ बलात्संग

NOTES OF CASES SECTION

का प्रयत्न — बालक साक्षी का साक्ष्य — दोषसिद्धि को इस आधार पर चुनौती दी गई कि यह बिना किसी सम्पुष्टि और चिकित्सीय साक्ष्य के सिखायी-पढ़ाई और गढ़ी हुई साक्ष्य पर आधारित है — अभिनिर्धारित — अभियोक्त्री ने घटना का जीवन्त विवरण दिया और सुस्पष्ट रूप से कथन किया कि अभियुक्त ने उस पर लैंगिक हमला किया था — उसकी साक्ष्य सिखायी-पढ़ाई या गढ़ी हुई प्रतीत नहीं होती एवं अकाट्य और विश्वसनीय पायी गई — यह विश्वास प्रेरित करती है — उसकी साक्ष्य इस कारण अमान्य नहीं की जा सकती कि वह बालक साक्षी है — अभियोक्त्री की साक्ष्य, उसकी चिकित्सीय रिपोर्ट, जिसे वस्तुतः प्रतिपरीक्षा में चुनौती नहीं दी गई, से भी पुष्ट होती है — अपील खारिज। (1998) 7 SCC 117 (संदर्भित)।

C. Evidence Act (1 of 1872), Section 45 - Non-examination of Doctor - Effect - Lady Doctor, who examined the prosecutrix, could not be examined as witness as she was dead - Though her medical report was proved to be in her handwriting by her husband - Held - Non-examination of the Doctor would not be fatal to prosecution case. (2005) 8 SCC 122 (ref.)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 45 — चिकित्सक की परीक्षा न कराना — प्रभाव — महिला चिकित्सक, जिसने अभियोक्त्री की जाँच की, की परीक्षा नहीं की जा सकी क्योंकि उसकी मृत्यु हो गई — यद्यपि उसकी चिकित्सीय रिपोर्ट उसके हस्तलेख में होना उसके पति द्वारा साबित किया गया — अभिनिर्धारित — चिकित्सक की परीक्षा न कराना अभियोजन मामले के लिए घातक नहीं होगा। (2005) 8 SCC 122 (संदर्भित)।

None, for the appellant.

R.S. Patel, Addl.A.G., for the respondent/State.

***Cr.A. No.272/1994 (Jabalpur), D/- 8 September, 2008.**

Short Note

(22)

U.C. Maheshwari, J

SAMEER AHMED

Vs.

ADIL & ors.

A. Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Appellant aged 20 years suffering 40% of permanent disability due to fracture of tibia & fibula bone of right leg - Tribunal awarding compensation of Rs.40,000 for loss of income, Rs.22,500 for treatment expenses and Rs.5,000 for pain & suffering - Held - Tribunal has not awarded any sum on the head of loss of income for the period of treatment and in treatment expenses only Rs.22,500 are awarded in which the expenses of attendant, special diet, travelling expenses to consult the doctor are also included - Considering overall circumstances, compensation further enhanced by Rs.30,000 along with interest @ 6% p.a. from the date of filing of claim petition.

क. मोटर यान अधिनियम (1988 का 59), धारा 166 — प्रतिकर — 20 वर्ष उम्र के अपीलार्थी को दांये पैर की टिबिया और फिबुला हड्डी के फ्रैक्चर के कारण 40 प्रतिशत स्थायी

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निःशक्तता आयी - अधिकरण ने आय की हानि के लिए 40,000 रुपये, इलाज व्यय के लिए 22,500 रुपये और 5,000 रुपये कष्ट और पीड़ा के लिए प्रतिकर अधिनिर्णीत किया - अभिनिर्धारित - अधिकरण ने इलाज की कालावधि में आय की हानि शीर्ष पर कोई राशि अधिनिर्णीत नहीं की और इलाज व्यय के लिए केवल 22,500 रुपये अधिनिर्णीत किये जिसमें अटेंडेंट का व्यय, विशेष आहार, चिकित्सक से परामर्श के लिए यात्रा व्यय भी शामिल हैं - समग्र परिस्थितियों पर विचार कर प्रतिकर में 30,000 रुपये दावा याचिका पेश करने की तारीख से 6 प्रतिशत वार्षिक ब्याज सहित की वृद्धि की गई।

B. Motor Vehicles Act (59 of 1988), Section 166 - Claim case - Appreciation of evidence - Evidentiary value - Papers of criminal case - Driver held to be rash & negligent whereas owner and insurer exonerated as the number of motorcycle was not mentioned in the FIR - Held - When unrebutted supporting evidence is available on the record then the papers of the criminal case could not be discarded lightly without considering the circumstances mentioned in such papers - After consideration and on appreciation it is held that the alleged accident was happened because of rash and negligent riding of the alleged motorcycle - Therefore, owner and insurer of alleged motorcycle are also liable jointly & severally with the driver.

ख. मोटर यान अधिनियम (1988 का 59), धारा 166 - क्लेम मामला - साक्ष्य का अधिमूल्यन - साक्ष्यिक मूल्य - दाण्डिक मामले के कागज - ड्रायवर को उतावला और उपेक्षावान ठहराया गया जबकि स्वामी और बीमाकर्ता को उन्मुक्त किया गया क्योंकि एफआईआर में मोटरसाइकिल का नम्बर उल्लिखित नहीं था - अभिनिर्धारित - जब अभिलेख पर अखण्डनीय सहायक साक्ष्य उपलब्ध हो तब दाण्डिक मामले के कागज ऐसे कागजों में वर्णित परिस्थितियों पर विचार किये बिना सरलता से अमान्य नहीं किये जा सकते - विचार करने के बाद और अधिमूल्यन करने पर यह अभिनिर्धारित किया गया कि कथित दुर्घटना कथित मोटरसाइकिल को उतावलेपन और उपेक्षापूर्वक चलाने के कारण घटित हुई - इसलिए कथित मोटरसाइकिल के स्वामी और बीमाकर्ता भी ड्रायवर के साथ संयुक्ततः और पृथक्तः दायी हैं।

C. Motor Vehicles Act (59 of 1988), Section 166 - Effect of non-mentioning the registration number of involved vehicle in FIR - FIR is not the encyclopedia of the incident - Thus, it could not be said that FIR relating to the road accident must have the number of the offending vehicle - In many cases, injured being illiterate or on sustaining the injury in accident does not remain in the position to see or identify the registered number of the vehicle - The same could be traced out only after holding the investigation by the police.

ग. मोटर यान अधिनियम (1988 का 59), धारा 166 - अन्तर्गस्त वाहन के रजिस्ट्रेशन क्रमांक का एफआईआर में उल्लेख न होने का प्रभाव - एफआईआर घटना का विश्वकोष नहीं है - इस प्रकार यह नहीं कहा जा सकता कि सड़क दुर्घटना से सम्बन्धित एफआईआर में उल्लंघनकारी वाहन का नम्बर होना चाहिए - अनेक मामलों में क्षतिग्रस्त निरक्षर होने या दुर्घटना में उसे क्षति आने पर इस स्थिति में नहीं रहता कि वाहन का रजिस्टर्ड नम्बर देख या पहचान सके - इसका केवल पुलिस द्वारा अन्वेषण किये जाने के बाद पता लगाया जा सकता है।

NOTES OF CASES SECTION

D.C. Gupta, for the appellant.

Mukesh Agrawal, for the respondent Nos.1 & 2.

Amrit Ruprah, for the respondent No.3.

*M.A. No.1605/2005 (Jabalpur), D/- 13 August, 2008.

Short Note

(23)

Ajit Singh, J

SUDHIR PRASAD DWIVEDI

Vs.

STATE OF M.P. & ors.

Service law - Recovery - Appointment of petitioner on monthly salary - After 4 years of appointment, recovery directed on the ground that appointment of petitioner in work charged and contingent establishment should have been made on fixed Collector's rate for 3 years and only thereafter he became entitled for salary in regular pay scale - Held - There was no misrepresentation on the part of petitioner - Appointment on monthly salary was mistake of employer - Recovery of excess amount would cause hardship to petitioner - Order of recovery quashed on equitable grounds - Petition allowed. (2006) 11 SCC 709 (ref.)

सेवा विधि - वसूली - याची की नियुक्ति मासिक वेतन पर - नियुक्ति के 4 वर्ष बाद इस आधार पर वसूली का निदेश दिया गया कि याची की कार्यभारित और आकस्मिकता स्थापना में नियुक्ति कलेक्टर द्वारा नियत दर पर 3 वर्ष के लिए की जानी चाहिए थी और केवल उसके बाद वह नियमित वेतनमान में वेतन का हकदार होता - अभिनिर्धारित - याची की ओर से कोई दुर्व्यपदेशन नहीं था - मासिक वेतन पर नियुक्ति नियोक्ता की भूल थी - अतिरिक्त राशि की वसूली याची को कठिनाई कारित करेगी - वसूली का आदेश साम्यिक आधारों पर अभिखण्डित - याचिका मंजूर। (2006) 11 SCC 709 (संदर्भित).

None, for the petitioner.

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

*W.P. No.13531/2003 (Jabalpur), D/- 21 October, 2008.

RAMSINGH Vs. STATE OF M.P.

I.L.R. [2009] M. P., 609

SUPREME COURT OF INDIA

Before Mr. Justice Arijit Pasayat & Mr. Justice J.M. Panchal

13 October, 2008*

RAM SINGH

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Evidence Act (1 of 1872), Section 3 - *Related witness - Relationship is not a factor to affect credibility of witness - A relation would not conceal actual culprit and make allegations against innocent person - Foundation has to be laid if plea of false implication is made.* (Para 8)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 - रिश्तेदार साक्षी - रिश्तेदारी साक्षी की विश्वसनीयता को प्रभावित करने वाला कारक नहीं है - रिश्तेदार वास्तविक दोषी को नहीं बचायेगा और निर्दोष व्यक्ति के विरुद्ध दोषारोपण नहीं करेगा - यदि मिथ्या फँसाने का अभिवचन किया जाता है तो आधार बताने चाहिए।

B. Penal Code (45 of 1860), Section 302 - *Murder - Presence of witness - Deceased was assaulted inside his house - Presence of wife and son at the time of incident natural - Nothing substantial has been brought on record to discard their evidence - Appeal dismissed.* (Para 14)

ख. दण्ड संहिता (1860 का 45), धारा 302 - हत्या - साक्षी की उपस्थिति - मृतक पर उसके घर के अन्दर हमला किया गया - घटना के समय पत्नी और पुत्र की उपस्थिति स्वामाविक - उनकी साक्ष्य अमान्य करने के लिए अभिलेख पर सारवान कुछ नहीं लाया गया - अपील खारिज।

Cases referred :

AIR 1953 SC 364, (1974) 3 SC 698, AIR 1957 SC 614, AIR 1965 SC 202, AIR 1999 SC 1776, (2003) 7 SCC 643, 2008 AIR SCW 5429.

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 of a Division Bench of the Madhya Pradesh High Court dismissing the appeal filed by the appellant and upholding his conviction for offences punishable under Sections 302, 452 and 504 of the Indian Penal Code, 1860 (in short 'the IPC') and sentence of imprisonment for life, rigorous imprisonment for three years and one year respectively with fine and default stipulations.

3. Appellant faced trial along with one Sukku alias Sikku, who was convicted for offence punishable under Section 302 read with Section 34 IPC and the other offences, as in the case of present appellant.

*Cr.A. No.1599/2008.

RAMSINGH Vs. STATE OF M.P.

4. Both the accused persons had preferred appeals before the High Court questioning correctness of the judgment recorded by learned 6th Additional Sessions Judge, Jabalpur, in Sessions Trial No.19 of 1997.

5. In brief the prosecution is that Ganesh Prasad, who is the author of the FIR heard hue and cry of Shakunbai at about 8-9 PM as a result of which he came out from his house and saw appellant Ram Singh carrying knife in his hand was coming out from the house of Laddu alias Baisakhu (hereinafter referred to as 'the deceased') and was running away. Behind him co-accused Sukku was also running away. Thereafter, this person came to the house of the deceased and asked Shakunbai, who is wife of the deceased, that how the incident had occurred, on which she replied that Sukku caught hold of the hands of the deceased and thereafter appellant Ramsingh dealt several blows of knife on the person of the deceased as a result of which he died.

Thereafter, Ganesh Prasad went to lodge the First Information Report and on lodging the FIR, law was set in motion. The investigating agency, in order to investigate the case, arrived at the spot, prepared necessary panchnama, seized the dead body and sent it for post-mortem; seized ordinary and blood stained earth; recorded the statement of the witnesses and arrested the accused persons and at the instance of appellant Ramsingh seized a knife which was used as a weapon in the commission of the offence.

After the investigation was over, a charge-sheet was submitted which, on its turn, committed the case to the Court of Session from where it was received by the trial court for its trial.

Since the accused persons abjured their guilt, trial was held. Nine witnesses were examined to further the prosecution version. Of them, Shakunbai (PW-2) was the widow of the deceased and Dhani Ram (PW-3) is his son, who claimed to be eye witnesses. Two witnesses were examined by the accused persons in support of their plea of innocence. The Trial Court found the evidence of the eye witnesses credible and cogent and, therefore, held both the accused persons guilty. It did not find any substance in the plea of the accused persons that the evidence of eye witnesses should be discarded as they are related to the deceased.

The stand of innocence and the plea to discard the evidence of PWs 2 and 3 on the ground that they are related to the deceased were reiterated before the High Court. By the impugned judgment, the appeals were dismissed.

6. Learned counsel for the appellant submitted that the presence of PWs 2 and 3 on the spot of occurrence is highly suspicious and they being relatives of the deceased, have falsely implicated the accused persons for reasons best known to them.

7. Learned counsel for the State supported the judgments of the courts below.

8. We shall first deal with the contention regarding interestedness of the

RAMSINGH Vs. STATE OF M.P.

witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

9. In *Dalip Singh and Ors. v. The State of Punjab* (AIR 1953 SC 364) it has been laid down as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

10. The above decision has since been followed in *Guli Chand and Ors. v. State of Rajasthan* (1974 (3) SCC 698) in which *Vadivelu Thevar v. State of Madras* (AIR 1957 SC 614) was also relied upon.

11. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh's case* (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court

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endeavoured to dispel in # '*Rameshwar v. State of Rajasthan*' (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

12. Again in *Masalti and Ors. v. State of U.P.* (AIR 1965 SC 202) this Court observed: (p, 209-210 para 14):

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

13. As observed by this Court in *State of Rajasthan v. Teja Ram and Ors.* (AIR 1999 SC 1776) the over-insistence on witnesses having no relation with the victims often results in criminal justice going away. When any incident happens in a dwelling house or nearby the most natural witnesses would be the inmates of that house. It would be unpragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen any thing. If the Court has discerned from the evidence or even from the investigation records that some other independent person has witnessed any event connecting the incident in question then there is justification for making adverse comments against non-examination of such person as prosecution witness. Otherwise, merely on surmises the Court should not castigate a prosecution for not examining other persons of the locality as prosecution witnesses. Prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighbourhood may be replete with other residents also. [See *Sucha Singh and Anr. v. State of Punjab* (2003 (7) SCC 643), *Hari Ram v. State of U.P.* (2004 (8) SCC 146) and *Ponnam Chandraiah v. State of A.P.* (2008 AIR SCW 5429)].

14. The presence of PWs 2 and 3 at the spot is quite natural because the occurrence took place inside the house of the deceased. Additionally, PWs 1 and 7 are immediate post occurrence witnesses who have stated that when they reached the house of the deceased on hearing the cries for help of PWs 2 and 3, PW-2 told them that her husband has been assaulted by the present appellant. It is to be noted that except some minor discrepancies, nothing substantial has been brought in the cross examination of PWs 2 and 3 to discard their evidence. PW-2's evidence is specific and clear to the extent that the present appellant gave first

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blow in the abdomen of the deceased and then near the naval and, thereafter, on the chest and in the neck. The medical evidence clearly shows the existence of the injuries at the places indicated by PW-2.

15. Above being the position, there is no merit in this appeal, which is, accordingly, dismissed.

Appeal dismissed.

I.L.R. [2009] M. P., 613
SUPREME COURT OF INDIA

Before Mr. Justice Arijit Pasayat & Mr. Justice Mukundakam Sharma

16 October, 2008*

STATE OF M.P.

... Appellant

Vs.

MAKHAN @ MADAN & ors.

... Respondents

Penal Code (45 of 1860), Section 302 - Murder - Place of occurrence - Witnesses stating different place of occurrence - Witnesses also admitted that because of darkness none of accused persons could be identified - Respondents were rightly acquitted by High Court in view of discrepancy as regards the place of occurrence but also on several vitals aspects like non-disclosure and non-possibility of identification - Appeal dismissed.

(Para 5)

दण्ड संहिता (1860 का 45), धारा 302 - हत्या - घटना का स्थान - साक्षियों ने भिन्न-भिन्न घटना स्थल बताये - साक्षियों ने यह भी स्वीकार किया कि अंधेरे के कारण किसी भी अभियुक्त को नहीं पहचाना जा सका - उच्च न्यायालय द्वारा घटना स्थल के सम्बन्ध में विसंगति को देखते हुए बल्कि कई अतिआवश्यक पहलुओं जैसे शिनाख्त का अप्रकटीकरण और शिनाख्त की असंभावना पर भी प्रत्यर्थियों को उचित रूप से दोषमुक्त किया गया - अपील खारिज।

J U D G M E N T

The Judgment of the Court was delivered by ARIJIT PASAYAT, J. :- Challenge in these appeals is to the judgment of a Division Bench of Madhya Pradesh High Court at Jabalpur directing acquittal of the respondents who are hereinafter referred to as the 'accused'. The accused persons faced trial for alleged commission of offence punishable under Sections 148, 302 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). They were found guilty by the Additional Sessions Judge, Betul in ST case No. 169 of 1989 and were convicted and sentenced to undergo rigorous imprisonment for one years and life respectively.

2. Prosecution version in a nutshell is as follows:

On 15.7.1989 Premlal (hereinafter referred to as the 'deceased') had called

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a doctor for treatment of his sister and while he was returning after seeing off the doctor and reached near Kanji House Bazar Bohalla, accused persons had altercation with him and in order to kill, assaulted him by sticks and rod. They also threatened to set on fire his motorcycle at which Laxmi Bai and Maniya Bai (PW5) went there where they saw accused persons assaulting the deceased by rod and lathi as also by fists and slaps. The deceased was shouting for help. Later he became unconscious and fell down and the accused persons fled away from the place of occurrence. Thereafter the deceased was taken by his wife Somti Bai (PW1) and Maniya Bai (PW 5) to their house in unconscious condition. Report of the incident was given at 4:30 AM to the police station at Sarni, which is at a distance of about 9Km from the place of incident. Premlal was sent for medical examination to Primary Health Centre from which he was referred to Padhar Hospital for treatment. Premlal succumbed to his injuries on 20.7.1989. After his death, his dead body was sent for postmortem examination which was conducted by Dr. V.K. Shrivastava (PW 14). In the opinion of the doctor Premlal died due to coma on account of head injury. After investigation charge sheet was filed.

Since the accused persons pleaded innocence, the trial was held. The trial court as noted above found the accused persons guilty and convicted them. In appeal, however, the High Court directed the acquittal.

3. Learned counsel for the appellant submitted that the High Court should not have discarded the evidence of the eye witnesses.

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

5. It is to be noted that the High Court with reference to evidence of Somti Bai, PW1 noted that in the First Information Report it was stated that the place of occurrence is Kanji House Bazar Bohalla but in court the witnesses stated that the accused persons had assaulted the deceased at the residence of Deoli (PW 7) the Sarpanch of the gram panchayat by Lathi and rod. According to Lachhu (PW 2) the deceased was assaulted on the way while he was coming from the house of Sarpanch (PW 7) whereas according to Somti Bai (PW1), the deceased was assaulted in front of the house of the Sarpanch. Maniya Bai (PW 5) stated in her examination in chief that she had seen the accused persons assaulting the deceased with fists and slaps but in cross examination she had stated that when she reached the police station alongwith Somti Bai (PW 1) they had disclosed that the deceased was lying in injured condition and had not disclosed the names of the accused persons. In contrast Somti Bai (PW 1), Lachhu (PW2) and Maniya Bai (PW5) stated that the name of the accused was in the first information report. In her cross-examination she clearly admitted that police told them that they would make enquiry and if report was found false they would be in trouble. Additionally, Maniya Bai (PW5) stated that they had reached the police station about mid night. But the

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FIR was registered early morning next day. Lachhu (PW2) in his statement had stated that he could not identify any of the accused persons due to darkness. If that be so, the evidence of Somti Bai (PW1) Maniya Bai (PW5), that they had clearly identified the accused persons cannot be believed. It is true that even in darkness known persons can be identified from the manner of speech, style of walking and several other peculiar features. But the evidence of PW 2 was to the effect that because of darkness none of the accused persons could be identified. In the instant case not only there is discrepancy as regards the place of occurrence but also on several vital aspects like non-disclosure and non-possibility of identification.

6. In view of what has been stated above, the judgment of the High Court does not suffer from any infirmity to warrant interference. Appeals are dismissed accordingly.

Appeal dismissed.

I.L.R. [2009] M. P., 615

SUPREME COURT OF INDIA

Before Mr. Justice C.K. Thakker & Mr. Justice D.K. Jain

4 November, 2008*

DADAN

... Appellant

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Section 302, Constitution, Article 136 - Scope of interference - In exercise of power under Article 136 of Constitution, Supreme Court does not reappreciate evidence, review and re-weight evidence which has been appreciated by trial Court and High Court - If Sessions Court was satisfied that witnesses are trustworthy and High Court has confirmed that part, it cannot be said that any illegality has been committed by Courts below - Appeal dismissed. (Para 13)

दण्ड संहिता (1860 का 45), धारा 302, संविधान, अनुच्छेद 136 — हस्तक्षेप का विस्तार — संविधान के अनुच्छेद 136 के अन्तर्गत शक्तियों के प्रयोग में उच्चतम न्यायालय साक्ष्य का पुनर्मूल्यांकन, पुनर्विलोकन और पुनर्विचार नहीं करता जिसका विचारण न्यायालय एवं उच्च न्यायालय द्वारा मूल्यांकन किया जा चुका है— यदि सेशन न्यायालय का समाधान हो गया कि साक्षीगण विश्वसनीय हैं और उच्च न्यायालय ने उस भाग की पुष्टि कर दी है, यह नहीं कहा जा सकता कि अधीनस्थ न्यायालयों द्वारा कोई अवैधता की गई है — अपील खारिज।

J U D G M E N T

The Judgment of the Court was delivered by C.K. THAKKER, J. :- The present appeal is filed by appellant Dadan-Accused No. 2 in Sessions Trial No. 39 of 1992 being aggrieved and dissatisfied with the

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judgment and order of conviction and sentence dated September 11, 1998, recorded by the Court of Additional Sessions Judge, Satna (Madhya Pradesh) and confirmed by the High Court of Judicature at Jabalpur, M.P. on April 25, 2006 in Criminal Appeal No. 2444 of 1998.

2. Shortly stated the facts of the case are that according to the prosecution, the incident in question took place on December 14, 1990 at 07:05 p.m. at Kabari Tola, District Satna in front of Pan shop of one Bablu. The case of the prosecution was that on the fateful day, all the accused were standing near the shop of Bablu. Jawaharlal Sahu (deceased) came there on his scooter. All the accused persons were waiting for the deceased. They formed an unlawful assembly whose members were armed with deadly weapons like gupti, knife, iron rods etc. The common object of the accused persons was to kill Jawaharlal. On seeing Jawaharlal, all the accused started inflicting injuries on him. Jawaharlal cried for help. His brother PW 5 Motilal who was sitting at the watch shop of Ramcharan Singh, immediately reached there to rescue him, but he was also beaten by the accused persons and serious injuries were caused to him. The incident was witnessed by PW 7 Hiralal, father of the deceased, PW 9 Janki Bai, mother of the deceased as also PW 10 Bharat Kumar, brother of the deceased. Other persons also came there. The accused fled away. Jawaharlal died due to injuries sustained by him. Motilal was taken to hospital. First Information Report was lodged immediately at 8:45 p.m. The accused were arrested on the next day, i.e. December 15, 1990. They were charged for commission of offences punishable under Sections 148, 302 read with 149 as also Section 307 read with 149, Indian Penal Code, 1860 (IPC). Usual investigation was carried out and the case was committed to the Court of Session by the Chief Judicial Magistrate since it was exclusively triable by the Sessions Court.

3. The plea of the accused was recorded. They denied having committed any offence and claimed to be tried.

4. At the trial, the prosecution, in support of the case, examined fifteen witnesses. The accused in their defence examined four witnesses.

5. The Sessions Court on the basis of medical evidence came to the conclusion and recorded a finding that Jawaharlal Sahu died due to injuries sustained by him and the death was homicidal in nature. It also recorded a finding that injuries caused to Motilal were serious in nature and they have been caused during the course of incident in which Jawaharlal Sahu lost his life.

6. Considering the part played by the accused and their responsibility, the trial Court heavily relied upon the evidence of PW 5 Motilal, real brother and injured witness and PW 7, Hiralal, PW 9 Janki Bai and PW 10 Bharat Kumar. On the basis of the said evidence, it held that it was proved by the prosecution beyond suspicion that accused persons formed an unlawful assembly and in furtherance

DADAN Vs. STATE OF M.P.

of common object to cause death of Jawaharlal, they inflicted injuries on him. All the accused were, therefore, liable to be convicted for offences punishable under Sections 148, 302 read with 149, IPC. It, however, held that it was not proved by the prosecution that the accused persons attempted to cause death of Motilal and were, therefore, not liable to conviction under Section 307 read with Section 149, IPC. But they had committed an offence of causing grievous hurt to Motilal and, therefore, were liable to be convicted for an offence punishable under Section 326 read with Section 149, IPC. The Court in the light of the said finding, ordered the accused persons to undergo rigorous imprisonment for one year for an offence punishable under Section 148; to suffer imprisonment for life for the offence under Section 302 read with Section 149 and to undergo rigorous imprisonment for three years for an offence punishable under Section 326 read with Section 149, IPC. They were also ordered to pay fine with default clause.

7. Being aggrieved by the order of conviction and sentence, out of five accused, four accused (other than Kirti Singh) preferred criminal appeals. The High Court again appreciated the evidence on record and by the judgment impugned in the present appeal held that the appeal filed by accused No. 3-Rajesh Viswakarma @ Thapa was required to be allowed. Accordingly, the appeal was allowed and his conviction and sentence was set aside. With regard to other accused, however, the court held that the trial court did not commit any error in recording finding of guilt against them and there was no substance in those appeals. Order of conviction and sentence, therefore, was confirmed.

8. Appellant Dadan who was accused No. 2 has challenged his conviction by filing the present appeal.

9. We have heard the learned counsel for the parties.

10. The learned counsel for the appellant contended that the order of conviction and sentence recorded by the trial Court and confirmed by the High Court cannot be said to be in accordance with law and it is liable to be set aside. It was also submitted that when the High Court acquitted one of the accused not believing the prosecution story and granted benefit of doubt to him, the said benefit ought to have been extended to the appellant also. When a part of the prosecution story was not believable and was not believed by the High Court, on the same set of facts and circumstances, it ought not to have convicted the appellant herein. The counsel also argued that iron rod said to have been used in commission of offence was not seized and on that ground also, the appellant is entitled to succeed. It was urged that both the courts mainly relied upon PWs 5, 7, 9 and 10. All the above prosecution witnesses were closely related to the deceased being father, mother and brothers. Though the incident took place in a busy locality and other witnesses were available, independent witnesses had not been examined and the High Court ought to have granted benefit of doubt to the appellant.

SUBASH ROY Vs. COAL INDIA LTD.

11. The learned counsel appearing for the State, on the other hand, supported the order passed by the High Court. According to him, on the basis of evidence on record, both the courts reached a finding against the appellant and there is no reason to interfere with the impugned judgment.

12. Having heard the learned counsel for the parties and having gone through the judgments of both the courts and relevant part of evidence of PW 5 Motilal, PW 7 Hiralal, PW 9 Janki Bai and PW 10 Bharat Kumar, we are of the view that no error can be said to have been committed either by the trial Court or by the High Court in recording guilt of the appellant herein and in convicting him for the offences with which he was charged.

13. This Court is exercising power under Article 136 of the Constitution and is not a regular Court of Appeal. In exercise of the said power, this Court does not re-appreciate, review and re-weigh the evidence which has been appreciated by the trial Court and by the High Court. If on the basis of evidence of the aforesaid witnesses, the Sessions Court was satisfied that the prosecution witnesses were trustworthy and relying on their testimony, conviction was recorded and the High Court confirmed that part of the order, it cannot be said that by doing so any illegality had been committed by the courts below. No interference, therefore, is called for by this Court against the said finding. The present appeal, therefore, is liable to be dismissed.

14. For the foregoing reasons, the appeal preferred by appellant-accused No. 2 Dadan deserves to be dismissed and is accordingly dismissed. Conviction and sentence awarded by the trial Court and confirmed by the High Court are maintained.

Appeal dismissed.

I.L.R. [2009] M. P., 618

WRIT APPEAL

Before Mr. Justice Dipak Misra & Mr. Justice Sanjay Yadav

22 August, 2008*

SUBASH ROY

Vs.

COAL INDIA LTD. & ors.

... Appellant

... Respondents

Constitution, Article 226 - Transfer - Appellant, a non-executive in service of a subsidiary of Coal India Limited, transferred to another subsidiary - Competency of Director (P & IR) to transfer from one subsidiary to another - Held - Delegation of power in favour of Director (P & IR) by Board of Director in exercise of power under the Articles and Memorandum of Association subject to conformity with Ruels - Transfer policy does not

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specify that Director (P & IR) can exercise power of transfer of a non-executive from one subsidiary to another - Order of transfer by Director (P & IR) without authority, hence, set-aside - However, President, Coal India can transfer appellant in case the administrative exigency so demand from one subsidiary to another subsidiary - Appeal allowed. (Paras 12 & 13)

संविधान, अनुच्छेद 226 - स्थानांतरण - अपीलार्थी सेवा में गैर कार्यकारी था, को कोल इंडिया लिमिटेड की एक सहायक कम्पनी से दूसरी सहायक कम्पनी में स्थानांतरित किया गया - निदेशक (पी एण्ड आईआर) की एक सहायक कम्पनी से दूसरी सहायक कम्पनी में स्थानांतरित करने की शक्ति - अभिनिर्धारित - निदेशक मंडल द्वारा निदेशक (पी एण्ड आईआर) के पक्ष में शक्ति का प्रत्यायोजन आर्टिकल्स और मेमोरेण्डम ऑफ एसोसिएशन के अध्यक्षीन शक्ति के प्रयोग में नियमों से अनुरूप - स्थानांतरण पॉलिसी यह विनिर्दिष्ट नहीं करती कि निदेशक (पी एण्ड आईआर) किसी गैर कार्यकारी का एक सहायक कम्पनी से दूसरी सहायक कम्पनी में स्थानांतरण करने की शक्ति का प्रयोग कर सकता है - निदेशक (पी एण्ड आईआर) द्वारा स्थानांतरण का आदेश बिना किसी प्राधिकार के, इसलिए अपास्त किया गया - तथापि, यदि प्रशासनिक अत्यावश्यकता की ऐसी मांग हो तो अध्यक्ष, कोल इंडिया अपीलार्थी को एक सहायक कम्पनी से दूसरी सहायक कम्पनी में स्थानांतरित कर सकता है - अपील मंजूर।

K.C. Ghidiyal, for the appellant.

Rohit Arya with Greesham Jain, for the respondents.

J U D G M E N T

The Judgment of the Court was delivered by SANJAY YADAV, J. :- Challenge in this Writ Appeal filed under Section 2(1) of Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam 2005, is to an order dated 17.4.2008 passed by learned single Judge in W.P. No. 14003/2007, whereby the challenge to an order of transfer of Appellant passed on 13/17th September, 2007 was nullified on the ground that the same is neither malicious nor without an authority but in administrative exigency.

2. The facts in nutshell are that the appellant is a Senior Dumper Operator, a non-executive Cadre post, in the service of Northern Coal Fields Ltd. a subsidiary of Coal India Ltd. (for short NCL) and was posted at Bina Project, NCL Singrauli. By order dated 13.11.2006, the appellant was transferred to Mahanadi Coal fields Ltd., Sambalpur, another subsidiary of Coal India Ltd. The appellant questioned the same in W.P. No. 17186/2006(s) filed before this Court on the ground that it was passed by an officer who was not having any authority to do so and that the petitioner was singled out with malafide intention because of the exposure by the Appellant of unfair practice of the management. The said Writ Petition was dismissed on 14.12.2006 for want of territorial jurisdiction. However, on challenge in Writ Appeal No.58/2007, the said order was reversed when the Writ Appeal was allowed on 19.6.2007. The Division Bench of this Court while declining to advert upon various aspects relating to the conduct of the appellant and the action

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of the respondents in transferring the Appellant, dwelt upon the issue as to whether there has been any kind of power with the coal India Ltd. to transfer an employee of the Appellant's Cadre serving under one subsidiary company to another subsidiary company and since the documents brought on record were not sufficient to arrive at a conclusion that it was within the power of the Coal India Ltd. to effect such transfer, the matter was remitted to the Coal India Ltd. with a direction that it will dilate upon its power and pass a reasoned order as to on what basis and under what authority it has passed the order of transfer of the Appellant to a different company. Consequent, thereupon, an order was passed on 13/17th September, 2007; whereby the appellant was ordered to be transferred to MCL Sambalpur. This order was subjected to challenge in W.P. No. 14003/2007(s), wherein it was upheld by the impugned order.

3. Challenging the order it is urged that the learned single judge has failed to appreciate the facts that authorities concerned having failed to justify their action in the light of direction by the Division Bench in W.A. No.58/2007 wherein the Coal India Ltd. was directed to dilate upon its power in respect of transferring a person belonging to non-executive- cadre from one company to another, the order of transfer was not sustainable. It is further argued that the transfer was not sustainable being passed by way of punishment so much so that he has been singled under the garb of administrative exigency, which is revealed from the note sheet and various correspondence entered in to between the officials of NCL and the Coal India Limited. It is therefore, urged that had the learned single Judge appreciated the material brought on record in their right perspective, the transfer of the appellant from one subsidiary to another by Director (Personnel and Industrial Relations) Coal, India Ltd. ought to have been interdicted.

4. The respondents on their turn while relying upon Delegation of Powers in favour of Director (P & IR) by Coal India Ltd. have supported the impugned order passed by learned single judge. It is further contended that it was within the power of the Director (P & IR.) to transfer the appellant from one subsidiary to another after consulting the concerned subsidiary in conformity with Company Rules. Placing reliance on the affidavit filed by Deputy Legal Manager, NCL, it is urged that Coal India Ltd. has its own Board of Directors (in short Board) which have various powers as enumerated in the Memorandum of Association. The Board has delegated its power to transfer an employee from one subsidiary company to another subsidiary company in favour of Director (P & IR) by its order dated 15.1.1985 and it was in exercise of such powers that the appellant was transferred from NCL to MCL and since this was, it is contended, in consonance with the order passed by the Division Bench, the learned single judge did not commit any error in negating the challenge.

5. Considered the rival submissions and perused various documents brought on record.

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6. The issue which crops up for consideration is whether it was within the competency of the Director (P&IR) to have transferred the Appellant from one subsidiary Company to another and whether the Appellant has been subjected to malafide transfer.

7. However before dwelling upon the aspect of malafides we propose to dwell upon the issue as to whether it was within the competence of the Director (P&IR) to have ordered the transfer of the Appellant from one Subsidiary Company to another. This we do because in an earlier round of litigation, as noted supra, the matter was remitted to the Coal India Ltd to dilate upon its power and to pass a reasoned order as to on what basis and under what authority it has passed the order of the transfer of Appellant to another Company. It is the Director (P&IR) who passes an order of 13/17.9.2007 purportedly in exercise of the powers delegated to him by the Board under order No. CILXI(D):04027:671 dated 15th January, 1985.

The relevant provision of the order dated 15.1.1985, i.e. Delegation of Powers stipulates the item and the extent of powers delegated in favour of Director (P&IR) and in respect of transfer, full powers are delegated in following terms :

**"Transfer/accept resignation/confirm employees/
sanction officiating allowances/increments/crossing of
efficiency bar in consultancy with the concerned Division/
Subsidiaries in conformity with Company Rules".**

8. The delegation of power in favour of Director (P&IR) by CIL is in exercise of its powers under The Articles and Memorandum of Association of CIL and the NCL.

9. Clause 31 of Articles of Association of Northern Coal Fields Ltd. Interpretation, Annexure "C", filed along with the affidavit dated 4.7.2008 stipulates that the business of the Company i.e., NCL, shall be managed by Board of Directors. Clause 33 (i)(d) stipulates that the Chairman or Vice Chairman on the Managing Director or other Directors shall exercise such powers and discretion in relation to the affairs of the Company may be specifically delegated to them respectively by the Board of Directors and are not required to be done by the Board of Directors of the Company at the General Meeting under the Act. Clause 37 Makes a provision regarding Powers of President/Coal India Ltd., to issue directions in the following terms :-

"Notwithstanding any thing contained in all these Articles the President/CIL may from time to time issue such directives on instructions as may be considered necessary in regard to conduct of business and affairs of the Company and in like manner may vary and all any such directive on instructions so issued..."

Similarly, clause 33 (i)(c) of Articles of Association of Coal India Ltd.

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Interpretation, stipulates that the Chairman, Vice Chairman or the Managing Directors or other Directors shall exercise such powers and discretion in relation to the affairs of the Company as may be specifically delegated to them respectively by the Board of Directors of the Company at the general meeting under the Act.

10. Thus the delegation of Powers to Director (P&IR) by CIL in respect of transfer in consultancy with the concerned subsidiaries and the exercise of such powers thereof by the respective Director (P&IR) cannot be faulted with. However, a close reading of the relevant delegation of powers reveal that such exercise of power has to be 'in Conformity with Rules'.

11. The transfer of an employee of the Company are governed by the transfer policy brought into existence vide office memorandum No. CIL/C-5A(vi)/50729/CCC/26 dated 26.4.2002. Annexure A/6. The said policy is in respect of Executives and Non-Executives working in sensitive disciplines. The area of operation in the non executive cadre declared as sensitive are Store Personnel; Security Personnel/Vigilance watchers; Assistants dealing with purchase; Assistants dealing with sales especially Road Sales; weight Bridge Staff; Loading clerk/ loading personnel, Bill clerks, Personnel Officers clerks posted in Collieries, Overseer (C)/ Engineering Asstt. (C) Medical Officer's clerks posted in collieries; Assistants dealing motor vehicles works; Staff posted in Central Hospitals to look after supply of meals etc. to patients; and take care of the Guest House. The policy further stipulates that the personnel declared on the above listed job should not be allowed to stay in a particular place for more than three years at a time and that they will be rotated within the Company on completion of three years and this relation/transfer will be regulated in a routine manner and to be mentioned by the Headquarters of the subsidiaries. The policy further moots that on promotion from non-executive cadre to executive cadre they will be transferred to other Subsidiary Companies. No other policy governing transfer of an employee from one subsidiary to another has been brought to the notice of this Court.

12. The transfer being covered by a policy having the force of rule, it is within the powers of an employee to question his transfer if it is de hors such policy. In the case at hand the learned Single Judge while analyzing the facts in paragraphs 9, 10, & 11 was please to hold that the transfer policy has no applicability in the case and then went on to approve the sweeping powers of the Director (P&IR) to transfer a Non-executive from one subsidiary to another. In our considered opinion, a plain reading of Delegation of Powers reveals that the Director (P&IR) does not enjoy a sweeping powers, but have powers which he has to exercise 'in conformity with the rules' and no rules, except the transfer policy quoted supra, has been brought on record to indicate that Director (P & IR) can exercise powers of transfer of a non-executive from one subsidiary to another. But that does not mean that a non-executive cannot be transferred from one place to another in administrative exigency which is writ large in the present case.

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13. Thus the Respondents have failed to show that the Director (P&IR) was empowered even to transfer a non-executive working in non-sensitive post to another subsidiary. However, we may not be understood to mean that President/CIL will also not have any power to transfer an-employee from one subsidiary to another. Similarly, it is within the power of subsidiary Company to transfer its employee from one place to another in administrative exigency.

14. Having thus considered we set aside the order dated 13/17.9.2007; however, we leave it to the President/CIL in case the administrative exigency so demand to transfer the appellant from one subsidiary to another or from one place to another within the NCL. The impugned order passed in W.P. No. 14003/2007 is accordingly set aside.

15. The appeal is allowed to the extent above. No Costs.

Appeal allowed.

I.L.R. [2009] M. P., 623

WRIT APPEAL

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

21 January 2009*

STATE OF M.P.

... Appellant

Vs.

RAGHVENDRA SOHGAURA

... Respondent

A. Panchayat Shiksha Karmis (Recruitment and Conditions of Service) Rules, M.P. 1997, Rule 7, Panchayat Service (Recruitment and General Conditions of Services) Rules, M.P. 1999, Rule 25 - Probation - Rules 1997 exclusively deals with appointment of Shiksha Karmis - Rules 1999 lays down recruitment and general conditions of Panchayat services - When a specific set of rule has been brought into existence to govern the terms and conditions of Shiksha Karmis, it is to be treated as special rule.

(Para 15)

क. पंचायत शिक्षा कर्मि (भर्ती तथा सेवा की शर्तें) नियम, म.प्र. 1997, नियम 7, पंचायत सेवा (भर्ती तथा सेवा की सामान्य शर्तें) नियम, म.प्र. 1999, नियम 25 - परीक्षा - 1997 के नियम अनन्य रूप से शिक्षा कर्मियों की नियुक्ति से संबंधित हैं - 1999 के नियम पंचायत सेवाओं की भर्ती और सामान्य शर्तें अधिकथित करते हैं - जब शिक्षा कर्मियों के निबंधनों और शर्तों को शासित करने के लिए नियम का कोई विनिर्दिष्ट समूह अस्तित्व में लाया गया हो, इसे विशिष्ट नियम के रूप में मानना चाहिए।

B. Interpretation of statute - Conflicting statutes - When two statutes or rules are conflicting or appear to be conflicting, the duty of Court is to find out which of the two apparent conflicting provisions is more general

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and which is more specific - In case of inconsistency between provisions of two enactments both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and clear intendment conveyed by language of relevant provisions therein. (Para 15)

ख. कानून का निर्वचन - अन्तर्विरोधी कानून - जब दो कानून या नियम अन्तर्विरोधी हों या अन्तर्विरोधी प्रतीत होते हों तब न्यायालय का कर्तव्य यह पता लगाना है कि दो प्रकट अन्तर्विरोधी उपबंधों में से कौन सा अधिक सामान्य है और कौन सा अधिक विनिर्दिष्ट है - दो अधिनियमितियों के उपबंधों के बीच असंगति के मामले में, जिनमें से दोनों की प्रकृति विशिष्ट मानी जा सकती, अन्तर्विरोध का समाधान दो अधिनियमितियों में अन्तर्निहित प्रयोजन और पॉलिसी को संदर्भित करके और उनके सुसंगत उपबंधों की भाषा से सूचित स्पष्ट अर्थान्वयन करके किया जाना चाहिए।

C. Service Law - Shiksha Karmis - Shiksha Karmis are not government employees. (Para 25)

ग. सेवा विधि - शिक्षा कर्मी - शिक्षा कर्मी शासकीय कर्मचारी नहीं हैं।

D. Panchayat Shiksha Karmis (Recruitment and Conditions of Service) Rules, M.P. 1997, Rule 7 - Probation - Increment - Shiksha Karmis are not entitled to increments during their probation period in terms of Rule 7. (Para 29)

घ. पंचायत शिक्षा कर्मी (भर्ती तथा सेवा की शर्तें) नियम, म.प्र. 1997, नियम 7 - परीक्षा - वेतनवृद्धि - शिक्षा कर्मी नियम 7 के निबंधनों के अनुसार उनकी परीक्षा अवधि के दौरान वेतनवृद्धि के हकदार नहीं हैं।

E. Service Law - Recovery - Increment wrongly paid to Shiksha Karmis - It was not a payment by any kind of misrepresentation by Shiksha Karmis - It was erroneous payment by authorities - Recovery of amount not warranted. (Para 29)

ङ. सेवा विधि - वसूली - शिक्षा कर्मियों को वेतनवृद्धि गलती से दी गई - यह संदाय शिक्षा कर्मियों द्वारा किसी प्रकार के दुर्व्यपदेशन से नहीं था - यह प्राधिकारियों द्वारा गलत संदाय था - राशि की वसूली के लिए समुचित आधार नहीं।

Cases referred :

1991 MPHT 15; 1995 SCC (L&S) 248, (2002) 4 SCC 662, AIR 1992 SC 1754, AIR 1968 SC 349, AIR 1989 SC 1308, (1995) 2 SCC 479, (2000) 4 SCC 406, (2004) 11 SCC 672, (2004) 10 SCC 65, (2007) 2 SCC 230, AIR 1983 SC 391 = (1983) 2 SCC 33, (2001) 4 SCC 534, (2003) 2 SCC 593, (2004) 11 SCC 64, (2005) 8 SCC 300, 2006(1) MPLJ 217, T.A. No. 1547/1988 Dr. P.L. Malik Vs. State of M.P.

R.N. Singh, A.G. with Kumaresh Pathak, Dy.A.G., for the appellant.

Rajendra Tiwari & P.R. Bhawe, Prabhakar Singh, Udayan Tiwari, Kamal

Singh Babhel, Mohan Sousarkar, Santosh Vishwakarma, Vishal Dhagat, Atul Upadhyay, Shivkumar Dubey, D.K. Tripathi, Awadhesh Gupta, Devesh Bhojne, J.L. Mishra, P.S. Tiwari, Deepak Okhade, Satyendra Patel, for the respondents.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :- Regard being had to the homogeneous character of the controversy in issue, this batch of writ appeals was heard analogously and is disposed of by a singular order. For the sake of clarity and convenience, the facts in Writ Appeal No.1098/2006 which arises out of W.P. (S) No.5843/04 are adumbrated herein.

2. Shorn of unnecessary details, the facts which are imperative to be exposted for adjudication of the lis are that the respondents (original petitioners) were appointed as Shiksha Karmis under the M.P. Panchayat Shiksha Karmis (Recruitment and Conditions of Service) Rules, 1997 (hereinafter referred to as 'the 1997 Rules') in various grades, i.e., Grades- I, II and III. The appointments were made on probation basis. The pay-scale for the said posts are prescribed in Schedule 1 to the Rules. The services of the respondents were confirmed on completion of three years probation and they were extended the benefit of increments on completion of one year of the date of initial appointment by order dated 4.2.2003. When the respondents were enjoying such benefit the Commissioner, Public Instructions issued an order dated 8.7.2004 directing that the benefit of increments which were given to 'Shiksha Karmis' on completion of one year of probation period after confirmation of their services had been extended erroneously and the same was to be recovered and the amount was to be adjusted out of the salary to be paid. Being aggrieved by the aforesaid action of the said authority, the respondents-'Shiksha Karmis' filed writ petitions invoking the extraordinary and equitable jurisdiction of this Court under Article 226 of the Constitution of India for issue of a writ of certiorari for quashment of the same and to command the respondents to continue the benefit.

3. It was contended before the learned single Judge that once the period of probation was completed, they were entitled to increments on completion of one year of probation from the date of their initial appointment and the same was rightly paid to them. Reliance was placed on various circulars and Fundamental Rule 26 to build the edifice to sustain the stand that the action of the State was sensitively susceptible.

4. Before the learned single Judge it was also urged that the release of increments was in accordance with the circulars dated 9.12.1974, 30.5.1977 and 6.6.1979 and clarificatory note given by the Accountant General. It was also argued that Rule 7 of the 1997 Rules does not create any impediment for grant of increments to the employees who are confirmed. The decision rendered in P.R.

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Malik v. State of M.P. and Others, 1991 MPHT 15 was pressed into service to highlight that the principles laid down therein would apply to the petitioners inasmuch as when ad hoc employees have to be given the benefit of the increments during ad hoc officiation, they cannot be dealt with differently.

5. The stand and stance put forth by the petitioners was resisted by the respondent -State contending, inter alia, that under Rule 7 of the 1997 Rules, 'Shiksha Karmis' were appointed on probation for a period of three years which was extendable for another two years and during the said period they were to be paid fixed pay, i.e., the minimum of the pay scale with dearness allowance and only on successful completion of probation, regular pay-scale is payable. It is worth noting that it was put forth that the appointment was equivalent to apprentice. A distinction was made between the civil servants and the Shiksha Karmis and justification was given for recovery of the amount that was erroneously paid.

6. The learned single Judge, as is manifest from the order, referred to Rule 7 of the 1997 Rules, Rule 25 of the M.P. Panchayat Service (Recruitment and General Conditions of Services) Rules, 1999 (in short 'the 1999 Rules'), M.P. Civil Services (General Conditions of Services) Rules, 1961 (for brevity 'the 1961 Rules'), the circular issued by the State Government on 30.5.1977, clarification to the said circulars issued by the General Administration Department, Fundamental Rule 26, clarification issued by the Accountant General, circular dated 06.6.1979 issued by the General Administration Department and referred to the decisions rendered in *Sahib Ram v. State of Haryana and Others*, 1995 SCC (L&S) 248, *State of Karnataka and Others v. G. Halappa and Others*, (2002) 4 SCC 662, *State of Rajasthan v. Gopi Kishan Sen*, AIR 1992 SC 1754, *The State of Mysore and Another v. P. Narasinga Rao*, AIR 1968 SC 349 and *V. Miakendeya and Others v. State of Andhra Pradesh and Others*, AIR 1989 SC 1308 and came to hold that 'Shiksha Karmis' are entitled to release of increments on confirmation of their services retrospectively when the increment fell due. Being of this view, the learned single Judge allowed the writ petitions and quashed the order passed by the Commissioner of Public Instructions.

7. Questioning the sustainability of the order passed by the learned single Judge, Mr. R.N. Singh, learned Advocate General for the State, has raised the following contentions:

(a) The learned single Judge has fallen into error in expressing the opinion that there is no embargo in Rule 7 of the 1997 Rules to give the benefit of increments on confirmation of service.

(b) The interpretation placed by the learned single Judge on Rule 7 especially on the terms 'minimum the pay-scale' is erroneous as the said words are to be in the context they are used, i.e., 'fixed pay'.

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(c) The reliance on Rule 25 of the 1999 Rules is unacceptable inasmuch as the writ petitioners were appointed as Shiksha Karmis under the 1997 Rules meant exclusively for the said posts and, therefore, the said Rules are to prevail.

(d) The reliance on the 1961 Rules, the circulars of the State Government and Fundamental Rules and the clarificatory letters issued by the Accountant General could not have been placed reliance upon as they basically and fundamentally have applicability to the Government employees and by no stretch of imagination 'Shiksha Karmis' could be equated with the Government servants.

(e) The direction issued by the learned single Judge quashing the order of recovery is untenable since the increment was released in violation of the rules in an erroneous manner and further the writ petitioners are in the initial period of their career.

8. Mr. Rajendra Tiwari, learned senior counsel appearing on behalf of the respondents combatting the submissions of the learned Advocate General, canvassed the following proponentes:

(i) The interpretation placed by the learned single Judge on Rule 7 of the 1997 Rules is not erroneous as the Rule has to be liberally interpreted regard being had to the fact that it pertains to the appointment of 'Shiksha Karmis' who impart education to build the nation.

(ii) Rule 7 of the 1997 Rules and Rule 25 of the 1999 Rules are to be read conjointly as that would achieve the real purpose and that having been done by the learned single Judge, the order cannot be found fault with.

(iii) The inspiration drawn from various circulars and the Fundamental Rule 26 by the learned single Judge should not be treated as faulty inasmuch as the opinion expressed by him in 'Shiksha Karmis' who have been appointed by the Rules in service of Panchayats are entitled to similar benefits which are granted to other employees of other local bodies and they cannot be treated less favourably as their status is better than ad hoc employees who have been given the increments during the period of ad hoc officiation.

(iv) This Court should apply the principle of purposive construction as the literal interpretation would be in the realm of semantic and narrow concept of lexicon construction.

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9. To appreciate the rivalised submissions raised at the Bar, it is apposite to refer to the scheme of the 1997 Rules. 'Shiksha karmi' has been defined in Rule 2(h) to mean a person appointed by Zila Panchayat or Janpad Panchayat for teaching in the schools under their control. Rule 4 of the said Rules deals with the classification and scale of pay. It is apt to reproduce the said Rule:

"4. Classification and Scale of Pay. -

The classification of Shiksha Karmis and their scales of pay shall be as given in the Schedule I. Number of the posts shall not be increased except with the prior approval of the Government or an Officer duly authorised by the Government."

10. Rule 5 provides for the methods of selection and recruitment. Rule 7, which forms the fulcrum of the present lis provides for probation, is reproduced below:

"7. Probation.- Every person directly recruited to the post of Shiksha Karmi shall be appointed initially on probation of three years, extendable upto five years for a particular school so that he serves in that school for full probation period. The performance will be assessed by the appointing authority at the end of each year. After three years, the Shiksha Karmi may be appointed in the regular pay scale of the Panchayat on the basis of his work, conduct and performance. In case the performance is not found satisfactory, he may be allowed to continue on probation for another one to two years to improve after which his performance will be assessed again at the end of extended period and if not found satisfactory, his service shall be terminated. But in no case the probationary period shall be extended beyond the maximum period of five years. Shiksha Karmi will be paid fixed pay equivalent to minimum of the pay scale with admissible dearness allowance during the probation period."

11. Rule 8 deals with promotion. Rule 11 which provides for the general conditions of service, is as follows:-

"11. General Conditions of Service. - Conditions of Service other than mentioned above, shall be the same as applicable to other employees of the Janpad Panchayat or Zila Panchayat, as the case may be."

12. As our attention has been invited to the 1999 Rules, it is also thought necessary to have a survey of the said Rules. Rule 2 which deals with application reads as under:

"2. Application. - Unless otherwise provided in the Madhya Pradesh Panchayat Raj Adhiniyam, 1992 (No. of 1994)

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or any other rules made thereunder, these rules shall apply to all posts in Zila Panchayat and Janpad Panchayat but shall not apply to the following categories, viz:-

(a) Posts on a contingency paid establishment, or work-charged establishment, or daily wage establishment;

(b) Posts to which appointments are made on part time basis; and

(c) Posts to which appointments are made on contract basis.”

13. Rule 3 (b) defines 'appointing authority' in respect of service meaning to the authority shown as appointing authority for the post concerned in the Schedule V. Rule 2(e) defines 'Panchayat Service' to mean the service of Zila Panchayat or Janpad Panchayat, as the case may be, under sub-section (1) of Section 70 of the Act. Rule 4 deals with the constitution of service. The same being relevant is reproduced below:

“4. Constitution of service. - Service shall consist of the following persons, namely, -

(1) Persons, who, at the commencement of these rules, are holding substantively the post specified in Schedule I;

(2) Persons, recruited to the service before the commencement of these rules; and

(3) Persons, recruited to the service in accordance with the provisions of these rules.”

14. Rule 5 deals with the staffing pattern in the Panchayat service. Rule 6 which deals with the classification and scale of pay, etc., provides that the same shall be in accordance with the provisions contained in Schedule I. Rule 7 deals with the method of recruitment. Rule 9 prescribes the conditions of eligibility for direct recruitment and Rule 10 deals with the disqualification for appointment to Panchayat service. Rule 25 on which the learned single Judge has placed reliance pertains to probation and confirmation. The said Rule reads as under:-

“25. Probation and Confirmation. - (a) All appointments to the Panchayat Service or post whether by direct recruitment or by promotion shall be made on probation. The period of probation shall be of two years:

Provided that the appointing authority may for sufficient reason to be recorded extend the period of probation for a period not exceeding one year.

(b) During the period of probation of employees, a six

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monthly confidential report shall be written and it shall include comments on his work, efficiency and devotion to duty.

(c) On the successful completion of the probation, the probationer shall be confirmed in the service or post to which he has been appointed.

(d) No person shall be confirmed in a post in the Panchayat Service unless he has completed the period of his probation satisfactorily and has passed the departmental examination, if any, and has successfully undergone training, if any, laid down by the State Government or by the Panchayat for the holder of such post.

Explanation. - Confirmation under this sub-rule may be made with effect from the date of continuous officiation of the person after completion of the period of probation if any in that post of the date from which the permanent post is substantively vacant, whichever is later.

(e) If the probationer does not complete his probation satisfactorily, the direct recruited candidate shall be discharged from the Panchayat service without paying any compensation and the candidate appointed by promotion shall be reverted to the post substantively held by him before the promotion."

15. As is luminescent from the order of the learned Single Judge, he has placed reliance on Rule 25 of the 1999 Rules. As held by him the explanation of Rule 25(d) of the 1999 Rules makes it clear that confirmation under Sub-Rule may be made with effect from the date of continuance of officiation of the person or the date from which the permanent post is substantively vacant, whichever is later. It is clear as crystal that the 1997 Rules exclusively deals with the appointment of 'Shiksha Karmis'. The 1999 Rules lays down recruitment and general conditions of Panchayat services. When a specific set of rule has been brought into existence to govern the terms and conditions of 'Shiksha Karmis', it is to be treated as a special rule. In view of the aforesaid, the maxim *generalalia specialibus non derogant* (general things do not derogate from special things) gets attracted. In a situation where two statutes or rules are conflicting or appear to be conflicting, the duty of the Court is to find out which of the two apparent conflicting provisions is more general and which is more specific. Thus, in case of inconsistency between the provisions of two enactments both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein.

16. In Craies on Statute Law, 1963 Edn., pp. 376-77, it has been stated thus:-

"The general rule, that prior statutes are held to be repealed

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by implication by subsequent statutes if the two are repugnant, is said not to apply if the prior enactment is special and the subsequent enactment is general, the rule of law being, as stated by Lord Selbourne in *Sewards v. Vera Cruz* (1984) 10 AC 59, 68, 'that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation; you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. There is a well known rule which has application to this case, which is that a subsequent general Act does not affect a prior special Act by implication. That this is the law cannot be doubted, and the cases on the subject will be found collected in the third edition of Maxwell is *generalis specialibus non derogant* - i.e. general provisions will not abrogate special provisions. When the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.'

17. In *Chairman, Thiruvalluvar Transport Corporation v. Consumer Protection Council*, (1995) 2 SCC 479, it has been held that the Motor Vehicles Act, 1988 can be said to be a special Act in relation to claims of compensation arising out of the use of a motor vehicle. The Consumer Protection Act, 1986 being a law dealing with the question of extending protection to consumers in general, could, therefore, be said to be a general law in relation to the specific provisions concerning accidents arising out of the use of motor vehicles found in Chapter XII of the 1988 Act. In the said case, it has been held that the 1988 Act creates a forum before which the claim can be laid if it arises out of an accident. That being a special law would prevail over the relevant general law such as the 1986 Act.

18. In *Allahabad Bank v. Canara Bank*, (2000) 4 SCC 406, it has been held thus:-

"There can be a situation in law where the same statute is treated as a special statute vis-a-vis one legislation and again as a general statute vis-a-vis yet another legislation."

19. In *P.S. Sathappan v. Andhra Bank Ltd.*, (2004) 11 SCC 672, it has been ruled thus:-

"It is settled law that between a special law and a general

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law the special law will always prevail. A Letters Patent is a special law for the High Court concerned. The Civil Procedure Code is a general law applicable to all courts. It is well settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail. We see no conflict between the Letters Patent and the Civil Procedure Code then the provisions of the Letters Patent would always prevail unless there was a specific exclusion."

20. In *Amrendra Pratap Singh v. Tej Bahadur Prajapati*, (2004) 10 SCC 65, it has been held that a general law cannot defeat the provisions of a special law to the extent to which they are in conflict; else an effort has to be made at reconciling the two provisions by harmonious reading.

21. In *Raghunath Rai Bareja V. Punjab National Bank*, (2007) 2 SCC 230, the view expressed in *Allahabad Bank* (supra) was reiterated.

22. In the case at hand, as Rule 7 of the 1997 Rules specifically deals with the issue of probation of 'shiksha karmis' the same has to be made full with applicable with force and on all fours and it would be an anathema to the science of construction and art of interpretation to read Rule 25 of 1999 Rules conjointly with Rule 7 of 1997 Rules. It would also destroy the basic facet of interpretation if both the rules are to be read in conjunction to have a purposive understanding of the rules because Rule 7 operates in a separate sphere and with exclusivity pertaining to the service conditions of the shiksha karmis. Rule 25 has nothing to do with shiksha karmis. It is in general character. Thus, Rule 7 has to prevail.

23. Another aspect which really deserves to be dealt with is whether the reliance on Rule 8 of 1961 Rules, various circulars and Fundamental Rule 26 can be taken aid of. The learned Single Judge has copiously referred to the same and to the instructions of the Accountant General. On a purposive survey of the said rules, circulars and instructions, there can be no scintilla of doubt that they pertain to government employees. It is worth-noting that Mr. Tiwari, learned Senior Counsel, at the commencement of hearing, had raised a spacious submission that 'shiksha karmis' are government employees but on being pointed as to on what basis they can be regarded as 'shiksha karmis', the learned senior counsel, realising the fallacy in the agreement abandoned the said submission and acceded that they are not government employees. Frankly speaking, the concession has been rightly given. We are disposed to think as on a scanning of the rules pertaining to 'shiksha karmi' by no stretch of imagination, it can be held that they are government employees. In this context we may refer with profit to the decision rendered in *State of Gujarat and another vs. Raman Lal Keshav Lal Soni*, (1983) 2 SCC 33 = AIR 1983 SC 391. In the aforesaid case the Apex Court while considering the question whether the members of Gujarat Panchayat Service are Government

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servants laid down various factors which would indicate the relationship of master and servant though none of them are conclusive as no single factor can be considered to be absolutely essential. In paragraph 27 their Lordships have held as under:-

“We have to first consider the question whether the members of the Gujarat Panchayat Services Are Government servants. Earlier we have already said enough to indicate our view that they are Government servants. We do not propose and indeed it is neither politics nor possible to lay down any definite test to determine when a person may be said to hold a civil post under the Government. Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as, the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of duties performed by the employee's manner and method of the work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances, may have to be considered to determine the existence of the relationship of master and servant. In each case, it is a question of fact whether a person is a servant of the State or not.”

24. If the aforesaid guidelines are kept in view it would be clear as crystal that a 'Shiksha Karmi' is not appointed by the State Government, the State Government is not the disciplinary authority, the nature of duties performed by him has no nexus with the State government and the salary is not paid by the State Government. Hence, he, by no stretch of imagination, can be regarded as an employee of the State Government.

25. Tested on the anvil of the aforesaid pronouncement of law, it is beyond any shadow of doubt that shiksha karmis are not government employees. Once they are not government employees, the question of the applicability of the 1961 Rules, fundamental rules, government circulars and the instructions of the Accountant General remotely do not have application as these exclusively apply to government servants.

26. Presently to the interpretation of Rule 7. The learned Single Judge has expressed the view that there is no embargo in Rule 7 not to give benefit of increment of confirmation of service. We have already reproduced Rule 7. It stipulates that a shiksha karmi will be paid fixed pay equivalent to minimum of the pay-scale with admissible dearness allowance during the probation period.

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Submission of Mr. Tiwari, learned senior counsel is that the Rule requires purposive interpretation. In this context, we may refer with profit to the decisions rendered in *Gurudevdatla VKSSS Maryadit v. State of Maharashtra*, (2001) 4 SCC 534, *Dayal Singh v. Union of India*, (2003) 2 SCC 593, *Swedish Match AB v. Securities and Exchange Board, India*, (2004) 11 SCC 64 and *Compack (P) Ltd. v. CCE*, (2005) 8 SCC 300 wherein it has been held that unless a literal meaning placed on a document, leads to anomaly or absurdity the principle of literal interpretation should be adhered to. A court is not required to pave the path of purposive construction to interpret the section which would usher in conflict in various provisions of the enactments or the rules. It is well settled in law that a strained meaning should not be assigned to the words if the legislative purpose is clear and conveys it through the literal meaning. In the case at hand the Rule is clear, unambiguous and does convey the intention of the Rule Making Authority. The words used are "fixed pay". Instead of specifying an amount it has been stated that the same should be equivalent to minimum of the pay scale with admissible dearness allowance. The manner or the method of quantification cannot be allowed to convey that there is no fixed pay. Once the concept of fixed pay is attracted, it is a different condition altogether. The conferral of benefit of increment on confirmation with retrospective effect cannot be allowed to govern as that would defeat the root rule.

27. A Division Bench of this Court in *Saroj Goswami vs. State of M.P. and others*, 2006(1) MPLJ 217, while dealing with the concept of fixed pay and appointment on a time-scale, expressed the view as follows:

"9. Before 10-3-1987, the petitioner's appointment was for period of six months each. It was on ad-hoc or stop gap service and on the basis of such service, the petitioner will not be entitled to the benefits which are given to a person who holds a substantive post. Therefore, the petitioner will not be entitled either to claim seniority or to get benefit of pay-scale attached to the post while working in an ad-hoc capacity. Reliance on FR-26 is not of any assistance. It merely provides that all duty in a post 'on a time-scale' counts for increments in that time-scale. Thus is if the appointment was to a post on time-scale, duty performed on such a post, would be counted for increments in that time-scale. Where appointment was not on a time-scale, but on fixed pay, the incumbent will neither be entitled to the benefit of seniority nor pay-scale. The fact that the fixed pay happened to be equivalent to the initial pay in a time scale does not mean that the ad-hoc service was on a time scale. The decision of the tribunal in *Dr. P.L. Malik vs. State of M.P.*, T.A. No.1547/88 and connected cases decided on 30-7-90 hold that ad-hoc employees are entitled to increments is, therefore, wrongly

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decided. The petitioner is not entitled to claim the benefit of increments for the ad-hoc service between 1983 to 1987.

10. We are fortified in our view by the decision of the Supreme Court in *Dhyan Singh vs. State of Haryana*, JT 2000 (10) SC 436, wherein considering whether temporary service or ad-hoc service rendered in specific schemes could be counted as employment under the State the Supreme Court observed:

"The continuance/engagement of the appellants under the specific scheme cannot be held to be an employment under any establishment of the government. Such schemes are taken up for certain contingencies when money for the same is provided either by the Central Government or at times by some foreign countries. But the employment under such scheme not being a part of formal cadre of the State Government, it is difficult to hold that the period for which an employee rendered service under such scheme can be counted either for the purposes of deciding their pensionary benefits or even for fixing of their salary in the scale of pay once they are regularly absorbed."

28. It is worth-noting that the learned Single Judge has placed reliance on the case of *Dr. P.L. Malik vs. State of M.P.*, [T.A. No.1547/1988 decided on 30-7-90] but the Division Bench has clearly held that the decision therein holding that ad hoc employees are not entitled to increment is, therefore, wrongly decided. The Division Bench has laid immense emphasis on the fixed pay and opined that if an appointment is made on fixed pay the incumbent will neither be entitled to the benefit of seniority nor pay-scale.

29. The next issue which arises for consideration is whether there should be recovery of the amount in question or not. In this regard, Mr. Tiwari commended us to the decision rendered in *Sahib Ram vs. State of Haryana*, 1995 SCC L&S 248 wherein a upgraded pay scale was given due to wrong construction of an order by the Authority concerned without any misrepresentation by the employee it was held by their Lordships that the amount paid shall not be recovered as there was no misrepresentation by the employee. In the case at hand we have been apprised at the Bar that the some have been paid and some have not been paid. It was not a payment by any kind of misrepresentation by the 'shiksha karmi's. It was erroneous payment on behalf of the authorities. Submission of Mr. Singh that incumbents have long years to go and hence, there should be recovery. The aforesaid submission has been put forth with the foundation that recovery would not affect them. Be that as it may, we are of the considered opinion that recovery of the amount in the obtaining factual matrix is not warranted. Therefore, we conclude and hold that the respondents are not entitled to increments during their probation period in terms of Rule 7 of 1997 Rules and, their increments would only

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commence after confirmation and the benefits that have been paid by erroneous fixation of increment should not be recovered. Needless to emphasis their pay scale shall be re-fixed on the basis of aforesaid conclusion and they be paid accordingly.

30. Ex consequenti, the writ appeals are allowed to the extent indicated above. The order passed by the learned Single Judge as far as it holds that the respondents were entitled to increment on completion of one year of probation is set aside and as far as the conclusion that there could not have been recovery for erroneous payment is upheld. In the facts and circumstances of the case, there shall be no order as to costs.

Appeal allowed.

I.L.R. [2009] M. P., 636

WRIT APPEAL

Before Mr. Justice Subhash Samvatsar & Mrs. Justice Manjusha P. Namjoshi

30 January, 2009*.

RAMESH

... Appellant

Vs.

STATE OF M.P. & anr.

... Respondents

A. Constitution, Article 21 - Protection of life and personal liberty
- Writ petition before High Court seeking a direction to set the petitioner at liberty and paying him adequate compensation on the ground that Arjun Singh who was alleged to have been killed by the petitioner is still alive - Held - It is clear that no person can be deprived of his life except according to the procedure established by law - Petitioner is kept under the custody after following the procedure established by law and, therefore, it cannot be said that his rights guaranteed by Article 21 are violated. (Para 12)

क. संविधान, अनुच्छेद 21 — प्राण एवं दैहिक स्वतंत्रता का संरक्षण — याची को स्वतंत्र किये जाने और उसे समुचित प्रतिकर अदा करने के निदेश के लिए उच्च न्यायालय के समक्ष रिट याचिका इस आधार पर कि अर्जुन सिंह, जिसे कथित रूप से याची द्वारा मारा गया था, अब तक जीवित है — अभिनिर्धारित — यह स्पष्ट है कि विधि द्वारा स्थापित प्रक्रिया के सिवाय किसी व्यक्ति को उसके जीने के अधिकार से वंचित नहीं किया जा सकता — याची को विधि द्वारा स्थापित प्रक्रिया का पालन करने के बाद अभिरक्षा में रखा गया इसलिए यह नहीं कहा जा सकता कि अनुच्छेद 21 द्वारा प्रत्याभूत उसके अधिकारों का उल्लंघन हुआ।

B. Constitution, Articles 226 & 227 - High Court exercising powers under Article 226/227 can not set-aside a judgment of a competent criminal Court which has attained finality. (Para 14)

ख. संविधान, अनुच्छेद 226 व 227 — उच्च न्यायालय अनुच्छेद 226/227 के अधीन शक्तियों का प्रयोग कर सक्षम दण्डिक न्यायालय के निर्णय, जो अंतिम हो गया है, को अपास्त नहीं कर सकता।

Cases referred :-

AIR(37) 1950 SC 27, 1996 CrLJ 4243.

Sunil Jain, for the appellant.

G. Desai, Dy.A.G., for the respondents/State.

J U D G M E N T

The Judgment of the Court was delivered by S. SAMVATSAR, J. :-This writ appeal is preferred by the present appellant, being aggrieved by the order dated 23rd day of January, 2007, passed by the learned Single Judge of this Court in W.P.No. 6503/2006, whereby the writ petition filed by the present appellant for seeking a direction to set the petitioner at liberty and for paying adequate compensation was dismissed.

2. The facts of the case, briefly stated, are that the present appellant-petitioner was prosecuted and eventually convicted for the offences punishable under Sections 302, 148 and 149 of IPC for committing murder of one Arjun Singh on 12.07.1990. The learned Sessions Judge by his order dated 31st July 1996 (Annexure P/1) in Sessions Trial No. 78/93 convicted the present appellant for commission of offence under Section 302 read with Section 149 of IPC and sentenced him to undergo imprisonment for life. The other co-accused Dilip Singh was acquitted from the charges levied against him.

3. This judgment was challenged by the present appellant by filing an appeal before this Court which has been registered as Criminal Appeal No. 644/1996. This Court decided the said appeal on 14th Day of February, 2006 and held that even though the offence against the present appellant under Section 302 of IPC is not made out, but he was found guilty for commission of offence under Section 304 Part-I of IPC and was sentenced to suffer rigorous imprisonment for seven years. This order has attained finality and the present appellant-petitioner is undergoing imprisonment.

4. The appellant-petitioner filed writ petition before this Court seeking a direction to set the petitioner at liberty and paying him adequate compensation on the ground that Arjun Singh who was alleged to have been killed by the present appellant in criminal trial, is still alive. Said writ petition was dismissed by the learned Single Judge of this Court vide order dated 23/01/07.

5. The order dismissing the writ petition was challenged by the present appellant by filing an appeal. Initially, the appeal was dismissed by this Court on 02/04/2007 on the ground that the appellant-petitioner has failed to surrender himself in terms of judgment dated 14.02.2006.

6. This order was challenged by the present appellant-petitioner by filing Special Leave Petition before the Apex Court which was registered as SLP(Criminal) No.3265/2008. The Apex Court allowed the appeal and set-aside

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the order passed by this Court dated 02/04/2007 on the ground that this Court has dismissed the appeal without considering the merits of the case since the appellant-petitioner has not complied with the order dated 23.2.2007 in terms of order dated 14.02.2006 and remanded the matter back to this Court.

7. Shri Sunil Jain, learned counsel appearing on behalf of the appellant, could not dispute the fact that the judgment dated 14.2.2006 rendered by this Court in Criminal Appeal No. 644/1996 has attained finality. The writ petition was filed on the ground that Arjun Singh who is alleged to have been murdered by this appellant in the said Sessions Trial No. 78/93 is still alive and, therefore, his conviction under Section 304 Part-II of IPC cannot be maintained. Hence, he be set free from the detention.

8. Learned counsel for the appellant contended that the detention of appellant is in violation of Article 21 of the Constitution. In support of his argument, he has relied on a judgment of the Apex Court in the case of *A.K. Gopalan Vs. State of Madras* AIR (37) 1950 Supreme Court 27 and in the case of *Vasanthi Vs. Ch. Jaya Prakasha Rao and Others*, 1996 Cri. L. J. 4243.

9. After hearing Shri Jain, learned counsel for the appellant, we find that his arguments are entirely misconceived. The Apex Court in the case of *A. K. Gopalan* (supra) while dealing with the case of detention under the Preventive Detention Act, 1950 and considering the variance of Section 1(12) and 14 of the said Act, has held that Section 14 of the said Act is ultra vires. The directions given to release the appellant-petitioner was on the ground that the period of detention is already over. Another judgment relied by the learned counsel for the appellant is in the case of *Vasanthi* (supra)-wherein the petitioner was kept under the detention by Inspector of Police without complying with due requirements of law and without any trial; and in such a situation, the Division Bench of Andhra Pradesh High Court has held that it is a case of violation of Article 21 of the Constitution.

10. In the present case, the appellant is under detention under the order of a Competent Criminal Court.

11. Article 21 of the Constitution provides as under:-

"21. Protection of life and personal liberty:- No person shall be deprived of his life or personal liberty except according to procedure established by law."

12. From bare reading of the said Article, it is clear that no person can be deprived of his life except according to the procedure established by law. In the present case, the appellant-petitioner is kept under the custody after following the procedure established by law and, therefore, it cannot be said that his rights guaranteed by Article 21 of the Constitution are violated.

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13. Apart from that, Shri Sunil Jain, learned counsel for the appellant could not point out any provision of law which empowers this Court to exercise powers under Articles 226 & 227 of the Constitution of India for setting aside the judgment passed by the Competent Court which has attained finality between the parties.

14. Moreover, if the prayer for setting the petitioner-appellant at liberty is granted by this Court in a writ petition under Articles 226 & 227 of the Constitution of India, then it will amount to setting aside the judgment of a Competent Criminal Court which has been affirmed by the High Court in an appeal, which is not permissible under the hierarchy of judicial system.

15. In such circumstances, we find this appeal to be devoid of any merit, hence, we dismiss the same.

Appeal dismissed.

I.L.R. [2009] M. P., 639

WRIT PETITION

Before Mr. Justice Dipak Misra & Mr. Justice S.A. Naqvi

4 July, 2008*

DHARAMDAS

... Petitioner

Vs.

RANI DURGAWATI V.V., JABALPUR

.... Respondent

Rani Durgawati Vishwavidyalay, Ordinance No.6, 7 & 8 - Revaluation of answer books - The average of marks awarded by two of the examiners, the original examiner and the two revaluers and nearest to each other will be taken to represent correct valuation - Any other interpretation of clause would cause violence to the language and it would usher in different meaning which is not intended - Petition dismissed. (Paras.8 & 9)

रानी दुर्गावती विश्वविद्यालय, अध्यादेश क्र. 6, 7 व 8 - उत्तर पुस्तिकाओं का पुनर्मूल्यांकन - दो परीक्षकों, मूल परीक्षक और दो पुनर्मूल्यांकनकर्ता द्वारा प्रदत्त अंकों का औसत और एक-दूसरे का निकटवर्ती सही मूल्यांकन का प्रतिनिधित्व करने के लिए लिया जाएगा - खण्ड का अन्य कोई निर्वचन भाषा पर आघात कारित करेगा और यह भिन्न अर्थ से मेंट करायेगा जो आशयित नहीं है - याचिका खारिज।

Greeshm Jain, for the petitioner.

Suyash Pandit, for the respondent.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** :-The petitioner had appeared in Class XII examination and obtained first division by securing 325 marks out of 450. He took admission in

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Bachelor of Computer Application in Jabalpur College of Computer. It is put forth that in the first three semesters he obtained 65% marks. He appeared in the IVth semester examination and secured first division marks but in the subject of 'Theory of Operating System' he was declared failed by awarding 35 marks. It is contended that he had hoped to get more than 60 marks in the said subject. Because of the same he applied for revaluation. In revaluation only three marks were increased in the said paper.

2. It is urged in the petition that the revaluation has defectively been done and has not been done as per the Ordinance No. 71. It is put forth that as per the postulation in the Ordinance No. 71 revaluation and scrutiny of the answer scripts are to be done by two examiners other than the one who initially valued it but before the revaluation, scrutiny of the marks is to be done and in case there is change in scrutiny of marks, the revaluation would be undertaken. It is put forth that in the case of the petitioner the revaluation has not been done as per the procedure and only three marks have been increased in an improper manner. In this backdrop a prayer has been made to command the respondent to revalue the answer scripts of the petitioner in the subject of 'Theory of Operating System'.

3. A return has been filed by the answering respondent contending, inter alia, that the petitioner had secured 35 marks in the subject of 'Theory of Operating System' and on that basis he was declared failed in that subject. On an application being filed for revaluation, the same was done as per procedure and three marks were increased in the said paper. It is put forth that the answer scripts of the petitioner was properly checked and revalued as per Clause 6 of the Ordinance No. 71. Clause 6 of the said Ordinance has been referred to, to highlight that when a person applies for revaluation in respect of a paper, his marks are scrutinised (re-totaled) before the answer-scripts are sent for revaluation without the candidate applying for it and if any change is found, necessary action is taken to revise the marks and accordingly the revaluation is undertaken. If the candidate still desires to get his answer-scripts revalued meaning thereby if in case he is not satisfied by the change in marks which is found in scrutiny of marks, then he would have the option if he still desires to get his answer scripts revalued. If no change is found the answer scripts are sent for revaluation. It is put forth that as per the Ordinance the answer script of the petitioner was sent for valuation to two examiners. The examiners revalued the answer-script in accordance with clause 8 of the Ordinance. Clause 8 has been referred to in the return. It is contended that the revaluation has been correctly done by taking the average of the marks awarded by two examiners (amongst the three examiners i.e. one original examiner and two revaluers) of whose marks are nearest to each other. In the return it has been averred that the petitioner had received 35 marks from original examiner and he was awarded 52 marks by the first-revaluer and 40 marks by second revaluer and taking average of the nearest marks which has been awarded

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by two examiners which is the second examiner in this case, the petitioner secured 37.5 marks and eventually it was rounded up to 38 marks. Thus, the justification has been given that revaluation has been done correctly.

4. We have heard Mr. Greeshm Jain, learned counsel for the petitioner and Mr. Suyash Pandit, learned counsel for the respondent university.

5. The sole question that arises for consideration is whether the answer-script of the petitioner is revalued properly in accordance with Ordinance No.71. Ordinance No.71 deals with revaluation and scrutiny of answer-scripts. Clause 6 of the said ordinance deals with the scrutiny of the marks. The same reads as under:

“6. The scrutiny of marks shall be done before the answer-books are sent for revaluation, without the candidate applying for it. Should any change be found out, necessary action to revise the marks will be taken accordingly, and revaluation will be undertaken, if the candidate still desires to get his answer-books revalued.”

6. Clause 7 deals with the procedure for revaluation. The said clause is as follows:

“Where a candidate applies for revaluation, the answer-book in which revaluation is sought, will be sent for valuation to two examiners (other than the one who initially valued it) who shall be from a place outside the jurisdiction of the University. The answer-books valued by the same examiner and a copy of the memorandum of instructions for the guidance of examiners, if prepared by the paper setter, will be sent to each of the two examiners to enable them to evaluate the answer-book concerned in the light of the standard set by the examiner and the memorandum of instructions. If less than ten candidates had appeared at the examination in the paper concerned, the answer-books of all the candidates shall be sent to each of the examiners. Each of the two examiners shall receive such remuneration for the revaluation of an answer-book, which may be fixed by the University from time to time.”

7. Clause 8 of the said Ordinance deals with how the marks are to be awarded. The same being fulcrum of the cavil, is reproduced below:

“8. If the marks awarded in the paper by any of the two examiners varies from the marks given by the original examiner by more than 10% of the maximum marks in the paper, the average of the marks awarded by two of the examiners, the original examiner and the two revaluers and nearest to each other will be taken to represent the correct valuation. This average of marks will be awarded to the candidate for the revision of his result.”

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8. Submission of Mr. Greeshm Jain, learned counsel for the petitioner is that if the language of clause 8 is properly understood along with the proviso it would mean that the average marks awarded by the two revaluers is to be taken average of marks of the original valuer and the higher marks granted by one of the two revaluer should be considered. Per contra, Mr. Pandit would submit that the language of clause 8 does not so envisage inasmuch as if the said interpretation is placed on the said clause the words which have been used in the said clause *"the average of the marks awarded by two of the examiners, the original examiner and the two revaluers and nearest to each other will be taken to represent the correct valuation."* would become totally redundant. In fact, the meaning would be given which is not intended.

9. On a careful scrutiny of the language in which the clause 8 is couched, we are of the considered opinion that the interpretation that Mr. Greeshm Jain would like us to place on the said clause would actually cause violence to the language and it would usher in a different meaning which is not intended. We may however, proceed to state that the language used in the said clause on a first blush may give an impression that the submission of Mr. Jain is correct but on a deeper probe and keener scrutiny, it would be clear that placing of the said meaning would be reading the provision out of the context. It is settled in law a provision has to be read regard being had to the text and the context. If a purposive meaning is given to clause 8 by interpretative process, we are unable to accept the interpretation placed by Mr. Greeshm Jain. On the contrary, we are inclined to think that the interpretation placed by the learned counsel for the respondent university is correct as that is more in consonance with the words employed in the clause. Thus, we are disposed to think that the marks awarded on revaluation is neither incorrect nor unsound.

10. Though we have found that the revaluation is correct, we have been apprised that the university has power to confer certain grace marks on certain circumstances. Though the said provision has not been brought before us, we would require the university to consider the case of the petitioner for conferral of benefit of grace marks, if there is such provision and if the case of the petitioner comes within the permissible realm of law.

11. With the aforesaid observation, the writ petition stands dismissed. There shall be no order as to costs.

Petition dismissed.

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I.L.R. [2009] M. P., 643

WRIT PETITION

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

14 August, 2008*

ASHOK NARAYAN KALE

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Constitution, Article 234, Lower Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994, Rule 5(1) - *Minimum eligibility for reserved candidate - Petitioner belonging to ST category - Applied for the post of Civil Judge Class II - Not selected because could not secure 35% marks in the aggregate - Petition filed on the ground that High Court could not have prescribed the condition of minimum of 35% marks - Held - In view of the proviso to sub-rule (1) to Rule 5, the final decision that reserved category candidates must secure a minimum of 35% marks in the aggregate was that of the M.P.S.C. though that decision was in the consultation with the High Court and the State Government - Petition dismissed.* (Para 8)

संविधान, अनुच्छेद 234, निम्नतर न्यायिक सेवा (भर्ती और सेवा की शर्तें) नियम, म.प्र. 1994, नियम 5(1) - आरक्षित अभ्यर्थी के लिए न्यूनतम पात्रता - याची अनुसूचित जनजाति श्रेणी से सम्बन्धित - सिविल न्यायाधीश वर्ग-2 के पद हेतु आवेदन किया - चयनित नहीं हुआ क्योंकि कुल अंकों में से 35 प्रतिशत अंक प्राप्त नहीं कर सका - याचिका इस आधार पर पेश की गई कि उच्च न्यायालय न्यूनतम 35 प्रतिशत अंकों की शर्त विहित नहीं कर सकता था - अभिनिर्धारित - नियम 5 के उपनियम (1) के परन्तुक को देखते हुए, अंतिम निर्णय, कि आरक्षित श्रेणी के अभ्यर्थियों को कुल अंकों में से न्यूनतम 35 प्रतिशत अंक प्राप्त करने होंगे, म.प्र. लोक सेवा आयोग का था यद्यपि उक्त निर्णय उच्च न्यायालय और राज्य सरकार के प्रामर्श से था - याचिका खारिज।

Cases referred :

(1985) 3 SCC 721, AIR 2008 SC 1657, (1974) 3 SCC 220, AIR 1995 SC 77 (distinguished).

Pankaj Dubey, for the petitioner.

Vivekanand Awasthy, G.A., for the respondent No.1.

K.S. Wadhwa, for the respondent Nos.2 & 3.

Kishore Shrivastava, for the respondent No.4.

ORDER

The Order of the Court was delivered by A. K. PATNAIK, C. J. :-The petitioner, who was a candidate for one of the 34 posts of Civil Judge Class-II reserved for Scheduled Tribes has filed this writ petition under Article 226 of the Constitution challenging his non-selection for the post of Civil judge, Class-II reserved for Scheduled Tribes candidates.

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2. The relevant facts briefly are that the Madhya Pradesh Public Service Commission (for the M.P.P.S.C.) issued an advertisement for the recruitment of Civil Judges, Class-II on 30.8.2001. The advertisement was corrected by a subsequent advertisement dated 24.10.2001 of the M.P.P.S.C. Under the corrected advertisement, out of the total posts of 190, 34 posts were reserved for Scheduled Tribes candidates. Pursuant to the advertisement, the petitioner applied and thereafter appeared in the written examination with Roll No. 204970 and, on the basis of results of the written examination declared on 24.11.2002, was called for interview. After the interview, the M.P.P.S.C. selected only six candidates for the 34 posts reserved for Scheduled Tribes candidates for appointment to the posts of Civil Judge, Class II. No recommendation was made by the M.P.P.S.C. for appointment to the remaining 28 posts reserved for Scheduled Tribes candidates. Aggrieved, the petitioner has filed this writ petition under Article 226 of the Constitution praying for a direction to the M.P.P.S.C. to submit the recommendation for the remaining 28 posts for Scheduled Tribes candidates and, in particular, for a direction to the M.P.P.S.C. to recommend the petitioner for appointment on one of the posts reserved for Scheduled Tribes candidates.

3. Mr. Pankaj Dubey, learned counsel for the petitioner, submitted that in the advertisements issued by the M.P.P.S.C. there was no mention that candidates for the posts reserved for Scheduled Tribes and Scheduled Castes must secure a minimum of 35% marks in the aggregate (written plus interview) for being selected on the post of Civil Judge, Class II, and yet the petitioner has not been selected only because he has not secured a minimum of 35% marks in the aggregate (written plus interview) in the selection conducted by the M.P.P.S.C. He cited the decision in *Umesh Chandra Shukla Vs. Union of India and others* (1985) 3 SCC 721 in which the Supreme Court has taken a view that the Selection Committee could not prescribe a minimum of 600 marks in aggregate as an additional requirement which the Committee has to satisfy for being selected when the Recruitment Rules did not prescribe such requirement. He also cited the decision of the Supreme Court in *Madan Mohan Sharma and another Vs. State of Rajasthan and others* AIR 2008 SC 1657 in which the Supreme Court has taken a view that once an advertisement is issued fixing a selection criteria, the selection criteria cannot be altered subsequently. Mr. Dubey finally submitted that the M.P.P.S.C. in its return has taken a stand before the court that after the result of the main examination of recruitment, the High Court prescribed the minimum qualifying marks for the Civil Judge, Class II, as 35% marks for Scheduled Tribes and Scheduled Castes candidates. He submitted that when the proviso to Sub-rule (1) of Rule 5 of the Madhya Pradesh Lower Judicial Service (Recruitment and Conditions of Service) Rules, 1994 is clear that the procedure and curriculum for holding examination for the selection of candidates shall be prescribed by the Public Service Commission in consultation with the High Court and the State

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Government, the High Court could not have prescribed the minimum of 35% marks in the aggregate (written plus interview) for selection of a candidate belonging to Scheduled Tribes and Scheduled Castes community.

4. Mr. Kishore Shrivastava, learned senior counsel, appearing for the High Court, Mr. K. S. Wadhwa, learned counsel, appearing for the M.P.P.S.C. and Mr. Vivekanand Awasthy, learned Government Advocate, appearing for the State of Madhya Pradesh, on the other hand, submitted that there was nothing in the advertisements of the M.P.P.S.C. stipulating that candidates not securing 35% marks in the aggregate would be selected for recruitment to the posts of Civil Judge, Class II. They further submitted that only candidates who are suitable for the appointment on the post of Civil Judge, Class II, could be selected and the advertisement of the M.P.P.S.C. is clear that final selection will be made on the basis of merit on total marks obtained in the written examination and interview. Mr. Shrivastava cited *The State of Haryana Vs. Subhash Chander Marwaha and others* (1974) 3 SCC 220 where the rules prescribed a minimum of 45% marks for selection in the Judicial Service in the State of Haryana and the Public Service Commission made a recommendation including in the select list of candidates who had secured a minimum of 45% marks for appointment, but the State Government, while making the appointments, only considered candidates who had secured a minimum of 55% marks in the aggregate and did not appoint candidates who had secured less than 55% marks in the selection and yet the Supreme Court held that such selection is valid and could not be interfered with by the Court. Mr. Shrivastava also cited the decision of Supreme Court in *Madhya Pradesh Public Service Commission Vs. Navnit Kumar Potdar and another* AIR 1995 SC77 in which for the posts of Presiding Officer of Labour Courts, Section 8(3)(c) of the M. P. Industrial Relations Act, 1960 provided that a person must have practiced as an Advocate or a Pleader in Madhya Pradesh for a total period of not less than five years but the Public Service Commission took the decision to call for interview only such candidates who have completed only seven and half years and not to call for interview the applicants who have put in Five years of practice and the Supreme Court held that such a decision of the Public Service Commission was not arbitrary or irrational and did not amount to changing of any criteria prescribed in the rules but it is only part of a selection process.

5. We have considered the submissions of the learned counsel for the parties and we find on reading of the English translation of the advertisement dated 30.8.2001 furnished by the learned counsel for the petitioner that it clearly states that the final selection will be made on the basis of merit on total marks obtained in main written examination and interview. Hence the selection, as per the advertisement of the M.P.P.S.C., was to be based on the merit on total marks obtained in main written examination and interview. It is true that in the

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advertisement there is no mention of what would constitute the merit on total marks obtained in main written examination and interview, but we find that in response to a communication dated 3.1.2003 of the Principal Secretary, Government of Madhya Pradesh, Law & Legislative Affairs Department, on the subject fixing the criteria of obtaining minimum qualifying marks in judicial Service Examination prescribed (Civil Judge, Class II), the High Court in its letter dated 13.1.2003 has taken a view that for selection for the post of Civil Judge, Class II, General Category candidates should atleast secure 45% marks in aggregate (written plus interview) and Reserved Category candidates, 35% marks in aggregate (written plus interview). This view of the High Court appears to have been conveyed to the M.P.P.S.C. and the M.P.P.S.C. thereafter has selected only those Reserved Category candidates who have secured 35% marks in aggregate (written plus interview) and as the petitioner did not secure 35% marks in aggregate (written plus interview) his name was not sent to the State Government for appointment to the post of Civil Judge, Class II.

6. Thus, this is not a case where a criteria was prescribed in the advertisement and was altered or changed subsequent to the advertisement. As we have already held, the only criteria prescribed was merit on total marks obtained in main written examination and interview. The total marks obtained in main written examination and interview was later on specified as 45% marks in aggregate (written plus interview) for General Category candidates and 35% marks in aggregate (written plus interview) for Reserved Category candidates. In the case of *Madan Mohan Sharma and another Vs. State of Rajasthan and others* (Supra) the advertisement specified the criteria for selection as marks obtained in Secondary Examination, but subsequently altered to marks obtained in the Higher Secondary Examination and the Supreme Court has taken a view that the criteria of marks obtained in Secondary Examination could not be altered to marks obtained in the Higher Secondary Examination and the 1996 Rules making such alterations would apply only to subsequent recruitments.

7. Similarly, the decision of Supreme Court in *Umesh Chandra Shukla Vs. Union of India and others* (Supra) does not apply to the facts of the present case because in that case the rules prescribed that the Selection Committee shall call for Viva Voce test only such candidates who have qualified in the written test as provided in the Appendix and the Selection Committee shall prepare the list of candidates only after merit of Viva Voce test, but the Selection Committee, in fact, prescribed an additional requirement that only those candidates who secured a minimum 600 marks in the aggregate will be considered for interview in the final selection list and the Supreme Court held that the list prepared by the Selection Committee is in clear violation of the rules and quashed the selection list. In the present case, the Madhya Pradesh Lower Judicial Service (Recruitment and Conditions of Service) Rules, 1994 do not prescribe who would

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be selected for the post of Civil Judge, Class II, and it only states that the procedure and curriculum for holding examination for the selection of candidates will be prescribed by the Public Service Commission in consultation with the High Court and the State Government, and accordingly a consultation took place between the M.P.P.S.C., State Government and the High Court in its letter dated 13.1.2003 took the view that for selection for the post of Civil Judge, Class II, General Category candidates should secure a minimum of 45% marks in aggregate (written plus interview) and Reserved Category candidates should secure a minimum of 35% marks in aggregate (written plus interview).

8. According to Mr. Dubey, however, when the proviso to Sub-rule (1) of Rule 5 is clear that the procedure and curriculum for holding examination for the selection of candidates shall be prescribed by the Public Service Commission in consultation with the High Court and the State Government, the High Court could not have prescribed that only Reserved Category candidates who secured 35% marks in aggregate (written plus interview) could be selected for the post of Civil Judge, Class II, and the decision could have been taken by the M.P.P.S.C. in this regard. What Mr. Dubey fails to appreciate is that the proviso to Sub-Rule (1) to Rule 5 provides that the procedure and curriculum for holding examination for the selection of candidates will be prescribed by the M.P.P.S.C. in consultation with the High Court and the State Government. In the present case, it is true that the High Court has taken a view that the Reserved Category candidates must have secured 35% marks in aggregate (written plus interview) for selection for the post of Civil Judge, Class II, but the State Government and the M.P.P.S.C. have agreed with this view of the High Court and the M.P.P.S.C. has acted accordingly and recommended only those Reserved Category candidates who have secured a minimum of 35% marks in the aggregate (written plus interview). In other words, the final decision that Reserved Category candidates must secure a minimum of 35% marks in the aggregate was that of the M.P.P.S.C. though that decision was in the consultation with the High Court and the State Government.

9. We do not, therefore, find any merit in this writ petition and we accordingly dismiss the same. No costs.

Petition dismissed.

RAM ABHILASH SHUKLA Vs. STATE OF M.P.**I.L.R. [2009] M. P., 648****WRIT PETITION****Before Mr. Justice R.S. Jha****11 September, 2008*****RAM ABHILASH SHUKLA**

... Petitioner

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

... Respondents

Service Law - Civil Services (Classification, Control and Appeal) Rules, M.P. 1966 - Compulsory retirement - Petitioner dismissed from service on being convicted u/s 302 r/w 109 IPC and Section 30 of Arms Act - Criminal appeal allowed and petitioner was acquitted from the charge u/s 302 r/w 109 IPC but conviction u/s 30 of the Arms Act was maintained - In compliance of the order passed by SAT, the petitioner was reinstated on 06.03.1999 and was again placed under suspension - Thereafter, he was compulsorily retired - Order challenged - Held - Order of compulsory retirement demonstrates total non-application of mind on the part of the disciplinary authority - No reasonable or prudent person could have recorded a finding that the petitioner was involved in the commission of a heinous crime like murder after the acquittal u/s 302 r/w 109 IPC by the High Court - Order suffers from arbitrariness and unreasonableness accordingly quashed - Petitioner has already superannuated from service, therefore, no useful purpose would be served in remitting the matter back for a fresh decision - Petitioner would be deemed to have been in service till the date of superannuation and would be entitled to revised pension and retiral benefits - As petitioner stand convicted u/s 30 of Arms Act, he shall not be entitled for back wages.

(Paras 13 to 15)

सेवा विधि - सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966 - अनिवार्य सेवानिवृत्ति - याची भा.द.सं. की धारा 302 सहपठित धारा 109 एवं आयुध अधिनियम की धारा 30 के अधीन दोषसिद्ध किये जाने से सेवा से पृथक किया गया - दण्डिक अपील मंजूर की गई और याची को भा.द.सं. की धारा 302 सहपठित धारा 109 के आरोप से दोषमुक्त किया गया किन्तु आयुध अधिनियम की धारा 30 के अधीन दोषसिद्ध कायम रखी गई - राज्य प्रशासनिक अधिकरण द्वारा पारित आदेश के अनुपालन में, याची को 06.03.1999 को पुनर्नियुक्त किया गया और पुनः निलम्बन के अधीन रखा गया - तत्पश्चात् उसे अनिवार्य रूप से सेवानिवृत्त कर दिया गया - आदेश को चुनौती दी गई - अभिनिर्धारित - अनिवार्य सेवानिवृत्ति का आदेश अनुशासनिक प्राधिकारी द्वारा मस्तिष्क का बिलकुल प्रयोग न करना प्रदर्शित करता है - कोई युक्तियुक्त और प्रज्ञावान व्यक्ति यह निष्कर्ष अभिलिखित नहीं कर सकता कि याची उच्च न्यायालय द्वारा भा.द.सं. की धारा 302 सहपठित धारा 109 के अन्तर्गत दोषमुक्त किये जाने के बाद हत्या जैसा जघन्य अपराध करने में अन्तर्गस्त हुआ - आदेश मनमानेपन और अयुक्तियुक्तता से ग्रस्त तदनुसार अभिखण्डित किया गया - याची सेवानिवृत्त हो चुका है, इसलिए नये सिरे से विनिश्चय के लिए मामला वापस भेजने से कोई

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उपयोगी प्रयोजन पूरा नहीं होगा - याची को सेवानिवृत्ति की तारीख तक सेवा में होना समझा जायेगा और वह पुनरीक्षित पेंशन और सेवानिवृत्ति लाभों का हकदार होगा - चूंकि याची को आयुध अधिनियम की धारा 30 के अधीन दोषसिद्ध किया गया है, वह पिछले वेतन का हकदार नहीं होगा।

Jagdish Tiwari, for the petitioner.

Om Namdeo, G.A., for the respondents.

O R D E R

R.S. JHA, J. :-The petitioner has filed this petition being aggrieved by the punishment of compulsory retirement imposed upon him by the impugned order dated 27-10-1999 and the order dated 16-3-2000 by which the appeal filed by him against the order of compulsory retirement has been dismissed.

2. The brief facts leading to the filing of the present petition are that the petitioner, a forest guard, was suspended by order dated 3-6-1987 with effect from 4-5-1987 on account of his involvement in an incident which occurred on 24-9-1987 in which one Kedar was shot and killed by Kavi Kant with a 12-bore gun belonging to the petitioner. A criminal case was instituted against the petitioner and the said Kavi Kant and both of them were convicted by the trial Court for offences punishable under Sections 302 read with Section 109 of the Indian Penal Code. Additionally, the petitioner was also convicted under section 30 of the Arms Act. Subsequent to his conviction a notice was issued to the petitioner on 13-1-1992 and thereafter by order dated 5-2-1992 the petitioner was dismissed from service.

3. Being aggrieved by the order of the trial Court the petitioner filed an appeal against the order of the trial Court and by order dated 10-11-1994 passed by this Court in Criminal Appeal No. 1279/99 the conviction of the petitioner for offences under Sections 302 read with Section 109 of the Indian Penal Code was set aside while his conviction under Section 30 of the Arms Act, not having been assailed by him, was affirmed. Thereafter, the petitioner filed applications before the respondent-authorities on 28-11-1994 and 14-12-1994 requesting for being reinstated in view of the order passed by the High Court in his criminal appeal but the authorities rejected his request by communication dated 2-1-1995 and his appeal against the aforesaid rejection was also rejected by order dated 20-12-1996.

4. Being aggrieved by the rejection of his request for reinstatement the petitioner filed a petition before the M.P. State Administrative Tribunal, Jabalpur which was registered as O.A.No. 2611 of 1992 and was ultimately allowed by order dated 28-8-1998 quashing the order of rejection of his request and directing the authorities to reinstate the petitioner and thereafter if the authorities considered it proper and desirable, to place him under suspension and take a fresh decision on the petitioner's representation after giving him due opportunity of hearing. In compliance of the order passed by the Tribunal the petitioner was reinstated on 6-3-1999 and was again placed under suspension on the same day and a notice

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dated 6-3-1999 was issued to him under the provisions of Rule 19 of Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966. The petitioner filed a reply to the aforesaid notice and thereafter the authorities after considering the same have passed the impugned order dated 27-10-1999 imposing a punishment of compulsory retirement upon the petitioner. The appeal filed by the petitioner against the order of compulsory retirement has also suffered dismissal by the impugned appellate order dated 16-3-2000.

5. Being aggrieved by the aforesaid order of compulsory retirement the petitioner filed the present petition before M.P. State Administrative Tribunal, Jabalpur, which has thereafter been transferred to this Court and is being decided herewith.

6. The contention of the learned counsel appearing for the petitioner is that the authority, while taking a decision under Rule 19, was required to apply its mind to the facts and circumstances of the case and take an appropriate decision thereon regarding the quantum of punishment, if any, to be imposed upon the petitioner and it could not have blindly punished the petitioner simply on the basis of his conviction under Section 30 of the Arms Act, specifically, when an offence under Section 30 of the Arms Act does not involve any moral turpitude on the part of the petitioner. It is also submitted that the authority, while taking the impugned decision did not follow the detailed procedure prescribed under the Rules of 1966 and did not afford any opportunity of hearing to the petitioner as envisaged by Rules 14 and 15 thereof.

7. Per contra, the learned Govt. Advocate, appearing for the respondents submits that it is an admitted fact that the petitioner has been convicted under Section 30 of the Arms Act and pursuant thereof has also undergone imprisonment of one month and in such circumstances, the competent authority was of the opinion that a person who has been convicted in a criminal case cannot be retained in service and has therefore compulsorily retired the petitioner by taking a lenient view. It is further submitted that in accordance with the provisions of Rule 19 of the Rules and a Full Bench judgment of this Court in the case of *Laxmi Narayan Hayaran v. State of M.P. and another*, 2004 (4) MPLJ 555, the authority is not required to follow the detailed procedure as prescribed under Rules 14 and 15 of the Rules of 1966 nor is any opportunity is required to be given to the petitioner while passing under order under Rule 19 and, therefore, the contentions of the petitioner to the contrary deserve to be rejected.

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

9. A bare perusal of Rule 19 of the Rules of 1966 indicates that the competent authority is empowered to pass appropriate orders in respect of persons on whom a penalty has been imposed on conviction in a criminal charge. In the case of *Laxmi Narayan Hayaran* (supra) a Full Bench of this Court has held that while

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passing appropriate orders under Rule 19 of Rules of 1966 no opportunity need be given to the concerned employee, however, all these aspects may not deter us in the present case as the authorities have given an opportunity of hearing to the petitioner in view of the directions issued by the Tribunal in O.A.No. 2611 of 1992 decided on 27-8-1998 and the authority has also duly taken into consideration the representation filed by the petitioner.

10. The only issue that needs to be examined in the present petition is as to whether the authority concerned has applied its mind to the facts and documents on record and the judgment of this Court in the criminal appeal filed by the petitioner and thereafter recorded a conclusion based on the aforesaid documents.

11. The facts regarding the petitioner's punishment and conviction under Section 30 of the Arms Act is not disputed by either of the parties appearing before this Court. From a perusal of the impugned order it is apparent that the authority has imposed a punishment of compulsory retirement on the petitioner on the basis of the fact that the petitioner has been convicted under section 30 of the Arms Act and while doing so, the authority has repeatedly stated that the petitioner has been convicted for his involvement in the heinous crime of murder as he had given his licenced twelve bore gun to Kavi Kant for the purposes of committing the murder of Kedar. This fact is evident from a perusal of the paragraph 4 as well as the operative part of the impugned order imposing the punishment of compulsory retirement on the petitioner.

12. On perusing the judgment of this Court passed in Criminal Appeal No. 1279/88, dated 10-11-1994 it is evident from a perusal of paragraph 2 thereof that this Court has specifically recorded a finding that the conviction of the petitioner under Sections 302 and 309 of the Indian Penal Code was not justified and consequently, in paragraph 4, this Court has set aside his conviction under the aforesaid sections and he has been acquitted of the charges under Sections 302 and 309 of the Indian Penal Code but his conviction on the charges under Section 30 of the Arms Act was sustained as it was not challenged. The relevant parts of the judgment of this Court is in the following terms:-

"2. We were taken through the evidence of the aforesaid eye witnesses to show that complicity of Ram Abhilakh in the case is not made out. There is some evidence to suggest that immediately after the murder Ram Abhilakh was seen going with Kavikant on the outskirts of the village. This has been stated to by Sharda Pd. (P.W.2). Other witnesses have not stated to that effect. The presence of appellant Ram Abhilakh at the scene of the incident is not proved at all. In such circumstances merely the fact that his official gun was used for killing and that he had objected to the animals' sacrifice at the 'Bhaira' temple which was the subject of discussion at the Panchayat when Kedar was

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murdered, shall, in our opinion, be wholly insufficient to bring home the charge u/s 302 read with Section 109 IPC against Ram Abhilash. His conviction u/s 30 of the Arms Act has not been assailed.

4. In result, Cr.A.No. 11/89 presented by Kavikant fails and is hereby dismissed. Cr.A.No. 1279/88 filed by Ram Abhilash is partly allowed. His conviction u/s 302 read with 109 IPC and sentence of imprisonment for life are hereby set aside and he is acquitted of that charge. His conviction on charge u/s 30 Arms Act is hereby sustained."

13. In view of the judgment of this Court in the criminal appeal filed by the petitioner, it is established beyond doubt that the petitioner was not involved in the commission of the heinous offence of murder under Section 302 of the Indian Penal Code nor was he, in any way, involved in aiding or abetting the same under Section 109 of the Indian Penal Code. It is also clear that the petitioner was only found guilty of having contravened the conditions of the arms licence issued to him under the provisions of the Arms Act 1959 and was, therefore, convicted and sentenced under Section 30 of the Arms Act for which he underwent imprisonment for a period of one month. From a perusal of the impugned order of punishment dated 27-10-1999 it is evident that the disciplinary authority while imposing a punishment of compulsory retirement has failed to take into consideration or appreciate in the proper perspective the judgment of this Court in the criminal appeal filed by the petitioner wherein it is clearly and specifically held that the petitioner was not involved in the commission of the offence under Sections 302 read with Section 109 of the Indian Penal Code and to properly appreciate the impact of the fact that his conviction under that offence has been set aside. I am constrained to say so as the authority in the impugned order has repeatedly mentioned that the petitioner was involved in the commission of a heinous offence of murder by giving his gun to Kavikant to commit the murder of the deceased, Kedar, which is contrary to the finding recorded by this Court in the judgment in the criminal appeal filed by the petitioner. Had the authority simply taken into consideration the petitioner's conviction under Section 30 of the Arms Act and his conduct regarding violation of the terms of the arms licence issued to him, the case would have been different.

14. In the circumstances, I am of the considered opinion that the impugned order of compulsory retirement demonstrates total non-application of mind on the part of the disciplinary authority and, therefore, suffers from arbitrariness. That apart, as no reasonable or prudent person could have recorded a finding that the petitioner was involved in the commission of a heinous crime like murder after the acquittal of the petitioner under Sections 302 and 109 of the Indian Penal Code by this Court in the criminal appeal filed by the petitioner, the impugned order also

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suffers from arbitrariness and unreasonableness and accordingly deserves to be and is hereby quashed.

15. From a perusal of the record it is apparent that the petitioner has already superannuated from service and, therefore, no useful purpose would be served in remitting the matter back to the authority for taking a fresh decision as that would result in undue hardship to the petitioner who has already retired and, therefore, it is directed that as a consequence of the quashment of the impugned order of compulsory retirement the petitioner would be deemed to have been in service till the date of his superannuation and would be entitled to revised pension and other retiral benefits by treating him to have been in service for his full tenure of service. However, looking to the fact that the petitioner was prosecuted in a criminal case and was ultimately convicted for an offence under section 30 of the Arms Act, he would not be entitled to any back-wages but if any amount towards subsistence allowance has been paid to him, the same would not be recovered from him.

16. With the aforesaid observations/directions the petition filed by the petitioner stands allowed. In the facts and circumstances of the case there shall be no order as to costs.

Petition allowed.

I.L.R. [2009] M. P., 653

WRIT PETITION

Before Mr. Justice Sanjay Yadav

16 September, 2008*

SIVANAND DAMAHE

Vs.

... Petitioner

STATE OF M.P. & ors.

... Respondents

A. Excise Act, M.P. (2 of 1915), Section 17, General Licence Conditions, Clause I, VI - *Transfer or sub-lease of Licence* - Licence was allotted to petitioner to run liquor shops for the excise year 2005-06 - Licence was renewed for the excise year 2006-07 - Petitioner transferred the contract of retail sale in favour of respondent No.4 for the excise year 2006-07 - Respondent No.4 got the licence renewed for the year 2007-08 - Respondent No.4 transferred the licence in favour of respondent No.5 - Petitioner claimed that as privilege was transferred therefore, the renewal clause was available to petitioner and not to respondent No.4 - Held - Lesser degree of right is enjoyed when a person has a privilege to deal in trade - Once, the right is relinquished by petitioner, he cannot say that he still holds back the right to trade in such privilege - Petitioner cannot be allowed to turn around and reclaim privilege - *Petition dismissed.*

(Para 17)

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क. आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 17, सामान्य लायसेंस शर्तें, खण्ड I, VI - लायसेंस का अंतरण या उप-पट्टा - याची को आबकारी वर्ष 2005-06 के लिए शराब की दुकान चलाने के लिए लायसेंस आवंटित किया गया - लायसेंस आबकारी वर्ष 2006-07 के लिए नवीनीकृत किया गया - याची ने आबकारी वर्ष 2006-07 के लिए खुदरा विक्रय की संविदा प्रत्यर्थी क्र. 4 के पक्ष में अंतरित की - प्रत्यर्थी क्र. 4 ने वर्ष 2007-08 के लिए लायसेंस नवीनीकृत करवाया - प्रत्यर्थी क्र. 4 ने लायसेंस प्रत्यर्थी क्र. 5 के पक्ष में अंतरित किया - याची ने दावा किया कि विशेषाधिकार अंतरित कर दिया गया है इसलिए नवीनीकरण खण्ड याची को उपलब्ध था न कि प्रत्यर्थी क्र. 4 को - अभिनिर्धारित - अधिकार की कम मात्रा का उपभोग किया जाता जब एक व्यक्ति व्यापार करने का विशेषाधिकार रखता है - एक बार जब याची द्वारा अधिकार का परित्याग कर दिया गया तब वह यह नहीं कह सकता कि उसने अब तक ऐसे विशेषाधिकार में व्यापार करने का अधिकार रोक लिया है - याची को मुकदमे और विशेषाधिकार का पुनः दावा करने की अनुमति नहीं दी जा सकती - याचिका खारिज।

B. Constitution, Articles 19(1)(g), (6) & 47 and Schedule VII List II Entry 8 - Trade or business in intoxicating liquor - No citizen has fundamental right to trade in liquor, the nature of right which is transferred in favour of a person to deal in the trade of liquor is only a privilege.

(Para 15)

ख. संविधान, अनुच्छेद 19(1)(जी), (6) व 47 और अनुसूची VII सूची II प्रविष्टि 8 - नशीली शराब का व्यापार या कारोबार - किसी नागरिक को शराब का व्यापार करने का मूलभूत अधिकार नहीं है, अधिकार, जो किसी व्यक्ति के पक्ष में शराब का व्यापार करने के लिए हस्तांतरित किया गया है, की प्रकृति केवल एक विशेषाधिकार है।

Case referred :

2006 STPL 37405 SC, AIR 2004 SC 4202, 1995 (Supp) (1) SCC 304, (2006) 11 SCC 464, (2004) 11 SCC 26, AIR 1986 SC 825, AIR 1974 SC 2061.

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

G.P. Singh, G.A., for the respondent No.1 to 3.

G.P. Kekre, for the respondent Nos.4 & 5.

ORDER

SANJAY YADAV, J. :- The petitioner by way of present writ petition filed under Article 226/227 of the Constitution of India, besides calling in question the legal validity of the orders dated 8.1.2007 (Annexure R-4-4) and the consequential orders passed thereof and as contained in Annexures R-4-5, R-4-6, R-4-7, R-4-8 and R-4-11 is seeking a mandamus that a liquor license granted in favour of respondent No. 5 be cancelled and may not be extended for the year 2008 and 2009 for the Partala block of district Chhindwara. Further direction is also sought to the effect that the respondents be directed to allow the petitioner to take possession of the shops and commence the sale of liquor as per the contract.

2. The facts briefly noted are that with the advent of new excise policy in the year 2005-06 small contractors got the opportunity to take part in the contract of

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country liquor and foreign liquor. The petitioner, in response to his participation in the bidding of liquor license was allotted the Partala Country liquor, Partala foreign liquor and Indian liquor shops in Chhindwara district for the excise year 2005-06. The said contract was renewed by depositing 20 % extra over the previous years sale for the excise year 2006-07 and this was in accordance with clause 16 of the liquor policy 2005-06. Clause 20 of the Excise Policy 2006-07 provides for that during the subsistence of the license, the licensee with prior permission can transfer his right under the license and on transfer such transferee shall be bound by all the conditions of the license. Invoking clause 20, the petitioner on 16.12.2006 moved an application to respondent No. 3 Collector stating his desire to transfer the running of the shops to respondent No. 4 for the remaining period of contract 2006-07. The contract of retail sale was accordingly transferred in favour of respondent No. 4. It is a matter of record that for subsequent year, i.e., excise year 2007-08, respondent No. 4 was granted renewal by invocation of renewal clause and during the subsistence of license for the year 2007-08, respondent No. 4 transferred the same in favour of respondent No. 5 which was effected vide order dated 27.12.2007 and while so operating, the respondent No. 5 got the license renewed for the excise year 2008-09 by invoking renewal clause and presently it is the respondent No. 5 who has in his favour the license to sell country/foreign liquor in Partala block.

3. It is in the backdrop of the aforesaid fact the learned Senior Counsel for the petitioner states that the licensee for trade in liquor being a personal privilege, the transfer effected by the petitioner in favour of respondent No. 4 was a transfer of personal privilege and not the license and the endorsement of transfer in his favour thereof on the license of the petitioner did not clothe the respondent No. 4 as a licensee but only had the privilege to operate the retail sale of country and foreign liquors. It is accordingly urged that on the expiry of term of license the option of the renewal clause was available to the petitioner and not to respondent No. 4, a transferee of privilege. Thus, the action of the respondents in creating a privilege in favour of respondent No. 4 by allowing him to opt for the renewal of license in his favour was per se illegal and the renewal if any ought to have been in favour of the petitioner. The learned Senior Counsel, therefore, states that the subsequent transfer in favour of respondent No. 5 and a license in his favour for the excise year 2008-09 is non-est in the eyes of law. Substantiating his arguments the learned Senior Counsel relied upon clause I, VI and XI of General License Conditions (referred to as GLC) framed by the State Government in exercise of its powers under Section 62 (2), (g) (h) and (j). It is contended, inter alia, under clause I, every license is granted personally by name and is thus a personal privilege and this aspect, as submitted, is evident from sub clause (2) of clause I of GLC, which stipulates that if any license holder dies before or during the currency of license such license would cease to be in force. Further more, while placing reliance on

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clause VI learned Senior Counsel submits that a proper construction of the clause reveals that the only right which transferee enjoys is to enter into a partnership and that too with a prior written permission of a Collector. In the alternate it is urged that the Collector at the time of drawing a lot in favour of more selectee after selecting a license in accordance with clause 7-5 of the liquor policy and in case the option is not exercised by the original licensee the right devolves upon such selectee but not in favour of the transferee of privilege. It is accordingly contended that the action of respondent in renewing the license in favour of the respondent No. 4 and thereafter granting the same in favour of respondent No. 5 is per se illegal and deserves to be quashed and the license be reverted back in favour of the petitioner.

4. Countering the submissions put-forth by the petitioner, the learned Govt. Advocate appearing for the State of Madhya Pradesh and its functionaries has supported the action, contending inter alia, that the petitioner having relinquished his right to trade in liquor, loses the principles which accrue out of license which gets devolved in favour of the transferee, it is urged, having transferred his right, cannot claim the privilege of exercising the option of renewal after the expiry of the term of license. It is accordingly urged that the claim put-forth by the petitioner being misconceived is liable to be negatived.

5. Learned counsel appearing for the respondent No. 5 while adopting the arguments put-forth by respondent State further states that the petitioner having transferred his right in favour of respondent No. 4 with a declaration on affidavit that he will not claim any benefit whatsoever which inures from the license cannot be allowed to turn around and retract his undertaking. It is urged that there being waiver of right to trade in liquor no right whatsoever survives in favour of the petitioner for grant of renewal. The learned counsel relies upon the judgment rendered by the Apex Court in the case reported in 2006 STPL37405 SC, AIR 2004 SC 4202, 1995 (Supp) (1) SCC 304. The learned counsel for the State urges that the petition is also hit by delay and laches and for that reliance is placed on (2006) 11 SCC 464. Having thus submitted the respondents seek dismissal of the petition.

6. Heard the learned counsel for respective parties at length and perused the pleadings.

7. The issue which crops up for consideration is whether the petitioner has any executable right in existence in his favour after divesting his privilege to trade in liquor, and whether he can claim any lien over such privilege.

8. However, before dwelling upon the issue as crops up for consideration worth it would be noted certain provisions of the M.P. Excise Act, 1915 and the General Conditions of License as framed thereunder to ascertain whether the nature of right granted by the State Govt. by issuing license to trade in liquor.

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9. There is no fundamental right to trade in liquor is a principle of law which has come to be settled. In the case of *State of Punjab vs. Devans Modern Breweries Ltd. and another* [(2004) 11 SCC 26] their Lordships of the Supreme Court were of the opinion that :

"103. It is well settled by a catena of decisions that trade in liquor is not a fundamental right. It is a privilege of the State. The State parts with this privilege for revenue consideration.

....."

(emphasis supplied)

Thereafter in paragraph 113 an opinion was expressed in the following term:

"In my opinion, the permissive privilege to deal in liquor is not a "right" at all. The levy charged for parting with that privilege is neither a tax nor a fee. It is simply a levy for the act of granting permission or for the exercise of power to part with the privilege. In this context, we can usefully refer to *Har Shankar v. Dy. Excise and Taxation Commissioner*: (1975) 1 SCC 737 and *Panna Lal v. State of Rajasthan* : (1975) 2 SCC 633. As noticed earlier, dealing in liquor is neither a right nor is the levy a tax or a fee. Article 301-304 will be rendered inapplicable at the threshold to the activity in question. Further, there is not even a single judgment which upholds the applicability of Articles 301-304 to the liquor trade. On the contrary, numerous judgments expressly hold these articles to be inapplicable to trade, commerce and intercourse in liquor. We can beneficially refer to the judgments in *State of Bombay v. R.M.D. Chamarbaugwala* (AIR 1957 SC 699), *Har Shankar* (supra), *Sat Pal and Co. v. Lt. Governor of Delhi* [(1979) 4 SCC 232] and *Khodey Distilleries Ltd. v. State of Karnataka* : (1995) 1 SCC 574".

In the case of *Chaitanya Kumar v. The State of Karnataka and others* (AIR 1986 SC 825) their Lordships of the Supreme Court were pleased to opine in paragraph 2 that:

"2. By general concurrence of opinion since days of yore, manufacture and sale of intoxicating liquor has always been considered to be a dangerous and obnoxious trade requiring the strictest vigilance and supervision and even prohibition. It is now firmly established that the Government is the exclusive owner of the privilege of manufacturing and selling intoxicating liquor and that the Government may farm out these privileges for the purpose of raising revenue.

(emphasis supplied)

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10. M.P. Excise Act, 1915 provides for regulation of manufacture, possession and sale of liquor. In the case at hand since it is the sale of liquor which is the issue, we confine to the provisions which regulate the sale of liquor.

11. Section 17 makes a provision regarding license required for sale of intoxicant. It stipulates:

"17. Licence required for sale of intoxicant - (1) no intoxicant shall be sold except under the authority and subject to the terms and conditions of licence granted in that behalf:

Provided that -

(a) a person having the right to the tari drawn from any tree may sell such tari without a licence to a person licensed to manufacture or sell tari under this Act;

(b) a person under Sec. 13 to cultivate the hemp plant may sell without a licence those portions of the plant from which the intoxicating drug is manufactured or produced to any person licensed under this Act to deal in the same, or to any officer whom the Excise Commissioner may prescribe; and

(c) nothing in this section shall apply to the sale of any foreign liquor lawfully procured by any person for his private use and sold by him or on his behalf or on behalf of his representatives interest upon his quitting a station or after his decease.

(2) On such conditions as the Excise Commissioner may determine, a licence for sale under the Excise Law for the time being in force in other States or Union territories may be deemed to be licence granted in that behalf under this Act."

12. Section 28 provides that every permit or pass granted under the Act shall be granted on payment of such fees, if any, for such period and subject to such restrictions and on such conditions and shall be in such form and contain such particulars as the State Govt. may direct either generally by rules made under Section 62. Section 62 empowers the State govt. to make rules for the purpose of carrying out the provisions of the Act. Section 62 (2) (g), (h) and (j) of the Act and relevant for the present empowers the State Govt.

"62 Power to make rules :- (1)

(2) In particular, and without prejudice to the generality of the foregoing provision, the State Government may make rules-

(g) regulating the amount, time, place and manner of payment of any duty or fee or tax or penalty;

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(h) prescribing the authority by, the form in which, and terms and conditions of and subject to which any licence, permit or pass shall be granted, any by such rules, among other matters -

(i) fix the period for which any licence, permit or pass shall continue in force,

(ii) prescribe the scale of fees or the manner of fixing the fees payable in respect of any such licence, permit or pass,

(iii) prescribe the amount of security to be deposited by holders of any licence, permit or pass for the performance of the conditions of the same.

(iv) Prescribe the accounts to be maintained and the returns to be submitted by licence-holders, and

(v) Prohibit or regulate the partnership in, or the transfer of, licenses;

(j) providing for the destruction or other disposal of any intoxicant deemed to be unfit for use;

13. In exercise of powers under Section 62 (2) (g) (h) and (j), the State Government has framed General Licence Conditions. Clause I of the G.L.C. provides that every licence granted shall be deemed to have been granted personally to the licensee named therein. It stipulates

"I. The personal character of privilege - (1) Every licence granted shall be deemed to have been granted personally to the licensee named therein and shall on the expiry thereof, be surrendered to the Collector.

(2) If any licence-holder dies before or during the period of the currency of his licence, such licence shall forthwith cease to be in force:

Provided that the Collector may, at his discretion continue any such licence in favour of any heir or of the surety the first working licence-holder."

14. Clause VI however, carves out an exception to clause I by permitting transfer of privilege by prior written permission; it stipulates:

VI. Transfer or sub-lease of Licence - No privilege of supply or sale shall be sold transferred or sub-leased, nor shall a holder of any such privilege enter into a partnership for the working of such privilege in any way or manner without the written permission of the Collector, which shall be endorsed on the licence. A partner, sub-lessee, or transferee shall be bound by all the

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conditions of the licence, but the original licensee shall also continue to be responsible to the State Government for the due payment of the licence fee and proper working of the shop."

15. Thus, a close view of various provisions coupled with the principle of law laid down that no citizen has a fundamental right to trade in liquor, the nature of right which is transferred in favour of a person to deal in the trade of liquor is only a privilege.

16. "Privilege" as laid in 'The Law Lexicon' by P. Ramanathan Aiyar : 1997 Edn.:

PRIVILEGE: As used in its broad and commonly accepted sense is a peculiar advantage; a personal benefit or favour; a private or personal favour enjoyed. It means also, in connection with the context, a particular and peculiar benefit or advantage, enjoyed by a person, company, or class, beyond the common advantage of other citizens; some peculiar right or favour granted by law contrary to the general rule; the enjoyment of some desirable right; special enjoyment of a good; an exemption from some general burden, obligation."

17. In *Isha Valimohamad and another v. Haji Gulam Mohamad & Haji Dada Trust* (AIR 1974 SC 2061) their Lordships were pleased to observe:

"A privilegium, in short, is a special act affecting special persons with an anomalous advantage, or with an anomalous burthen. It is derived from *privatum*, which, as opposed to *publicum*, signified anything which regards persons considered individually; *publicum* being anything which regards persons considered collectively, and as forming a society"

(see Austin's Jurisprudence. Vol. II, 5th ed. (1911) P. 519)

The meaning of that word in jurisprudence has undergone considerable change after Austin wrote. According to Hohfeld:

"..... a privilege is the opposite of a duty, and the correlative of a 'no-right' For instance, where 'X has a right or claim that 'Y.... should stay off the land (of X), he himself has the 'privilege' of entering on the land or in equivalent words, X does not have a duty to stay off."

(see Fundamental Legal Conceptions, (1923) pp. 38-39)

Arthur L. Corbin writes:

"We say that B had a right that A should not intrude and that A had a duty to stay out. But if B had invited A to enter, we know that those results would not occur. In such case we

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may say that B had no right that A should stay out and that A had the privilege of entering."

(see "Legal Analysis and Terminology", 29 Yale Law Journal 163)

According to Kocourek:

"Privilege and inability are correlatives. Where there is a privilege there must be Inability. The terms are correlatives. The dominus of a Privilege may prevent the servus of the Inability from exacting an act from the dominus".

(see "Jural Relations", 2nd ed., p. 24)

Paton says:

"The Restatement of the law of Property defines a privilege as a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a certain act".

(see Jurisprudence, 3rd ed. (1964). P. 256)"

Thus, 'privilege' is an exemption from some duty or burden.

Immunity from civil action is a privilege.

17. Thus, in a considered opinion of this court, a lesser degree of right is enjoyed when a person has a privilege to deal in a trade which is *rex extra commercium*. In other words the trade in liquor being not a fundamental right and the same being the monopoly of the State, a person gets a privilege to deal into the same when such permission is accorded, which, in the present case is being nomenclature as a license. The petitioner therefore is only a privilegee and no more and no less, and this aspect is affirmed by Clause I of G.L.C., read with clause VI and once this right is relinquished the petitioner cannot say that he still holds back the right to trade in such privilege. Furthermore, the petitioner having transferred the privilege to trade in liquor in favour of respondent No. 4, further declaring thereby his intention of relinquishing all his privilege cannot now be allowed to turn around and reclaim the privilege which already stand endorsed in favour of the respondent No. 4 and the said respondent having acquired a privilege to trade in liquor is well within his right to invoke a renewal clause and exercise his right of transfer under the G.L.C.

18. Having thus considered, no relief can be granted to the petitioner, who has no executable right. In the result petition fails and is hereby dismissed. However, no costs.

Petition dismissed.

ASHOK NORONHA Vs. M.A. KHAN

I.L.R. [2009] M. P., 662

WRIT PETITION

Before Mr. Justice Rajendra Menon

23 September, 2008*

ASHOK NORONHA

... Petitioner

Vs.

M.A. KHAN & ors.

.... Respondents

A. Service Law - Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 2(f), General Clauses Act, M.P. 1957, Section 16 - Government Servant - Suspension - Appointing Authority - *Petitioner placed under suspension by the State Government while working as Managing Director of Madhya Pradesh Khadi & Village Industries Board - Action challenged on the ground that State Government has no competence to pass the order of suspension - Held - The appointing authority of the petitioner on the post of M.D./Addl.M.D. is the State Government - By virtue of the provisions of Section 16 of the Act of 1957, the State Government being the appointing authority is empowered to suspend or dismiss the petitioner.* (Para 17)

क. सेवा विधि - सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 2(एफ), साधारण खण्ड अधिनियम, म.प्र. 1957, धारा 16 - शासकीय सेवक - निलम्बन - नियुक्ति प्राधिकारी - राज्य सरकार द्वारा याची को मध्य प्रदेश खादी और ग्रामोद्योग बोर्ड के प्रबंध निदेशक के रूप में कार्य करते समय निलम्बन के अधीन रखा गया - कृत्य को इस आधार पर चुनौती दी गई कि राज्य सरकार को निलम्बन का आदेश पारित करने की कोई सामर्थ्य नहीं है - अभिनिर्धारित - प्रबंध निदेशक/अतिरिक्त प्रबंधित निदेशक के पद पर याची का नियुक्ति प्राधिकारी राज्य सरकार है - 1957 के अधिनियम की धारा 16 के उपबंधों के आधार पर राज्य सरकार नियुक्ति प्राधिकारी होने से याची को निलम्बित या बर्खास्त करने के लिए सशक्त है।

B. Service Law - Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9 & 20, Gramodyog Adhiniyam, M.P. 1978, Section 29, Khadi and Gramodyog Regulation, M.P. 1980 - Suspension - Competence - *Petitioner placed under suspension by the State Government while working as Managing Director of Madhya Pradesh Khadi & Village Industries Board - Action challenged on the ground that State Government has no competence to pass the order of suspension - Held - Rules of 1966 are applicable to the petitioner, then the right to suspend the petitioner u/R 9 is available to the appointing authority i.e. State Government - State Government has appointed the petitioner on the post of M.D. of the Board, and the power u/R 20 entitles the borrowing department to take action in the matter - As the petitioner is on deputation to Khadi & Gramodyog Board, the*

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Gramodyog Department being the borrowing department is empowered to take action by virtue of the powers vested in it u/R 20(1) of the Rules of 1966.

(Para 18)

ख. सेवा विधि - सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9 व 20, ग्रामोद्योग अधिनियम, म.प्र. 1978, धारा 29, खादी और ग्रामोद्योग विनियम, म.प्र. 1980 - निलम्बन - सक्षमता - राज्य सरकार द्वारा याची को मध्य प्रदेश खादी और ग्रामोद्योग बोर्ड के प्रबंध निदेशक के रूप में कार्य करते समय निलम्बन के अधीन रखा गया - कृत्य को इस आधार पर चुनौती दी गई कि राज्य सरकार को निलम्बन का आदेश पारित करने की कोई सामर्थ्य नहीं है - अभिनिर्धारित - याची को 1966 के नियम लागू होते हैं तब नियम 9 के अधीन याची को निलम्बित करने का अधिकार नियुक्ति प्राधिकारी अर्थात् राज्य सरकार को उपलब्ध है - राज्य सरकार ने याची को बोर्ड के प्रबंध निदेशक के पद पर नियुक्त किया और नियम 20 के अधीन शक्ति ऋणी विभाग को मामले में कार्यवाही करने का हकदार बनाता है - चूंकि याची-खादी और ग्रामोद्योग बोर्ड में प्रतिनियुक्ति पर है, ग्रामोद्योग विभाग ऋणी विभाग होने से 1966 के नियम के नियम 20(1) के अधीन उसमें निहित शक्तियों के आधार पर कार्यवाही करने के लिए सशक्त है।

C. Service Law - Suspension - Mala fide - As serious charges leveled against the petitioner and the charges are based on complaint made by the Local MLA, the same cannot be interefered with on merit at this stage, when the enquiry is pending - If a complaint is made by the MLA and action is taken, that by itself cannot be a ground to attribute mala fides. (Para 20)

ग. सेवा विधि - निलम्बन - असदभाव - चूंकि याची के विरुद्ध गम्भीर आरोप लगाये गये और आरोप स्थानीय विधायक द्वारा की गई शिकायत पर आधारित हैं, इसलिए इसमें इस प्रक्रम पर गुणदोषों में हस्तक्षेप नहीं किया जा सकता, जब जाँच विचाराधीन हो - यदि विधायक द्वारा कोई शिकायत की जाती है और कार्यवाही की जाती है, तो वह स्वयमेव असदभाव का उपारोपण करने के लिए आधार नहीं हो सकता।

Case referred :

1973 Lab.I.C. 1063.

Shobha Menon with M.P.S. Chuckal, for the petitioner.

Mrigendra Singh, for the respondent No.1.

Shailesh Mishra, G.A., for the respondent Nos.3 & 4.

V.S. Shroti with A.P. Shroti, for the respondent No.5.

None, for the respondent No.2.

ORDER

RAJENDRA MENON, J. :-Challenging the order-dated 13.3.2008 passed by the State Government suspending the petitioner under Rule 9 read with Rule 20 of the Madhya Pradesh Civil Services (Classification, Control and Appeal Rules) 1966 [hereinafter referred to as 'Rules of 1966'], petitioner has filed this petition.

2. It is the case of the petitioner that he was initially appointed as Managing

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Director of Madhya Pradesh Laghu Udyog Nigam Limited (hereinafter referred to as 'Nigam'), on 26.7.2002. On 3.8.2004 one Shri Ashish Upadhyay was posted as Managing Director of this Nigam. At that point of time there was no order pertaining to posting of the petitioner. However, petitioner was thereafter designated as Additional Managing Director of the Nigam and allowed to function in the said capacity. Vide order-dated 31.1.2005, the State Government appointed the petitioner as Managing Director of Madhya Pradesh Khadi and Village Industries Board (hereinafter referred to as 'Board') after taking over his services in the Commerce and Industries Department temporarily and until further orders. It is the cases of the petitioner that this posting in the Board was infact an order of deputation, which was issued without consent of the petitioner.

3. Challenging the order appointing Shri Ashish Upadhyay as Managing Director and sending the petitioner on deputation to the Board, Writ Petition No.1632/2005(S) has been filed by the petitioner, which is also heard and decided analogously alongwith this petition. Petitioner claims that during the pendency of Writ Petition No.1632/2005, vide order-dated 8.8.2006, State Government repatriated the petitioner to his parent department i.e... Nigam, and when no post on which petitioner was to work on repatriation in the parent department was indicated, petitioner filed an interim application in Writ Petition No.1632/2005(S) which was rejected on 4.11.2006 and, therefore, petitioner filed Writ Appeal No.1159/2006. On 23.11.2006, notice was issued by the Division Bench in the said Writ Appeal and a direction was issued that petitioner should be permitted to continue as Managing Director of the Board. However, in between when the petitioner was suspended by the impugned order dated 13.3.2008, vide Annexure P/1, petitioner brought this fact to the notice of the Division Bench, where the Writ Appeal was pending. Initially, the Division Bench took a serious note of the manner in which petitioner was suspended, but finally the Writ Appeal was disposed of as having been rendered infructuous, due to suspension of the petitioner. It is the case of the petitioner that suspension of the petitioner ordered by the impugned order is illegal and cannot be sustained.

4. During the course of hearing of this petition, assailing the order of suspension Smt. Shobha Menon, learned Senior Counsel raised the following three grounds:

(i) The first contention is that once petitioner was sent on deputation to the Board, then by virtue of Section 29-2(c) of the Madhya Pradesh Gramodyog Adhiniyam, 1978 (hereinafter referred to as 'Adhiniyam of 1978'), services of the petitioner would be governed by the Regulations framed under section 29 i.e... Annexure P/8, known as M.P. Khadi and Gramodyog Regulation, 1980. Under the aforesaid Regulation it is stated that only the Board of the Directors can take action against the petitioner and, therefore, suspension ordered by the State Government is unsustainable.

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(ii) The second contention is that petitioner is an employee of the Nigam; the terms and conditions of the petitioner are governed by the Rules applicable to employees of the Nigam and, therefore, the provisions of Rules of 1966 will not apply in the case of the petitioner, who is an employee of the Nigam. It was pointed out by learned counsel that when a person is employed by an Autonomous Board like the University or a Statutory Body created under an enactment like the M.P. Electricity Board, employees of such Autonomous Bodies or Statutory Authorities are governed by the Rules and the Service Conditions applicable to the Autonomous Bodies or the Corporation and not the Rules of 1966. *Interalia* contending that petitioner is an employee of the Nigam and to such an employee the Rules of 1966 does not apply, challenge is made to the order of suspension.

(iii) The third ground of challenge is *malafides* on the part of the respondents and interference made at the instance of a Local MLA, without there being any *prima facie* case or basis for suspension.

5. Smt. Shobha Menon, learned Senior Advocate, by taking me through the provisions of the Adhiniyam of 1978 (Annexure P/10); the provisions of Sections 5, 7 and 29 of the aforesaid Adhiniyam; and, the Regulations framed under the aforesaid Adhiniyam as contained in Annexure P/8, emphasized that once petitioner's services are taken over temporarily by the Khadi & Gramodyog Board, the power to suspend and take disciplinary action is vested only in the said Board constituted under section 4 of the Adhiniyam of 1978, and the State Government does not have any power to take action. It is stated that suspension of the petitioner and further action with regard to any act committed by the petitioner while in service of the Board, is to be done in accordance to the Adhiniyam of 1978 and the Regulations framed *vide* Annexure P/8. In that view of the matter the order passed by the State Government is said to be unsustainable.

6. As an alternative submission in this regard Smt. Shobha Menon, learned Senior Advocate, argued that all the orders passed sending the petitioner on deputation are issued by the General Administration Department (hereinafter referred to as 'GAD') of the State Government and, therefore, even if it is assumed that the State Government can take action, it is only the GAD which can issue the orders of suspension and not the Gramodyog Department. On this ground also, challenge is made to the aforesaid action.

7. As far as the second ground is concerned, it was urged by Smt. Shobha Menon, learned Senior Advocate, that petitioner is an employee of the Nigam and, therefore, his terms and conditions of appointment are governed by Article

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80 and 83 of the Memorandum of Association of the aforesaid Nigam, as he is an employee of the Nigam, the Service Rules applicable to the employees of the Nigam will govern the Terms and Conditions of appointment, including the procedure and power to take disciplinary action and the Rules of 1966 are not applicable to the petitioner, being an employee of the Nigam, therefore, action taken under the aforesaid Rules of 1966 is said to be unsustainable.

8. Finally in support of the third ground it was argued that the entire action is taken in view of certain questions asked in the Vidhan Sabha and the complaint (Annexure P/18) submitted by the a Local MLA. It is argued, because the petitioner did not succumb to the demands of the Local MLA, malafidely the Local MLA has complained and the same is baseless and even in the answer to the question in the Vidhan Sabha it is found that petitioner is not responsible for any lapses and the same were also not found to be established, that being so, it is argued that the action initiated for suspending the petitioner and taking disciplinary action is unsustainable and, therefore, on these grounds interference into the matter is sought for.

9. Shri Shailesh Mishra, learned counsel for the State, Shri Mrigendra Singh, learned counsel for respondent No.1, and Shri V.S. Shrotri, Senior Advocate, and Shri A.P. Shrotri, Advocate, for respondent No.5, refuted the aforesaid contentions and pointed out that even though petitioner is an employee of the Nigam, but when the petitioner was appointed as a Director and subsequently as Managing Director and Additional Managing Director of the Nigam by virtue of the powers conferred on the State Government under Articles 80 and 83 of the Memorandum of Association, petitioner's services were temporarily taken over from the Nigam by the Commerce and Industries Department and, therefore, it is the State Government which is empowered to take action once the petitioner is appointed as Director, Additional Managing Director and Managing Director of the Nigam. It is stated that the petitioner at the relevant time was holding the post of Managing Director on which post he was appointed by the State Government and, therefore, the State Government is entitled to take action in the matter. Inviting my attention to Rule 20 of the Rules of 1966, learned counsel for the respondents emphasized that as the services of the petitioner was lent to the Khadi Gramodyog Board, action taken by the borrowing department i.e., the Gramodyog Department being in accordance to the provisions of Rule 20 (1) read with the proviso thereof, suspension of the petitioner by the Government Department is proper and legal.

10. As far as applicability of the Rules of 1966 is concerned, it is argued by Shri A.P. Shrotri, learned counsel for the respondents, that under Rule 9, a Government servant can be suspended under the Rules of 1966. Referring to the meaning of the term 'Government servant' as contained in Rule 2(f) of the Rules of 1966 and referring to sub-clause (iii), Shri A.P. Shrotri submitted that once petitioner's services were temporarily placed at the disposal of the State Government in the Department of Commerce and Industry, then the Rules of 1966 would apply to

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the petitioner, on account of his being a 'Government servant' within the meaning of the said Rules. Accordingly, it is argued that the Rules of 1966 would apply in the case of the petitioner and in suspending the petitioner under the said Rule, respondents have not committed any error.

11. As far as malafides and taking action against the petitioner is concerned, Shri Mrigendra Singh, learned counsel for respondent No.2, and Shri Shroti, learned counsel for respondent No.5, pointed out that there are serious allegations against the petitioner. Referring to the charge sheet issued to the petitioner, it is emphasized by learned counsel for the respondents that 13 serious charges have been levelled against the petitioner and the petitioner having committed serious acts of commission and omission while serving in the Khadi & Gramodyog Board during the period 2.2.2005 to 25.11.2006, action taken for suspending him is proper. There is no malafides involved in suspending the petitioner and, therefore, the order of suspension does not warrant any interference. Accordingly, on these grounds respondents seek for dismissal of this petition.

12. Having heard learned counsel for the parties and on a perusal of the records it is clear that petitioner was initially appointed in the Nigam and was substantively holding the post of Chief General Manager in the said Nigam. In the connected petition filed by the petitioner, which has been heard today i.e.. Writ Petition No.1632/2005(S), various averments are made by the petitioner and certain documents have also been filed, which are relevant for deciding the disputes involved in the present petition also.

13. It is stated by the petitioner in Writ Petition No.1632/2005 (S) that there are two level of appointments in the Nigam. Internal appointments upto the rank of Chief General Manager is done by the Board of Directors of the Nigam; and, appointments of Additional Managing Director, Directors and Managing Directors are done by the State Government under Articles 80 and 83 of the Memorandum of Association applicable to the Nigam. Articles 80 and 83 of the Memorandum of Association is reproduced herein under:-

"80 (a) (1) The Directors shall be appointed by the State Government and shall be paid such salary and/or allowance as the State Government may from time to time determine subject to the provision of Section 314 of the Act.

(2) The Chairman and non-official Directors shall hold the office for a period of two years from the date of their appointment as Chairman and Directors respectively. The Managing Director shall retire and his/her ceasing to hold the office of Managing Director. The State Government shall determine the tenure for which the other Director will hold office. A retired Director shall be eligible for reappointment.

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(3) The State Government shall have the power to remove any Director including the Chairman and the Managing Director from office at any time in his absolute discretion.

(4) The State Government shall have the right to fill any vacancy in the office of the Director caused by retirement, removal, resignation, death or otherwise."

(b) xxx xxx xxx xxx
 xxx xxx xxx xxx

83(1) The State Government may appoint one of the Directors to be the Managing Director who shall be a whole time employee of the Company or a Board of Management consisting of two Directors namely the Managing Director and the other to be known as Additional Managing Director who shall be a whole time employee of the Company for the conduct or management of the business of the Company subject to the control and supervision of the Board of Directors. In case of the Board of Management, the Additional Managing Director shall be appointed from amongst the officers of the Nigam. The Managing Director of the Board of Management so appointed may be authorised by the Board to exercise such powers and discretion individually in relation to the affairs of the Company as are specifically delegated to him/them by the Board and the State Government and are not required to be done by the Board of Directors of the Company at the general meeting under the Act.

(2) The Managing Director/Additional Managing Director shall be paid such salary and allowances as may be fixed by the State Government. The Nigam employees who have put in more than 8 years service as Chief General Manager shall also be eligible for the above posts. In case of such appointment from the Nigam's cadre one post of Chief General Manager will be kept in abeyance."

(Emphasis supplied)

A perusal of the aforesaid Articles would clearly indicate that Director in the Nigam is appointed by the State Government and the Chairman, Managing Director and Additional Managing Director are also appointed by the State Government and they are paid such salaries and allowances as are fixed by the State Government and they are not employees of the Nigam. A Nigam employee who has put in 8 years of service as a Chief General Manager also becomes entitled for appointment as a Director/Managing Director/Additional Managing Director. It is, therefore, clear from the aforesaid provision that a Director, Managing Director and Additional Managing Director in the Nigam are appointed

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by the State Government and available in the record of the said petition are order-dated 30.6.2000 (Annexure P/9) appointing the petitioner as Director; subsequently appointing him as Additional Managing Director and Managing Director vide Annexures P/10 and P/12 respectively. All these orders are issued by the State Government and the petitioner's appointment in the Nigam as Director, Managing Director and Additional Managing Director is done by the State Government. Petitioner has filed a document pertaining to certain opinion rendered with regard to status and functions of the Chairman, Managing Director and the Additional Managing Directors in the Nigam. The said document is filed as Annexure P/11, in W.P.No.1632/2005(S). This document also indicates that appointment upto the level of Chief General Manager in the Nigam is done by the Board of Directors; and, appointment on the post of Chairman, Managing Director, Additional Managing Director and Directors are Government level appointments and these appointments are outside the purview of appointments made under the service rules of the Nigam. In this regard, the averments made by the petitioner in paragraph 5.2 of Writ Petition No.1632/2005(S), becomes relevant. Petitioner in the said paragraph has so averred:

"5.2 The appointment of Chairman, Managing Director, Additional Managing Director, Board of Management and the Directors on its Board are Government level appointments and outside the purview of appointments made under the service rules."

(Emphasis supplied)

14. From the aforesaid contentions raised by the petitioner, it is clear that petitioner himself admits that once he is appointed as a Managing Director/Additional Managing Director/Director by the Government, the service rules of the Nigam will not apply to the petitioner. From the averments made by the petitioner in the said writ petition, it is clear that petitioner has been appointed initially as a Director of the Nigam in the year 1996 and subsequently as an Additional Managing Director and a Managing Director of the Nigam. It is, therefore, clear that the petitioner became a Director/Managing Director/Additional Managing Director in the Nigam and before doing so, his services were temporarily taken over by the State Government in the Department of Commerce and Industries. It is after taking over the services of the petitioner by the State Government that he has been appointed in Nigam, as a Director. The orders in this regard filed by the petitioner in the said writ petition i.e., Annexures P/8, P/9 and P/10 indicate that the services of the petitioner were temporarily taken over by the State Government in the Department of Commerce and Industries and thereafter, he has been appointed as a Director and Additional Managing Director and thereafter he was sent on deputation to the Board. In this regard, order-dated 3.8.2004 (Annexure P/27); order-dated 24.1.2005 (Annexure P/34); and, order-dated 31.1.2005 (Annexure P/35) become relevant. A perusal of these documents clearly indicate

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that services of the petitioner were temporarily taken over by the State Government in the Department of Commerce and Industries and thereafter, he was sent on deputation. It is, therefore, clear that petitioner became a 'Government servant' as defined under Rule 2(f)(iii) of the Rules of 1966. A 'Government servant' under the aforesaid Rule is defined to mean a person who being in service of a local or other authority and whose services are temporarily placed at the disposal of the State Government. It is, therefore, clear from a complete reading of the orders passed in the case of the petitioner that his services were taken over from the Corporation temporarily and placed at the disposal of the State Government and, therefore, petitioner becomes a 'Government servant' within the meaning of Rule 2(f)(iii), of the Rules of 1966, and in that view of the matter the Rules of 1966 would apply to the petitioner.

15. The provisions of Rule 20 of the Rules of 1966 are para materia with Rule 20 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 [hereinafter referred to as 'Rules of 1965']. In the case of *R.B. Verma Vs. The Food Corporation of India and Others* [1973 Lab. I.C. 1063], a Division Bench of the Allahabad High Court had considered the question of suspension of an employee of the Food Corporation of India taken on deputation by the Government of India. In the said case, the words 'other authority' appearing in Rule 20, of the Rules of 1965 was taken note of and it was held that these words are not defined in the Rules, but the words 'other authorities' would mean authorities like the Food Corporation of India or other instrumentalities of the State, which come within the purview of State or other authorities as defined under Article 12 of the Constitution. After considering the meaning of the word 'other authority' and after placing reliance on a judgment of the Supreme Court in the case of *Rajasthan State Electricity Board Vs. Mohan Lal* (AIR 1967 SC 1857), considering the dictionary meaning of the word 'authority', it has been held by the Division Bench of the Allahabad High Court that when the employee of the Food Corporation of India is taken on deputation by the Government of India, then the Government of India becomes the borrowing authority and Rule 20 of the Rules of 1965 would apply to an employee of the Food Corporation of India, who is taken on deputation by the Government of India. In the said case, various judgments of the Supreme Court in the matter of defining the word 'authority', 'other authorities' have been taken note of and the principle laid down with regard to power to be exercised by borrowing authority under Rule 20 of the Rules of 1965. In the present case also, the Nigam is a company fully owned by the State of Madhya Pradesh and, therefore, would come within the purview of the 'authority' or 'other authorities' as appearing in Rule 2(f)(ii) and Rule 20(i) of the Rules of 1966 and, therefore, the State Government and the Gramodyog Department can suspend the petitioner exercising powers under the Rules of 1966.

16. Contention of the petitioner made vide ground (ii) to the effect that petitioner

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is an employee of the Nigam and, therefore, his services are governed by the Rules of the said Nigam and not by the Rules of 1966 is wholly misconceived. On a complete reading of petitioner's own contentions made in Writ Petition No.1632/2005(S) and the documents available in the said petition, it is clear that petitioner who was holding the post of Chief General Manager was appointed initially as a Director and subsequently as a Additional Managing Director and finally as a Managing Director by the Commerce and Industries Department of the State Government and by taking over his services temporarily, he has been sent on deputation to the Khadi & Gramodyog Board, on which post he has been suspended, that being so, the second ground urged by the learned counsel for the petitioner is unsustainable. Once, the petitioner's services are taken over by the State Government temporarily, petitioner becomes a 'Government servant' within the meaning of Rule 2(f)(iii) of the Rules of 1966. That apart, petitioner having been appointed as a Director and Managing Director of the State Government in view of Articles 80 and 83 read with Article 127 of the Memorandum of Association of the Nigam is subject to the Rules and Regulations and control of the State Government, and the State Government is empowered to take action against the petitioner. Article 127 of the Memorandum of Association contemplates as under:

"127. Notwithstanding anything contained in any of these Articles the State Government may from time to time, issue such directives or instructions as he may consider necessary in regard to the affairs or conduct of the business of the Company or the Directors thereof, and in the like manner may vary and annul such directions or instructions. The Directors shall duly comply with and give immediate effect to directions and instructions so issued."

A complete reading of the aforesaid Article in the Memorandum of Association would clearly show that petitioner after his appointment as Director in the Nigam is subject to control, for all actions, by the State Government and in applying the Rules of 1966, the State Government has not committed any error. In that view of the matter, the objections raised by ground No.(ii) in this petition is found to be wholly unsustainable.

17. Even otherwise, this question can be considered from a different angle. In the petition petitioner has only stated that he is an employee of the Nigam and, therefore, the State Government is not empowered to take action and the Rules of 1966 are not applicable. However, no Rule or Regulation or Bylaw applicable in the Nigam is brought to the notice of this Court or relied upon to show that petitioner's service conditions are governed by the said Rules or the power of suspension is conferred on some other authority under the said Rules. On the contrary as indicated hereinabove, petitioner has made a categorical statement in Writ Petition No.1632/2005(S) that the appointment of the petitioner made by the Government on the post of Managing Director, Additional Managing Director is

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outside the purview of appointment made under the service rules of the Nigam. If that be so, once it is held that the appointing authority of the petitioner on the post of Managing Director/Additional Managing Director is the State Government, then by virtue of the provisions of Section 16 of the M.P. General Clauses Act, 1957, the State Government being the appointing authority is empowered to suspend or dismiss the petitioner. In the light of the provisions of Section 16 of the General Clauses Act, it has to be held that Government being the appointing authority of the petitioner on the post of Managing Director/Additional Managing Director, has a right to suspend the petitioner who is a 'public servant' appointed by the Government. If this analogy is applied, then also the argument advanced by the learned counsel becomes unsustainable.

18. As far as ground No.(i) pertaining to action taken by the Gramodyog Department is concerned, once it is held that the Rules of 1966 are applicable to the petitioner, then the right to suspend the petitioner under Rule 9 is available to the appointing authority which is the State Government, as the State Government has appointed the petitioner on the post of Managing Director of the Board, and the power under Rule 20 entitles the borrowing department to take action in the matter. In the case of the petitioner, as he is on deputation to the Khadi & Gramodyog Board, the Gramodyog Department being the borrowing department is empowered to take action by virtue of the powers vested in it under Rule 20(1) of the Rules of 1966.

19. As far as applicability of the Regulations framed under the Adhiniyam of 1978 are concerned, the said argument is wholly misconceived. The Regulations framed under Section 29 of the Adhiniyam of 1978 are only applicable with regard to conditions of service of officers appointed to the Khadi & Gramodyog Board, but does not apply to other persons who are appointed by the State Government. The provisions of Section 29(2)(c) makes it clear that the Regulation framed under the said section will apply to all employees other than those who are appointed by the State Government to the services of the Board i.e... the Madhya Pradesh Khadi Thatha Gramodyog Board. In the present case as petitioner is appointed to the Board by the State Government, therefore, the Regulations framed under section 29 of the Adhiniyam of 1978 will not be applicable in the case of the petitioner and, therefore, the petitioner is not right in contending that the petitioner can be suspended only by the Board and not by the State Government. The Regulations framed vide Annexure P/8 will not apply in the case of the petitioner, petitioner being an appointee in the Board by the State Government. That being so, the first ground of attack made is also not sustainable and has to be rejected.

20. As far as the third ground is concerned, it is seen that except for contending that action is taken malafidely by the State Government, no substantial material is adduced before this Court to show that action is taken malafidely. On the contrary, the charges levelled against the petitioner and the imputations made therein clearly

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indicates that while petitioner was working as a Managing Director in the Board, petitioner had indulged in serious acts of misconduct because of which action is taken against the petitioner. The charges levelled against the petitioner indicates that they are serious in nature. The following allegations are levelled against the petitioner with regard to his working as a Managing Director of the Khadi & Gramodyog Board during the period 2.2.2005 to September 2006 and again upto 25.11.2006. The allegations levelled and the charges against the petitioner as indicated in the charge sheet (Annexure R/5) dated 19.3.2008, are as under:-

(i) That he deliberately did not make the payment to the labourers and employees at the Blanket Manufacturing Centre, Mandsaur as per directions of the Court and deliberately disobeyed the directions of this Hon'ble Court;

(ii) That he created obstacles in the proper functioning of the labourers at the said centre by not making timely and proper arrangements for raw material;

(iii) That he deliberately did not make payment to the regular employees of the said centre of the Board for a period of 10 months and further intentionally did not pay the grant and the amount of rebate from the Government;

(iv) That he did not submit the report to the Government on the complaints received about violation of the administrative and financial norms of the Government despite reminders and D.O Letters and thus did not comply with the instructions issued by the State Government;

(v) That even though the proposal for increase of the age of superannuation for the employees of the Board was rejected by the Government, he again put up the said proposal before the Directors of the Board and got himself empowered to grant extension in the age of superannuation which was contrary to the Government instructions;

(vi) That he received a sum of Rs.7.00 lacs on account of illness of his wife Smt. Rita Noronha from the Board for the period April, 2006 to November, 2007, whereast Smt. Rita Noronha herself was a Government servant and was entitled to medical reimbursement for herself. Thus, the finds of the Board were misused;

(vii) That against the provisions as contained in Section 10 of the M.P. Khadi and Gram Udyog Board Adhiniyam, 1978, he gave on contract the shops run by the Board to the employees/ individuals causing loss to the Board;

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- (viii) That he appointed agent against the rules;
- (ix) That against the order of the Khadi and Gramodyog Commission, Government of India, the petitioner did not realize the penal interest from the borrowers who were granted loan by the Board out of the funds received from the consortium;
- (x) That he did not deal properly with the inquiries instituted against the officers and employees of the Board and did not exercise proper control as a result of which several cases of departmental inquiry got prolonged and because the inquiry report was not received, no decision could be taken in those cases for a long time;
- (xi) That even after the receipt of inquiry report in the case of Shri Ashok Kumar Jain, P.K. Dixit and C.S. Solanki and Manager Vidya Ram Singh Gurjar in the inquiries of corruption against them, no decision was taken despite directions by the Government."

As serious charges are levelled against the petitioner and charges are based on complaint made by the Local MLA, the same cannot be interfered with on merit at this stage, when the enquiry is pending. Merely because the Local MLA has made a complaint, malafides cannot be attributed on this ground. The Local MLA being the representative of the general public is empowered to bring to the notice of the State Government illegalities committed by the public functionaries and if a complaint is made by the MLA and action is taken, that by itself cannot be a ground to attribute malafides. Until and unless other factors are available to impute malafides to the aforesaid action of the MLA, this principle laid down by the Supreme Court in the case of *Mohd. Masood Ahmad Vs. State of UP and Others* [(2007) 8 SCC 150], can be applied in the present case also. Accordingly, the third ground raised is also not substantiated by the petitioner by any cogent material and, therefore, the same cannot be a ground for interference into the matter.

21. Accordingly, finding no ground for interfering into the matter on the grounds raised in this petition, the petition is dismissed.

Petition dismissed.

LALLU KOL Vs. STATE OF M.P.

I.L.R. [2009] M. P., 675

WRIT PETITION

Before Mr. Justice Abhay M. Naik

25 September, 2008*

LALLU KOL

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Panchayat Karmi Yojna, Clause 3(3.4) - Appointment of Secretary - Preference - Preference to candidates of ST/SC/OBC/Female categories - If candidates of different categories are equal in merits, candidate belonging to SC/ST/OBC/Female category is to be preferred - Petitioner belonging to ST category securing 59.6% marks whereas respondent No.4 belonging to General category secured 74% marks in High School Examination - Petitioner not entitled for preference. (Para 7)

क. पंचायत कर्मी योजना, खण्ड 3(3.4) - सचिव की नियुक्ति - अधिमान - एसटी/एससी/ओबीसी/महिला श्रेणी के अभ्यर्थियों को अधिमान - यदि भिन्न श्रेणियों के अभ्यर्थी मेरिट में समान हैं तो एसटी/एससी/ओबीसी/महिला श्रेणी से सम्बन्धित अभ्यर्थी को अधिमान दिया जाना चाहिए - हाईस्कूल परीक्षा में एसटी श्रेणी के याची ने 59.6 प्रतिशत अंक अर्जित किये जबकि सामान्य श्रेणी के प्रत्यर्थी क्र. 4 ने 74 प्रतिशत अंक अर्जित किये - याची अधिमान का हकदार नहीं।

B. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 69(1), Panchayat (Resignation by Office Bearers) Rules, M.P. 1995, Rule 4 - Appointment of Secretary - Brother of respondent No.4 is Panch - He submitted his resignation before the appointment of respondent No.4 as Secretary - Brother also not participated in the meeting - Resignation of brother not accepted so far - Section 69 merely prohibits person from holding charge of Panchayat Secretary if he happens to be a relative of Panch or Sarpanch - No bar that respondent No.4 cannot be appointed as Secretary - However, respondent No.4 shall not be permitted to hold charge of the office of Secretary till the resignation of his brother is accepted - In case resignation is not accepted, respondent No.4 shall not be permitted to hold the charge of Secretary. (Para 9 & 13)

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 69(1), पंचायत (पदाधिकारियों द्वारा त्यागपत्र) नियम, म.प्र. 1995, नियम 4 - सचिव की नियुक्ति - प्रत्यर्थी क्र. 4 का भाई पंच - उसने प्रत्यर्थी क्र. 4 की सचिव के रूप में नियुक्ति के पूर्व अपना त्यागपत्र दिया - भाई ने बैठक में भी भाग नहीं लिया - भाई का त्यागपत्र अब तक स्वीकार नहीं किया गया - धारा 69 व्यक्ति को पंचायत सचिव का कार्यभार ग्रहण करने से प्रतिषिद्ध करती है यदि वह पंच या सरपंच का रिश्तेदार हो - कोई रोक नहीं कि प्रत्यर्थी क्र. 4 सचिव के रूप में नियुक्त नहीं किया जा सकता - तथापि, प्रत्यर्थी क्र. 4 को उसके भाई का त्यागपत्र स्वीकार हो जाने तक सचिव का पदभार ग्रहण करने के लिए अनुज्ञात नहीं किया जाएगा।

LALLUKOL Vs. STATE OF M.P.**Cases referred :**

1992 Supp (3) SCC 217, W.A. No.1819/2007 (*Krishn Yadav Vs. State of M.P. and others*).

Harvinder Singh, for the petitioner.

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

Sanjay Tamrakar, for the respondent No.3.

A.G. Dhande with Piyush Jain, for the respondent No.4.

O R D E R

ABHAY M. NAIK, J. :- Petitioner belonging to Scheduled Tribe category is stated to be permanent resident of Gram Panchayat Amiliya whereas respondent No.4 is stated to be a practicing Advocate belonging to general category. Applications were made for appointment on the post of Panchayat Karmi of Gram Panchayat Amiliya by various candidates including the petitioner and respondent No.4.

2. Case of the petitioner is that according to the Panchayat Karmi Yojna he ought to have been preferred since he belong to Schedule Tribe category. Copy of Panchayat Karmi Yojna is on record as Annexure/P-4. Guidelines were provided for appointment on the post of Panchayat Karmi vide circular dated 27.1.2006 contained in Annexure/P-5. Gram Panchayat, Amiliya was asked to make appointment on the post of Panchayat Karmi within 30 days vide letter dated 10.7.2007. Since, the appointment was not made within 30 days, Gram Panchayat Amiliya became functus officio and the power to appoint Panchayat Karmi was only with Prescribed authority after expiry of 30 days. This apart, it is stated that respondent No.4 is real brother of Rajendra Prasad Tiwari, Pancha of Ward No.14 of village Amiliya. In view of the aforesaid, it is stated that the appointment of respondent No.4 on the post of Panchayat Karmi vide resolution dated 21.8.2007 is illegal and is liable to be quashed. Petitioner was kept in the waiting list, though he was entitled to be appointed on the post of Panchayat Karmi. Respondent No.4 was thereafter notified as Panchayat Secretary vide Annexure/P-2 dated 17.9.2007 which, too, is liable to be quashed for the aforesaid reasons. Petitioner had preferred an appeal against the resolution before the Collector, Satna which was got dismissed as not pressed on 8.1.2007.

3. Respondent No.4 submitted his reply stating therein that he has been rightly appointed as Panchayat Karmi and notified as Panchayat Secretary. Respondent No.4 was the most meritorious candidate amongst the applicants with 74% marks in the High School Certificate Examination whereas the petitioner was having 59.6% marks in the same examination. As regards allegation about Rajendra Prasad Tiwari, the elder brother of respondent No.4, it is stated that he was Pancha from Ward No.14 but had tendered his resignation from the post on 30.7.2007. He did not participate in any meeting after tendering the resignation including the meeting on 21.8.2007 in which the petitioner was selected and appointed on the

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post of Panchayat Karmi. Respondent Nos.1 and 2 supported respondent No.4 by submitting a separate return.

4. Gram Panchayat, Amiliya submitted its return stating therein that the impugned resolution dated 21.8.2007 was passed by keeping Sarpanch and other Panchas in dark. They were informed that the agenda of the meeting for 21.8.2007 was for development matters and under the garb of wrong notion and taking advantage of the illiteracy of the Panchas, the impugned resolution was passed at the instance of Rajendra Prasad Tiwari. Signatures of Sarpanch and other panchas were obtained fraudulently. Representation to this effect was made to the Collector, Satna and other higher authorities vide Annexure/R-3-A. Without considering the representation, respondent No.4 has been notified as Panchayat Secretary vide Annexure/P-2 dated 17.9.2007. As regards resignation of Rajendra Prasad Tiwari, it is stated that the same was received in the office of Sarpanch on 24.9.2007 which has not been placed and considered in the meeting of Gram Panchayat. Thus, resignation of Rajendra Prasad Tiwari has not been accepted till date and he is still continuing as Pancha of Gram Panchayat Amiliya.

5. Respondent No.3 has made available the record of Gram Panchayat for perusal.

6. Shri Harvinder Singh, learned counsel for the petitioner, Shri Vinod Mehta, Govt. Advocate for respondent Nos.1 and 2, Shri Sanjay Tamrakar, learned counsel for respondent No.3 and Shri A.G. Dhande, learned senior counsel for respondent No.4 made their submissions at length which have been duly considered in the subsequent paragraphs.

7. Contention of Shri Harvinder Singh, learned counsel is that the petitioner being a candidate belonging to Scheduled Tribe category is to be preferred in comparison to respondent No.4 in view of sub-clause 3.4 of Clause 3 of Panchayat Karmi Yojna which is on record as Annexure/P-4. Clause-3 of Annexure/P-4 lays down qualifications for the post of Panchayat Karmi. Sub-clause 3.4 provides preference to a candidate belonging to Scheduled Caste, Scheduled Tribe, O.B.C. and Female candidate. It may be seen that under Panchayat Karmi Yojna, there is only one post for Panchayat Karmi in every Gram Panchayat. In the case of *Indra Sawhney Vs. Union of India and others* 1992 Supp. (3) SCC 217 learned Apex Court has clearly held that their cannot be reservation in case of a single post. Accordingly, it is held that sub-clause 3.4 does not tantamount to reservation in favour of a candidate belonging to Scheduled Caste, Scheduled Tribe, O.B.C. and Female category. It does not mean that a candidate belonging to any of the aforesaid category has to be preferred irrespective of merits of the candidates. It has been clearly provided in the circular dated 13.8.2007 (Annexure/R-1) that appointment on the post of Panchayat Karmi was to be made on the basis of merits. Accordingly, it is observed that sub-clause 3.4 of Clause 3 of Annexure/P-4 is to be construed in a manner so as to mean that if candidates of different

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categories are equal in merits, a candidate belonging to Scheduled Caste, Scheduled Tribe, O.B.C. and Female category is to be preferred for the post of Panchayat Karmi. I am fortified in my this view by the Division Bench decision of this Court dated 3.12.2007 passed in W.A. No.1819/2007 (*Krishn Yadav Vs. State of Madhya Pradesh and others*) wherein it has been held that when the candidate securing highest marks in the qualifying examination is appointed on the post of Panchayat Karmi, the concept of preference is not attracted. In the present case respondent No.4 has secured 74% marks in the High School Certificate Examination whereas petitioner has secured merely 59.6% marks in the same examination. Obviously, respondent No.4 is more meritorious than the petitioner. From the resolution in question it is apparent that respondent No.4 was the most meritorious candidate amongst the applicants. Thus, his appointment is not found in contravention of Panchayat Karmi Yojna or the various circulars issued by the State Government from time to time.

8. Next contention of the learned counsel for the petitioner is that respondent No.4 is brother of Rajendra Prasad Tiwari who was a Pancha from Ward No.14 of Gram Panchayat, Amiliya. Resignation of Rajendra Prasad Tiwari was not accepted in accordance with the provisions of M.P. Panchayat (Resignation By Office Bearer) Rules, 1995 (hereinafter referred to as "Resignation Rules" for brevity). Accordingly, appointment of respondent No.4 on the post of Panchayat Karmi is bad in law being in contravention of Section 69 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993. Sub section (1) of Section 69 empowers the State Government or the prescribed authority to appoint a Secretary for a Gram Panchayat. Second proviso to Sub section (1) prohibits a person from holding charge of Panchayat Secretary, if such a person happens to be relative of any office bearer of the concerned Gram Panchayat. Sub section (1) of Section 69 is reproduced below for convenience :-

"(1) The State Government or the prescribed authority may appoint a Secretary for a Gram Panchayat or group of two or more Gram Panchayats :

Provided that the person holding the charge of a Secretary of Gram Panchayat 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 Panchayat, if such a person happens to be relative of any office bearer of the concerned Gram Panchayat.

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.

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9. A bare perusal of the aforesaid provision makes it clear that there is no embargo on the appointment of a person on the post of Panchayat Karmi or notification in his favour as Panchayat Secretary. It merely prohibits a person from holding a charge of Panchayat Secretary if he happens to be a relative of Pancha or Sarpanch of the same Gram Panchayat. Thus, the appointment of respondent No.4 on the post of Panchayat Karmi on account of being the most meritorious candidate is not affected merely on account of his brother being the Pancha. Rule 3 of the Resignation Rules provides for giving notice as follows :-

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 authorised 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'."

10. Rule 4 makes provisions for acceptance of resignation which is as follows :-

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, Panchayat and Social Welfare and the collector.

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

(3) The Panchayat 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 panchayat.

(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

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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 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 Panchayat.

11. By virtue of sub rule 5 a person would cease to be a pancha immediately after termination of meeting wherein the resignation is accepted. In the present case there is no iota on record to show that the resignation has been accepted. Similarly, there is no material on record to show that Rajendra Prasad Tiwari had participated in the proceedings of the resolution dated 21.8.2007. Thus, the appointment of respondent No.4 on the post of Panchayat Karmi as well as notification in his favour as Panchayat Secretary are not affected on account of non-acceptance of resignation, moreso, which is not shown to have been withdrawn by Rajendra Prasad Tiwari. Fact remains in the light of the aforesaid is that Rajendra Prasad Tiwari has not ceased to be a pancha on account of non-acceptance of his resignation till date. The necessary consequence would be that the respondent No.4 shall not be entitled to hold the charge of Secretary of Gram Panchayat, Amiliya until acceptance of resignation of Rajendra Prasad Tiwari. Sarpanch of Gram Panchayat, Amiliya has admitted in her return to have received the resignation of Rajendra Prasad Tiwari from the post of pancha. By virtue of sub rule (2) of Rule 4 of Resignation Rules, the notice of resignation contained in Annexure/R-3-B was liable to be considered by the Gram Panchayat, Amiliya in its next meeting. From perusal of the record of Gram Panchayat, Amiliya it seems that no steps in accordance with Rule 4 were taken by Gram Panchayat, Amiliya. Respondent No.4 cannot be held guilty for inaction on the part of respondent No.3 and cannot be made to suffer on account of the same. Accordingly, it is held that appointment of respondent No.4 on the post of Panchayat Karmi and consequent notification in his favour as Panchayat Secretary are not vitiated on account of non-acceptance of the resignation.

12. Next contention of learned counsel for the petitioner is that the Gram Panchayat, Amiliya was asked to make appointment vide Annexure/P-6 dated 10.7.2007 within a period of 30 days and accordingly, the Gram Panchayat ceased to have power to make appointment on the post of Panchayat Karmi after expiry of 30 days. This submission is misconceived because under Panchayat Karmi Yojna a Gram Panchayat is empowered to make appointment on the post of Panchayat Karmi. Under sub section (1) of Section 86 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 State Government or the prescribed authority may direct a Gram Panchayat to perform any duty imposed upon it. Thus, the power of appointment available to the Gram Panchayat cannot be

qualified for a period of 30 days and the same if, exercised, in due manner even thereafter cannot be treated as having been vitiated on this ground.

13. In the result, the writ petition is dismissed with an observation that respondent No.4 shall not be permitted to hold the charge of Secretary of Gram Panchayat, Amiliya for a period of one month during which respondent No.3 shall hold the meeting of Gram Panchayat for consideration of the resignation of Rajendra Prasad Tiwari.

Needless to say that if the resignation is withdrawn by Rajendra Prasad Tiwari, or not accepted on valid ground, charge of Secretary of Gram Panchayat, Amiliya shall not be permitted to be held by respondent No.4.

No order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 681

WRIT PETITION

Before Mr. Justice Prakash Shrivastava

13 October, 2008*

MOHAMMAD SAGEER MANIHARI WALE

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Constitution, Article 226 - Demolition of shops while removing encroachment - Claim for rehabilitation on same place - Temporary lease in favour of petitioner expired prior to demolition - Respondents offered alternate site for rehabilitation - In the master plan area earmarked for parking of vehicles - Held - Rehabilitation at old place can not be granted as that would run counter to the interest of general public - Petition dismissed.

(Paras 8, 9 & 10)

क. संविधान, अनुच्छेद 226 - अतिक्रमण हटाने के समय दुकानों का गिराया जाना - उसी स्थान पर पुनर्वास के लिए दावा - याचिका के पक्ष में अस्थायी पट्टे का दुकान गिराने के पूर्व अवसान हो गया - प्रत्यर्थियों ने पुनर्वास के लिए वैकल्पिक स्थल प्रस्तावित किया - मास्टर प्लान में क्षेत्र वाहनों की पार्किंग के लिए चिन्हित किया गया - अभिनिर्धारित - पुराने स्थान पर पुनर्वास प्रदान नहीं किया जा सकता क्योंकि वह आम जनता के हित के विरुद्ध होगा - याचिका खारिज।

B. Natural Justice - Notice to remove encroachment by publication in newspaper - Held - Since petitioners have no right to continue at the same place and there was urgency to take action in public interest - Even if notice was given to petitioners, the result would have been same - Action of respondents not faulted on the ground of non-compliance of principles of natural justice.

(Para 20)

ख. नैसर्गिक न्याय - समाचार पत्र में प्रकाशन द्वारा अतिक्रमण हटाने की सूचना -

MOHAMMAD SAGEER MANIHARIWALE Vs. STATE OF M.P.

अभिनिर्धारित – चूंकि याचियों को एक ही स्थान पर बने रहने का कोई अधिकार नहीं है और लोक हित में कार्यवाही करने की अत्यावश्यकता थी – यदि याचियों को सूचनापत्र दिया भी जाता तो भी परिणाम वही हुआ होता – प्रत्यर्थियों का कृत्य नैसर्गिक न्याय के सिद्धांतों के अननुपालन के आधार पर त्रुटिपूर्ण नहीं।

C. Constitution, Article 226 - Damages - Can not be ascertained in exercise of writ jurisdiction. (Para 21)

ग. संविधान, अनुच्छेद 226 – नुकसानी – रिट अधिकारिता के प्रयोग में अभिनिश्चित नहीं की जा सकती।

Cases referred :

(2003) 9 SCC 731, (2000) 7 SCC 529, (2006) 7 SCC 558, (1993) 4 SCC 727, (1997) 3 SCC 169.

Ahadulla Usmani, for the petitioner.

P.N. Dubey, Dy.A.G., for the respondent Nos.1, 3 & 6.

Anshuman Singh, for the respondent No.5.

O R D E R

PRAKASH SHRIVASTAVA, J. :- This writ petition has been filed by the petitioner seeking a direction that 14 shopkeepers, to whom the petitioner is representing, should be immediately rehabilitated over sheet no.33, Khasra no.3360, area 0.30 hectares (10183 sqft.) known as 'Manihari Market' in Naya Bazar, Damoh, at the cost and expense of the State and they be granted permanent lease for that area and paid damages for the loss caused by the respondents on 17.2.2005.

2. The brief facts are that the petitioner is the President of Manihari Market, Damoh, and is stated to be representing 14 shopkeepers whose shops were situated at Manihari Market. On 17.2.2005 without any notice these shops were alleged to have been demolished by the respondents. The petitioner had earlier filed writ petition W.P.No.1440/2005 before this court aggrieved with the aforesaid action of the respondents. The writ petition was disposed of by order dated 6.4.2005 with a direction to the Commissioner, Sagar, to conduct an enquiry with regard to the rights of the petitioner and to ascertain whether the demolition was done in accordance with law. In pursuance to the direction of this court an enquiry was conducted by the Commissioner and the report dated 3.10.2005 was prepared. The petitioner being dissatisfied with the report has filed the present writ petition claiming the relief, mentioned above.

3. Learned counsel appearing for the petitioner submitted that the petitioners are in possession of the land in question since 1932 and they have been dispossessed on 17.2.2005 without giving any opportunity of hearing. He further submitted that the petitioners are entitled for permanent lease for running their shops at Manihari Market. He submitted that since the petitioners are running their business in the Manihari Market for last so many years, therefore, right has accrued in their favour.

4. Learned counsel appearing for the respondents have opposed the writ petition and submitted that the area in question has been marked for parking in the master plan, therefore, the petitioners cannot be granted lease for that area. He further submitted that the petitioners were encroachers on the land, therefore, they have rightly been removed. Placing reliance upon the resolution, annexure R/5-2, he submitted that the Municipality is ready to provide alternate site to the petitioner's where permanent shops have been constructed. He submitted that the petitioners were rightly removed from the Manihari Market and they had no right of hearing since they were removed in terms of the provisions of the lease deed, Transfer of Property Act and by giving a public notice.

5. The Commissioner in pursuance to the directions of this court contained in the order dated 6.4.05 passed in W.P.No.1440/2005 has conducted an enquiry and prepared the report dated 3.10.2005 which has been filed as annexure P/1 to the writ petition. The Commissioner, in the report, has reached to the following important conclusions :

i) the land at the place of Manihari Market is Nazul land which is registered in the name of Municipal Committee;

ii) between 1990-91 to 2001-02 temporary lease for one year was granted every year to 32 persons. Out of these, 22 persons paid ground rent upto 2001-02, two persons upto 1994-95, one upto 1991 and 7 upto 1991-92. Thereafter they have not paid the ground rent nor the temporary lease deed was renewed in their favour and thus the lease deed has automatically terminated.

iii) Manihari shopkeepers by constructing the temporary shops are doing the business since 1935.

iv) Manihari area is the main commercial area and this area has been earmarked for parking in the Damoh Master Plan and a decision has been taken to remove the encroachment due to the hindrances in traffic.

v) Alternate shops have been made available in the premises of Damoh Municipality and to join the alternative site with the main road, road has been constructed by demolishing two rooms. The Manihari shopkeepers and other shopkeepers sitting by the side of the road have vacated the disputed area by shifting their temporary shops to the alternative site. The Manihari shopkeepers while negotiation had willingly agreed to shift to the alternative site.

vi) There were hindrances in traffic on the main road due to the temporary shops of the Maniharis.

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vii) Neither notice nor opportunity of hearing was given to the Manihari shopkeepers before removing them. The procedure prescribed under section 248 of the M.P. Land Revenue Code was not followed. Neither the Nazul officer nor any competent revenue officer followed any lawful process in removing the encroachment, therefore, the process of removing the shops of Manihari shopkeepers was not in accordance with law.

viii) Though a public notice were published in Dainik Jagran newspaper on 14.2.2005 and 19.2.2005 for removing the encroachment but no individual cases were registered and individual notices to remove the encroachment were not given to the encroachers.

6. The aforesaid findings recorded by the Commissioner indicate that the 14 shopkeepers to whom the petitioner is stated to be representing, were temporary lease holders and neither did they deposit the ground rent after 2001-02 nor their temporary lease deed was renewed, therefore, they had no right to continue on the land in question. The Commissioner has recorded contradictory findings in respect of the process of removal adopted by the authorities. On one hand the Commissioner has recorded that the shopkeepers had willingly shifted their temporary shops to the alternate site by negotiation and on the other hand the Commissioner has concluded that lawful process as required under section 248 of the M.P. Land Revenue Code was not adopted for removing the encroachments and the encroachments have not been removed as per law.

7. The writ petition has been filed by the petitioner claiming a relief that the petitioner should be settled on the same place in the Manihari market where they were earlier doing their business for the last several years. The Commissioner in the report has noted clause 7 and 8 of the temporary lease which was granted to the petitioner which provides that :

"7. On expiry of the period of the lease, the lessee shall vacant the land and leave it and any trees or structures thereon in substantially the same condition as at the time that he entered on the lease.

8. As soon as the new site of the Bazar is finalized, the lessee will have to shift when ordered".

8. Under the aforesaid clause on the expiry of period of lease the petitioners were required to vacate the premises and leave it substantially in the same condition as it was existing in the time they had entered the lease. As per clause 8 even during the subsistence of the temporary lease, the temporary lease holder could be shifted as soon as the new site of Bazar was finalized, therefore, under the terms of the lease the petitioner had no right to continue in possession of the lease

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area on the termination of the lease. It is not in dispute that the temporary lease granted to the petitioner has already been terminated prior to 2002 and has not been renewed thereafter. Even as per section 108(2) of the Transfer of Property Act, the petitioner is liable to vacate the premises on the termination of the lease.

9. The respondents have placed on record the relevant extract of the master plan of Damoh city which shows that the area which was earlier used as Manihari market has been earmarked for creating a place for parking of the vehicles to solve the parking problem in the central area of the town. Before publishing the final master plan in terms of section 19 of the M.P. Nagar Tatha Gram Nivesh Adhiniyam, a draft master plan is required to be published under section 18 and objections invited. Thus, apparently, the master plan demarcating the area in question for the parking purpose has been prepared after hearing the objections. The need which has been noted by the Commissioner in his report and which is also reflected in the master plan, annexure R/5-1 is the need of the larger public, which has to be given precedence as against the individual interest of the petitioners.

10. In view of the aforesaid analysis the direction which has been sought by the petitioner in the writ petition relating to their rehabilitation at the old place of Manihari market cannot be granted since such a direction would run counter to the master plan prepared under section 18 of the Act and that would also run counter to the interest of the general public. Such a direction cannot be issued also for the reason that the petitioners have no legal and enforceable right to claim settlement at the old Manihari market place.

11. After removing the petitioner from the area in question they have been offered the alternative site in the premises of the Municipality where 23 permanent shops with the shutters have been constructed. A resolution passed by the Municipality, Damoh, to this effect has been placed on record as Annexure R/5-2.

12. The report of the Commissioner also indicates that the Damoh Municipality had given the proposal for allotment of the alternative site to the petitioner and the other similarly situated shopkeepers which was rejected by them as they were claiming the re-settlement at the old place at Manihari market. Learned counsel appearing for the respondent no.5 has fairly stated that the offer to settle the petitioners at the alternative site is still open and if they approach the respondent no.5 within a reasonable time of three months from the date of this order accepting that offer, then their case can still be considered. In view of the stand of the respondent no.5 no direction need be issued in respect of re-settlement of the petitioners at the alternative site.

13. Now, coming to the question whether the petitioners have been illegally dispossessed on 17.2.2005 from their earlier place of business at Manihari market, it is not in dispute that no individual notice was given to the petitioners nor any

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proceedings under section 248 of the M.P. Land Revenue Code were initiated to remove them but it is on record that the notice in the local newspaper was published on 14.2.2005 and 19.2.2005 in respect of removal of the encroachment. The fact the petitioners were forcibly dispossessed from their shops is in dispute since the Commissioner in the report has also recorded that the Manihari shopkeepers had willingly shifted their temporary shops to the alternate place by vacating the disputed place.

14. It is settled law that there is no straight jacket formula to apply the principle of natural justice. The Supreme Court in several judgments which have been noted hereinafter has settled that principles of natural justice can be excluded in following circumstances besides others :-

(i) right of hearing can be excluded in view of the subject matter and exceptional situation such as urgency to safeguard public health, safety or public interest etc.

(ii) When no prejudice is caused to person concerned.

(iii) When quashing of order on ground of breach of principles of natural justice will revive another order which itself is illegal.

(iv) Where on admitted or undisputed facts only one conclusion which has been drawn is possible.

15. The Supreme Court in the matter of *State of Maharashtra and others V. Jalgaon Municipal Council and others*, (2003) 9 SCC 731, has taken the view that :

32. The caution of associating rules of natural justice with the flavour of flexibilities would not permit the Courts applying different standards of procedural justice in different cases depending on the whims or personal philosophy of the decision maker. The basic principles remain the same; they are to be moulded in their application to suit the peculiar situations of a given case, for the variety and complexity of situations defies narration. That is flexibility. Some of the relevant factors which enter the judicial process of thinking for determining the extent of moulding the nature and scope of fair hearing and may reach to the extent of right to hearing being excluded are : (i) the nature of the subject-matter, and (ii) exceptional situations. Such exceptionality may be spelled out by (i) need to take urgent action for safeguarding public health or safety or public interest, (ii) the absence of legitimate exceptions, (iii) by refusal of remedies in discretion, (iv) doctrine of pleasure such as the power to dismiss an employee at pleasure, (v) express legislation. There is also a situation which Prof. Wade and Forsyth terms as "dubious doctrine" that right to a fair hearing

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may stand excluded where the Court forms an opinion that a hearing would make no difference. Utter caution is needed before bringing the last exception into play. (Administrative Law, *ibid*, at pp. 543-544).

16. In the matter of *Aligarh Muslim University and others V. Mansoor Ali Khan*, (2000) 7 SCC 529, the apex court while noting its earlier judgments has held that compliance of rule of natural justice is not mandatory if no prejudice is caused by holding that :

21. As pointed recently in *M.C.Mehta V. Union of India* (1999) 6 SCC 237 there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in *Gadde Venkateshwara Rao v. Govt. of A.P.*, AIR 1966 SC 828, it is not necessary to quash the order merely because of violation of principles of natural justice.

22. In *M. C. Mehta* it was pointed out that at one time, it was held in *Ridge v. Baldwin*, (1964) AC 40, that breach of principles of natural justice was in itself treated as prejudice and that no other 'de facto' prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In *S. L. Kapoor v. Jagmohan*, (1980) 4 SCC 379, Chinnappa Reddy, J. followed *Ridge v. Baldwin* and set aside the order of supersession of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were quashed on the ground of violation of principles of natural justice. But even in that case certain exceptions were laid down to which we shall presently refer.

23. Chinnappa Reddy, J. in *S. I. Kapoor's case* (1980) 4 SCC 379 laid two exceptions (at p. 395 of SCC) namely, "if upon admitted or indisputable facts only one conclusion was possible", then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

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24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In *K. L. Tripathi v. State Bank of India*, (1984) 1 SCC 43, Sabyasachi Mukharji, J. (as he then was) also laid down principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting Wade's Administrative Law (5th Ed. Pp. 472-475) as follows (Para 31) :

"..... it is not possible to lay down rigid rules as to when principles of natural justice are to apply, nor as their scope and extent There must have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with and so forth."

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in *State Bank of Patiala v. S. K. Sharma*, (1996) 3 SCC 364. In that case, the principle of 'prejudice' has been further elaborated. The same principle has been reiterated again in *Rajendra Singh v. State of M.P.*, (1996) 5 SCC 460

25. The 'useless formality' theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, - there has been considerable debate of the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in *M. C. Mehta*, (1999) 6 SCC 237, referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Singham, Megarry, J. and Staughton, L.J. etc. in various cases and also views expressed by leading writers like Profs, Garner, Craig, De Smith, Wade, D. H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the Court will be prejudging the issue. Some others have said, that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via-media rules. We do not think it necessary, in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case.

17. In the matter of *Om Prakash Mann V. Director of Education (Basic) and others*, (2006) 7 SCC 558, the Supreme Court has held that :

9. By now it is well-settled principle of law that the doctrines of principle of natural justice are not embodied rules. They cannot be applied in a straitjacket formula. To sustain the complaint of violation of the principle of natural justice one must establish that he has been prejudiced by non-observance of the principle of natural justice. As held by the High Court the appellant has not been able to show as to how he has been prejudiced by non-furnishing of the copy of the enquiry report. The appellant has filed a detailed appeal before the Appellate Authority, which was dismissed as noticed above. It is not his case that he has been deprived of making effective appeal for non-furnishing of copy of enquiry report. He has participated in the enquiry proceedings without any demur. It is undisputed that the appellant has been afforded enough opportunity and he has participated throughout the enquiry proceedings, he has been heard and allowed to make submission before the Enquiry Committee.

18. In *Managing Director, ECIL, Hyderabad and others V. B. Karunakar and others*, (1993) 4 SCC 727, the Supreme Court has held that :

30.(v) The next question to be answered is what is the effect on the order of punishment when the report of the Enquiry Officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee

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to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice.

19. Supreme Court in the matter of *Anamallai Club V. Government of T.N. and others*, (1997) 3 SCC 169, has held that :

10. Shri Sorabjee contended that the appellant is entitled to notice before the order of termination of grant made and so the action is bad in law and so the appellant is entitled to restitution of the property. We are not inclined to agree with him. The recourse to Article 226 of the Constitution, to establish title would not be proper remedy. In this case, we are not inclined to go into the question for the reason that the High Court has held that the writ petition is not maintainable. After termination of the licence by the Government under the Government Grants Act, the Estate Officer appointed under Section 3 cannot go into its correctness and adjudicate in the proceedings under Section 3 thereof. In our view, the Division Bench of the High Court is right in its finding. The Government having determined the licence, the Estate Officer cannot go into the question of legality of the termination of the licence under the Crown (Government) Grants Act to take further steps under Sections 4 and 5 of the Act. In that view of the situation in this case, we think that it is not necessary for the State Government to nominate the Estate Officer and for the Estate Officer to give notice under Sections 4 and 5. There is no need for the State to file a suit for eviction. But notice in compliance of principles of natural justice should have been given giving reasonable time of 10 or 15 days to vacate the premises and to deliver vacant and peaceful possession; thereafter, the Government would be free to resume possession. Since possession was already taken, though we are not approving of the manner in which the same was taken, we do not think that in this matter notice afresh needs to be given to the appellant. It may be open to the appellant to avail of any remedy available in law.

20. Thus, applying the law settled by these judgments in the facts of the present case it is found that the action of the respondents cannot be faulted on ground of non-compliance of principles of natural justice, since undisputedly petitioners have no right to continue in Manihari Market, there was urgency to take action in public interest and even if the notice was given to the petitioners, the result would have been the same.

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21. Now coming to the question of damages claimed by the petitioners, even assuming that the respondents by their act have caused damage to the shops and the property and the petitioners are entitled for damages then also damage cannot be ascertained in exercise of the writ jurisdiction and the proper remedy for the petitioner is to approach the appropriate forum and establish the claim in accordance with law.

22. In view of the aforesaid, I do not find any merit in the writ petition and the writ petition is accordingly dismissed. No orders as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 691

WRIT PETITION

Before Mr. Justice Prakash Shrivastava

14 October, 2008*

AJAY SINGH

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Land Revenue Code, M.P. (20 of 1959), Section 50 - *Suo motu revision* - *Reasonable time* - *Exercise of suo motu power by Collector after a lapse of 16 years* - *Held* - *Exercise of suo motu power of revision cannot be said to be within reasonable period* - *Order quashed.* (Para 19)

मू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50 - स्वप्रेरणा से पुनरीक्षण - युक्तियुक्त समय - कलेक्टर द्वारा स्वप्रेरणाधीन शक्ति का प्रयोग 16 वर्ष व्यतीत होने के बाद - अभिनिर्धारित - पुनरीक्षण की स्वप्रेरणाधीन शक्ति का प्रयोग युक्तियुक्त समय के भीतर होना नहीं कहा जा सकता - आदेश अभिखण्डित।

Cases referred :

1990 RN 77, 1996 RN 80, 1997 RN 219, 1999(1) MPLJ 179, 2000 RN 161, 2000(3) MPLJ 189, AIR 1969 SC 1297, 1998(1) MPWN 26.

R.P. Agarwal with S.K. Tiwari, for the petitioner.

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

O R D E R

PRAKASH SHRIVASTAVA, J. :-This writ petition has been filed against the order dated 14.11.2005 passed by the Collector in suo motu exercise of the revisional power under section 50(1) of the M.P. Land Revenue Code, 1959.

2. The facts as narrated in the writ petition are that the land ad measuring 0.405 hectares situated at Khasra no.106/ka-3 was settled in the name of the respondent no.3 by order dated 7.11.1988 under the provisions of M.P. Krishi

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Prayojan Ke Liye Upayog Ki Ja-Rahi Dakhal Rahit Bhoomi Par Bhumiswami Adhikaron Ka Pradan Kiya Jana (Vishesh Upabandh) Adhiniyam, 1984, (herein after referred to as 'the Act of 1984'). The petitioner by way of a registered sale deed dated 9.12.1998 purchased an area of one acre out of the aforesaid land from the respondent no.3. The petitioner started construction activity on the purchased land and he was issued show cause notice dated 9.3.2005 stating that the land has been sold to the petitioner in violation of the provisions of the Act of 1984 and requiring him to appear in the proceedings taken up by the Collector.

3. The petitioner appeared before the Collector and raised preliminary objection on 17.11.2005 vide annexure P/3 as regards the maintainability of the suo motu revision proceedings taken up by the Collector under section 50 of the M.P. Land Revenue Code on the ground that such proceedings cannot be taken up after a lapse of a reasonable time.

4. The Collector by the impugned order dated 14.11.2005 rejected the petitioner's preliminary objection and passed a final order setting aside the order of settlement dated 7.11.1988 which was made in favour of respondent no.3 Dharmendra Kumar. A further direction was issued to lodge an FIR with the police against the respondent no.3 since he had fraudulently sold the land to the petitioner. Aggrieved with this order present writ petition has been filed.

5. Learned counsel appearing for the petitioner submitted that the Collector could not have exercised the suo motu revisional power against the settlement order dated 7.11.1988 after a lapse of about more than 16 years. Such a power under section 50 of the Code is required to be exercised within a reasonable time.

6. He further submitted that the petitioner had raised a preliminary objection about limitation but while deciding the preliminary objection the Collector passed the final order on the same date without giving any further opportunity to the petitioner.

7. Learned counsel appearing for the respondents submitted that the Collector initiated the proceedings under section 50 of the Code immediately after getting the knowledge of the settlement order dated 7.11.1988, therefore, there was no delay from the date of knowledge. He further submitted that the order of the Collector is right since the initial settlement order dated 7.11.1988 in favour of the respondent no.3 Dharmendra Kumar itself was bad and also after settlement of the land the respondent no.3 in violation of section 3 and 4 of the Act of 1984 sold the land to the petitioner. Therefore, by a composite order the revisional authority has rightly set aside the order of the settlement dated 7.11.1988.

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

9. In the present case the suo motu revisional power has been exercised by the Collector under section 50 of the Code. Under section 50 revisional power can be exercised by the Collector either on his own motion or on the application

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made by any party. Section 50(1)(ii) prescribes the limitation of 60 days for making the application for revision by a party. For exercising suo motu revisional power by the Collector no limitation has been prescribed and sub section (1) of section 50 provides that such a power can be exercised by the Collector at any time.

10. The words "at any time" occurring in sub section (1) of section 50 would not mean the time in infinity but it has been settled that such a power of suo motu exercise of revision under section 50 is to be exercised within a reasonable time. The full bench of this court while considering the similar provisions contained in section 42 of the Ceiling on Agricultural Holdings Act, (MP), has examined this aspect of the matter of *Usha Devi (Smt.) and others V. State of M.P. and others*, 1990 RN 77, and has held as under:

17. We have, however, no hesitation in accepting the submission of Shri Bhargava that power of revision suo motu contemplated under section 42 of the Act can be, and has to be, exercised within a reasonable time and that is the meaning to be attributed to the term "at any time" used therein. Counsel's reliance on *State of Gujarat V. P. Raghav* (AIR 1969 SC 1297) in support of that contention is indeed well merited. There can be no dispute with that proposition because of the Constitutional imperative requiring statutory authorities to act reasonably and not arbitrarily. However, what should be the reasonable time for exercise of the power, as held in *P. Raghav* (supra), must be determined with reference to the facts and circumstances of the case and the nature of the order which is being revised.

11. In the matter of *Hamir Singh V. State of M.P. and others*, 1996 RN 80, this court has held as under :

1. A show cause notice issued by respondent no.3 on 4th of April, 1977 calling upon petitioner to show cause as to why the order of settlement be not quashed in suo motu revisional jurisdiction in the subject-matter of this writ petition. The show cause notice is Annexure-B. According to the petitioner, this is a cyclostyled notice. It further stated that no specific ground has been mentioned in the notice. The notice given after a lapse of more than six years from the date the premium was paid is being challenged. It is argued that lot of improvement has been made by the petitioners and they cannot be deprived of this property. There is merit in the contention of the learned counsel for the petitioner. This Court in *Mangilal Bohare and others V. State of M.P. and others*, decided on 24th of September, 1994, held in category terms that suo motu jurisdiction cannot be invoked after a long delay.

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Reliance was placed on a Full Bench decision of this Court reported as *Usha Devi V. State of M.P.*, 1990 RN 77. The full Bench has placed reliance on a decision given by the Supreme Court in the case reported as *State of Gujrat v. P.Raghav*, 1979 SC 1297.

2. In view of the above legal situation, I am of the view that the exercise of suo motu jurisdiction in this case after a lapse of more than six years is belated. This reason alone is enough to interfere in this writ petition.

12. This court again considered the same issue in the matter of *Pratap Singh and another V. State of M.P.*, 1997 RN 219, and has held as under :

"14. The powers of revision are provided in Section 50 of M.P. Land Revenue Code. While considering the scope of Section 50 in the case of *Rammulal* (supra), this Court held in para 5 of its judgment that the power of suo-motu revision must be exercised within a period of few months. The Divisional Bench in the case of *Rammulal* (supra), while considering the judgment in the case of *State of Gujarat* (supra), held that the powers of revision under section 65 and 211 of the Bombay Land Revenue Code are pari material with Section 50 of M.P. Land Revenue Code and held that the powers must be exercised within a reasonable time and the length of reasonable time must be determined by the facts of the case and the nature of the order which is being revised. Here the land was settled in the name of plaintiff in the year 1972 and suo motu powers were exercised in the year 1979. No reasons have been assigned nor any fact has been narrated in the written statement by the defendant to demonstrate that the facts and circumstances of the case were such that delay of 7 years in exercising the power suo motu revision was justified.

13. In the matter of *Sitaram V. State of M.P.*, 1999(1) MPLJ 179 this court has held as under :

6. In this context I may refer to the decision rendered in the case of *Usha Dev and others V. State of M.P. and others*, 1990 MPLJ 353, wherein this Court has held that there is no bar of limitation while exercising power under section 50 of the Code but the same has to be exercised within a reasonable time. I may quote with profit the following observations of their Lordships :-

"We have, however, no hesitation in accepting the submissions of Shri.Bhargava that power of revision suo motu contemplated under section 42 of the Act can be, and has to be, exercised within

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a reasonable time and that is the meaning to be attributed to the term "at any time" used therein. Counsel's reliance on *State of Gujarat V. P. Raghav*, AIR 1969 SC 1297, in support of that contention is indeed well-merited. There can be no dispute with that proposition because of the constitutional imperative requiring statutory authorities reasonably and not arbitrarily. However, what should be reasonable time for exercise of the power, as held in *P. Raghav* (supra), must be determined with reference to the facts and circumstances of the case and the nature of the order which is being revised."

7. From the aforesaid, it is categorically clear that the suo motu power has to be exercised within a reasonable time and what would be reasonable time has to be determined in individual cases. Similar view was taken in case of *Murarilal and others vs. State of M. P. and others*, 1994 MPLJ 378, I may hasten to add here that in the aforesaid case, their Lordships did not interfere with the order as jurisdiction was invoked after six years on the ground that effect of the aforesaid matter came to light before a short period of such invocation. Thus, the effect of the aforesaid decision is that exercise of power has to be done within a reasonable period. Shri Agrawal has also drawn my attention to the decision in the case of *Mohd Kavi vs. Hatma Bai Ibrahim*, 1998 (1) MPWN 37, wherein their Lordships of the Supreme Court dealing with section 50 of the Code, held that suo motu power of revision has to be exercised within a reasonable time and while so holding, their Lordships opined that even one year may be unreasonable. I may quote with profit:-

"This Court in connection with other statutory provisions in the case of *State of Gujrat vs. Patil Raghavanatha*, 1969 (2) SCC 187, and in the case of *Ramchand vs. Union of India*, 1994 (1) SCC 44 has impressed that where no time limit has prescribed for exercise of a power under a statute. It does not mean that it can be exercised at any time : such power has to be exercised within a reasonable time. We are satisfied that in the facts and circumstances of the case of the present case, the suo motu power under section 84-C of the Act was not exercised by the Mamlatdar within a reasonable time."

14. In the matter of *Ravi Narayan V. State of M.P. and others*, 2000 RN 161, this court while considering the words "at any time" used in section 50 held that :

22. The words 'at any time' used either in section 50 or in section 51 for exercise of the suo motu powers would ordinarily

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mean that question of limitation would not arise. But the rule of prudence says that such power should be exercised within reasonable time. The principle of interpretation says that if the plain words are given their plain meaning and they lead to absurdity then such interpretation should be avoided. In all matters referred above, Supreme Court and this Court considering the totality of the circumstances and the facts before the said Courts, came to the conclusion that the words 'at any time' would not mean an indefinite period. In some of the cases period of months and in some of the cases period of one year was considered to be belated.

23. When the Courts are required to consider whether particular period is a reasonable period for exercising the suo motu revisional powers or sue motu review powers then the Courts are guided not only by the provisions of law or rule of prudence but are also guided by the principles of equity, fair play and justice. The Courts cannot ignore the fact that public at large deposes confidence in the Judicial system and they wish to say that some end should be brought to the litigation. Though from the plain language of section 51 it does not appear that length of time would curtail or curb the powers of the authority to review its order but by the Judicial dictum it has been circumscribed. The words 'at any time' in view of the judgments of the Supreme Court, this Court and other Courts will have to mean 'within reasonable time'. The period in which powers can be exercised should be reasonable period. A man is entitled to feel that after a final order in his favour he is free and is entitled to use and enjoy his property and chattel. If it enters in his mind that some authority on some day may exercise suo motu review or revisional powers then it would be almost impossible for such person to enjoy the property which is in his possession. There must be some end to the litigation. If the things are kept in suspension and no finality is attached even to a final order it is going to shatter the public faith in the system. The law nowhere provides that the things may be kept in animated suspension so that someone or the other whenever wants transfusion of life into the suspended article may bring it back to life. The law is to be respected and justice is to be done by those who have authority to dispense justice. One cannot forget that interpretation of the law should be in accordance with equity, fair play and justice. At some point somebody is entitled to say that enough is enough. Somebody must permit the deads to remain buried in their graves.

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15. In the matter of *Ram Bharosi Sharma V. State of M.P. and others*, 2002(3) MPLJ 189, this court held as under :

8. That being so there is some force in the arguments of learned Counsel for the petitioner it cannot be said that Commissioner, has exercised suo motu powers. He was directed to make some enquiry. The question of limitation was considered by this Court when powers of revision were exercised by the Commissioner, in the case of *Sardar Singh* (supra) and after considering the provision of section 50 it has been held that the suo motu powers of revision cannot be exercised after a lapse of a period of 7 years, placing reliance of judgment of Supreme Court in the case of *State of Gujarat vs. Patel Raghav Natha and others*; AIR 1969 SC 1297 this Court in the said case has held that the power cannot be exercised after a lapse of 7 years powers has to be exercised within a reasonable time. The aforesaid legal position is further confirmed by this Court in the case of *Pratap Singh and others vs. State of M. P.*, 1997 Revenue Nirnaya 219 wherein again considering the powers of suo motu revision under section 50 placing reliance on the judgment of Supreme Court in the case of *State of Gujarat* (supra) it has been held that the powers of suo motu revision when not exercised within a reasonable time, the right which has accrued to a person cannot be withdrawn after such a belated stage. The Supreme Court also while considering power of suo motu revision in the matters of Bombay Tenancy and Agricultural Lands Act, 1976 in the case of *Mohamad Kavi* (supra), has held that when no time limit is prescribed under the statute it should be exercised within a reasonable limit. Considering the legal position in the light of the aforesaid judgment there cannot be any doubt that in the instant case also exercise of the powers of revision has been done after a lapse of 7 years, accordingly the proceedings cannot be permitted to continue the show cause notice issued, proceedings instituted by the respondents vide Annexure-P/1 are unsustainable under the law in view of the well settled legal principle.

16. The Supreme Court in the matter of *State of Gujarat V. Patel Raghav Natha*, AIR 1969 SC 1297, while considering the similar provisions relating to the revisional power contained in section 211 of the Bombay Land Revenue Code has held as under :

11. The question arises whether the Commissioner can revise an order made under Section 65 at any time. It is true that there is no period of limitation prescribed under Section 211, but it seems to us plain that this power must be exercised in reasonable time and the length of the reasonable time must be determined of the facts of the case and the nature of the order which is being revised.

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12. It seems to us that Section 65 itself indicates the length of the reasonable time within which the Commissioner must act under Section 211. Under Section 65 of the Code if the Collector does not inform the applicant of his decision on the application within a period of three months the permission applied for shall be deemed to have been granted. This section shows that a period of three months is considered ample for the Collector to make up his mind and beyond that the legislature thinks that the matter is so urgent that permission shall be deemed to have been granted. Reading Sections 211 and 65 together it seems to us that the Commissioner must exercise his revisional powers within a few months of the order of the Collector. This is reasonable time because after the grant of the permission for building purposes the occupant is likely to spend money on starting building operations at least within a few months from the date of the permission. In this case the Commissioner set aside the order of the Collector on October 12, 1961, i. e., more than a year after the order, and it seems to us that this order was passed too late.

17. The Supreme Court in the matter of *Mohamad Kavi V. Fatimbai Ibrahim*, 1998(1) MPWN 26, while considering the similar issue of reasonable time for exercise of suo motu power held that even one year time may be unreasonable. The view of the Supreme Court in that judgment has held as under :

"Section 84-C of the Act does not prescribe any time for initiation of the proceeding. But in view of the settled position by several judgments of this Court that whether a power is vested in a statutory authority without prescribing any time-limit, such power should be exercised within a reasonable time. In the present case the transfer took place as early as in the year 1972 and suo motu enquiry was started by the Mamlatdar in Sept., 1973. If sale deeds are declared to be invalid the appellant is likely to suffer irreparable injury, because he has made investments after the aforesaid purchase. In this connection, on behalf of the appellant reliance was placed on a judgment of Justice S.B. Majumdar (as he then was in the High Court of Gujarat) in *State of Gujarat V. Jethmal Bhagwandas Shah* (Spe.W.A.No.2770 of 1979) disposed of on 1.3.1990, where in connection with section 84-C itself it was said that the power under the aforesaid section should be exercised within a reasonable time. This court in connection with other statutory provisions, in the case of *State of Gujarat V. Patil Raghav Natha* [(1969)2 SCC 187] and in the case of *Ram Chand V. Union of India* [(1994) 1 SCC 44] has impressed that where no time-limit is prescribed for exercise of a power under a statute

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it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time. We are satisfied that in the facts and circumstances of the present case, the suo motu power under section 84-C of the Act was not exercised by the Mamlatdar within a reasonable time".

18. Therefore, it is the settled law that when no period of limitation is prescribed the power is to be exercised within a reasonable time and the length of the reasonable time depends on the facts of each case.

19. Now, coming to the facts of the present case. The settlement order in favour of the respondent no.3 under the Act of 1984 was passed on 7.11.1988. After the land was settled in the name of respondent no.3 he remained the owner of the land exercising all the rights as owner till 1998 when he sold a part of the settled land in favour of the petitioner by way of registered sale deed. The petitioner acted bonafidely and purchased the land since the land was settled in the name of the respondent no.3 almost 10 years prior to the purchase and there was no clout on the title of the respondent no.3. After purchasing the land, the petitioner also raised the construction on the land. The Collector took up the matter against the order dated 7.11.1988 in suo motu exercise of the revisional powers by issuing the show cause notice dated 9.3.2005, which was after a lapse of more than 16 years. The exercise of the revisional power in aforesaid circumstances after a lapse of 16 years cannot be held to be the exercise of power within a reasonable time. With the lapse of time the Collector had lost the jurisdiction to initiate the proceedings in suo motu exercise of powers under section 50 of the Act, therefore, the impugned order of the Collector so far as it relates to the exercise of suo motu revisional power against the order dated 7.11.1988 cannot be sustained and is hereby quashed.

20. It is further submitted by the learned counsel appearing for the State that the settlement made in favour of the respondent no.3 is also liable to be cancelled since he has sold the land to the petitioner in violation of the provisions contained in section 3 and 4 of the Act of 1984. If the respondents no.3 has violated any condition of the Act after initial settlement made in 1988 then that would furnish a ground for initiating separate proceeding against the respondent no.3 and the official respondents will be at liberty to initiate such proceedings against the respondent no.3 for alleged violation in accordance with law and take such action against the respondent no.3 as permissible in law. Such an action, if taken against the respondent no.3, would be without prejudice to any observations made in this order.

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

Petition disposed of.

ANIL AGRAWAL Vs. UNION OF INDIA

I.L.R. [2009] M. P., 700

WRIT PETITION

Before Mr. Justice Sanjay Yadav

23 October, 2008*

ANIL AGRAWAL

... Petitioner

Vs.

UNION OF INDIA & ors.

... Respondents

A. Constitution, Article 226 - Judicial Review - Natural Justice - Instrumentalities of State are under obligation to discharge their functions in a fair and just manner, even when such discharge of duty is an administrative or a quasi-judicial power. (Para 10)

क. संविधान, अनुच्छेद 226 - न्यायिक पुनर्विलोकन - नैसर्गिक न्याय - राज्य के माध्यम उनके कार्यों का निर्वहन ऋजु और न्यायसंगत ढंग में करने के आभार के अधीन हैं, जब कर्तव्य का ऐसा निर्वहन प्रशासनिक या अर्धन्यायिक शक्ति भी हो।

B. Constitution, Article 226 - Allotment of Kerosene/LDO Dealership - Petitioner was selected and letter of intent was issued for Kerosene/LDO dealership - Subsequently, selection and letter of intent were cancelled - Cancellation was based on complaints - Complaints were investigated by the Director General, Anti Adulteration Cell, Govt. of India - Cancellation order challenged in Writ Petition - Held - Director General, Anti Adulteration Cell was competent to recommend the cancellation of selection of dealers - After receiving the orders about abolition of Dealers Selection Board, the Board ought to have rescued itself from the entire selection process but it proceeded with selection process and even declared a panel of selection - Recommendations by a non-existing body of persons cannot be termed as recommendations in the eyes of law - No mandamus can be issued for implementation of such recommendations - Petition dismissed. (Para 14)

ख. संविधान, अनुच्छेद 226 - केरोसीन/एलडीओ डीलरशिप - केरोसीन/एलडीओ डीलरशिप के लिए याचिका का चयन किया गया और लेटर ऑफ इन्टेंट जारी किया गया - तत्पश्चात् चयन और लेटर ऑफ इन्टेंट रद्द किये गये - रद्दकरण शिकायतों पर आधारित था - शिकायतों की महानिदेशक, अपमिश्रण निरोध प्रकोष्ठ, भारत सरकार द्वारा जाँच की गई - रद्दकरण आदेश को रिट याचिका में चुनौती दी गई - अभिनिर्धारित - महानिदेशक, अपमिश्रण निरोध प्रकोष्ठ डीलरों के चयन के रद्दकरण की अनुशंसा करने के लिए सक्षम था - डीलर चयन बोर्ड के समापन के बारे में आदेश प्राप्त करने के बाद बोर्ड को मन्त्र चयन प्रक्रिया से स्वयं को बचाना चाहिए था किन्तु उसने चयन प्रक्रिया में आगे कार्यवाही की और चयन का एक पैनल भी घोषित किया - व्यक्तियों के अस्तित्वहीन निकाय द्वारा अनुशंसाएँ विधि की दृष्टि में अनुशंसाएँ नहीं मानी जा सकतीं - ऐसी अनुशंसाओं को लागू करने के लिए कोई परमादेश जारी नहीं किया जा सकता - याचिका खारिज।

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Cases referred :

AIR 2003 SC 2562, AIR 1970 SC 150, AIR 1969 SC 198.

Ajay Mishra with Deepti Suhane, for the petitioner.

Mohan Sousarkar, for the respondents No.1 & 3.

Alok Aradhe with Jaideep Sirpurkar, for the respondent No.2.

O R D E R

SANJAY YADAV, J. :—Controversy which crops up for consideration in the present writ petition under Article 226/227 of the constitution of India falls within a narrow compass as to whether the respondents are justified in their action of cancelling the letter of Intent for Kerosene/LDO dealership.

2. The relevant facts for proper appreciation briefly are that in response to the advertisement for allotment of Kerosene/LDO dealership at Panchsheel Nagar, Bhopal, the petitioner applied for the allotment in the proforma prescribed by the respondent oil company, respondent no.2. The petitioner was interviewed by the Dealer Selection Board on 8.5.2002 and was placed at serial no.1 of the selection list dated 9.5.2002. A letter of Intent dated 21.6.2002 was issued to the effect that the petitioner shall make all the financial and other arrangements for operating the Kerosene/LDO dealership within six months. It is the contention of the petitioner that in response to the said letter of intent he purchased a land admeasuring 0.058 hectares (580.21) sq.mts at village Borda Teh.Huzur District Bhopal vide registered sale deed dated 6.7.2002, obtained consent letters from State Bank of Indore, Bhopal and State Bank of India, Govindpura, Bhopal for grant of financial assistance and proceeded to seek no objection certificate for establishing a godown and dealership from the District Authorities, Dy. Director, Industrial Health and Safety and from Janpad Panchayat Fanta. However, by letter dated 13.8.2002, Annexure P/17, the petitioner was informed about the cancellation of selection and cancellation of letter of Intent in respect of proposed dealership. This intimation was in pursuance to a policy decision of Government of India, Ministry of Petroleum and Natural Gas, Communicated vide letter dated 9.8.2002; whereof all public sector oil companies were directed to cancel all the Petrol Pumps/LPG Distributionships and Kerosene Dealerships made under recommendations of Dealer Selection Boards since 1.1.2000. This letter i.e. 9.8.2002 was however, axed by the Supreme Court in case of *Omkar Lal Bajaj etc V. Union of India*: AIR 2003 SC 2562. And a challenge put forth by the petitioner to letter dated 13.8.2002 in W.P.No.4590/2002 resulted in its disposal on the same line as *Omkarlal Bajaj* (supra) vide order dated 8.1.2003. In pursuant thereof the respondent no.2 vide letter dated 28.1.2003, Annexure P/33, revoked the communication dated 13.8.2002 and advised the petitioner to proceed further in time with LOI for the proposed dealership. This was however without prejudice to any other right that the corporation may have against the petitioner in any respect whatsoever. In sequel thereof respondent by letter dated 27.3.2003

ANIL AGRAWAL Vs. UNION OF INDIA

(Annexure P-22) addressed to Collector, Bhopal was requested to issue whole sale Kerosene/licence to the petitioner.

3. On 23.5.2003, Annexure P/1, the petitioner was informed about the cancellation of selection and that of letter of Intent dated 21.6.2001. This cancellation allegedly was based on the complaint received from second empanelled candidate Shri Rajeev Agrawal. The complaints were investigated by the Director General, Anti Adulteration Cell Government of India, Ministry of Petroleum and Natural Gas, who observed that the selection of the petitioner for the said dealership was not proper.

4. Assailing the order, Annexure P/1, and questioning the authority of the Director General, Anti Adulteration Cell, in recommending cancellation of selection as contained in Annexure R-3, the learned senior counsel makes the following submission.

5. It is urged that, the order impugned suffers from the vice of arbitrariness. Because, being an instrumentality of the State, it was incumbent upon the Director General, Anti Adulteration cell to have acted in a fair and just manner. Pointing out from the contents of the observations contained in Annexure R/3, it is contended by the learned counsel for the petitioner that the observations recorded by the Director General were subjective in nature and contrary to the objective assessment made by the Dealership Selection Board and the observations were at the instance of the complainant who was related to a highly placed office bearer of a political party.

6. Secondly, it is contended that no opportunity of hearing was afforded to the petitioner before cancelling the letter of Intent and the entire enquiry was conducted behind the back of the petitioner and is therefore, bad in the eyes of law and is liable to be quashed.

7. The respondents on their turn have supported the action of cancellation of letter Intent and the cancellation of merit panel, which as contended was prepared despite of abolition of dealership selection Board on 9.5.2002 and a further decision to initiate fresh process for selection.

8. Considered the rival submissions put forth, by the learned counsel for the parties and perused the record.

9. Taking up the issue as to competency of the Director General Anti Adulteration Cell to recommend the cancellation of selection of dealers, the learned counsel appearing for respondent no.2 brings on record an office memorandum No.P-20030/1/2001-PP dated 20.3.2001 whereby a Director General, Anti Adulteration Cell in the Oil Co-ordination Committee (Joint Secretary level) under the Ministry of Petroleum and Natural Gas was appointed. And another letter no P-43011/24/2000-10C dated 2.5.2001 has been brought on record whereof in paragraph 2 and 3 it is stipulated:

ANIL AGRAWAL Vs. UNION OF INDIA

"2. All complaints against the DSBs or the dealer selection process received by the Ministry or complaints against the Chairman and/or Members of DSBs received by the Ministry and the oil marketing companies will be forwarded to the office of Director General, Anti Adulteration Cell. Director General Anti Adulteration Cell, will then inquire into the complaints that are against the Chairpersons of DSBs or against the officials of the oil companies. The complaints against the empanelled candidates or against the process as such, received by the oil marketing companies and such complaints received by the Director General, Anti Adulteration Cell will be forwarded by the Office of Director General, Anti Adulteration Cell to the oil marketing companies, to be dealt with in terms of procedure laid down in the guidelines circulated by this Ministry vide letter No.P-39012/1/99-IOC dated 9.10.2000.

3. The oil marketing companies after receipt of the complaints from the Director General, Anti Adulteration Cell will take action in terms of the guidelines and then send the report to Director General, Anti Adulteration Cell. As regards the inquiry report submitted by the Director General, Anti Adulteration Cell against the Chairperson and Members of DSBs, a decision of a Ministry would be conveyed to the concerned oil marketing company for compliance."

The above stipulations thus negatives the contentions of the petitioner that it is beyond the preview of Director General, Anti Adulteration Cell to recommend the cancellations.

10. In respect of submissions regarding arbitrariness and fair play on the part of functionaries of the State. It has, in the considered opinion of this Court, come to be settled as law, that the instrumentalities of the State are under obligation to discharge their functions in a fair and just manner, even when such discharge of duty is an administrative power or a quasi-judicial power, because of the prevalence of rule of law. For an authority, please see *A.K.Kraipak Vs. Union of India*: AIR 1970 SC 150, paragraph 13. Regarding the rules of natural justice, it has been held by the Apex Court in *Suresh Koshy George V. University of Kerala*: AIR 1969 SC 198, that they are not embodied rules. Their lordships were pleased to observe further 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 enquiry is held and the Constitution of the Tribunal or body of persons appointed for 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.

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11. In the case at hand, it is observed that by virtue of letter dated 21.6.2002; Annexure P/5, it was categorically made clear to the petitioner that the letter of Intent be not construed as a firm offer of dealership which can be confirmed/formalised only by an appointment letter followed by the signing of Standard Dealership Agreement. Thus there is no concluded contract. It is further observed that the Government of India, Ministry of Petroleum and Natural Gas communicated vide letter dated 2.8.2002 the policy decision of the cancellation of all the petrol pumps/CPG Distributionship and Kerosene Dealerships made under recommendations of Dealer Selection Board since 1.1.2000. And the fact that Government of India by letter dated 9.5.2002 informed all the Dealers Selection Board that no Board is in existence. The issue therefore, which looms large is whether, it was within the competence of District Selection Board to have prepared a merit list on 9.5.2002; though the Board was aware of this fact.

12. The petitioner has disputed the fact that there was a due intimation of the decision of cancellation and it is contended that the selection had completed before such cancellation. The petitioner denies the receiving of information of dissolution of the Board on 9.5.2002 in paragraph 2(i) of its rejoinder dated 11.4.2004.

13. The respondents have however, frescoed a different picture. The Government of India, Ministry of Petroleum and Natural Gas, respondent no.1, in its reply while referring to the facts of complaint that the ministry had abolished the DSBs on 9.5.2002, but DSB Bhopal-I continued to function till evening of 9.5.2002 when the result were announced at 5.30 PM, it is contended in paragraph 8 and 9 of the return that the complaint were got examined through Director General Anti Adulteration Cell whereupon considerable justification in the complaint was observed. The respondent no.2, i.e. Indian Oil Corporation Ltd, categorically states that in spite of the fact that the fax of abolition of Board was received by the Board headed by Shri K.C.Pare, President, DSB continued to conduct the interviews and prepared a merit list on 9.5.2002. It is contended in paragraph 2 and 3 of the return in the following terms:

"2. Large number of complaints were received in respect of various Dealers Selection Boards and the allotments were subjected to judicial scrutiny before the Apex Court. It is submitted that the Government of India abolished all the Dealers Selection Boards, keeping in view the irregularities committed by them. The Government of India by letter dated 9th May 2002 informed all the Dealers Selection Boards that no Board is in existence and the fax was also received by the Board at Bhopal on 9th May, 2002 at 12.00 noon.

3. In spite of the fact that the fax was received by the Board headed by Shri Pare and it continued to conduct the interviews, prepared a merit list on 9.5.2002. The Dealers

ANIL AGRAWAL Vs UNION OF INDIA

Selection Board could not have done so specially in view of the fact that it was non-existence on the date the interviews took place. The Board placed the petitioner at Serial No.1, Shri Rajiv Agrawal at Serial No.2 and Shri M.P.S. Bundela at Serial No.3 in the order of merit. A copy of the recommendations of the Dealers Selection Board dated 9.5.2002 is enclosed as Annexure R.1."

Again, in paragraph 14 of the return, it is averred by respondent no.2:

"that in case of selection made by the Dealers Selection Board was unlawful as the Board was informed by the Ministry on 9th May 2002 at 12 noon that the Board had stood abolished. However, it proceeded with the selection process illegally for the reasons best known to it and the merit list was prepared. The merit list which was prepared by the authority not competent to do so has got no meaning, and therefore, the Ministry has rightly conveyed the recommendations of the AAC directing fresh selection in the matter for the location at Panchsheel Nagar, Bhopal."

14. The aforementioned averments in a return supported by an affidavit leaves no iota of doubt that the abolition of Dealership Selection Board Bhopal-I, by letter dated 9.5.2002 was well within the knowledge of its President and that being so, the propriety demands that the Board ought have recused itself from the entire Selection Process, but as evident from record, it proceeded with selection process and even declared a panel on 9.5.2002 which, in the considered opinion of this Court, cannot be termed as valid. Because any recommendation by a non existing body of persons cannot be termed as recommendations in the eyes of law. For a recommendations to be valid, they must emanate from a body duly constituted under law. In the present case since the existence of Board, which recommended and prepared a merit list on 9.5.2002, had no sanction of law, no mandamus can be issued for implementation of so called recommendations. In view of this all other contentions like arbitrariness and the failure to observe Rule of Natural Justice dissolves in thin air.

15. Having thus considered, this Court does not find any substance in the petition. In the result the petition fails and is hereby dismissed. The respondents are at liberty to proceed with fresh selection as proposed vide letter dated 23.4.2003, Annexure R-1/3 in accordance with law. However, no costs.

Petition dismissed.

SURESH KUMAR Vs. BALURAM

I.L.R. [2009] M. P., 706.

WRIT PETITION*Before Mr. Justice R.S. Garg & Mr. Justice S.K. Seth*

3 November, 2008*

SURESH KUMAR & ors.

... Petitioners

Vs.**BALURAM (DECEASED) THROUGH L.RS. & anr.**

... Respondents

A. Civil Procedure Code (5 of 1908), Order 22 Rule 9 - Abatement - Sub-tenant - Sub-tenant not a necessary party in a suit for eviction against original tenant - Firm joined as defendant in its capacity as sub-tenant - On death of one or all of the partners, the suit would not abate against the firm.

(Para 7)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 22 नियम 9 - उपशमन - उपभाड़ेदार - मूल भाड़ेदार के विरुद्ध बेदखली के वाद में उपभाड़ेदार आवश्यक पक्षकार नहीं - फर्म को उपभाड़ेदार की हैसियत से प्रतिवादी के रूप में जोड़ा गया था - भागीदारों में से एक या सभी की मृत्यु पर फर्म के विरुद्ध वाद का उपशमन नहीं होगा।

B. Civil Procedure Code (5 of 1908), Order 30 Rule 4 - Right of suit on death of partner - Where two or more persons may sue or be sued in the name of a firm, if any such person dies during the pendency of the suit, it shall not be necessary to join the legal representatives of deceased as a party to suit.

(Para 9)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 30 नियम 4 - भागीदार की मृत्यु पर वाद का अधिकार - जहाँ दो या अधिक व्यक्ति फर्म के नाम से वाद ला सकते हों या उन पर वाद लाया जा सकता हो वहाँ यदि वाद के लम्बित रहने के दौरान ऐसे किसी व्यक्ति की मृत्यु हो जाती है तो यह आवश्यक नहीं होगा कि मृतक के विधिक प्रतिनिधियों को वाद के पक्षकार के रूप में जोड़ा जाए।

V.K. Jain, for the petitioners.

Yogesh Mittal, for the L.Rs. of respondent No.1.

None, for the respondent No.2.

ORDER

The Order of the Court was delivered by **R.S. GARG, J.** :- The original respondent No.1 Baluram s/o Nathulal Goyal filed a civil suit against Motilal s/o Prahladji Agrawal and M/s Ramdhan Kisanlal with the allegation that the original defendant No.1 Motilal was inducted as a tenant but during the tenancy, he sub let part of the suit property to original defendant No.2. It is worth noticing that the suit was filed in the year 1961 and is still pending.

2. It is also to be noted that the original defendant No.2 M/s Ramdhan Kisanlal was joined as a partnership firm with its two partners viz. Ramdhan s/o Kishorilal and Kisanlal s/o Ramnath Agrawal. Somewhere in January, 1997, one Suresh Kumar filed an application with a submission that Ramdhan s/o Kishorilal had expired long back, his legal representatives have not been brought on record, the suit had abated and in case the Court finds that the suit had not abated, then a direction be issued to the plaintiff to correct the record.

3. On 29.9.2003, the plaintiff moved an application under Order 22 Rule 4 CPC for substitution of the legal representatives. However, separate applications under Order 22 Rule 9 CPC for setting aside abatement and under Section 5 of the Limitation Act for condonation of delay were not filed. On 10.12.2003, a consolidated application under Order 22 Rule 9 CPC and Section 5 of the Limitation Act came to be filed. The applications were opposed tooth and nail. However, by impugned order dated 7.7.2007, the learned trial Court allowed the application, therefore, the legal representatives of Ramdhan s/o Kishorilal have come to this Court under Article 227 of the Constitution of India.

4. Shri Jain, learned counsel for the petitioner submitted that as appropriate application was not filed up to the year 1997, one of the legal representatives filed an application before the Court to bring the fact of death to the notice of the Court and again for a period of six years, the plaintiff did not make an application for substitution of the legal representatives. According to Shri Jain the suit had abated and the applications were miserably misconceived. The submission is that the trial Court could not have granted the application.

5. Shri Yogesh Mittal, learned counsel for the respondent No.1 (since deceased) has submitted that defendant No.2 M/s Ramdhan Kisanlal was a partnership firm and it is settled law that on the death of a partner, the suit against the firm would not abate. His further submission is that M/s Ramdhan Kisanlal was not a tenant in the property but was added as a party defendant with an allegation that they were inducted as sub tenant in the property. His further submission is that joinder or non-joinder of sub tenant to the suit proceeding would be within the discretion of the plaintiff, the plaintiff being the dominus litis.

6. We have heard the parties.

7. It is settled law that a sub tenant would not be a necessary party in a suit for eviction against the original tenant. The sub tenant may be joined as a formal party to the proceeding so that the future complications are avoided. In the present case as M/s Ramdhan Kisanlal was a partnership firm and as it was joined as a party defendant in its capacity as sub tenant, we do not think that on the death of one or all of the partners, the suit would abate against the firm.

8. Order 30 Rule 4 of the Code of Civil Procedure reads as under:-

(4) Right of suit on death of partner -(1)Notwithstanding

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anything contained in section 45 of the Indian Contract Act, 1872 (9 of 1872), where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have -

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

9. A fair understanding of reading of the rule would make it clear that where two or more persons may sue or be sued in the name of a firm under the provisions of other rules of Order 30 and any such persons die, during the pendency of any suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit.

10. Shri Jain, however, submitted that if both the partners of the firm die then there would be no representation of the firm, which was otherwise also an unregistered firm, and in such a case, the plaintiff was obliged to make application for substitution of the legal representatives of the deceased.

11. A perusal of sub rule (2) of Rule 4 of Order 30 of the CPC would make it clear that nothing in sub rule (1) of Rule 4 shall limit or otherwise affect any right, which the legal representatives of the deceased may have to apply to be made a party to the suit. If such is the law, then the legal representatives of the deceased partner could make an application for their substitution and in such a case, the Court could allow the application and permit the legal representatives of deceased partners to be brought on record.

12. It would be trite to say that once a decree is passed against a tenant, then whether a sub tenant was a party or not to the proceeding, he would be bound by the decree.

13. After hearing learned counsel for the parties, we are unable to hold that the order passed by the learned Court below calls for any interference.

14. The petition is dismissed with cost quantified at Rs.2,500/- to be deposited by the petitioner with the trial Court within three weeks from today. After the cost is deposited with the trial Court, it shall be paid to the plaintiff through his legal representatives.

15. The trial Court is hereby directed to conclude the proceedings in the suit within a period of six months from the date of production of copy of this order.

Petition dismissed.

I.L.R. [2009] M. P., 709

WRIT PETITION

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

4 November, 2008*

LAXMINARAYAN DIXIT

... Petitioner

Vs.

UNION OF INDIA & ors.

... Respondents

Service Law - Departmental enquiry and recovery of rent - Petitioner after his transfer got relieved on the strength of forged vacation report of Govt. accommodation - Petitioner was punished in D.E. - Initiation of realization of rent from the salary of petitioner - Action challenged on ground that demand of rent amounts to double jeopardy - Held - Payment of rent was not subject matter of D.E. - Realization of rent is independent liability from submitting forged vacation report - He cannot escape liability to pay rent - Petition dismissed.

(Para 5)

सेवा विधि - विभागीय जाँच और किराये की वसूली - याची उसके स्थानांतरण के बाद शासकीय आवास रिक्त करने की कूटरचित रिपोर्ट के आधार पर कार्यमुक्त हुआ - याची को विभागीय जाँच में दण्डित किया गया - याची के वेतन से किराये की वसूली प्रारम्भ - कार्यवाही को इस आधार पर चुनौती दी गई कि किराये की माँग दोहरे दण्ड की कोटि में आती है - अभिनिर्धारित - किराये की अदायगी विभागीय जाँच की विषयवस्तु नहीं थी - किराये की वसूली आवास रिक्त करने की कूटरचित रिपोर्ट प्रस्तुत करने के दायित्व से स्वतंत्र है - वह किराया अदा करने के दायित्व से नहीं बच सकता - याचिका खारिज।

Akash Choudhary, for the petitioner.

Anoop Nair, for the respondents.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :- The writ petition has been filed by the petitioner Laxminarayan Dixit assailing the Order Annexure P/1 passed by the Central Administrative Tribunal, Jabalpur in O.A.No.922/04 on 6.5.05.

2. The facts in short are that Laxminarayan Dixit was posted as Senior Store Keeper at C.O.D. Kanpur on 13.4.98. He was allotted Government accommodation i.e CPWD quarter at Gulmohar Vihar, Kanpur. He occupied the quarter on 19.12.98. He was then transferred to C.O.D. Jabalpur from Kanpur. He was relieved from Kanpur on 6.10.01 and joined at Jabalpur thereafter. It is alleged that he did not surrender the CPWD quarter at Kanpur and instead submitted a forged vacation report to secure relieving from C.O.D. Kanpur and got relieved. The case set-up by the petitioner was that he vacated the quarter and produced the vacation report from the Office of Assistant Engineer, CPWD, Kanpur. However, Shri M.K.Gupta,

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Junior Engineer Kanpur had given a letter dated 4.2.02 under his signature that vacation report is forged and does not bear his signature. Correspondence was entered into with the authorities and C.O.D. at Jabalpur. They advised the petitioner to obtain the vacation certificate and settle the matter otherwise he would be liable to pay the rent and interest or market rent. As no attention was paid by the employee, the CPWD issued a letter to the Commandant, C.O.D. Jabalpur for recovery of rent with effect from September, 2001 onwards at normal rent for the first two months and thereafter at market rate. Consequently, the recovery of Rs.2,605/- has been started from the salary of the petitioner with effect from July, 2004. The same was assailed before the tribunal. It was submitted that petitioner was charge-sheeted for submitting a forged vacation report in order to get relieving from Kanpur for which he has been punished with reduction of pay by two stages for three years in the departmental inquiry which was held and an order of punishment was passed on 17.1.05. The aforesaid punishment was assailed. The appeal has been rejected on 20.1.06. It was not open to impose the double punishment as the major punishment was already imposed. The tribunal held that the recovery of rent and misconduct of submitting the forged vacation report are two different matters. The petitioner is liable to pay the rent who is found guilty of sub-letting the accommodation and submitting a false vacation report to secure his relieving from Kanpur to Jabalpur.

3. Shri Akash Choudhary, counsel appearing on behalf of the petitioner has submitted that when punishment was imposed in the departmental proceedings of reduction of pay by two stages for three years, recovery of rent could not have been ordered for the same accommodation. Even otherwise, it could have been done in the course of departmental inquiry itself. The action of demand of rent amounts to double jeopardy.

4. Shri Anoop Nair, counsel appearing on behalf of the respondents submitted that the departmental inquiry was held by the employer whereas the rent is recovered by the CPWD. These two are independent matters not connected with each other. The misconduct was of submitting the forged vacation report for which he has been found guilty in departmental inquiry held by the employer. He has sub-let the accommodation also. Thus, the order of recovery of rent for retaining the accommodation passed by the CPWD is proper. No case for interference in the writ petition is made out.

5. We find no merit in any of the submissions made by the counsel for the petitioner. The departmental inquiry held by the employer COD Jabalpur was an independent matter than realization of the rent. We have gone through the charge-sheet. The payment of rent was not the subject matter of the charge-sheet which was issued to the petitioner. Even otherwise, realization of the rent for not vacating the accommodation is independent liability from submitting false vacation report in order to get relieving from Kanpur. Petitioner was given advise to pay the rent

inspite of it he did not pay the same. Thus, no independent show-cause was necessary as the correspondence made to him indicate that he was advised to vacate the accommodation and obtain the vacation report in which he has failed. Thus, he cannot escape the liability to pay the rent of Rs.2605/- demanded by the CPWD. No case for interference is made out. The petition is dismissed. No costs.

Petition dismissed.

I.L.R. [2009] M. P., 711

WRIT PETITION

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

4 November, 2008*

N.K. CHAKRABARTI & ors.

... Petitioners

Vs.

UNION OF INDIA & ors.

... Respondents

Service Law - Promotion and seniority - Petitioners promoted on ad hoc basis as Head TTE - Subsequently, reverted back to post of TTE as they had failed in interview - Circular dated 25.01.1976 which provides that employees working in the posts on ad hoc basis quite satisfactorily are not declared unsuitable in interview - Circular dated 25.01.1976 has binding force - Petitioners already given promotion during pendency of petition - Seniority be accorded from the day from which their juniors were promoted - Petition allowed.

(Para 6)

सेवा विधि - पदोन्नति और वरिष्ठता - याचियों को तदर्थ आधार पर प्रधान टीटीई के रूप में पदोन्नत किया गया - तत्पश्चात् टीटीई के पद पर पदावनत किया गया क्योंकि वे साक्षात्कार में असफल हो गये थे - परिपत्र तारीख 25.01.1976, जो उपबध्दित करता है कि तदर्थ आधार पर पद पर पूर्ण संतोषजनक ढंग से कार्यरत कर्मचारियों को साक्षात्कार में अनुपयुक्त घोषित नहीं किया जाए - परिपत्र तारीख 25.01.1976 बंधनकारी प्रभाव रखता है - याचियों को याचिका के लम्बित रहने के दौरान ही पदोन्नति दे दी गई - वरिष्ठता उस दिन से दी जाए जिस दिन से उनके कनिष्ठों को पदोन्नत किया गया - याचिका मंजूर।

M.R. Chandra, for the petitioners.

Prakash Upadhyay, for the respondent Nos.1 to 6.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :-Writ petition has been preferred by the petitioners aggrieved by Order (P.1) passed by Central Administrative Tribunal in OA No.643/1996 and OA No.731/96 decided on 25th day of July,2002.

2. The case of petitioners was that they were promoted on adhoc basis as

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Head TTE (HTTE) in the pay scale of Rs.1400-2300, they were given adhoc promotion to the post of HTTE with effect from 28.4.95, initially for four months against regular vacancies and have continued thereafter. They were called to appear in the written test for formation of panel for the post of HTTE. They appeared in the written test held on 23.12.95 and 30.12.95 and were declared passed vide notice dated 19.4.96. Thereafter they appeared in the viva voce test held on 12th and 13.6.96. The respondents 1 to 3 have promoted 20 TTEs to the post of HTTE and reverted the applicants to their original post of TTE on the ground that they have not qualified in the viva voce test.

3. The stand of respondents 1 to 3 was that on 28.4.95 adhoc promotion was ordered, they were not subjected to any suitability test, though they have passed in the written test and they stood at serial no.9 and 16 respectively in the written test, but they failed in interview. Final results were declared on 31.7.96, they made representation on 14.8.96, the petitioners are not entitled for any relief, their case will be considered in future if required. The Tribunal has dismissed the application. Dissatisfied thereby the writ petition has been preferred.

4. Shri M.R.Chandra, learned counsel appearing on behalf of petitioners has relied upon circular dated 25.1.1976 para 2.2. which provides that panels should be formed for selection posts in time to avoid adhoc promotions. Care should be taken to see while forming panels that employees who have been working in the posts on adhoc basis quite satisfactorily are not declared unsuitable in the interview. In particular any employee reaching the field of consideration should be saved from harassment. Learned counsel has also relied upon decision of Apex Court rendered in SLP (C) No.9866/1993 (*R.C.Shrivastava vs. Union of India and another*).

5. Shri Prakash Upadhyay, learned counsel appearing for respondent has submitted that all the juniors have not been arrayed as parties to the petition. He has also referred to the instructions dated 9.8.1982. In his submission by instructions dated 9.8.1982, the circular dated 25.1.1976 has been diluted.

6. It is stated at Bar that petitioners have been promoted later on to the post of HTTE from the post of TTE. Question remains that of seniority. Some other juniors have been impleaded as respondents. As question is of seniority only and the persons who were likely to be affected have been arrayed as parties, we are not inclined to accept the submission of Shri Upadhyay that petition suffers with non-joinder of necessary parties. Question for consideration is whether the instructions contained in para 2.2 of the circular dated 25.1.1976 are binding. Para 2.2 is quoted below :-

"2.2 Panels should be formed for selection posts in time to avoid adhoc promotions. Care should be taken to see while forming panels that employees who have been working in the posts on

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ad hoc basis quite satisfactorily are not declared unsuitable in the interview. In particular any employee reaching the field of consideration should be saved from harassment."

The decision of Apex Court in *R.C. Shrivastava's case* (supra) has been relied upon in which the aforesaid circular has been taken into consideration. The Apex Court has held thus :-

"The Tribunal rejected the said contention of the appellant on the ground that the circular dated March 19, 1976 is a recorded note of the meeting of the Deputy Minister for Railways and the Railway Board with the Head Quarters of the Personnel Department of the Railway Administration and that it cannot have statutory force. Shri V.C. Mahajan, the learned senior counsel, appearing for the respondents, supported the said finding recorded by the Tribunal and has submitted that the circular dated March 19, 1976 can not cover ride the statutory rules, since the circular is in the nature of an administrative direction only.

It is no doubt true that a circular of the Railway Board cannot over ride a statutory rule but a circular, which is in the nature of administrative direction can certainly supplement the rules on matters on which, the rules are silent. A reading of the circular dated March 19, 1976 would show that it does not run contrary to any statutory rule. Indeed, the said circular only gives guidance in the matter of exercise of the power by the selection committee, while considering the suitability at the stage of interview and says that a person who has been working on the post for which selection is being made, on ad hoc basis and whose work is quite satisfactory, should not be declared unsuitable in the interview. The learned counsel for the respondents has not been able to show that this direction is inconsistent with any statutory rule. We are, therefore, unable to hold that the said direction in the circular dated March 19, 1976 is inconsistent with any statutory rule."

In other cases also the Tribunal has granted the relief such as OA No. 211/ 1995 (*Moolchand and others vs. Union of India and others*) decided on 13th March, 2001. Circular dated 9.8.82 has been relied upon by Shri Prakash Upadhyay, learned counsel appearing for respondents 1 to 6, which is quoted below :-

"It would appear that the instructions referred to above have led to the normal rules and procedure of selection as contained in the Indian Railways Establishment Manual and other cognate orders issued from time to time not being followed in some cases. With a view to ensuring that such departures do not take place, it

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is hereby clarified that the intention of the instructions conveyed in the Board's letter of 25.1.1976 referred to above was not to bypass or supersede in any manner, the normal rules of selection as contained in the Indian Railway Establishment Manual and other orders issued from time to time but only to serve as a broad guideline for the Departmental Promotion Committees and the authorities who are required to consider and approve employees for promotion. In any case, there was no intention to confer any right on employees officiating on adhoc basis in higher posts to be selected and included in the panels for these posts. You are requested to issue instructions to all concerned accordingly."

On bare reading of decision of Apex Court makes it clear that instructions contained in circular dated 25.1.1976 in para 2.2 which are referred to in Circular (P.9) No. 211/1982 has been held to be binding. There is no escape from the conclusion that decision of the Apex Court has to be respected. Even otherwise, aforesaid para 2 of circular no. 211/1982 does not dilute the provisions made in para 2.2 of the circular dated 25.1.1976 in any manner whatsoever. Thus, the petitioners are entitled for the relief prayed for by them as they have also been promoted as HTTE during pendency of the instant matter. It is clear from the circular dated 25.1.1976 that the incumbents working on the adhoc post could not be left out on the basis of viva voce test after they have cleared the written examination and it is not the case that they were not entitled otherwise. The question remains that of seniority, that shall be accorded to them from the day from which their juniors were promoted.

7. Writ petition is allowed. Impugned order passed by the Tribunal is hereby set aside. No costs.

Petition allowed.

I.L.R. [2009] M. P., 714

WRIT PETITION

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava
4 November, 2008*

UNION OF INDIA & ors.

... Petitioners

Vs.

SIDD PRAKASH SINGH

... Respondents

Service Law - Gramin Dak Sewak (Conduct and Employment) Rules, 2001, Rule 4(3) - Chief Postmaster General in exercise of powers u/R 4(3) issued a show cause notice as to why the service be not terminated - As per the instructions contained in letter dated 27.11.1997, it was incumbent upon the appointing authority to take sanction of higher authority for appointment

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of OBC category candidates in place of ST category candidates - Held - High Court, after interpreting the instructions contained in the letter dated 27.11.1997, found that sanction of higher authority was not necessary - Therefore, appointment could not be said to be illegal - Show cause notice was issued without any basis and has been rightly set-aside by the tribunal - Petition dismissed. (Para 7)

सेवा विधि - ग्रामीण डाक सेवक (आचरण और रोजगार) नियम, 2001, नियम 4(3) - मुख्य पोस्टमास्टर जनरल ने नियम 4(3) के अन्तर्गत शक्तियों के प्रयोग में कारण बताओ सूचना पत्र जारी किया कि क्यों न सेवा समाप्त की जाए - पत्र तारीख 27.11.1997 में अन्तर्विष्ट अनुदेशों के अनुसार, नियुक्ति प्राधिकारी के लिए यह आवश्यक था कि अनुसूचित जनजाति श्रेणी के अभ्यर्थियों के स्थान पर पिछड़ा वर्ग श्रेणी के अभ्यर्थियों की नियुक्ति के लिए उच्चतर प्राधिकारी का अनुमोदन ले - अभिनिर्धारित - उच्च न्यायालय ने पत्र तारीख 27.11.1997 में अन्तर्विष्ट अनुदेशों का निर्वचन करने के बाद पाया कि उच्चतर प्राधिकारी का अनुमोदन आवश्यक नहीं था - इसलिए, नियुक्ति अवैध नहीं कही जा सकती - कारण बताओ सूचना पत्र बिना किसी आधार के जारी किया गया और अधिकरण द्वारा उचित रूप से अपास्त किया गया - याचिका खारिज।

O.P. Namdeo, for the petitioners.

Akash Choudhary, for the respondent.

ORDER

The Order of the Court was delivered by **ARUN MISHRA, J.** :- The writ petition has been preferred by the Union of India and others assailing the order passed by the Central Administrative Tribunal, Jabalpur on 6.5.05 in O.A. No. 301/04.

2. The facts lie in a narrow compass. On 5.3.02, an advertisement for filling up the post of Gramin Dak Sewak Branch Post Master (hereinafter to be referred as GDSBPM in short), Jaypee Puram, ED Branch was published. Siddh Prakash Singh/respondent submitted an application. He belonged to OBC category, though the post was meant for Scheduled Tribe category. He was selected and appointed in terms of the conditions mentioned in the advertisement providing that if no Scheduled Tribe category candidate is available, appointment shall be made from Scheduled Caste category candidates or OBC category candidates. He joined the post on 1.6.02. He worked satisfactorily. The Chief Post Master General in exercise of the powers conferred on him w.e.f. 9.5.03, under Rule 4(3) of Gramin Dak Sewak (Conduct and Employment) Rules, 2001 issued a show cause notice dated 16.2.04 as to why the service be not terminated. The said show cause notice was assailed.

3. The stand of the Union of India, Chief Post Master General in the reply was that approval of higher authority was to be obtained for appointment of OBC category candidates in place of Scheduled Tribe category candidates, it was necessary to obtain the approval vide instructions contained in letter dated 27.11.97

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(P-1). In para 8 of the letter (P-1), it has been mentioned that names of eligible candidates should be called from Employment Exchange and the Employment Exchange fails to sponsor the minimum number of three eligible candidates, an open advertisement should be issued calling for nomination. Even if the minimum number of 3 eligible candidates do not offer their candidatures approval of the next higher authority to the proposed appointment should be obtained before selection is made from amongst such candidates. In case the Employment Exchange nominates lesser number of eligible candidates than 3 and it becomes necessary to call for application from the open market also the candidatures of the nominees of the employment Exchange should also be considered alongwith those offering their candidatures in response to the open advertisement. Reliance has been placed on the aforesaid instructions contained in para 8 of the letter.

4. The Tribunal has quashed the notice. Aggrieved thereby the Union of India and others have come up in the writ petition.

5. Shri O.P. Namdeo, learned counsel appearing on behalf of the petitioner has submitted that vide para 8 of the instructions contained in letter dated 28.11.97, it was incumbent upon the appointing authority to take sanction of the next higher officer, which was not obtained. The show cause notice was rightly issued, it should not have been quashed by the Tribunal.

6. Shri Akash Choudhary, learned counsel appearing for respondent/employee has submitted that vide above letter, power of review was conferred on Post Master General with effect from 9.5.03, appointment has been made in the year 2002, power to review could not have been exercised.

7. Main question is whether as per instructions contained in para 8 of letter (P-1) dated 27.11.97, it was necessary to get the approval of the higher authority. Para 8 quoted below :-

"In case the Employment Exchange fails to sponsor the minimum number of eligible candidates, an open advertisement should be issued calling for nominations. Even here if the minimum number of 3 eligible candidates do not offer their candidatures approval of the next higher authority to be proposed appointment should be obtained before selection is made from amongst such candidates. In case the Employment Exchange nominates lesser number of eligible candidates than 3 and it becomes necessary to call for applications from the open market also, the candidatures of the nominees of the Employment Exchange should also be considered alongwith those offering their candidatures in response to the open advertisement."

A reading of para 8 makes it clear that in case the number of candidates is less than three and appointment is to be made out of them, in that case, approval of

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higher authority is required to be taken. In the instant case, it is not in dispute that number of candidates sponsored by the Employment Exchange was less than three and method of selection from the open market was resorted to by issuance of advertisement (A-2) dated 5.3.02, filed in the original application(P-5), which has been placed on record. Condition No.1 of the advertisement clearly prescribes that the post was reserved for Scheduled Tribe category. In case requisite number of Scheduled Tribe category candidate do not apply, the post shall be filled up from Scheduled Caste, OBC or other category, priority shall be given in the aforesaid order. Meaning thereby initially Scheduled Tribe candidates has to be appointed, in case of non-availability of Scheduled Tribe candidates, Scheduled Caste candidate could be appointed, otherwise from OBC and lastly from other category i.e., general. In circumstances, admittedly as Scheduled Tribe and Scheduled Caste candidates were not available, appointment of OBC candidates could not be said to be illegal in any manner. There was no necessity of obtaining the approval of higher authority in the aforesaid circumstances.

8. Thus we find no merit in the submission raised by learned counsel for the petitioners that it was necessary to obtain approval of next higher authority, on the basis of which show cause notice was issued to the respondent/employee. The show cause notice issued was without any basis and has been rightly set aside by the Tribunal. We do not find any reason to make interference in the impugned order.

9. Resultantly, writ petition being devoid of merits is hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2009] M. P., 717

WRIT PETITION

Before Mr. Justice Prakash Shrivastava

12 November, 2008*

JASWANT SINGH

... Petitioner

Vs.

CHIEF ELECTION COMMISSION & ors.

... Respondents

A. Constitution, Articles 329(b) & 226, Election Symbols (Reservation and Allotment) Order, 1968, Order 13 - Bar to interference by Court in electoral matter - Petitioner candidate for election of State Legislative Assembly - Failed to file declaration in Form A & B of Recognized National Political Party, till last date of filing nomination - Nomination form rejected by Returning Officer - Writ Petition - Held - Filing of nomination form, its scrutiny and acceptance or rejection is part of process which is to be gone through to return a candidate, hence, covered within meaning of

*W.P. No.13698/2008 (Jabalpur)

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election - Order rejecting nomination paper is to be challenged in election petition - Writ can not be entertained - Petition dismissed.

(Paras 10, 14, 15, 19, 23 & 24)

क. संविधान, अनुच्छेद 329(बी) व 226, चुनाव चिन्ह (आरक्षण एवं आवंटन) आदेश, 1968, आदेश 13 - निर्वाचन संबंधी मामले में न्यायालय द्वारा हस्तक्षेप पर रोक - याची राज्य विधान सभा के निर्वाचन के लिए उम्मीदवार - नामांकन पेश करने की अंतिम तारीख तक प्ररूप ए व बी में मान्यता प्राप्त राष्ट्रीय राजनीतिक दल की घोषणा पेश करने में असफल रहा - निर्वाचन अधिकारी द्वारा नामांकन पत्र खारिज किया गया - रिट याचिका - अभिनिर्धारित - नामांकन पत्र पेश करना, उसकी जाँच और स्वीकृति या खारिजी प्रक्रिया का भाग है जिसकी किसी उम्मीदवार को निर्वाचित करने के लिए सावधानीपूर्वक जाँच करनी चाहिए, इसलिए निर्वाचन के अर्थ के अन्तर्गत आती है - नामांकन पत्र खारिज करने के आदेश को निर्वाचन याचिका में चुनौती दी जानी चाहिए - रिट ग्रहण नहीं की जा सकती - याचिका खारिज।

B. Representation of the People Act (43 of 1951), Sections 80 & 100 - Rejection of nomination paper by Returning Officer - Held - Act provides the improper rejection of nomination paper as a ground for challenging the election in election petition - Writ petition can not be filed.

(Paras 15 & 16)

खा. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएँ 80 व 100 - निर्वाचन अधिकारी द्वारा नामांकन पत्र की खारिजी - अभिनिर्धारित - अधिनियम निर्वाचन याचिका में निर्वाचन को चुनौती देने के लिए नामांकन पत्र की अनुचित खारिजी को एक आधार के रूप में उपबंधित करता है - रिट याचिका पेश नहीं की जा सकती।

Cases referred :

(1999) 2 SCC 489, AIR 2000 SC 2979, (2000) 1 SCC 145, AIR 1952 SC 64, (1978) 1 SCC 405, (2004) 7 SCC 492, (2005) 8 SCC 383, (2006) 8 SCC 487.

Naman Nagrath, for the petitioner.

R.N. Singh, A.G., to assist the Court.

K.K. Trivedi, for the respondent No.1.

ORDER

Prakash Shrivastava, J. :- This writ petition has been filed by the petitioner challenging the order dated 8.11.2008 passed by the Returning Officer, Vidhan Sabha Constituency No. 143 Silvani District, Raisen rejecting the nomination papers of the petitioner for State Assembly election.

2. The facts in narrow compass are that as per the schedule notified by Election Commission of India for election of the member of the State Legislative Assembly in the State of Madhya Pradesh, the last date of filing nomination papers was 7.11.2008. It is stated in the writ petition that the petitioner was declared as an authorized candidate by Indian National Congress Party for contesting election from Silvani No. 143 Constituency in the District Raisen. The petitioner had filed

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nomination papers on 3.11.2008 giving a declaration in the prescribed form that he was an authorized candidate of Indian National Congress i.e. a Recognized National Political Party. The petitioner being the authorized candidate of Indian National Congress Party was required to submit Form A and Form B in terms of the provisions of Election Symbols (Reservation and Allotment) Order 1968.

3. It is not in dispute that the petitioner had not submitted Forms A & B along with the nomination papers or till the last date of filing nomination. The Forms A & B were stated to be submitted by the petitioner before the Returning Officer at 11:05 a.m. on 8.11.2008. The Returning Officer at the time of scrutiny rejected the petitioner's nomination papers by the impugned order dated 8.11.2008 on the ground that the last date for submitted Forms A & B and of nomination papers was 7.11.2008 upto 3 O' clock whereas the petitioner submitted the Forms A & B on 8.11.2008 at 11:05 O' clock contrary to the directions contained in the handbook of Returning Officer and the Election Symbols (Reservation and Allotment) Order, 1968. Aggrieved with the rejection of the nomination papers, the petitioner has approached this court by way of the present writ petition under Article 226 of the Constitution.

4. Shri Naman Nagrath learned counsel appearing for the petitioner submitted that the petitioner failed to submit Forms 2A and 2B which as per Rule 4 of the Conduct of Election Rules is not a defect of substantial nature. Section 36(4) provides that the Returning Officer will not reject nomination papers on the ground of any defect which is not of a substantial nature, therefore, the rejection is per se illegal. He further submitted that the petitioner had submitted the requisite Forms A & B prior to the scrutiny, therefore, the same ought to have been accepted by the Returning Officer. He further submitted that since the Returning Officer had wrongly rejected the nomination papers, therefore, interference is required in writ jurisdiction under Art. 226 and such an interference at this stage would facilitate the elections and ensure fair elections. In support of his submission he placed reliance upon the judgments reported in the matter of *Rakesh Kumar vs. Sunil Kumar* [1999(2) SCC 489] and *Election Commission of India vs. Ashok Kumar and others* [AIR 2000 SC 2979]

5. Shri R.N.Singh, learned Advocate General, who is present to assist the court, has placed before the court the judgments relating to the scope of interference under Art. 226 of the Constitution in the election matters.

6. Shri K.K.Trivedi, learned counsel appearing for respondent No. I, on advance notice, submitted that the correctness of the order of rejection of nomination papers is a matter of enquiry which can only be examined in the election petition. He submitted that Forms A and B which the petitioner failed to submit within time is different from Forms 2A and 2B, therefore, the very foundation of the case set up by the petitioner is defective. Placing reliance upon section 33 of the Act, he submitted that the nomination paper complete in all respect, was required to be

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presented before the prescribed time and date and the nomination papers of the petitioner which was presented within prescribed time was not a complete nomination paper since it was not accompanied by Forms A and B, therefore, the presentation of nomination papers itself was defective which was not a curable defect. Hence, the nomination paper has rightly been rejected. In support of his submission, he has placed reliance upon the judgments reported in the matter of *Krishna Mohini (Ms) versus Mohinder Nath Sofat* [2000(1) SCC 145].

7. In the present matter, the first question, which arises for consideration, is whether the writ petition filed by the petitioner under Article 226 of the Constitution of India against the order of the returning officer rejecting the nomination form of the petitioner is maintainable?

8. Article 329 of the Constitution of India which is the last Article in Part XV of the Constitution deals with the bar of interference by court in electoral matters and provides as under:-

329. Bar to interference by courts in electoral matters.—

1[Notwithstanding anything in this Constitution 2[* * *]—]

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

The Article starts with the non obstante clause. For the present controversy, clause (b) is relevant. As per this clause the election of Legislative Assembly of a State can not be called in question except by an election petition presented to the prescribed authority in the prescribed manner.

9. Under Art. 329 (b) bar is for questioning the "election". In the present case, the petitioner has come to this court at the stage of rejection of the nomination papers therefore it is to be seen whether the stage of rejection of the nomination papers is covered within the meaning of word "election" occurring in clause (b) of Art. 329. A Bench of six Hon'ble Judges of the Supreme Court in the matter of *N.P. Ponnuswami vs. Returning Officer, Namakkal Constituency* reported in AIR 1952 SC 64 has examined this issue and has held that the word "election" has been used in Part XV of the Constitution in wider sense which include the entire procedure to be gone through to return a candidate to the Legislature. Supreme Court in the matter of *Ponnuswami* held that :-

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7. xxxxxxxxxxxxxxxxxxxxxxxx. Xxxxxx xxxxxxxx It seems to me that the word "election" has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expression "conduct of elections" in Article 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions, which occur in Part XV including Article 329(6). That the word "election" bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins."

The Supreme Court has further held that:-

"The discussion in this passage makes it clear that the word "election" can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process."

10. Another Constitution Bench of the Supreme Court in the matter of *Mohinder Singh Gill Vs. Chief Election Commissioner* reported in 1978(1)SCC 405 while considering Article 329 of the Constitution held that the election has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate. Every step from start to finish of the total process constitutes "election" and not merely the conclusion or culmination. The view of the Constitution of the Supreme Court in *Mohinder Singh Gill's case* is that:-

22. At the first blush we get the comprehensive impression that every calling in question of an election save, at the end, by an election petition, is forbidden. What, then, is an election? What is "calling in question"? Every step from start to finish of the total process constitutes "election", not merely the conclusion or culmination xxxxx xxx xxxxx xxxxx xxxxx xxx xxxxx xxxxxxxx xxx xxx xxx xxx xxxxx xxxxx xxx xxx xxxxx xxxxx xxx

92. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsise the formulations. Of course, the condensed statement we make is for convenience, not for exclusion of the relevance or attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings:

"(1)(a) Article 329(b)"- is a blanket ban on litigative

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challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.

The filling of the nomination forms, its scrutiny and acceptance or rejection is part of the process which is to be gone through to return a candidate, it is a stage after the issuance of presidential notification for election, hence, covered within the meaning of "election" under Article 329.

11. Clause (b) of Article 329 provides that "no election shall be called in question". Therefore, in view of the specific bar, which has been created under Article 329(b), whether the writ petition against the order of rejection of nomination paper can be entertained? Supreme Court in the matter of *Poonuswami* (supra) has examined this question and has held that two attacks on matters connected with election proceedings, one under Article 226 and another by means of election petition, is not contemplated under the scheme of Part XV of the Constitution and any matter which has the effect of vitiating an election should be brought up only by way of election petition before the Special Tribunal. Supreme Court in the matter of *Poonuswami* (supra) held that :-

"9. The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a Special Tribunal and should not be brought up at an intermediate stage before any court xx xx xx xx x xxxxxxxxxxxxxxxxx.

Supreme Court in the matter of *Poonuswami* finally held that :

15. xxxx xxxx xxxx xxxx xxxx xxxx The question which has to be asked is what conceivable reason the legislature could have had to leave only matters connected with nominations subject to the jurisdiction of the High Court under Article 226 of the

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Constitution. If Part XV of the Constitution is a code by itself i.e., it creates rights and provides for their enforcement by a Special Tribunal to the exclusion of all courts including the High Court, there can be no reason for assuming that the Constitution left one small part of the election process to be made the subject matter of contest before the High Courts and thereby upset the time-schedule of the elections. The more reasonable view seems to be that Article 329 covers all "electoral matters xx xx xx.xx xxxx.

12. Another Constitution Bench of Mohinder Singh Gill considered the question of availability of two parallel remedies one by way of writ petition under Article 226 and another by way of election petition under the Representation of People Act and held that there is a non-obstante clause in Article 329 and, therefore, Article 226 stands pushed out where the dispute takes the form of calling in question an election.

13. Learned counsel appearing for the petitioner has placed reliance upon the judgment in the matter of *Election Commission of India* (supra). In that judgment, the Supreme Court after referring to the judgment in the matter of *Poonuswami and Mohinder Singh Gill* has noted the controversies which may not attract the wrath of Article 329(b) of the Constitution such as the case where Election Commission which is repository of power may act in breach of law or arbitrarily or mala fide or dispute which may not amount to calling in question an election if it sub serves the progress of the election and facilitates the completion of the election or an order of Election Commission which far from accomplishing and completing the process of election may thwart the course of the election and adopt a course which is wholly unwarranted by the Constitution and unsustainable in law or a case where before the declaration of the result of election assistance of the court may be urgently and immediately needed to preserve the evidence without in any manner intermeddling with or thwarting the progress of election or a case where the relief sought for may not interfere or intermeddle with the process of the election but the jurisdiction of the Court is sought to be invoked for correcting the process of election taking care of such aberrations as can be taken care of only at that moment failing which the flowing stream of election process may either stop or break its bounds and spill over. The Judgment in the matter of *Election Commission of India* (supra) has been rendered by three Hon'ble Judges of the Supreme Court which mentions in general controversies when interference can be made, but the judgment in the matter of *Poonuswami* is a judgment by the Bench of six Hon'ble Judges which specifically deals with the issue of filing of the writ petition against the order rejecting the nomination and held that an order rejecting the nomination can not be challenged by way of writ petition under Article 226. Thus, the judgment reported in AIR 2000 SC 2977 in the matter of *Election Commission of India* (supra) does not carry the petitioner's case any further.

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14. It is worth noting that interference at this stage of rejection of the nomination paper can not be held to be interference to accelerate the completion of the election or act in furtherance of the election. If at the stage of rejection of the nomination paper the writ petition is entertained against the order rejecting nomination then against such an order process of litigation in the form of writ petition, writ appeal, Special Leave Petition will start which would affect the process of election, therefore, it would be interference with the process of election.

15. There is yet another reason why interference can not be done in exercise of the writ jurisdiction under Article 226 against the order rejecting the nomination form. Representation of People Act, 1951 has been enacted with the object to provide for the qualifications and disqualifications of members, the corrupt practices and the other offence at or in connection with the elections of the house of Parliament and houses of Legislature of each State and decision of doubts and disputes arising out of order in connection with such elections. Section 80 of the Representation of People Act which deals with the election petition specifically provides that:-

80. Election petitions.- No election shall be called in question except by an election petition presented in accordance with the provisions of this Part.

Thus, in addition to the constitutional bar there is also a statutory bar to call in question any election by any other mode except by an election petition presented in accordance with Part VI of the Representation of People Act, 1951. In this regard, Section 100 of the Representation of People Act is also relevant, which contained the grounds for declaring election to be void. Under clause (c) of sub-section (1) of section 100 improper rejection of nomination forms is a ground for declaring the election to be void. Thus, remedy of election petition is available against the improper rejection of nomination forms is a ground for declaring the election to be void. Thus, remedy of election petition is available against the improper rejection of nomination form.

16. The issue is now when the Representation of People Act specifically provides the improper rejection of the nomination paper as a ground for challenging the election in the election petition whether in the midst of the election process, writ petition can be filed to challenge the order rejecting the nomination paper?

17. Supreme Court in the matter of *Poonuswami* (supra) has considered this aspect and has held that the ground of improper rejection of the nomination paper available under the election law can not be urged in any other manner at any other stage before any other court except in accordance with the process prescribed under the election law. If it is permitted to be raised at an earlier stage and errors, if any, are rectified, the provisions contained in Article 329(b) will lose its significance. The Supreme Court in the matter of *Poonuswami* held that:-

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9. XXXXXXXXXXXX XXX XXX XXX XX XXXX XX XXX XXXX. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question Article 329 (b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other Court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Art. 329 (b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it.

18. The clear view of the Supreme Court is that the Representation of People Act, 1951 is a self-contained code, which provides only for one remedy i.e. by way of election petition. Supreme Court in the matter of *Ponnuswami* (supra) further held that:

11. XXXXX XXX X XXXXXXXXXXXX X XXX XXX XXX XXX XXX XXXX XX X XXX XXXXX. Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder. The provisions of the Act which are material to the present discussion are Ss. 80, 100, 105 and 170, and the provisions of chap. II of Part IV dealing with the form of election petitions, their contents and the reliefs which may be sought in them. Section 80, which is drafted in almost the same language as Art. 329 (b), provides that "no election shall be called in question except by an election petition presented in accordance with the provisions of this Part." Section 100, as we have already seen, provides for the grounds on which an election may be called in question, one of which is the improper rejection of a nomination paper. Section 105 says that "every order of the Tribunal made under this Act shall be final and conclusive." Section 170 provides that "no civil Court shall have jurisdiction to question the legality of any action taken

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or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election." These are the main provisions regarding election matters being judicially dealt with, and it should be noted that there is no provision any where to the effect that anything connected with elections can be questioned at an intermediate stage."

12. It is now well-recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of
 XXXXX XXXXX XXXX XXXX XXXXX
 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
 I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage."

Thus, the issue relating to the interference by the Supreme Court in writ petition against the order of rejection of the nomination papers has been concluded by the judgment of Six Hon'ble Judges of the Supreme Court in the matter of *Poonuswami* (supra).

19. It is worth noting that even the facts in *Poonuswami's case* were similar to the present one. In *Poonuswami's case* the appellant's nomination paper was rejected by the Returning Officer and the writ petition was filed by the appellant under Article 226 of the Constitution before the High Court praying for quashing of the order of the Returning Officer rejecting his nomination paper and including his name in the list of the valid nomination to be published. Same is the relief claimed by the present petitioner in the relief clause of the writ petition. In *Poonuswami's case* the High Court had dismissed the writ petition on the ground that it had no jurisdiction to interfere with the order of the Returning Officer in view of the bar contained in Article 329(b) of the Constitution. The Supreme Court in appeal, affirmed the view of the High Court that the High Court had no jurisdiction under Article 226 of the Constitution to entertain petition regarding improper rejection of the nomination paper.

20. The judgment delivered in the matter of *Poonuswami* (supra) is still holding the field and has been subsequently relied upon. Supreme Court in the matter of *Manda Jaganath vs. K.S. Rathnam and others* reported in [2004(7) SCC 492] considered the same issue relating to the jurisdiction of the High Court in election matters and held that such matters cannot be decided by the High Court in exercise of its writ jurisdiction and can be agitated only in an election petition. In the matter of *Manda Jaganath* (supra), the argument was raised that the defect noted by the Returning Officer is merely a curable irregularity and not the defect of

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substantial nature. Similar argument has been raised in the present case also but such an argument was rejected by the Supreme Court holding that these arguments can be addressed in properly constituted election petition. The Supreme Court in the matter of *Manda Jaganath* (supra) held that:

23. The next argument of learned counsel for the respondent is that as per the provisions of Section 36 of the R. P. Act, Rule 4 of the Conduct of Elections Rules, 1961 and clause 30 of the Election Symbols (Reservation and Allotment) Order, 1968, the omissions found by the Returning Officer in Form B filed by the respondent herein are all curable irregularities and are not defects of substantial nature, calling for rejection of the nomination paper. We think these arguments based on the provisions of the statutes, Rules and Orders are all arguments which can be addressed in a properly constituted election petition, if need be, and cannot be a ground for setting aside the order of the Returning Officer which is prima facie just and proper in our opinion.

21. The Supreme Court in the matter of *Harnek Singh vs. Charanjit Singh and others* reported in [2005(8) SCC 383] has examined the same issue relating to the maintainability and scope of interference under Article 226 in the matter relating to election to the post of Chairman Panchayat Samiti and held that section 89(1)(d)(iv) of Punjab State Election Commission Act, 1994 to be in pan materia with S.100 (1)(d)(iv) of the Representation of People Act, 1951 and writ petition as not maintainable.

22. In the matter of *Avtar Singh Hit vs. Delhi Sikh Gurdwara Management Committee and others* reported in [2006(8) SCC 487], Supreme Court, while examining the issue of maintainability of writ petition in an election matter has taken note of the judgments delivered from time to time and held that:-

21. In *Mohinder Singh Gill vs. The Chief Election Commissioner*, AIR 1978 SC 851, it was held that if during the process of election, at any intermediate or final stage, the entire poll has been wrongly cancelled and a fresh poll has been wrongly ordered, that is a matter which may be agitated after declaration of the result on the basis of the fresh poll, by questioning the election in the appropriate forum by means of an election petition in accordance with law.

22. The same view has been taken in regard to the elections held in accordance with some statutory provision where Article 329(b) of the Constitution is not applicable and they are not governed by Representation of the People Act. In *K.K. Shrivastava vs. Bhupendra Kumar Jain* AIR 1978 SC 1703, the

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dispute related to election to Bar Council of Madhya Pradesh under the Indian Advocates Act and Rule 31 of Election Rules framed by Bar Council of Madhya Pradesh provided that all disputes arising under the Rule shall be decided by a tribunal to be known as an election tribunal. The defeated candidate approached the High Court under Article 226 of the Constitution challenging the validity of the election which was allowed by the High Court. This Court set aside the judgment of the High Court with the following observations: -

“Where there is an appropriate or equally efficacious remedy the Court should keep its hands off. This is more particularly so where the dispute relates to an election. Still more so where there is a statutorily prescribed remedy which almost reads in mandatory terms.”

23. In *Gujarat University vs. Shri N. U. Rajguru* AIR 1988 SC 66, the dispute related to election to the Court of Gujarat University. Some teachers challenged the holding of elections by means of a writ petition before the High Court which was allowed. In appeal this Court set aside the judgment of the High Court with the following observations: -

“It is well settled that where a statute provides for election to an office, or an authority or institution and if it further provides machinery or forum for determination of dispute arising out of election, the aggrieved person should pursue his remedy before the forum provided by the statute. While considering an election dispute it must be kept in mind that the right to vote, contest or dispute election is neither a fundamental or common law right instead it is a statutory right regulated by the statutory provisions. It is not permissible to invoke the jurisdiction of the High Court under Art. 226 of the Constitution by-passing the machinery designated by the Act for determination of the election dispute. Ordinarily the remedy provided by the statute must be followed before the authority designated therein. But there may be cases where exceptional or extraordinary circumstances may exist to justify by-passing the alternative remedies.”

24. There are several other decisions where the same view has been taken. *S.T. Muthusami vs. K. Natarajan* AIR 1988 SC 616 is a case relating to election to the office of Chairman of a panchayat union under the Tamil Nadu Panchayats Act, 1958 where it was held that the parties who are aggrieved by the result of the election can question the validity of an election by an election

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petition which is an effective alternative remedy and it is not appropriate for the High Court to interfere with the election process.

25. *C. Subrahmanyam vs. K. Ramanjaneyullu* 1998 (8) SCC 703 is a case relating to election under the Andhra Pradesh Panchayat Raj Act and in a short judgment it was observed that the main question for decision being the non-compliance of a provision of the Act which is a ground for an election petition in Rule 12 framed under the Act, the writ petition under Article 226 of the Constitution should not have been entertained for this purpose.

26. In *Ashok Kumar Jain vs. Neetu Kathoria* 2004 (12) SCC 73, a writ petition was filed under Article 226 of the Constitution challenging the election held under Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972. This Court observed that Section 66-A of the said Act provided that an election under the Act could be challenged only by presenting an election petition and except in some exceptional extraordinary circumstances normally remedy under Article 226 of the Constitution, challenging the election by filing a writ petition would not be available.

27. *Umesh Shivappa Ambi vs. Angadi Shekara Basappa* 1998 (4) SCC 529 is a case relating to election of President, Vice-President and Chairman, etc., under the Karnataka Cooperative Societies Act, wherein the High Court in a writ petition under Article 226 of the Constitution set aside the order by which the nomination of the first respondent therein was rejected. This Court reversed the judgment of the High Court with the following observation :-

"Once an election is over, the aggrieved candidate has to pursue his remedy in accordance with the provisions of law and the High Court will not ordinarily interfere with the elections under Article 226. The High Court will not ordinarily interfere where there is an appropriate or equally efficacious remedy available, particularly in relation to election disputes."

28. Similar view has been taken in *Harnet Singh vs. Charanjit Singh* 2005 (8) SCC 383 which is a case relating to election of Chairman of Gram Panchayat and the judgment of the High Court by which the order of the Returning Officer was set aside in a writ petition was reversed.

23. Thus, in view of the aforesaid analysis the writ petition which has been filed by the petitioner against the order of the Returning Officer rejecting the petitioner's nomination paper can not be entertained. Against such an order of rejection, the

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appropriate remedy available to the petitioner is to challenge the election of the returned candidate in an election petition raising the grounds available under section 100 of the Representation of People Act 1951.

24. The other grounds, which have been raised by the petitioner on merit need not be examined at this stage since it has been held that remedy of writ petition is not available to the petitioner and these grounds will be available to the petitioner if he prefers to file election petition at the appropriate stage:

25. In view of the aforesaid, the writ petition filed by the petitioner against the order rejecting his nomination is dismissed.

Petition dismissed.

I.L.R. [2009] M. P., 730

WRIT PETITION

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

12 November, 2008*

NARESH SINGH & ors.

... Petitioners

Vs.

UNION OF INDIA & ors.

... Respondents

A. Coal Bearing Areas (Acquisition and Development) Act (20 of 1957), Section 14, Land Acquisition Act, 1894, Section 11 - Central Government acquired right to mine w/s 9 of the Act of 1957 but instead of issuing notice of intention to acquire land w/s 7 of the Act of 1957, requested the Collector to acquire under Act of 1894 - State Government issued notification and initiated proceedings w/s 9 of the 1894 Act and the Collector made the award determining the compensation w/s 11 of the 1894 Act - Held - 1894 Act was a general Act whereas 1957 Act was a special Act for acquisition of land and 1957 Act has partially repealed 1894 Act - Land owners, whose lands were acquired, were deprived of determination of compensation by agreement or failing such agreement by tribunal w/s 14 of Act of 1957 - Considering the public interest vis-à-vis private interest, instead of quashing acquisition proceeding, Central Government directed to proceed under Act of 1957 and determine compensation. - Petition allowed.

(Paras 21 & 22)

क. कोयला धारक क्षेत्र (अर्जन और विकास) अधिनियम (1957 का 20), धारा 14, भूमि अर्जन अधिनियम, 1894, धारा 11 - केन्द्रीय सरकार ने 1957 के अधिनियम की धारा 9 के अधीन खान का अधिकार अर्जित किया किन्तु 1957 के अधिनियम की धारा 7 के अधीन भूमि अर्जित करने के आशय का सूचनापत्र जारी करने के बजाय कलेक्टर से 1894 के अधिनियम के अधीन अर्जन करने का निवेदन किया - राज्य सरकार ने अधिसूचना जारी की और 1894 के अधिनियम की धारा 9 के अधीन कार्यवाही प्रारम्भ की और कलेक्टर ने 1894 के अधिनियम की धारा 11 के अधीन प्रतिकर अवधारित करते हुए अधिनिर्णय किया - अभिनिर्धारित - भूमि के अर्जन के लिए

1894 का अधिनियम सामान्य अधिनियम था जबकि 1957 का अधिनियम विशेष अधिनियम था और 1957 के अधिनियम ने 1894 के अधिनियम को आंशिक रूप से निरसित कर दिया — भूमिस्वामी, जिनकी भूमियाँ अर्जित की गईं, अनुबन्ध द्वारा या ऐसे अनुबन्ध के विफल होने पर 1957 के अधिनियम की धारा 14 के अधीन अधिकरण द्वारा प्रतिकर के अवधारण से वंचित कर दिये गये — निजी हित की तुलना में लोकहित का विचार करते हुए अर्जन कार्यवाही अभिखण्डित करने के बजाय केन्द्रीय सरकार को 1957 के अधिनियम के अधीन कार्यवाही करने और प्रतिकर अवधारित करने का निदेश दिया गया — याचिका मंजूर।

B. Constitution, Article 226 - Writ petition challenging acquisition of land for coal company - Court will have to weigh the public interest vis-à-vis the private interest while exercising the power under Article 226 - And even if it finds that the acquisition was vitiated on account of non-compliance of some legal requirement or that the persons interested are entitled to particular amount of compensation - Court should appropriately mould the relief and redress the wrong instead of quashing the acquisition proceedings.

(Para 22)

ख. संविधान, अनुच्छेद 226 — रिट याचिका में कोयला कम्पनी के लिए भूमि के अर्जन को चुनौती — न्यायालय को अनुच्छेद 226 के अन्तर्गत शक्ति का प्रयोग करते समय लोक हित व निजी हित को आमने-सामने रखकर तोलना होगा — और यदि यह भी पाया जाए कि अर्जन कुछ विधिक अपेक्षाओं के अननुपालन के कारण दूषित हो गया या कि हितबद्ध व्यक्ति प्रतिकर की विशिष्ट राशि के हकदार हैं — न्यायालय को अर्जन कार्यवाहियों को अभिखण्डित करने के बजाय अनुतोष को समुचित रूप से परिवर्तित करना चाहिए और गलती सुधारनी चाहिए।

C. Land Revenue Code, M.P. (20 of 1959), Section 165(6) - Provision does not prohibit the Government to acquire and transfer any land belonging to aboriginal tribe under law - But, it applies only to the transfer of a right of Bhumiswami belonging to a tribe by way of sale, lease, mortgage to a person not belonging to aboriginal tribe.

(Para 8)

ग. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(6) — उपबन्ध सरकार को आदिम जनजाति की किसी भूमि का विधि के अधीन अर्जन और अंतरण करने से निषेधित नहीं करते हैं — बल्कि, यह केवल किसी जनजाति के भूमिस्वामी के किसी अधिकार का किसी गैर आदिम जनजाति के व्यक्ति को विक्रय, पट्टा, बंधक द्वारा अन्तरण को लागू होते हैं।

D. Provisions of the Panchayats (Extension to the Scheduled Areas) Act (40 of 1996), Section 4 - Exception and modification to Part IX of the Constitution - Notwithstanding anything contained under Part IX of Constitution State Government shall not make any law under this part which is inconsistent with any feature mentioned in Clause 4 - Held - The embargo u/s 4 is not on Parliament but on Legislature of State - Acquisition of land for mining is under Coal Bearing Area (Acquisition and Development) Act, 1957 which is Act of Parliament - Section 4 of Act of 1996 not applicable.

(Para 10)

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घ. पंचायत उपबंध (अनुसूचित क्षेत्रों पर विस्तार) अधिनियम (1996 का 40), धारा 4 - संविधान के भाग IX के अपवाद और उपातिरण - संविधान के भाग IX में कुछ भी अन्तर्विष्ट होने पर भी राज्य सरकार इस भाग के अधीन कोई विधि नहीं बनायेगी जो खण्ड 4 में वर्णित किसी विशेषता से असंगत हो - अभिनिर्धारित - धारा 4 के अधीन निषेध संसद पर नहीं है बल्कि राज्य विधायिका पर है - खनन के लिए भूमि का अर्जन कोयला धारक क्षेत्र (अर्जन और विकास) अधिनियम, 1957 के अधीन है जो संसद का अधिनियम है - 1996 के अधिनियम की धारा 4 अनुप्रयोज्य नहीं।

E. Constitution, Article 244, Schedule V - Land required for mining of coal located in scheduled areas and owned by tribals - Any project which deprives the tribals in scheduled areas of their land by acquisition must ensure that such tribals are rehabilitated and resettled with alternate source of living in accordance with policy of appropriate Government. (Paras 23 & 24)

ड. संविधान, अनुच्छेद 244, अनुसूची V - कोयले के खनन के लिए अपेक्षित भूमि अनुसूचित क्षेत्रों में स्थित और जनजातियों के स्वामित्वाधीन - कोई परियोजना जो अर्जन द्वारा अधिसूचित क्षेत्रों में जनजातियों को उनकी भूमि से वंचित करती है को यह सुनिश्चित करना चाहिए कि ऐसी जनजातियों को समुचित सरकार की नीति के अनुसार जीवन निर्वाह के वैकल्पिक स्रोत के साथ पुनर्वासित और पुनःस्थापित किया जाए।

Cases referred :

AIR 1997 SC 3297, AIR 2002 SC 350, (2003) 6 SCC 255, (2003) 12 SCC 274, (1997) 1 SCC 134, (2008) 7 SCC 53, (2007) 2 SCC 640, AIR 1990 SC 548.

A.M. Trivedi with Ashim Trivedi, Neelam Goyal, for the petitioners.

V.K. Shukla, Dy.A.G., for the respondent No.2.

P.S. Nair with Prabhat K. Shrivastava, for the respondent Nos.3 & 4.

ORDER

The Order of the Court was delivered by **A. K. PATNAIK, C. J.** :- The petitioners in W.P.No.13561 of 2005 are Sarpanch and Up-Sarpanch of Gram Panchayats in Anuppur District of State of Madhya Pradesh and the petitioners in other writ petitions are all owners of land in Kotma Tahsil, District Anuppur which have been acquired by the State Government for the South Eastern Coal-fields limited. The petitioners have filed these writ petitions under Art. 226 of the Constitution of India challenging the acquisition of land in Kotma Tahsil for mining of coal by the South Eastern Coal-fields Limited (for short 'SECL') under the Land Acquisition Act, 1894.

2. The relevant facts for disposal of these writ petitions briefly are that on 30th March, 1994, the Central Government in exercise of its powers under sub-section (1) of Section 4 of the Coal Bearing Areas (Acquisition & Development) Act, 1957 (for short 'the 1957 Act') gave notice of its intention to prospect for coal in 3412.610 hectares of land in Kotma Tahsil described in the schedule to the notification. Thereafter, by notification dated 6th February, 1996, the Central

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Government in exercise of its powers under sub-section (1) of Section 4 of the 1957 Act gave notice of its intention to acquire the rights to mine, quarry, bore, dig and search for, win, work and carry away minerals in the lands measuring 3407.408 hectares. By notification dated 6th February, 1996, objections to the acquisition of the whole or any part of the land or any rights over the land were invited in writing. On 4th February, 1997, the Central Government issued a notification stating therein that after considering the report of the Competent Authority and after consulting the Government of Madhya Pradesh, it was satisfied that the rights to mine, quarry, bore, dig and search for, win, work and carry away the minerals in the lands measuring 3407.408 hectares approximately described in the Schedule to the notification should be acquired. Accordingly, in exercise of its powers under sub-section (1) of Section 9 of the 1957 Act, the Central Government declared by notification dated 24th June, 1998 that the rights to mine, quarry, bore, dig and search for, win, work and carry away the minerals in the lands measuring 3407.408 hectares are acquired. The rights in and over the aforesaid land acquired by the Central Government were thereafter vested in the SECL by an order issued by the Central Government under sub-section (1) of Section 11 of the 1957 Act, subject to the terms and conditions mentioned in the aforesaid order dated 24th June, 1998.

3. The Government of India, Ministry of Coal, Department of Coal then wrote a letter dated 31.8.2001 to the Collector, District Shahdol in which Kotma Tahsil was then located, requesting him to arrange for acquisition of 699.698 hectares of tenancy land and 46.154 hectares of Government land for Amadand Open Cast Mine of Jamuna Kotma Area under the Land Acquisition Act, 1894 (for short 'the 1894 Act') and to take possession of the same as provided under Section 17 of the 1894 Act immediately. Pursuant to this request, the State Government issued a notification on 28th February, 2004 under Section 4 of the 1894 Act for acquiring the aforesaid land. After considering the objections, the State Government issued a declaration under Section 6 of the 1894 Act in respect of the aforesaid land on 23rd May, 2004. Proceedings under Section 9 of the 1894 Act were completed on 5th September, 2004 and awards were passed on 30th November, 2004 and a Panchnama was made on 7th January, 2005 handing over symbolic possession of the aforesaid land to the SECL. The SECL deposited compensation to the tune of Rs. 17,49,00,233/- for the owners of the land and the houses located on the land. Out of 2485 owners of land in whose favour awards were passed, 774 persons withdrew the compensation amounting to Rs.6.52 crores.

4. Mr. P.S. Nair, learned Senior Counsel appearing for the SECL, raised a preliminary issue regarding the locus standi of the Sarpanch and Up-Sarpanch to file W.P.No.13561 of 2005 challenging the acquisition of land when the owners of the land acquired could challenge the acquisition, but as the owners have also filed separate writ petitions challenging the acquisition which are being decided by this order, we do not think it necessary to decide this academic issue.

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5. Mr. A.M. Trivedi, learned senior counsel, leading the arguments on behalf of the petitioners in all the writ petitions submitted that admittedly Kotma Tahsil is a scheduled area to which the provisions of the Fifth Schedule of the Constitution apply as provided in Clause (1) of Art. 244 of the Constitution. He submitted that para 5 (2) (a) of the Fifth Schedule of the Constitution provides that the Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area and such regulations may include regulation prohibiting or restricting the transfer of land by or among members of the Scheduled Tribes in such area. He submitted that in *Samatha vs. State of Andhra Pradesh and others*, AIR 1997 S.C. 3297, a plea was raised before the Supreme Court by the State of A.P. that Section 3 of the A.P. Scheduled Area Land Transfer Regulation, 1959 made under para 5 (2) (a) of the Fifth Schedule of the Constitution does not apply to Government land in scheduled area; but the Supreme Court rejected this plea holding that in Section 3 of the A.P. Scheduled Area Land Transfer Regulation, 1959, the word 'person' who is prohibited to transfer land in scheduled area includes not only natural person but also a juristic person and accordingly, includes the State Government and, therefore, the State Government cannot transfer land in Scheduled Areas by way of lease for mining purpose in favour of non-tribals as prohibited by para 5 (2) (b) of the Fifth Schedule of the Constitution. He submitted that in the present case, therefore, the land belonging to the Tribals in the scheduled areas cannot be acquired by the State Government and transferred to the SECL for mining purposes.

6. In reply, Mr. P.S. Nair, learned senior counsel appearing for the SECL, submitted that in *Samatha vs. State of A.P. and others* (supra), the Supreme Court, on an interpretation of the A.P. Scheduled Area Land Transfer Regulation, 1959, held that even Government land in scheduled area cannot be transferred by the Government to non-tribals for mining purposes but the provisions in Section 165 of the M.P. Land Revenue Code, 1959 are differently worded than the A.P. Scheduled Area Land Transfer Regulation, 1959. He submitted that in *Balco Employees Union vs. Union of India and others*, AIR 2002 S.C. 350, the Supreme Court interpreted sub-section (6) of Section 165 of the M.P. Land Revenue Code, 1959 and held that it does not contain any provision prohibiting giving of tribal lands by way of lease to non-tribals and distinguished the provisions of Section 165 of the M.P. Land Revenue Code, 1959 from the provisions of Section 3 (1) of the A.P. Scheduled Area Land Transfer Regulation, 1959.

7. Sub-Section (6) of Section 165 of the M.P. Land Revenue Code, 1959, which is relevant for deciding these cases is quoted herein below:

"165. Rights of transfer:

(1)

(2)

(3)

(4)

(5)

(6) Notwithstanding anything contained in sub-section (1) the right of Bhumiswami belonging to a tribe which has been declared to be an aboriginal tribe by the State Government by a notification in that behalf, for the whole or part of the area to which this Code applies shall -

(i) in such areas as are predominantly inhabited by aboriginal tribes and from such date as the State Government may, by notification, specify, not be transferred nor it shall be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe in the area specified in the notification;

(ii) in areas other than those specified in the notification under clause (i), not to be transferred or be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe without the permission of a Revenue Officer not below the rank of Collector, given for reasons to be recorded in writing.

Explanation - For the purposes of this sub-section the expression 'otherwise' shall not include lease....."

8. It will be clear from a plain reading of sub-section (6) of Section 165 of the M.P. Land Revenue Code, 1959, quoted above, that this provision cannot and does not prohibit the acquisition of land belonging to an aboriginal tribe under law, such as the 1957 Act or the 1894 Act, and it applies only to the transfer of a right of a bhumiswami belonging to a tribe by way of sale, lease, mortgage etc. to a person not belonging to the aboriginal tribe. Moreover, sub-section (6) of Section 165 of the M.P. Land Revenue Code, 1959 does not prohibit, in any manner, the Government to transfer any land belonging to aboriginal tribe acquired by it under law such as 1957 Act or 1894 Act to a Government Company such as SECL. In fact, in *Samatha vs. State of A.P. and others* (supra), cited by Mr. Trivedi, the Supreme Court has held in para 117 at page 3344 of the AIR 1997 S.C. that transfer of Government land to a Government company is excluded from the prohibition in para 5 (2) (b) of the Fifth Schedule of the Constitution of India and Section 3 (1) (a) of the A.P. Scheduled Area Land Transfer Regulation, 1959. We are, thus, of the considered opinion that the acquisition of land of the tribals in the scheduled areas and the transfer of such land to the SECL in the scheduled area are not prohibited by sub-section (6) of Section 165 of the M.P. Land Revenue Code, 1959.

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9. Mr. Trivedi next submitted that under clause (3) of Art. 243-ZC of the Constitution, Parliament has been empowered by law to extend the provisions of part IX-A of the Constitution to the Scheduled Areas referred to in clause (1) of Art. 244 of the Constitution subject to such exceptions and modifications as may be specified in such law and in exercise of this power. Parliament has enacted 'The Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996' (for short 'the 1996 Act'). He submitted that Section 4 of the 1996 Act provides that notwithstanding anything contained in part IX to the Constitution, the Legislature of a State shall not make any law under that Part which is inconsistent with any of the features mentioned in clauses in Section 4 and clause (i) of Section 4 provides that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas. He submitted that the Gram Sabhas or the Panchayats of the Scheduled Areas have not been consulted before making acquisition of land in question in Kotma Tahsil, which is a Scheduled Area, and hence the acquisition of land for mining of coal by SECL is in violation of the provisions of Section 4 of the 1996 Act read with clause (3) of Art. 243-ZC of the Constitution.

10. Section 4(i) of the 1996 Act is quoted below :

"4. Exceptions and modifications to Part IX of the Constitution - Notwithstanding anything contained under Part IX of the Constitution, the Legislature of a State shall not make any laws under that Part which is inconsistent with any of the following features, namely: -

(i) The Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level;"

.....

It will be clear from the language used in Section 4 of the 1996 Act that the embargo therein is not on Parliament but on Legislature of a State but the acquisition of land in the Scheduled Areas in the present case for mining by SECL is under law made by Parliament, namely, the 1957 Act or the 1894 Act and Section 4 (i) of the 1996 Act does not apply to such acquisition. The contention of Mr. Trivedi is thus wholly misconceived.

11. Mr. Trivedi next submitted that the acquisition of land in this case admittedly is for mining of coal by the SECL and for such acquisition of land for mining of

coal, the 1957 Act is applicable as it is a special Act providing for acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land. He argued that the 1894 Act, which is a general Act for acquisition of land thus stood impliedly repealed by the 1957 Act in so far as acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land is concerned. He referred to the different provisions of the 1957 Act to show that it contains an exhaustive Code with regard to acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land. He submitted that the provisions of the 1957 Act and the provisions of the 1894 Act are in conflict with each other. In this context, he referred to the provisions of Section 14 of the 1957 Act to show that the amount of compensation for acquisition of land under the Act can be fixed by agreement and where no such agreement can be reached, the compensation is to be determined by a Tribunal. This provision, Mr. Trivedi submitted, was different from Section 11 of the 1894 Act under which the Collector was to make an award for compensation for land acquired under the 1894 Act. He also referred to the provisions of Section 28 of the 1957 Act to show that notifications issued under the 1894 Act, in cases where the land acquisition proceedings were pending were to be treated as notifications issued under the 1957 Act and argued that this would go to show that for acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land could be only under the 1957 Act.

12. Mr. Nair, on the other hand, submitted that there is no conflict between the 1894 Act and the 1957 Act and argued that the 1894 Act equally applies to acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land. He cited the decision in *Savitri Cairae vs. U.P. Avas Evam Vikas Parishad and another*, (2003) 6 S.C.C. 255 in which the Supreme Court having found that the purpose for acquisition of land both under the Parliament Act and the State Act is the same and the order of acquisition is to be passed by the State, held that it is immaterial whether it is one Acquisition Act or another Acquisition Act under which the land is acquired but if a higher compensation is payable under one of the Acts, such higher amount would be payable to avoid discrimination in violation of Art. 14 of the Constitution. He further submitted that for finding out whether there is implied repeal of the 1894 Act by the 1957 Act in respect of acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land, the questions to be asked are (i) whether there is a direct conflict between the two provisions, (ii) whether the Legislature intends to lay down exhaustive code in respect of the subject matter replacing the earlier law, and (iii) whether the two laws occupy the same field. In support of this contention, he cited the decision in *Kishorebhai Khamanchand Goyal vs. State of Gujarat and another*, (2003) 12 S.C.C. 274. According to Mr. Nair, if these tests are applied, then it cannot be

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held that there is implied repeal of the 1894 Act in respect of acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land.

13. Mr. Nair alternatively submitted that the Supreme Court has held in *Ramniskial N. Bhutta and another vs. State of Maharashtra and others*, (1997) 1 S.C.C. 134 that the Court will have to weigh the public interest vis-a-vis the private interest while exercising the power under Art. 226 of the Constitution and it will even be open to the High Court to direct, in case it finds finally that the acquisition was vitiated on account of non-compliance with some legal requirement, that the persons interested shall also be entitled to a particular amount of damages to be awarded as a lump sum or calculated at a certain percentage of compensation payable and that there are many ways of affording appropriate relief and redressing a wrong and quashing the acquisition proceedings is not the only mode of redress. He submitted that these observations of the Supreme Court in *Ramniskial N. Bhutta and another* (supra) were relied on by the Supreme Court in *Girias Investment Private Limited and another vs. State of Karnataka and others*, (2008) 7 S.C.C. 53 and it was held therein that though the rights of an individual whose property is sought to be acquired must be scrupulously respected, an acquisition for the benefit of public at large is not to be lightly quashed and extra-ordinary reasons must exist for doing so. He submitted that even if the Court comes to a conclusion that the acquisition of land in the present case for mining of coal should have been made under the 1957 Act and not under the 1894 Act, the Court should not quash the acquisition particularly when the majority of the 2485 persons, whose lands have been acquired, have not come to the Court and only 31 of them have come to the Court and 773 land owners have already received compensation. He further submitted that compensation for the land which has been acquired has been deposited by the SECL with the State Government as far back as on 1st January, 2005.

14. Mr. Trivedi, however, submitted that physical possession of the land acquired continues with the land owners and that the compensation determined for acquisition of the land is on the lower side and in any case, the tribals whose land has been acquired were entitled to compensation as agreed upon or as determined by the Tribunal under Section 14 of the 1957 Act. He further submitted that the Government of M.P., Rehabilitation Department, has declared a policy on 25th September, 1991 whereunder persons/families likely to be oustees due to mineral projects were entitled to be employed by the SECL on priority basis and for land for residential purposes and other facilities by way of rehabilitation but none of these benefits for rehabilitation have been extended by the SECL to the oustees. He referred to the provisions of Art. 275 of the Constitution wherein it is provided that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to

enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State. He also stated that in *Samatha vs. State of A.P.* (supra), the Supreme Court has observed that the Cabinet while exercising powers under Art. 298 of the Constitution should equally be cognizant to the constitutional duty to protect and empower tribals and has further observed that exploitation of mineral resources is undoubtedly for the development of the nation but the competing rights of the tribals are required to be balanced by the State. He referred to para 113 of the judgment of the Supreme Court in *Samatha vs. State of A.P.* (supra) as reported in the AIR in which it is observed that the executive is enjoined to protect social, economic and educational interest of the tribals and when the State leases out the lands in the Scheduled Areas to the non-tribals for exploitation of mineral resources, it transmits the correlative these constitutional duties and obligation to those who undertake to exploit the natural resources to also improve the social, economic and educational empowerment of the tribals. He also cited judgment in *Ashoka Smokeless Coal India (P) Ltd. and others vs. Union of India and others*, (2007) 2 S.C.C. 640 in which the Supreme Court referring to Art. 39 (b) of the Constitution has impressed upon the necessity for ensuring equitable distribution of resources. He argued that coal is of course the most important known sources of energy and thus a vital national resource but individuals and particularly tribals whose lands are acquired for mining of coal must be rehabilitated and resettled.

15. We have considered the contentions of Mr. Trivedi and Mr. Nair and we find that the 1894 Act is a law for acquisition of land needed for public purposes and for companies. Section 4 of the 1894 Act provides that whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, a notification to that effect shall be published in the official gazette. Section 5A of the 1894 Act states that any person interested in any land which has been notified under Section 4 may object to the acquisition of land. Section 6 of the 1894 Act provides that when the appropriate Government is satisfied after considering the report, if any, made under Section 5A, that any particular land is needed for public purpose or for any company, it may issue a declaration to that effect. Section 7 of the 1894 Act provides that after such declaration made under Section 6, the appropriate Government shall direct the Collector to take order for the acquisition of the land. Section 9 of the 1894 Act provides for notice to the persons interested in the land by the Collector stating that the Government intends to take possession of the land and claims for compensation for all interests in such land may be made to him. Section 11 of the 1894 Act provides for enquiry and award of compensation by the Collector and Section 16 states that when the Collector has made an award under Section 11, he

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may take possession of the land, which shall thereupon vest absolutely in the Government free from all encumbrances. Section 17 of the 1894 Act enumerates the special powers of the appropriate Government and Collector in cases of urgency and provides for taking possession of any land needed for any public purpose and for dispensing with the inquiry under Section 5A in case of urgency.

16. On examining the 1957 Act, we find that it provides for acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land. Section 4 of the 1957 Act provides that whenever it appears to the Central Government that the coal is likely to be obtained from land in any locality, it may, by notification in the official gazette, give notice of its intention to prospect for coal. Section 6 of the 1957 Act provides for compensation for any necessary damage done under Section 4 of the 1957 Act. Section 7 of the 1957 Act confers powers on the Central Government to give notice of its intention to acquire the whole or any part of the land or of any rights in or over such land if the Central Government is satisfied that the coal is obtainable in the whole or any part of the land, notified under sub-section (1) of Section 4. Section 8 of the 1957 Act says that any person interested in any land in respect of which a notification under Section 7 has been issued may object to the acquisition of the whole or any part of the land or of any rights in or over such land. Section 9 of the 1957 Act states that when the Central Government is satisfied after considering the report if any made under Section 8 that any land or any rights in or over such land should be acquired, a declaration shall be made to that effect. Section 9A of the 1957 Act provides for special powers in case of urgency and states that if the Central Government is satisfied that it is necessary to acquire immediately the whole or any part of the land notified under sub-section (1) of Section 4 or any rights in or over such land, the Central Government may direct that the provisions of Section 8 will not apply and if it does so, a declaration shall be made under Section 9 in respect thereof instead of issuing notification under Section 7. Section 10 of the 1957 Act provides that on publication in the official gazette of the declaration under Section 9, the land or the rights in or over the land, shall vest absolutely in the Central Government free from all encumbrances. Section 11 of the 1957 Act empowers the Central Government to direct vesting of land or rights over land in a Government company instead of the Central Government. Section 12 of the 1957 Act empowers the competent authority to require any person in possession of the land acquired to surrender or deliver possession of the land within such period as may be specified in the notice. Section 14 of the 1957 Act provides for method of determining compensation and states that where the amount of any compensation payable under the Act can be fixed by agreement, it shall be paid in accordance with such agreement and where no such agreement can be reached, the award of compensation shall be made by the Tribunal after hearing the parties. Section 17 of the 1957 Act provides for payment of compensation.

17. This discussion of the provisions of the 1894 Act and the 1957 Act would

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show that the 1894 Act is a prior general Act for acquisition of land needed for public purpose and for companies and provides the manner in which the acquisition of such land shall be made and the manner in which the compensation will be determined and paid to the owners of land acquired and when possession of the acquired land shall be taken. The 1957 Act is a later special Act for acquisition by the Central Government for itself or for Government Companies land containing or likely to contain coal deposits or of rights in or over such land and similarly provides the manner in which such land or rights in such land will be acquired, the manner in which compensation will be determined and paid to the owners of land or rights and when possession of such acquired land will be taken. Hence the intention of Parliament in enacting the 1957 Act was that for acquisition of land containing or likely to contain coal deposits or of rights in or over such land, the 1894 Act would no longer apply and instead, the 1957 Act would apply.

18. This intention of Parliament will also be clear from Section 28 of the 1957 Act which is extracted herein below:

"26. Notifications under Act 1 of 1894 in which proceedings are pending to be treated as notification under this Act-

(1) Every notification issued before the commencement of this Act, whether by the Central Govt. or by a State Government, under section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the said Act), in which lands were stated to be needed for the prospecting of coal seams for the development of collieries to be worked by the Union of India shall be deemed to have been issued by the Central Government under section 4 of this Act as if this Act had been in force on the date of the notification.

(2) Every notification issued before the commencement of this Act, whether by the Central Government or by a State Government, under section 6 of the said Act in which lands were stated to be needed for the development of coal shall be deemed to have been issued under section 9 of this Act as if this Act had been in force on the date of the notification.

(3) Any objection preferred under section 5A of the said Act in respect of any land covered by any notification issued under section 4 of the said Act shall be deemed to be an objection preferred under section 8 of this Act to the relevant competent authority and may be disposed of by him as if the objection had been made in relation to a notification issued under section 7 of this Act in respect of such land or of any rights in or over such land; and the Central Government may at any time make a

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declaration under section 9 of this Act in respect of the land or any part thereof or any rights in or over such land or part.

(3A) Where in respect of any land covered by any notification issued under section 4 of the said Act, no objection has been preferred under section 5A thereof within the period specified in that section, then it shall be deemed that a notification had been issued under section 7 of this Act in respect of such land or of any rights in or over such land and that no objection to the acquisition of the land or any rights in or over the land had been preferred under section 8 of this Act, and accordingly the Central Government may at any time make a declaration under section 9 of this Act in respect of the land or any part thereof or any rights in or over such land or part.

(4) Subject to the other provisions contained in this section, the provisions of this Act (including provisions relating to compensation) shall apply in relation to any such notification as is referred to in sub-section (1) or sub-section (2) as they apply in relation to any notification issued under section 4 or section 9, as the case may be, of this Act."

A reading of the aforesaid Section 28 of the 1957 Act would show that notifications and declarations issued under the 1894 Act under which proceedings for acquisition of land for prospecting or development of coal were initiated have to be treated as notifications and declarations under the 1957 Act and all such acquisition proceedings initiated under the 1894 Act but pending at the time of commencement of the 1957 Act were to continue only under the 1957 Act and not under the 1894 Act.

19. Thus, it is crystal clear that the 1894 Act which was a general Act for acquisition of land for public purpose and for companies was partially repealed by the 1957 Act which was a special Act for acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land. As stated in Principles of Statutory Interpretation, Tenth Edition 2006 by Justice G.P. Singh:

"A prior general Act may be affected by a subsequent particular or special Act if the subject-matter of the particular Act prior to its enforcement was being governed by the general provisions of the earlier Act. In such a case the operation of the particular Act may have the effect of partially repealing the general Act, or curtailing its operation, or adding conditions to its operation for the particular cases."

20. An example of such partial implied repeal of an earlier general statutory

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provision by later particular provision is the case of *Municipal Board, Bareilly vs. Bharat Oil Co. and others*, AIR 1990 S.C. 548. The relevant facts of this case briefly were that in exercise of powers under Sections 131 to 135 of the U. P. Municipalities Act, 1916, the Government of the United Provinces framed octroi rules which were published by notification dated 25th October, 1925 and these rules were included in the Municipal Account Code (Chapter X Rules 131 to 231) published by the Government of U.P. But several decades thereafter, separate rules for assessment and collection of octroi in the Bareilly Municipality were framed by the Government of U.P. in exercise of the powers conferred by Section 296 of the said Act. On these facts, the Supreme Court held that the octroi rules contained in Chapter X are general rules framed by the State Government in respect of matters referred to in Section 153 in exercise of power under Section 296 and are general for all municipalities, but the 1963 rules are framed for the Municipal Board, Bareilly expressly superseding the general rules in so far as they apply to the Municipal Board, Bareilly. The Supreme Court further held that by framing the 1963 Rules, the Government evinced its intention to cover the field which was covered by the 1925 Rules in so far as the Bareilly Municipality was concerned and the subject matter dealt with in the 1963 rules was the same as dealt with in 1925 rules and hence the intention to supersede the earlier rules was clearly expressed and Rule 131 of the 1925 Rules has no longer any application in the matter of levying octroi by the Municipal Board, Bareilly and the said rules stood repealed insofar as the Municipal Board, Bareilly is concerned.

21. We have, therefore, no hesitation to hold that the 1894 Act and the 1957 Act cover the same field and same subject matter, namely, acquisition of land by the State for public purposes and for companies; but Parliament in enacting the 1957 Act for acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land has clearly evinced its intention that with commencement of the 1957 Act, the 1894 Act will no longer apply and would stand repealed in respect of acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land. Hence, acquisition of land in the present case for mining of coal by SECL should have been done under the 1957 Act and not under the 1894 Act.

22. Nonetheless, in exercise of our power under Art. 226 of the Constitution, we are not inclined to quash the entire proceedings for acquisition. This is because the Central Government in exercise of its powers under Section 4 (1) of the 1957 Act had already given notice of its intention to acquire the rights to mine, quarry, bore, dig and search for, win, work and carry away minerals in the lands measuring 3407.408 hectares by notification dated 6th February, 1996 and after hearing objections had also issued notification on 4th February, 1997 that it was satisfied that the rights to mine, quarry, bore, dig and search for, win, work and carry away minerals in the lands measuring 3407.408 hectares approximately should be acquired

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and had also issued a notification dated 24th June, 1998 under sub-section (1) of Section 9 of the 1957 Act that the rights to mine, quarry, bore, dig and search for, win, work and carry away minerals in the lands measuring 3407.408 hectares have been acquired. What the Central Government failed to do is to issue a notification under Section 7 of the 1957 Act giving notice of its intention to acquire the land and instead requested the Collector by letter dated 31st August, 2001 to issue notifications to acquire 699.698 hectares of tenancy land under the 1894 Act and to take possession of the same under Section 17 of the 1894 Act immediately and pursuant to this request, the State Government issued notifications under Section 4 and issued declaration under Section 6 of the 1894 Act in respect of the land on 23rd May, 2004 and initiated proceedings under Section 9 of the 1894 Act and the Collector made the award determining the compensation under Section 11 of the 1894 Act. As a consequence, the land owners whose lands were acquired were deprived of the determination of compensation in the land so acquired by agreement or failing such agreement by the Tribunal under Section 14 of the 1957 Act. Hence, the appropriate relief we should grant in these writ petitions is to direct the Central Government to issue notifications under Sections 7, 9 and 9-A of the 1957 Act acquiring the land in question under the 1957 Act and to direct vesting of the land in the SECL under Section 11 of the 1957 Act and to take possession of the land under Section 12 of the 1957 Act and to determine the compensation payable to the land owners by agreement and failing such agreement through the Tribunal in accordance with Section 14 of the 1957 Act. As has been held by the Supreme Court in *Ramnihal N. Bhutta and another vs. State of Maharashtra and others* (supra) and as has been reiterated in *Girias Investment Private Limited and another vs. State of Karnataka and others* (supra), the Court will have to weigh the public interest vis-a-vis the private interest while exercising the power under Art. 226 of the Constitution and even if it finds that the acquisition was vitiated on account of non-compliance of some legal requirement or that the persons interested are entitled to particular amount of compensation, the Court should appropriately mould the relief and redress the wrong instead of quashing the acquisition proceedings. Similarly, as observed in *Savitri Cairae vs. U.P. Avas Evam Vikas Parishad and another* (supra), it is immaterial under which Act the acquisition has been made, but the land owner should be given higher compensation to avoid discrimination.

23. The lands required for mining of coal by the SECL in the present case, moreover, are located in the Scheduled Areas and are owned by the tribals. Art. 244 (1) and the Fifth Schedule of the Constitution make provisions to ensure that the tribals residing in the Scheduled Areas are not exploited and their rights over the land are protected. This is because tribals living in Scheduled Areas are dependent on the agricultural land for their living. Any project of the Central Government or the State Government or of any corporation or government company owned by the Central Government or the State Government which deprives the

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tribals in the Scheduled Areas of their land by acquisition either under the 1894 Act or the 1957 Act must ensure that such tribals are rehabilitated and resettled with an alternative source of living in accordance with the policy of the appropriate Government.

24. The Government of Madhya Pradesh, Rehabilitation Department has formulated a policy in September, 1991 for rehabilitation of persons who become oustees due to mineral projects situated in the State. The policy of the Government of Madhya Pradesh, Rehabilitation Department of September, 1991 is extracted herein below:

**“GOVERNMENT OF MADHYA PRADESH
REHABILITATION DEPARTMENT**

No.F/5-8:90:28

Bhopal, 25 Sept. 1991

It has been decided by the State Government that the following policy may be enforced for rehabilitation for the persons who become oustees due to the mineral projects situated in the State.

1. ELIGIBILITY:

The person/family likely to be oustees due to mineral projects will be eligible for the facilities on the following basis:

- (a) Whose whole lands have been acquired.
- (b) Whose 1/3 agricultural land and residential have been acquired.
- (c) Whose only residential lands have been acquired.
- (d) Who are living without residential facility in the area which is effected by this scheme.

2. DEFINITION OF OUSTEES FAMILY:

(a) The oustees family means, husband, wife, minor children and other who are dependent on the family such as, widow mother, widow sister, sister daughter, or old father.

(b) The boys of oustees family, who become adult on the date of issue of notification under Section 4 of Land Acquisition Act, will be treated as separate family.

3. EMPLOYMENT FACILITY:

(a) One person of that each family, whose residential land and more than 1/3rd land have been acquired will be eligible for getting employment by SECL on first priority basis.

(b) One person of each family, whose non-irrigated land more than 3 acres and irrigated land more than 2 acres have been acquired will be eligible to get employment by SECL on second priority.

(c) One person of such family, whose agricultural land

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and/or residential land have been acquired, will be eligible for getting employment by SECL on priority basis.

(d) One person such as family, whose 2/3 agricultural land has been acquired, will be eligible for getting employment by SECL on availability basis.

(e) Landless oustees of concerned area, whose essential livelihood have been affected will be provided training through the medium of self employment plan with the help of the State Government, SECL will evaluate the need for training shall be arranged by SECL.

4. DISTRIBUTION OF LAND:

Every oustees family will be provided ten decimals of residential land. For this purpose the state will provide land to SECL which will pay its cost.

5. OTHER FACILITIES

In the residential facility, normal facilities like road, street, lights, school buildings, health centers, facility for drinking water well, entertainment, water tanks, play grounds, gardens and shopping centers will be provided by SECL.

6. ASSISTANCE

For temporary residential facility, every oustee family will receive from the SECL Rs.2500/- (rupees two thousand five hundred only) as immediate resettlement assistance, SECL will also arrange for training of entitled individuals of such families.

7. In areas affected by mining projects, a joining committee will decide the entitlement of all those who were engaged in business, commerce or other forms of livelihood and have been adversely affected because of projects. This committee will include representatives of SECL and of the State Government nominated by the Collector. People falling in this category will trend through the medium of self employment, plan, etc. SECL will evaluate the need for the training for such individuals with the assistance of the State Government and will arrange for it.

8. OTHER TERMS AND CONDITIONS:

(a) If the Department of Coal, Govt. of India, decides an additional compensation or facility in any mining project will be applicable to all the resettlement plans, in addition to what has been listed above.

(b) The Government can change or modify this policy in consultation with SECL.

(c) If any other related company desires, it can with the

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approval of the State Government implement this policy in mining projects other than those of SECL.

In the name and as per the order of
The Governor of Madhya Pradesh.

Sd/- (SH. SHARMA)

DEPUTY SECRETARY,

GOVT. OF M.P. REHABILITATION DEPTT."

The State Government and the SECL will ensure that the persons, who are eligible to the rehabilitation facilities indicated in the policy of September, 1991 of the Government of Madhya Pradesh, quoted above, are granted the said facilities.

25. In the result, we direct the Central Government to issue notifications under the 1957 Act for acquisition of the land and take possession of the land in question, as discussed in paragraph 22 of this judgment, and get the compensation determined in accordance with Section 14 of the 1957 Act and pay the same to the land owners. Any amount of compensation already received by the owners of the land will be adjusted against the compensation so determined under Section 14 of the 1957 Act. SECL will deposit the compensation less the amount already deposited with the appropriate authority accordingly. We further direct that the State Government and the SECL will provide the rehabilitation facilities to the eligible persons in accordance with the policy of September, 1991 of the State Government.

The writ petitions are allowed with the aforesaid reliefs. There shall be no orders as to costs. Interim orders passed in these writ petitions are vacated.

Petition allowed.

I.L.R. [2009] M. P., 747

WRIT PETITION

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

14 November, 2008*

SMRITI AGARWAL (KU.)

... Petitioner

Vs.

M.P. PROFESSIONAL EXAMINATION BOARD & ors.

... Respondents

M.P. Professional Examination Board Pre MCA and MET Rules, 2008, Rule 1.4.8, Rajiv Gandhi Prodyogiki Vishwavidyalaya Bhopal Ordinance, Clause 2.1 - Admission to MCA course - After permitting petitioner to undertake examination, admission in MCA course denied on the ground that she did not have mathematics as subject either at Higher Secondary or at Graduation level - Held - Petitioner had business mathematics at Higher Secondary level as additional subject - Syllabuses

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and chapters of mathematics and business mathematics are quite different - Distinction was in knowledge of petitioner - Rule, ordinance and norms issued by All India Council for Technical Education prescribes minimum admission qualification for MCA course that one should have passed either Higher Secondary or Graduation with mathematics as one subject - Petitioner does not possess requisite qualification - Admission rightly denied - Petition dismissed. (Para 10)

म.प्र. व्यावसायिक परीक्षा मण्डल पूर्व एमसीए और मेट नियम, 2008, नियम 1.4.8, राजीव गांधी प्रौद्योगिकी विश्वविद्यालय भोपाल अध्यादेश, खण्ड 2.1 - एमसीए पाठ्यक्रम में प्रवेश - याची को परीक्षा में बैठना अनुज्ञात करने के बाद एमसीए पाठ्यक्रम में प्रवेश से इस आधार पर इंकार किया गया कि उसका उच्चतर माध्यमिक या स्नातक स्तर पर गणित विषय नहीं था - अमिनिर्धारित - याची ने उच्चतर माध्यमिक स्तर पर व्यावसायिक गणित अतिरिक्त विषय के रूप में लिया था - गणित और व्यावसायिक गणित के पाठ्यक्रम और अध्याय बिल्कुल भिन्न हैं - भिन्नता याची के ज्ञान में थी - अखिल भारतीय तकनीकी शिक्षा परिषद द्वारा जारी नियम, अध्यादेश और मानक एमसीए पाठ्यक्रम के लिए न्यूनतम प्रवेश अर्हता विहित करते हैं कि या तो उच्चतर माध्यमिक या स्नातक एक विषय के रूप में गणित के साथ उत्तीर्ण होना चाहिए - याची अपेक्षित अर्हता नहीं रखती है - प्रवेश उचित रूप से नामंजूर - याचिका खारिज।

A.P. Singh & K.D. Singh, for the petitioner.

Kumaresh Pathak, Dy.A.G., for the respondent No.2.

Paritosh Gupta, for the respondent No.3.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** :- Invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India the petitioner has prayed for issue of a writ of certiorari for quashment, of the order dated 11.9.2008 contained in Annexure-P-8 whereby the petitioner has been intimated by the Director, Directorate of Technical Education, Bhopal that she is not eligible for admission to the M.C.A. Course on the ground that she did not have the Mathematics as a subject either at the Higher Secondary or at the Graduation Level.

2. The factual expose which is necessitous to be uncurtained are that in pursuance of an advertisement issued by the M.P. Professional Examination Board calling for the applications from eligible candidates for examination of Pre. M.C.A. Course. 2008-09 the petitioner submitted an application on the basis of which she was issued an Admit Card and she was permitted to undertake the examination. Though she was called for counselling, she was denied admission on the ground that she did not have Mathematics as a subject either at the Higher Secondary or at the Graduation level. It is averred that the petitioner had "Business Mathematics" as an additional subject in the Higher Secondary School Certificate Examination and she had passed B.Sc. from Barkatullah University, Bhopal in First Division and, therefore, she was entitled to be admitted in the course in question.

3. It is urged that on being satisfied that she had met the eligibility criteria she was permitted to undertake the examination and after being qualified she has been denied the benefit of admission on the ground that she did not have the Mathematics as a subject either at the Higher Secondary or at the Graduation Level which is unjustified and unwarranted. It is put forth that the candidates who have completed Bachelor of Computer Application (B.C.A.) and given examination with Business Mathematics as a subject, the said candidates have been given admission in M.C.A. Course, but the petitioner has been denied the benefit for the reasons best known to the respondents-authorities. In this backdrop a prayer has been made for quashment of the order denying him the admission and further to issue a writ of mandamus commanding the respondents to admit her for the M.C.A. Course for the academic session 2008-09.

4. A counter affidavit has been filed by the respondent No.2 contending, inter alia, that the M.P. Professional Examination Board has framed M.P. Professional Examination Board-Pre M.C.A. and MET Rules, 2008 (for short '2008 Rules') allowing the eligibility criteria for the academic session 2008-09. Rule 1.4.2 of the aforesaid Rules stipulates that for seeking admission to M.C.A. Course the candidate should be a graduate from any UGC/AICTE approved Indian University with Mathematics as a compulsory or as an additional subject at either Higher Secondary (10+2) or at Graduation Level. The said criteria does not include the subject of Business Mathematics and; therefore, the petitioner is not be eligible for seeking admission to M.C.A. Course. It is contended that as per the norms laid down by the All India Council for Technical Education, New Delhi a Bachelor's Degree of minimum three years with Mathematics as one of the subjects has been prescribed to be the minimum qualification for admission to M.C.A. Course. It is asseverated that as per the Ordinance issued by Rajiv Gandhi Proudyogiki Vishwavidyalaya, Bhopal a candidate seeking admission to M.C.A. Course should be a graduate from any Indian University or Institute recognized by the University as equivalent thereto. The graduation should be with three years of regular study after passing (10+2) Senior Secondary Examination or its equivalent of an approve Board with Mathematics as a compulsory subject. In view of the aforesaid provisions, as pleaded, passing an examination with Mathematics as a subject is a condition precedent and none of the said provisions include the Business Mathematics subject. It is put forth that no candidate with B.C.A Degree has been allowed to take admission in the M.C.A. course who do not have Mathematics as a compulsory or additional subject. No candidate passing B.C.A. with Business Mathematics, who has been allowed to participate in the counselling, has been given admission to the course in question and, therefore, the question of equality clause being frowned at does not arise.

5. A return has been filed by the respondent No.3. Rajiv Gandhi Proudyogiki Vishwavidyalaya, Bhopal, contending, inter alia, that Rule 2.5.2 of the 2008 Rules

prescribes eligibility for admission to M.C.A. Rules. As per the said provision it is imperative to have Mathematics as a compulsory or as an additional subject at either Higher Secondary (10+2) Level or Graduation Level. The petitioner had not studied mathematics either at the Higher Secondary Level or at the Graduation level but had studied Business Mathematics as an additional subject in the Higher Secondary Level. It is put forth that there is a distinction between the subjects of Mathematics and Business Mathematics inasmuch as the subject of Mathematics has 20 Chapters whereas the Business Mathematics is a different subject having only 9 Chapters. Both the subject are by no means equivalent. To draw a distinction, documents showing syllabi of Higher Mathematics and Business Mathematics have been brought on record as Annexures-R-1 & R-2. In this backdrop it is asserted that the petitioner does not meet the eligibility criteria and hence, he is not entitled to admission.

6. A rejoinder has been filed to the return filed by the respondent No.2 stating, inter alia, that the University has recognized the Business Mathematics as a subject in the curriculum of B.C. A. and the candidates who have appeared for the examination at B.C.A. Level are entitled for the admission to M.C.A. Course. It is set forth that once the examination for Business Mathematics has been recognized; at Graduation level the candidates cannot be discriminated at the Post Graduation level i.e. M.C.A. The syllabus of B.C.A. has been brought on record as Annexure-P-10. It is the stand in the rejoinder affidavit that the technical rules of respondent No. 2 shall not come in the way of the petitioner in getting the admission to M.C.A. Course. It is also pleaded that the petitioner was not aware that the Mathematics does not include Business Mathematics, as the same was not mentioned in the Rules or in the prospectus.

7. We have heard Mr.A.P.Singh and Mr.K.D.Singh, learned counsel for the petitioner, Mr.Kumaresh Pathak, learned Deputy Advocate General for the respondent No.2 and Mr.Paritosh Gupta, learned counsel for the respondent No.3.

8. The singular question that emerges for consideration is whether the petitioner has been inappropriately denied the admission to M.C.A. Course, Rule 1.4.2 of 2008 Rules deals education qualification. The relevant part of it reads as under:-

"MCA COURSE:

A candidate seeking admission to MCA Course should be a graduate of any UGC/AICTE approved Indian University or from a foreign University recognized by Association of Indian Universities (AIU) or institute recognized by the concerned University as equivalent thereto. The Bachelor's degree must be of minimum three years duration in any discipline with Mathematics as compulsory or an additional subject at either Higher Secondary (10+2) or at Graduation Level.

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9. The All India Council for Technical Education has issued norms on 08.5.2008 prescribing Minimum Admission Qualifications for MCA course stipulating that one should have passed from any recognized Bachelors degree of minimum three years duration in any discipline with Mathematics as one of the subjects. The Ordinance of the University under Clause 2.1 lays a following postulate:-

"2.1 A candidate seeking admission to M.C.A. Course should be graduate of any Indian University or Foreign University or Institute recognized by the University as equivalent thereto. The graduation should be with three year of regular study after passing 10+2 Senior Secondary Examination or its equivalent of an approved Board "with mathematics as a compulsory subject."

10. In view of the aforesaid provisions there can be no iota of doubt that one must have mathematics as a subject at the Higher Secondary level or at the Graduation level. The petitioner had the Business Mathematics at the Higher Secondary level as an additional subject. The University has brought on record documents to highlight that there is distinction between the Higher Mathematics and Business Mathematics. From a bare glance at the same, such a difference is perceivable. The averment that equally placed candidates have been admitted to the course in question has been categorically denied by the respondents. It is submitted by the learned counsel for the petitioner that in the Rule or the prospectus no distinction has been brought between the subjects of Mathematics and Business Mathematics and when the petitioner was permitted to appear in the examination, the respondents should not have acted in an ultra-technical manner to deny her admission. The aforesaid submission is noted to be rejected inasmuch as the Rules are crystal clear that the candidates should have Mathematics as a subject. The petitioner is expected to know the distinction between the subjects of Mathematics and Business Mathematics when the syllabuses and chapters of both the subjects are quite different. The syllabi distinctly postulate what is meant by Mathematics and Business Mathematics. It is within the special knowledge of the petitioner. When the Rules clearly prescribes that the candidate should have mathematics as a subject, the petitioner cannot take a plea that she was not made aware of the distinction between the Mathematics and the Business Mathematics. Thus, the stand of the petitioner that she was not aware of the distinction does not merit acceptance.

11. In view of the aforesaid analysis we hold that the petitioner does not possess the requisite qualification and therefore, she has been justifiably denied the admission to the MCA course. Ergo, no fault can be found with the action of the respondents.

12. Consequently, the writ petition, being devoid of merit, stands dismissed without any order as to costs.

Petition dismissed.

WRIT PETITION

Before Mr. Justice K.K. Lahoti & Mrs. Justice Sushma Shrivastava

24 November, 2008*

VED PRAKASH & ors.

... Petitioners

Vs.

GURU GRANTH SAHEB STHAN MEERGHAT

TOWN VANARAS SARVRAHI & anr.

... Respondents

A. Civil Procedure Code (5 of 1908), Sections 10 & 151 - Stay of suit - Pendency of civil case and criminal case on the same subject matter - Whether civil suit can be stayed even after recording of plaintiff's almost evidence - Yes..

The judgment of *M.S. Sheriff* (AIR 1954 SC 397) is fully applicable in the present case, the petitioners who have setup their case on the basis of Will in respect of which the plaintiff has made allegation that it is a forged & fabricated and in that regard criminal proceedings are pending against the petitioners, in our considered opinion, the proceedings in civil suit deserves to be stayed. At this stage, Shri Ojha, the learned counsel appearing for the respondent submitted that the plaintiff's evidence has already commence and if at this stage, the proceedings in civil suit are stayed, it shall cause prejudice to the plaintiff. It is submitted by him that even if the proceedings are to be stayed, then the plaintiff should be permitted to conclude its evidence and thereafter, after the decision in criminal case, the defendants may commence their evidence. Though the aforesaid contention appears to be just & proper, but in view of the specific mandate in the case of *M.S. Sheriff* (Supra), we are unable to accept the aforesaid contention. The Apex Court has very specifically held that in such situation, the proceedings of civil suit should be stayed. This petition is accordingly allowed. (Para 6)

क. सिविल प्रक्रिया संहिता (1908 का 5), धाराएँ 10 व 151 - दाद का रोका जाना - एक ही विषयवस्तु पर सिविल मामला और दाण्डिक मामला विचाराधीन होना - क्या सिविल मामला वादी की अधिकांश साक्ष्य अभिलिखित किये जाने के बाद भी रोका जा सकता है - हाँ।

B. Precedent - Conflict between two decisions of the Apex Court - In presence of division bench decisions and larger bench decisions, the decisions of larger bench are binding on the High Court and subordinate courts - In the case of Kalyan Sundaram [(1996) 3 SCC 87], the judgment of the M.S. Sheriff [AIR 1954 SC 397] was not placed for consideration before division bench - Therefore, M.S. Sheriff's case, decided by five judges bench, being a larger bench judgment of the Apex Court - It is having a binding effect. (Para 5)

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ख. पूर्वनिर्णय - शीर्ष न्यायालय के दो निर्णयों में अन्तर्विरोध - खण्ड न्यायपीठ के निर्णयों और वृहत्तर न्यायपीठ के निर्णयों की उपस्थिति में वृहत्तर न्यायपीठ के निर्णय उच्च न्यायालय और अधीनस्थ न्यायालयों पर बंधनकारी होते हैं - कल्याण सुन्दरम [(1996) 3 SCC 87] के मामले में एम.एस. शेरिफ [AIR 1954 SC 397] का निर्णय खण्ड न्यायपीठ के समक्ष विचारार्थ नहीं रखा गया - इसलिए, पाँच न्यायाधीशों की न्यायपीठ द्वारा विनिश्चित एम.एस. शेरिफ का मामला शीर्ष न्यायालय की वृहत्तर न्यायपीठ का निर्णय होने से - यह बंधनकारी प्रभाव रखता है।

Cases referred :

1988 J LJ 687, (1996) 3 SCC 87 (Distinguished), AIR 1954 SC 397, 2003(1) MPJR 158.

P.S. Das, for the petitioners.

Ajay Ojha, for the respondents.

ORDER

This petition is filed challenging the order dated 21.4.2008 by First Additional Judge to the Court of First Additional District Judge, Panna in Civil Suit No.10-A/2006 by which the trial Court rejected the application filed by the petitioners under Section 10 read with Section 151 of C.P.C. seeking stay of the civil suit during the pendency of criminal proceedings, in respect of subject-matter of the suit.

2. The learned counsel for the petitioners submitted that till the decision in Criminal proceedings, the proceedings of the civil suit ought to have been stayed by the trial Court. He placed reliance to the judgment of the Single Bench of this Court in *New Bank of India v. M/s Radhakishan and Co. and others* : 1988 J LJ 687. It was further submitted by Shri Das that when civil suit and the criminal case were based on same cause of action, the civil suit ought to have been stayed and filing of the written statement was of no consequence.

3. Shri Ajay Ojha, the learned counsel for respondent, submitted that the petitioners had filed their written statement in the case and now only evidence is to be recorded. In the written statement, the petitioners have already disclosed their defence. In these circumstances, there was no necessity of staying the civil suit. He placed reliance to the Supreme Court's judgment in *State of Rajasthan vs. Kalyan Sundaram Cement Industries Ltd.* [(1996) 3 SCC 87].

4. To appreciate the aforesaid contentions, the factual position may be stated:-

The plaintiff/respondent filed a civil suit against the petitioners and some other persons seeking declaration of title, perpetual injunction and possession in respect of the disputed lands of which details were furnished in para 2 of the plaint. In para 6 of the plaint, the plaintiff stated that the defendants 1 to 7 in collusion fabricated a will in the name of Devki Nandan, which was un-registered will, filed an application seeking mutation before the Tehsildar, Ajaygarh and sought declaration about the will and also that the order of mutation dated 24.11.1999 by the Tehsildar, Ajaygarh directing mutation of the names of the petitioners on the basis of the will, be declared as null and void.

VED PRAKASH V. GURU GRANTH SAHEB S. M. T. V. SARVRAHI

The petitioners contested the suit and set up their title on the basis of will. Thereafter, the plaintiff commenced its evidence and when the evidence was going on, the petitioners filed an application for staying proceedings of the civil suit because of pendency of criminal case. The trial Court by the impugned order dated 21.4.2008 found that the proceedings of Civil Suit and Criminal case are not based on same facts and because of proceedings of the civil suit, there is no possibility of causing any prejudice to the defendants. The defendants have filed written statement and the case is at the stage of evidence. On these grounds, the trial Court dismissed the application filed by the petitioners. Reliance was placed by the trial Court to the Apex Court judgment in *State of Rajasthan vs. Kalyan Sundaram Cement Industries*: [(1996) 3 SCC 87.]

This order is under challenge in this petition. In this case, the factual position is not in dispute that the defendants were claiming their title on the basis of will dated 2.7.1997 in respect of which a mutation order dated 24.11.1999 was passed by the Tehsildar. The plaintiff in para 6 of the plaint specifically challenged the order and sought relief for declaring that the mutation order be declared null and void. The defendants though have filed written statement may be required to appear in the witness box to prove their contentions, stated in the written statement.

5. In *Kalyan Sundaram Cement's case* (supra), two Judges Bench of the Apex Court, considering the question, held that the pendency of criminal proceedings relating to the same matter, there is no impediment to proceed with the civil suit. The Criminal Court would deal with the offence punishable under the relevant Act. On the other hand, the Courts rarely stay the criminal cases only when the compelling circumstances require the exercise of their power. The Apex Court further observed that "we have never come across stay of any civil suits by the Courts so far". The aforesaid judgment is applicable in the set up of the present facts. But the learned counsel appearing for the petitioners placed reliance to a judgment of the Apex Court in *M.S. Sheriff v. State of Madras* (AIR 1954 SC 397), which is a judgment of five Judges of the Apex Court. The Apex Court in paras 15 and 16 of the judgment held thus:

"15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decision in the civil and criminal Courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of the Court binding on the other; or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under S. 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

The aforesaid legal position was not brought into the notice of the Apex Court in the case of *Kalyan Sundaram Cement* (supra). In these circumstances, when five Judges Bench of the Apex Court held that in these circumstances, the civil suit should be stayed till the criminal proceedings, in our considered opinion, the larger bench judgment is to be followed by the Courts. In the case of *Kalyan Sundaram Cement*, the judgment of the *M.S. Sheriff* was not placed for consideration and being a larger bench judgment of the Apex Court, it is having a binding effect. A Five judges bench of this Court in *Jabalpur Bus Operators Association and Ors. Vs. State of M.P. and Anr.* (2003(I) MPJR 158 held thus:

" In case of conflict between two decisions of the Apex Court, Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter bench of equal strength, in which case the later decision is binding. Decision of a Larger Bench is binding on smaller Benches. Therefore, the decision of earlier Division Bench, unless distinguished by latter Division Bench is binding on the High Courts and the Subordinate Courts. Similarly, in presence of Division Bench decisions and Large Bench decisions, the decisions of Larger Bench are binding on the High Courts and the Subordinate Courts. No decision of Apex Court has been brought to our notice which holds that in case of conflict between the two decisions by equal number of Judges, the later decision is binding in all circumstances, or the High Courts and the Subordinate Courts can follow any decision which is found correct and accurate to the case under consideration. High Courts and Subordinate Courts should lack competence to interpret decisions of Apex Court since that would

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not only defeat what is envisaged under Article 141 of the Constitution of India, but also militate hierarchical supremacy of Courts. The common thread which runs through various decisions of Apex Court seems to be that great value has to be attached to precedent which has taken the shape of rule being followed by it for the purpose of consistency and exactness in decisions of Court, unless the Court can clearly distinguish the decision put up as a precedent or is per incuriam, having been rendered without noticing some earlier precedents with which the Court agrees. Full Bench decision in *Balbir Singh's case* (supra) which holds that if there is conflict of views between the two co-equal Benches of the Apex Court, the High Court has to follow the judgment which appears to it to state the law more elaborately and more accurately and in conformity with the scheme of the Act, in our considered opinion, for reasons recorded in the preceding paragraph of this judgment, does not lay down the correct law as to application of precedent and is, therefore, over ruled on this point."

In view of the settled position, we are bound to the decision of the Apex Court in *M.S.Sheriff*, which is a judgment of five Judges of the Apex Court.

6. The judgment of *M.S.Sheriff* is fully applicable in the present case. The petitioners, who have set up their case on the basis of will in respect of which the plaintiff has made allegation that it is a forged and fabricated and in that regard criminal proceedings are pending against the petitioners, in our considered opinion, the proceedings in Civil Suit deserve to be stayed. At this stage, Shri Ojha, the learned counsel appearing for the respondent submitted that the plaintiff's evidence has already commenced and if at this stage, the proceedings in civil suit are stayed, it shall cause serious prejudice to the plaintiff. It is submitted by him that even if the proceedings are to be stayed, then the plaintiff should be permitted to conclude its evidence and thereafter, after the decision in criminal case, the defendants may commence their evidence. Though the aforesaid contention appears to be just and proper, but in view of the specific mandate in the case of *M.S.Sheriff* (supra), we are unable to accept the aforesaid contention. The apex Court has very specifically held that in such situation, the proceedings of civil suit should be stayed. This petition is accordingly allowed. The order passed by the Ist Additional District Judge to the Court of Additional Judge, Panna dated 21.4.2008 in Civil Suit No. 10-A/2006 is hereby set aside and it is directed that till the decision of criminal case, the proceedings in Civil Suit No.10-A/2006 shall remain stayed.

Petition allowed.

RAKESH MISHRA Vs. STATE OF M.P.

I.L.R. [2009] M. P., 757

WRIT PETITION

Before Mr. Justice R.K. Gupta

2 December, 2008*

RAKESH MISHRA & anr.

... Petitioners

Vs.

STATE OF M.P. & ors.

... Respondents

A. Civil Services (General Conditions of Service) Rules, M.P. 1961, Rules 8(6) & 12(4) - Grant of seniority from the date of initial appointment - Appointment order clearly stipulating that petitioners have to pass the necessary examination from the central training institute within a period of 3 years - Petitioners could not pass the said examination within 3 years - Held - Petitioners not entitled to seniority from the date of initial appointment - Both the petitioners have accepted the said condition - In absence of any challenge to the said condition even otherwise are estopped from claiming the benefit of ad hoc period for the purpose of reckoning the seniority - Petition dismissed. (Paras 19 & 22)

क. सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र. 1961, नियम 8(6) व 12(4) - प्रारम्भिक नियुक्ति की तारीख से वरिष्ठता प्रदान किया जाना - नियुक्ति आदेश स्पष्ट रूप से शर्त लगाता है कि याची को केन्द्रीय प्रशिक्षण संस्थान से 3 वर्ष की कालावधि के भीतर आवश्यक परीक्षा उत्तीर्ण करनी है - याची उक्त परीक्षा 3 वर्ष के भीतर उत्तीर्ण नहीं कर सके - अभिनिर्धारित - याची प्रारम्भिक नियुक्ति की तारीख से वरिष्ठता के हकदार नहीं - दोनों याचियों ने उक्त शर्त स्वीकार की - उक्त शर्त को किसी चुनौती के अभाव में अन्यथा भी वरिष्ठता की गणना करने के प्रयोजन के लिए तदर्थ कालावधि के लाभ का दावा करने से विवंधित हैं - याचिका खारिज।

B. Constitution, Article 14 - Equality - Negative equality - Merely on a wrong done by the State will not confer any right on the petitioners - It is a case of negative equality and a wrong benefit conferred shall not carry any right in favour of other person to claim the same relief by applying the concept of negative equality. (Para 31)

ख. संविधान, अनुच्छेद 14 - समानता - नकारात्मक समानता - राज्य द्वारा केवल गलत सम्पादन पर याचियों को कोई अधिकार प्रदान नहीं किया जायेगा - यह नकारात्मक समानता का मामला है और प्रदान किया गया कोई गलत लाभ नकारात्मक समानता की संकल्पना लागू कर उसी अनुतोष का दावा करने के लिए अन्य व्यक्ति के पक्ष में कोई अधिकार संचारित नहीं करता।

Cases referred :

(2006) 4 SCC 1, (1996) 11 SCC 113, ILR [2008] MP 1869.

Sanjay K. Agrawal, for the petitioners.

Deepak Awasthy, G.A., for the respondent Nos.1 & 2.

None, for the respondent No.3.

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O R D E R

R.K. GUPTA, J. :-They are heard.

2. Both the petitioners filed the present case before the tribunal for quashment of the order dated 31.10.2000 issued by the respondents. Both the petitioners have also prayed for a writ of Mandamus against the respondents to accord them seniority from the date of their initial appointment.

3. By communication dated 31.12.2000 which is Annexure A/17, the representation submitted by one Shri V.K. Shukla, the Asst. Training Officer has been rejected. Mr. Shukla is not the petitioner in the present petition. The said representation was submitted by Mr. Shukla for grant of seniority from the date of his first adhoc appointment.

4. The facts leading to the present case are that both the petitioners were initially appointed on adhoc basis. According to the averments made in the petition they were selected by the Mini P.S.C.

5. According to the orders of appointment, the appointment was made for a period of 89 days and according to the petitioners the said period of appointment was extended after the expiry of the earlier period of appointment. The petitioners have also not given details about the number of days on which there was a break in the service between the period after expiry of the earlier period of appointment till the issuance of new order of appointment on adhoc basis.

6. Admittedly, there had been intermediate breaks in service of each petitioner but it is stated that the said break is technical in nature and cannot be considered as a break.

7. While arguing the matter, learned counsel appearing for the petitioners fairly submitted that on the date when the first appointment was given, there were no recruitment rules regulating the appointment of the petitioners on the post. According to the averments made in the petition, both the petitioners were selected by the Mini PSC on regular basis and were appointed as Assistant Training Officer by orders dated 30.3.89 and 29.3.89. It is contended on behalf of the petitioners that the new recruitment rules came into force in the year 1988 and it was further admitted by learned counsel for the petitioners that there was no provision for regularization under the Recruitment Rules of 1988.

8. It is pertinent to mention here that the order of initial adhoc appointment specifically stipulates a condition that the adhoc appointment of the present petitioners shall not give any right to seniority. Both the petitioners accepted the aforesaid condition.

9. It is to be further mentioned that the petitioners when were said to have been regularized by order Annexure A/10 and A/11, a specific condition was also appended therein that petitioners were appointed on adhoc basis and they have to

RAKESH MISHRA Vs. STATE OF M.P.

pass the examination from Central Training Institute within a period of three years. This order further stipulates that in case both the petitioners could not pass the aforesaid examination within a period of three years then their services shall be treated as regular under Rule 8(6) of M.P. Civil Services (General condition of service) Rules, 1961. In the petition filed by the petitioner, it is not stated anywhere that petitioners have passed the said examination to which they were required to pass within a period of three years in terms to the condition enumerated in the order Annexure A/10 and A/11 by which the petitioners were said to have been given regular appointment.

10. In the rejoinder, there are no averments made that any of the petitioners that they have passed the said examination within the stipulated period of three years while giving them appointment in pursuance to the orders Annexure A/10 and A/11 which is said to be a regular appointment.

11. Learned counsel appearing on behalf of the petitioners submitted that the tribunal has passed the order Annexure A/12 in O.A. No 1979/91 decided on 26.11.94, the relevant para of the aforesaid order is quoted below:-

"In my opinion, the request cannot be conceded to. The matter of the fact remains that both the applicants were appointed on ad hoc basis and they have continued on ad hoc basis and they have continued all these years in that capacity. The applicants never agitated their claims requesting the respondents to regularize them on the post they have been holding. Therefore, the only direction can be issued by the tribunal is to direct the respondents to constitute a Screening Committee within two months of the date of this order. If the committee finds them suitable for the post in all respects, they shall be regularized on the post held by them and shall also pay them salary on regular scale. They shall also be entitled to salary for the days on break in service. Their seniority will be counted from the date of their initial appointments."

12. On this basis, an attempt is made on behalf of the petitioners to claim similar relief which was granted by the tribunal in the said Original Application.

13. It is also contended on behalf of the petitioners that in terms to Rule 12(4) of the M.P. Civil Services (General condition of service) Rules, 1961 which was amended with effect from 02.04.98, the petitioners even otherwise are entitled to be given the benefit of seniority because both the petitioners were appointed by following due procedure.

14. The submission so made by learned counsel for the petitioners is considered.

15. In this reference before adverting to the question raised on behalf of the petitioners, it would be appropriate to refer herein below Rule 12 sub-rule 4 of M.P. Civil Services (General Condition of Service) Rules, 1961 on which the reliance is placed which reads as under:-

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"12(4) Seniority of Adhoc employees.-(a) A person appointed on adhoc basis shall not get any seniority till the regularization of his services.

(b) If a person is appointed on adhoc basis by substantially following the procedure laid down by the Recruitment Rules and the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service shall be counted for seniority."

16. The reading of Rule 12 sub-rule 4 (a) indicates that a person appointed on adhoc basis shall not get any seniority till the regularization of his services which means that after regularization, a person appointed on adhoc basis shall be entitled for seniority and the previous services rendered by such an incumbent on adhoc basis shall not be reckoned for the purposes of seniority. Rule 12 sub-rule 4(b) further indicates that if an incumbent is appointed on adhoc basis by substantially following the procedure laid down by the Recruitment Rules and the appointee continues on the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service shall be counted for seniority which means that for the purposes of reckoning seniority. The person appointed on adhoc basis has to be appointed by substantially by following the procedure laid down by the Recruitment Rules. In the present case, as admitted by learned counsel for the petitioners, there had been no recruitment rules on the date of the first appointment therefore there is no question of following any procedure substantially or otherwise prescribed under the relevant Recruitment Rules. This clause also indicates that the appointee if continues on the post uninterruptedly till the regularization of his services in accordance with the rules, the period of officiating service shall be counted for the seniority. The later part of this clause indicates that there should be no interruption till the regularization in the adhoc appointment of an incumbent.

17. Admittedly in the present case there had been interruptions which according to the petitioners, is artificial but the fact remains that there are interruptions in the service till regularization is admitted.

18. Learned counsel for the petitioners submitted that there are no rules regulating the regularization of the petitioners' services or to the post on which they were initially appointed on adhoc basis. It is contended on behalf of the petitioners that regularization and regular appointment is the same. Learned counsel for the petitioners has also not brought to the notice of this Court, any authority or judicial pronouncement to substantiate his submission that regularization and regular appointment is one and the same. Though, the Apex Court in the case of *Secretary, State of Karnataka and Others Vs. Uma Devi and Others* 2006(4) SCC 1 has not accepted the same.

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19. In the present case it is to be seen that when the order Annexure P/10 and P/11 were passed which according to the petitioners are the orders of regularization then it was also a condition mentioned therein that the petitioners have to pass the necessary examination from Central Training Institute within a period of three years. There is nothing on record that petitioners have passed the said examination then it being the situation then in terms to Rule 8(3), the probationer has to undergo the said training and pass such Departmental Examination during the period of probation as may be prescribed then again the question would be, a person who has not passed the examination, how would be entitled to be confirmed and would also be entitled to claim seniority from the date of his initial appointment even though he has not passed the said examination.

20. The question as such has been considered by the Apex Court in 1996(11) SCC 173 *M.P. Chandoria Vs. State of M.P. and Others* and relevant para 4 and 5 of the said judgment are as under:-

"4. The learned counsel for the appellant has contended that since he has been appointed w.e.f. the date of joining of duty, his seniority should be reckoned from the date of his starting discharging duty of the post, viz., February 15, 1967. As he has not been discharged from service due to his failure to pass the test, though he passed his test at later, he must be deemed to have been confirmed w.e.f. the date of his joining the duty. Therefore, the seniority is required to be confirmed from that date. We find no force in the contention. Indisputably, the appellant is governed by the Madhya Pradesh Civil Services [General Conditions of Service] Rules, 1961 [for-short, the 'Rules']. Clause 2[g] defines 'service' to mean a service of group of posts in connection with the affairs of the State other than the Indian Administrative Service and the Indian Police Service, organised as such by the Government. Rule 4 classifies the post with which we are not concerned. Rule 8 prescribes probation. Rule 8[1] envisages that a person appointed to a service or post by direct recruitment shall ordinarily be placed on probation for such period as may be prescribed. The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year. The probationer has to undergo such training and pass such departmental examination during the period of his probation as may be prescribed. Sub-rules (4) and (5) are not relevant and are omitted. Sub-rule (6) of Rule 8 is relevant for the purpose of the case which envisages that on successful completion of probation and passing the prescribed departmental examination, if any, the probationer shall, if there is a permanent post available,

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be confirmed in the service or post to which he has been appointed. Otherwise a certificate shall be issued in his favour by the appointing authority to the effect that the probationer would have been confirmed but for the non-availability of the permanent post. As soon as a permanent post becomes available, he will be confirmed. Under sub-rule (7), a probationer, who has neither been confirmed nor a certificate issued in his favour under sub-sec. (6), nor is he discharged from service under sub-rule (4), he shall be deemed to have been appointed as a temporary Government servant w.e.f. the date of expiry of probation and his conditions of service shall be governed by the Madhya Pradesh Government Servants [Temporary and Quasi - Permanent Service] Rules, 1960.

5. Under Rule 12, the seniority of the members of the service of a district branch or group of posts of that service shall be determined in accordance with the principles laid down therein. Sub-clause (i) of Clause (a) envisaged that the seniority of a directly recruited Government servant appointed on probation shall count during his probation from the date of his appointment; the proviso is not relevant. Sub-clause (ii) envisages that the same order of inter se seniority of direct recruits maintained by confirmation of the normal period of probation. If, however, the period of probation of any direct recruit is extended, the appointing authority should determine the date from which the candidate should be assigned seniority. Until the probation is declared and he was confirmed in the post, he does not become a member of the service (sic) successful completion of the probation and pass of the prescribed tests or conditions precedent to declare the probation. So, mere passage of time one year does not entitle a probationer to be a member of the service. He remains to be on temporarily service. On declaration of probation, the appointing authority should confirm in a pending post available or to grant quasi-permanent status. As soon as the post is available, he should be confirmed. In view of the admitted position that he did not pass the test, the appointing authority considered that his seniority would be counted w.e.f. the date of his passing the test. Rule 12(a)(ii) clearly empowers the appointing authority to assign, in these circumstances, the seniority in lower level than the one assigned by the Public Service Commission. We do not find any illegality committed by the authorities in giving seniority from the date of his passing the test."

21. On the basis of the law laid down as aforesaid, no material has been placed on record that petitioners have passed the requisite examination which was a

condition mentioned in the order of appointment, Annexure P/10 and P/11 whereby they were appointed on probation.

22. The next question also arises for consideration that while appointing the petitioners on adhoc basis, a condition as such was enumerated that petitioners shall not be entitled to claim any benefit of the period of their adhoc appointment for the purposes of reckoning seniority. Petitioners accepted the said condition. The condition as such has also not been challenged in the present petition. Once both the petitioners have accepted the said condition then in the absence of any challenge to the said condition even otherwise are stopped from claiming the benefit of adhoc period for the purposes of reckoning the seniority.

23. In this reference the judgment passed by the Gwalior Bench of this Court is referable which is reported in I.L.R. (2008) M.P. 1869 *State of M.P. and Others Vs. Vinod Mohan Shrivastava* wherein the Division Bench has taken into account the conditions mentioned in the order of appointment which were accepted by an employee then it is held that in case the employee does not fulfill the said conditions mentioned in the order of appointment then the employee as such has to fulfill the said condition before obtaining the benefits arising out of the order.

24. Thus, in view of the condition laid down in the order of first appointment which was on adhoc basis that petitioners shall not claim the period of adhoc appointment for reckoning the seniority and thereafter the petitioners were appointed on probation by orders, Annexure P/10 and P/11 then there, a condition was imposed that they have to pass the examination from Central Training Institute within a period of three years. There is nothing on record that petitioners have passed the above said examination. In the absence of any material to this Court, the judgment so passed by the Division Bench of this Court (*supra*) shall have full application in the present case and, therefore, petitioners, until fulfill the said condition cannot claim any benefit of the said order.

25. The next question which has also been raised by the petitioners is that the tribunal has decided the Original Application No 1979/91 decided on 26.11.94 wherein the employees who are similarly situated were directed to be regularized and seniority is also directed to be reckoned from the date of their initial appointment.

26. It is to be seen that the judgment passed by the tribunal has no binding precedent on the High Court. The aforesaid judgment was passed on 26.11.94 and the relevant recruitment rules i.e. Rule 12 of M.P. Civil Services (General Condition of Service) Rules, 1961 was amended with effect from 02.04.98. The petitioners have also placed reliance on this rule. Thus, on the date when the said case was decided, there were different set of rules and on the date when the present case was filed by the petitioners the amendments in the recruitment rules have already came into operation and the present case has to be decided in the light of the rules in vogue on the date when the case was filed.

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27. As per Rule-12(4) (b) there has to be uninterrupted service and regularization has also to be done of adhoc appointment in terms to the relevant recruitment rules. Admittedly, there were no recruitment rules which provides for the regularization.

28. Apart from this, there had been interruptions also which is admitted by the petitioners in their service, thus keeping in view the mandate of Rule 12(4)(b) of the 1961 Rules, the petitioners have no case in their favour. On the contrary, Rule 12(4) (a) says that an adhoc appointee shall have no right to claim seniority. This is the mandatory rule which is in existence and, therefore, in the absence of requirement of non fulfillment of the conditions as enumerated under Rule 12(4) (b), the petitioners cannot be given the benefit of the said rules but the case of the petitioners is covered by Rule 12(4) (a) which has already been reproduced hereinabove.

29. Under the circumstances, the judgment on which heavy reliance is placed passed by the tribunal has no application in the present case and is also distinguishable.

30. The next submission made by learned counsel for the petitioners is that certain other similarly placed persons have been given the benefit of seniority from the date of their adhoc appointment and therefore, petitioners are also entitled to the same.

31. It is to be seen that merely a wrong is done by the State Govt. that will not confer any right on the petitioners. It is a case of negative equity and a wrong benefit conferred shall not carry any right in favour of other persons to claim the same relief by applying the concept of negative equity. Apart from the aforesaid, no details have been given by the petitioners with respect to other persons those who were similarly situated, according to the petitioners.

32. Mere bald submission in the petition has been made that petitioners are also the similarly situated persons. There is nothing on record whether there was any break against their services or not. Nothing is also shown that other persons were having no break into their services.

33. In view of the aforesaid, in the absence of proper material to this Court merely a bald submission made in the petition cannot be accepted for conferring the benefit in favour of the petitioners.

34. Accordingly, no case is made out in favour of the petitioners and the petition stands dismissed.

Petition dismissed.

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I.L.R. [2009] M. P., 765

WRIT PETITION

Before Mr. Justice S.K. Gangele

11 December, 2008*

MATHURO (SMT.)

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Service Law - Municipalities Act, M.P. (37 of 1961), Sections 95 & 355, Municipal Employees Recruitment and Conditions Rules, M.P. 1968, Rule 23, Shaskiya Sevak (Adhivarshiki-Ayu) Tritiya Sanshodhan Adhyadesh, M.P. 1998, Section 3, State Municipal Service (Executive) Rules, M.P. 1973 - *Age of retirement of municipal employees - Parity in employment - Petitioner a Safai Karamchari was retired from service on attaining age of 60 years on 28.02.1999 - Subsequently, State Government issuing notification that Safai Karamchari of Municipality entitled to continue upto 62 years w.e.f. 27.09.2003 - However, the members of M.P. State Municipal Service have been given the benefit of 60 years of age of retirement w.e.f. 26.09.1998 at par with the employees of State Government - Petitioner seeking parity in age of retirement with other municipal employees - Held - Petitioner was entitled to the benefit of age of 62 years on the basis of Article 14 because she has been retired at the age of 60 years when at that time the benefit of retirement of age of 62 years has been given by the State Government to its employees and same benefit has been given to the class IV municipal employees by the Government w.e.f. 27.09.2003.* (Para 7)

क. सेवा विधि - नगरपालिका अधिनियम, म.प्र. (1961 का 37), धाराएँ 95 व 355, नगरपालिका कर्मचारी मर्ती और शर्तें नियम, म.प्र., 1968, नियम 23, शासकीय सेवक (अधिवार्षिकी-आयु) तृतीय संशोधन अध्यादेश, म.प्र. 1998, धारा 3, राज्य नगरपालिका सेवा (कार्यकारी) नियम, म.प्र. 1973 - नगरपालिका कर्मचारियों की सेवानिवृत्ति की तारीख - नियोजन में समानता - याची सफाई कर्मचारी 60 वर्ष की आयु पूर्ण करने पर 28.02.1999 को सेवानिवृत्त हुई - तत्पश्चात् राज्य सरकार ने अधिसूचना जारी की कि नगरपालिका का सफाई कर्मचारी 27.09.2003 से 62 वर्ष की आयु तक सेवा में बने रहने का हकदार है - तथापि, म.प्र. राज्य नगरपालिका सेवा के सदस्यों को 26.09.1998 से राज्य सरकार के कर्मचारियों के समकक्ष 60 वर्ष की सेवानिवृत्ति की आयु का लाभ दिया गया - याची ने अन्य नगरपालिका कर्मचारियों के साथ सेवानिवृत्ति की आयु में समानता चाही - अभिनिर्धारित - याची अनुच्छेद 14 के आधार पर 62 वर्ष की आयु के लाभ की हकदार थी क्योंकि वह 60 वर्ष की आयु पर उस समय सेवानिवृत्त हुई है जब राज्य सरकार द्वारा अपने कर्मचारियों को सेवानिवृत्ति की 62 वर्ष की आयु का लाभ दिया गया और वही लाभ राज्य सरकार द्वारा चतुर्थ श्रेणी के नगरपालिका कर्मचारियों को 27.09.2003 से दिया गया।

B.. Constitution, Article 14 - *State Government's notification dated*

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27.09.2003 prescribes the age of superannuation of 62 years of class IV employees of the Municipalities including Safai Kamgar - Held - Article 14 forbids class legislation - However, it permits reasonable classification - Two classes of IVth class employees of Municipalities have been created - One class of employees is who have been retired between the period of 1998-2003 and other class of employees who have been retired after the notification - The second class of employees have been given the benefit of the notification but the earlier class of employees have been denied the benefit - However, the benefit of retirement at par with the State Government employees have been given to the members of M.P. State Municipal Service - No reasons have been assigned by the State Government as to why the class IV employees of the Municipalities have not been given the benefit of age of superannuation from the same date i.e. 26.09.1998 as has been given to the members of M.P. State Municipal Service - Petition allowed with the direction to give the benefit to petitioner. (Para 11)

ख. संविधान, अनुच्छेद 14 - राज्य सरकार की अधिसूचना तारीख 27.09.2003 सफाई कामगार को सम्मिलित करते हुए नगरपालिका के चतुर्थ श्रेणी के कर्मचारियों की सेवानिवृत्ति की आयु 62 वर्ष विहित करती है - अभिनिर्धारित - अनुच्छेद 14 वर्ग विधायन का निषेध करता है - तथापि, वह युक्तियुक्त वर्गीकरण अनुज्ञात करता है - नगरपालिका के चतुर्थ श्रेणी कर्मचारियों के दो वर्ग सृजित किये गये हैं - कर्मचारियों का एक वर्ग वह है जो 1998-2003 की कालावधि में सेवानिवृत्त हुए हैं और कर्मचारियों का अन्य वर्ग वह है जो अधिसूचना जारी होने के बाद सेवानिवृत्त हुए हैं - द्वितीय वर्ग के कर्मचारियों को अधिसूचना का लाभ दिया गया किन्तु पहले वर्ग के कर्मचारियों को लाभ देने से इंकार किया - तथापि, राज्य सरकार के कर्मचारियों के समकक्ष सेवानिवृत्ति का लाभ म.प्र. राज्य नगरपालिका सेवा के सदस्यों को दिया गया - राज्य सरकार द्वारा कोई कारण नहीं बताया गया कि क्यों नगरपालिका के चतुर्थ श्रेणी कर्मचारियों को सेवानिवृत्ति की आयु का लाभ उसी तारीख अर्थात् 26.09.1998 से नहीं दिया गया जैसा कि म.प्र. राज्य नगरपालिका सेवा के सदस्यों को दिया गया है - याची को लाभ देने के निदेश के साथ याचिका मंजूर की गई।

Cases referred :

AIR 1963 SC 222, AIR 1968 SC 349, (2004) 4 SCC 646.

C.P. Singh, for the petitioner.

Ami Prabal, Dy.A.G. with Brijesh Sharma, G.A., for the respondent Nos. 1 & 2 / State...

M.P.S. Raghuvanshi, for the respondent No.3.

ORDER

S.K. GANGELE, J.:-The petitioner has filed this petition under Article 226 of the Constitution of India challenging her retirement on the basis of 60 years of age.

2. The petitioner was appointed as Safai Kamgar in Municipal Council, Sabalgarh in the year 1965. After attaining the age of 60 years, she has been

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retired vide order dated 9.2.1999, passed by Municipal Council, Sabalgarh with effect from 28.2.1999. The main ground of challenge in this writ petition is that the petitioner is entitled to continue in service upto the age of 62 years because the State Government has given benefit of IVth Class employees to continue in service upto the age of 62 years. Similar benefit has been given to the employees of the Madhya Pradesh State Municipal Service (Executive). Subsequently, the State Government has also given the benefit of age of retirement of 62 years to IVth Class employees of Municipalities but that benefit has been given from the date of issuance of notification i.e. 27.9.2003.

3. The respondents-State in the return has stated that the petitioner was working as Safai Kamgar in the municipality of Sabalgarh vide notification dated 27.3.2003. The Safai Kamgar of the Municipalities have been given the benefit of age of retirement of 62 years from the date of issuance of notification. The petitioner already retired from service in the year 1999, hence, she is not entitled the benefit to continue in service upto the age of 62 years.

4. Shri C.P.Singh, learned counsel for the petitioner has submitted that the petitioner is also entitled the benefit of age of retirement of 62 years at par with the IVth Class employees of the State Government. The learned counsel further submitted that the State Government has given the benefit of 62 years to the IVth Class employees of the Municipalities in the year 2003 and the benefit should have been given to the petitioner also.

5. Contrary to this, Shri M.P.S.Raghuvanshi, learned counsel for the Municipal Council has submitted that the petitioner is an employee of the Municipality. The petitioner is not entitled the benefit of 62 years of age. The same argument has been advanced by learned Deputy Advocate General on behalf of the State.

6. From the facts of the case, it is clear that the petitioner has been retired after attaining the age of 60 years with effect from 28.2.1999. She has been working as Safai Kamgar. The petitioner was an employee of the Municipal Council. According to the Section 94 of the Madhya Pradesh Municipalities Act, 1961, every Municipal Council having an income of five lakhs of rupees or more shall have power to employ a certain cadre in the Municipalities. It is an admitted fact that the petitioner was appointed by the Municipality under the aforesaid provision of the law. The service of the petitioner has been governed by the rules named as 'Madhya Pradesh Municipal Employees Recruitment & Conditions... Rules, 1968' (hereinafter called as the 'Rules of 1968') framed by the State Government in exercise of the powers conferred by sub-section 1 of Section 355 read with Section 95 of Madhya Pradesh Municipalities Act, 1961. Rule 23 of the aforesaid rules prescribes the age of superannuation. As per the aforesaid rule the superannuation of the municipal employees is 58 years and for IVth Class employees, the age of superannuation shall be determined by the Government. The relevant rule is as under :-

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“23. (1) Age of Superannuation.- The age of superannuation for Municipal employees other than class IV employees shall be 58 years. For class IV employees the age of superannuation shall be as determined by the Government.”

7. The State Government has issued an ordinance named as 'The Madhya Pradesh Shaskiya Sevak (Adhivarshiki-Ayu) Tritiya Sanshodhan Adhyadesh, 1998' (hereinafter called as the 'Ordinance of 1998'). As per the aforesaid Ordinance, the age of superannuation of class IV Government servants has been fixed as 62 years. The aforesaid Ordinance was published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated 26th September, 1998. The Local Self Government and Development Department further amended the Rule 29 of M.P State Municipal Service (Executive) Rules, 1973 and by the aforesaid amendment the age of the superannuation of the employees of the Municipal service has been fixed as 60 years. Subsequently, the State Government has also issued another notification with regard to the age of superannuation of class IV employees of the municipalities under Rule 23 of the Recruitment Rules, 1998. By the aforesaid notification dated 27.9.2003, copy of which has been filed as Annexure-R/1, the age of retirement of class IV employees of Municipalities including Safai Kamgar has been fixed as 62 years. However, from the aforesaid facts, it is clear that the members of M.P State Municipal Service have been given the benefit of 60 years of age of retirement vide a Gazette Notification, dated 26th September, 1998 at par with the employees of the State Government because the State Government employees have also been given the benefit of age of retirement of 60 years of age upto Class III employees by the Ordinance, 1998 with effect from 26th September, 1998 and the class IV employees of Municipal Council have been given the benefit of the age of superannuation of 62 years from 27.9.2003. The petitioner, who retired on 28.2.1999 has been left out from the aforesaid benefit. It is clear that the members of M.P State Municipal Service have been given the benefit of age of retirement from the same date which has been given to the Government employees and only IVth class employees of Municipalities have been given the benefit of age of superannuation from the year 2003. No reasons have been given by the respondents in the return that why the aforesaid benefit has not been given to the petitioner, who was a IVth class employee of the Municipalities from the year 1998, as has been given to the member of M.P State Municipal Service at par with the Government employees.

8. A constitutional Bench of the Hon'ble Supreme Court in the case of *Lachhman Dass Vs. State of Punjab*, reported in AIR 1963 SC 222, with regard to protection under Article 14 of the Constitution of India has held as under :-

“The law is now well settled that while Article 14 prohibits discriminatory legislation directed against one individual or class of individuals, it does not forbid reasonable classification, and that

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for this purpose even one persons or group of persons can be a class. Professor Willis says in his Constitutional Law, p.580 'a law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it'. This statement of the law was approved by this court in *Charanjit Lal Chowdhury v. Union of India*. There the question was whether a law providing for the management and control by the Government, of a named company, the Sholapur Spinning & Weaving Company Ltd. was bad as offending Article 14. It was held that even a single company might, having regard to its features, be a category in itself and that unless it was shown that there were other companies similarly circumstanced, the legislation must be presumed to be constitutional and the attack under Article 14 must fail. In *Ram Krishna Dalmia v. Justice S.R. Tendolkar* (SCR at p. 297 : AIR at p. 547) this Court again examined in great detail the scope of Article 14, and in enunciating the principles applicable in deciding whether a law is in contravention of that article observed

'that a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others that single individual may be treated as a class by himself.'

9. The same principle has been laid down by the Hon'ble Supreme Court in the case of *State of Mysore v. P. Narsinga Rao*, reported in AIR 1968 SC 349, wherein it was observed that :-

"It is well settled that though Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. When any impugned rule or statutory provision is assailed on the ground that it contravenes Article 14, its validity can be sustained if two tests are satisfied: The first test is that the classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group, and the second test is that the differentia in question must have a reasonable relation to the object sought to be achieved by the rule or statutory provision in question. In other words, there must be some rational nexus between the basis of classification and the object intended to be achieved by the statute or the rule. As we have already stated, Articles 14 and 16 form part of the same constitutional code of guarantees and supplement each other. In other words, Article 16 is only an instance of the application of the general rule of equality laid down in Article 14 and it should be construed as such. Hence, there is

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no denial of equality of opportunity unless the person or persons who are alleged to have been situated with the person or persons who are alleged to have been favoured; Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection."

10. The Hon'ble Supreme Court further in the case of *M.P. Rural Agriculture Extension Officers Association Vs. State of M.P. and another*, reported in (2004) 4 SCC 646, with regard to Article 14 and class legislation, has held as under :-

"15. Article 14 forbids class legislation but permits reasonable classification subject to the conditions that it is based on an intelligible differentia and that the differentia must have a rational relation to the object sought to be achieved."

11. It is clear from the law laid down by the Hon'ble Supreme Court that the Article 14 forbids class legislation, however, it permits reasonable classification. In the present case, by issuing the notification Annexure-R/1, dated 27.9.2003, by which the Government has prescribed the age of superannuation of 62 years of class IV employees of Municipalities including Safai Kamgar. Two classes of IVth Class employees of Municipalities have been created. One class of employees is, who have been retired between the period of 1998-2003 and other class of employees who have been retired after the notification. The second class of employees have been given the benefit of retirement of the age of 62 years but the earlier class of employees have been denied the aforesaid benefit. However, the benefit of retirement at par with the State Government employees have been given to the members of M.P State Municipal Service at par with the State Government employees. No reasons have been assigned by the respondents-State Government as to why the class IV employees of the Municipalities have not been given the benefit of age of superannuation from the same date as has been given to the members of M.P State Municipal Service. The Rule 23 of the 'Madhya Pradesh Municipal Employees Recruitment & Conditions... Rules, 1968' gives power to the State Government to fix the age of superannuation of class IV employees and that power has to be exercised by the State Government, keeping in mind the Constitutional provisions and protection of Article 14 of the Constitution of India. In my opinion, the petitioner, who was retired in the year 1999 was also entitled the benefit of age of 62 years on the basis of Article 14 because she has been retired at the age of 60 years when at that time the benefit of retirement of age of 62 years has been given by the State Government to its employees and same benefit has been given to the Class IV Municipal employees by the Government from 2003.

12. Consequently, the petition of the petitioner is allowed. It is held that the petitioner is entitled to continue in Municipal service upto to the age of 62 years.

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However, looking to the facts of the case, the petitioner shall not be entitled for arrears of salary on the principle of 'no-work-no-pay' and on the fact that the petitioner has filed this petition after a delay of two years. However, the petitioner will be entitled other post retiral benefits on the basis of her date of retirement. No order as to cost.

Petition allowed.

I.L.R. [2009] M. P., 771

WRIT PETITION

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

16 January, 2009*

JITENDRA YADAV & anr.

... Petitioners

Vs.

UNION OF INDIA & ors.

... Respondents

Cantonments Act (41 of 2006), Section 15(1), Cantonment Electoral Rules, 2007, Rule 20 - Postponement of Election to Cantonment Board - Rule 20 provides that elections shall not be postponed by more than 40 days - Preamble of Act show that Act has been made to impart greater democratization in cantonment area - If elections are postponed contrary to provision in proviso to Rule 20, the Court may direct holding of elections within 40 days - However, the elections scheduled to be held after 40 days from the original date of election cannot be declared as null and void.

(Para 7)

छावनी अधिनियम (2006 का 41), धारा 15(1), छावनी निर्वाचन नियम, 2007, नियम 20 - छावनी बोर्ड के चुनाव का मुलतवी करना - नियम 20 उपबंधित करता है कि चुनाव 40 दिन से अधिक मुलतवी नहीं होंगे - अधिनियम की उद्देशिका दर्शित करती है कि अधिनियम छावनी क्षेत्र में गुरुतर लोकतंत्रीकरण करने के लिए बनाया गया है - यदि चुनाव नियम 20 के परन्तुक में दिये उपबंध के प्रतिकूल मुलतवी किये जाते हैं तो न्यायालय 40 दिन के भीतर चुनाव कराये जाने का निदेश दे सकता है - तथापि, चुनाव की मूल तारीख से 40 दिन बाद कराये गये चुनाव अकृत और शून्य घोषित नहीं किये जा सकते।

Umesh Tripathi, for the petitioners.

Dharmendra Sharma, A.S.G., for the respondent No.1.

Indira Nair, for the respondent Nos.2 to 4.

Pankaj Dubey, for the intervener/Dharmendra Kushwah.

A.M. Trivedi with Uttam Maheshwari, for the intervener.

ORDER

The Order of the Court was delivered by
A. K. PATNAIK, C. J. :-The petitioners are residents of Jabalpur Cantonment

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area and have filed this writ petition under Article 226 of the Constitution of India praying for a declaration that public notice dated 11th December, 2008 issued by the President, Cantonment Board, Jabalpur, notifying the date of polling for Jabalpur Cantonment Board election as 18th January, 2009 is illegal and further praying for a direction to the respondents to issue fresh election notice as per law.

2. The relevant facts very briefly are that by notification dated 10th September, 2008 issued by the Government of India, Ministry of Defence, New Delhi, under sub-section (1) of section 15 of the Cantonments Act, 2006 (for short 'the Act'), 9th November 2008 was fixed as the date on which the elections to the Cantonment Boards of Jabalpur, Saugor and Mhow shall be held. Thereafter, the Government of India, Ministry of Defence, New Delhi, issued another notification dated 3rd October, 2008 under sub-section (1) of section 15 of the Act read with Rule 20 of the Cantonment Electoral Rules, 2007, (for short 'the Rules') fixing 14th December, 2008 to be the date on which elections to the Cantonment Boards of Jabalpur, Mhow and Saugor shall be held. It was stated in the notification that the Assembly elections for the Madhya Pradesh State was expected to be held very shortly and the elections had to be postponed to avoid administrative problems which would arise in view of the proximity of the Assembly elections. But the Government of India, Ministry of Defence, again issued a notification dated 17th November, 2008 under sub-section (1) of Section 15 of the Act read with Rule 20 of the Rules, fixing the date of elections of the Cantonment Boards Jabalpur, Mhow and Saugor as 18th January, 2009 instead of 14th December, 2008. The President, Cantonment Board, Jabalpur accordingly issued a public notice dated 11th December, 2008 notifying the date, time and places of polling, number of persons to be elected and details of wards reserved for Scheduled Castes or Scheduled Tribes or women, the time and place for receipt of nominations, the time and place for scrutiny of nominations, the symbols that may be chosen by candidates and the restrictions to which their choice shall be subject and the detailed election programme. Aggrieved, the petitioners have filed this writ petition under Article 226 of the Constitution of India.

3. Mr. Umesh Tripathi, learned counsel appearing for the petitioners, submitted that under the proviso to Rule 20 of the Rules, the Central Government could postpone the date of elections to a Cantonment Board to a later date by not more than forty days. He submitted that by the first notification dated 10th September, 2008 issued under sub-section (1) of Section 15 of the Act, the date of elections to the Cantonment Boards was fixed as 9th November, 2008 and forty days from 9th November, 2008 expired around 20th December, 2008 and therefore, the Central Government has exceeded the time limit of forty days prescribed in the proviso to Rule 20 of the Rules by fixing the date of elections to the Jabalpur Cantonment Board as 18th January 2009 and for this reason, the impugned public notice fixing the date of elections as 18th January 2009 is illegal and is liable to be quashed.

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4. We are unable to accept the aforesaid submission of Mr. Tripathi. Section 15 of the Act and Rule 20 of the Rules are quoted hereinbelow :

"S.15. Filling of vacancies.--- (1) Vacancies arising by efflux of time in the office of an elected member of a Board shall be filled by an ordinary election to be held on such date as the Central Government may, by notification in the Official Gazette, direct.

(2) A casual vacancy shall be filled by a casual election, the date of which shall be fixed by the Central Government by notification in the Official Gazette, and shall be, as soon as may be, after the occurrence of the vacancy:

Provided that no casual election shall be held to fill a vacancy occurring within six months of any date on which the vacancy will occur by efflux of time, but such vacancy shall be filled at the next ordinary election."

"R.20. Public notice of election, --- As soon as possible after the notification by the Central Government of the date of an election under section 15 of the Act, the Board or where a Board has not been constituted, the Officer Commanding the station shall draw up and publish in the same manner as in rule 12, a public notice setting out -

- (a) the date, time and places of polling,
- (b) the number of persons to be elected and details of wards reserved for Scheduled Castes or Scheduled Tribes or women,
- (c) the time and place for receipt of nominations,
- (d) the time and place for scrutiny of nominations,
- (e) the symbols that may be chosen by candidates and the restrictions to which their choice shall be subject, and
- (f) any other matter which may be necessary for information and assistance of voters and candidates :

Provided that the Central Government may, on receipt of a recommendation to that effect from the President, postpone, by not more than forty days, the date of such election to a later date if -

- (i) the date of election coinciding with or is in close proximity of the date of election for the Lok Sabha, State Assembly or any adjacent local authority;
- (ii) a riot or open violence breaks out or there is tension in the Cantonment on account of such riot or violence; or

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(iii) some natural calamity affects the Cantonment :

Provided further that, in respect of items (ii) and (iii) of the preceding proviso, the President may, if deemed necessary, on receipt of a report from the Returning Officer, adjourn the polling in any ward of the Cantonment in case -

(a) a riot or open violence breaks out in that ward or any of the polling stations on the eve of, or on the date of polling; or

(b) some sudden natural calamity affects the Cantonment :

Provided also that on receipt of a report of such adjournment of election or polling, the Central Government may appoint the day on which such postponed election or polling will be held by publishing a notification to that effect in the Official Gazette and after the date is so notified, the President shall notify locally, in the manner specified in this rule, the place and time of polling for the election so postponed without de novo compliance of formalities specified in these rules."

5. It will be clear from sub-section (1) of Section 15 of the Act that vacancies arising by efflux of time in the office of an elected member of a Board shall be filled by an ordinary election to be held on such date as the Central Government may, by notification in the Official Gazette, direct. Hence, the Central Government has been empowered under sub-section (1) of Section 15 of the Act to fix the date of ordinary election to be held to the vacancies in the office of an elected member of a Board. Neither Section 15 nor any other provision of the Act, however, provides for postponement of the date of election so fixed by notification issued under sub-section (1) of Section 15 of the Act. Section 31 of the Act, however, provides that the Central Government may, either generally or specially for any cantonment or group of cantonments, after previous publication, make rules consistent with this Act to regulate all or any of the matters specified in this section for the purpose of holding elections under the Act. Under clause (h) of section 31 of the Act, the Central Government has been empowered to make rules on any other matter relating to elections in respect of which the Central Government is empowered to make rules under the Chapter in respect of which the Act makes no provision or makes insufficient provision and provision is, in the opinion of the Central Government, necessary. In exercise of such power under clause (h) of Section 31 of the Act, the Central Government has made a provision in the proviso to Rule 20 of the Rules that the Central Government may on receipt of a recommendation to that effect from the President, postpone, by not more than forty days, the date of such election to a later date if inter-alia the date of election coinciding with or is in close proximity of the date of election for the Lok Sabha, State Assembly or any adjacent local authority.

6. It is in exercise of this power conferred on the Central Government in the proviso to Rule 20 of the Rules that the Central Government postponed the date of elections once under the notification dated 3rd October 2008 from 9th November 2008 to 14th December 2008 and again by notification dated 17th November, 2008 from 14th December, 2008 to 18th January, 2009. The question which arises for consideration is whether the postponement of date of an election which was first notified to be 9th November 2008 beyond forty days to 18th January 2009 by the Central Government in exercise of its powers under proviso to Rule 20 of the Rules will make the elections scheduled to be held on 18th January 2009 to be null and void. The answer to this question would depend upon the object of the rule making authority in providing the maximum limit of forty days for postponement in the proviso to Rule 20 of the Rules. A reading of the preamble of the Act would show that the Act has been made inter alia to impart greater democratization in cantonment administration. Accordingly in Section 12 of the Act, provision has been made for having elected members in the Cantonment Boards of different categories of cantonments. If vacancies arising by efflux of time in the office of the elected member of the Board are not filled up within a short time then the entire purpose of democratization of the cantonment administration would be frustrated. It is for this reason that sub-section (1) of Section 15 of the Act provides for filling up of the vacancies arising by efflux of time in the office of an elected member of the Board by an ordinary election to be held on such date as the Central Government may, by notification, direct and sub-section (2) of Section 15 of the Act provides for filling up of casual vacancy by a casual election on such date as may be fixed by the Central Government by notification issued, as soon as may be after the occurrence of the vacancy. There could, however, be contingencies in which an election cannot be held on the date so fixed by the Central Government by a notification issued under sub-section (1) of Section 15 of the Act. To take care of such contingencies, the proviso to Rule 20 of the Rules provides that the Central Government may postpone the elections of the Cantonment Board in the contingencies mentioned therein, but to ensure that the election takes place as early as possible, the outer limit of forty days postponement has been fixed in proviso to Rule 20 of the Rules otherwise elections to the Cantonment Board may be indefinitely postponed resulting in non-filling of vacancies in the office of an elected member of the Board, thus, frustrating the democratization of cantonment administration.

7. In our considered opinion, therefore, if the election is postponed by more than forty days by the Central Government, such postponement is contrary to the provision in the proviso to Rule 20 of the Rules and if a party approaches the Court for directing holding of elections within forty days from the original date of election as notified under sub-section (1) of Section 15 of the Act, the Court may promptly issue a direction to hold the elections within a period of forty days as

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provided in the proviso to Rule 20 of the Rules, but if, for some reason or other, the Central Government postpones election for more than forty days from the original date of election notified under sub-section (1) of Section 15 of the Act, the Court will refuse to declare the election scheduled to be held after 40 days from the original date of election as null and void because such declaration would be contrary to the object of the Act as discussed above, namely the early elections to the vacancies in the offices of elected members of the Board for ensuring a democratic cantonment administration.

8. Mr. Umesh Tripathi, however, submitted that the real object of providing the maximum limit of 40 days for postponement of election in the proviso to Rule 20 of the Rules is to ensure that a fresh electoral roll is prepared if the election is postponed beyond 40 days so that persons who are entitled to vote but have not been included in the electoral roll are included in the electoral roll and this would be clear from Rule 19 of the Rules.

9. Rule 19 of the Rules, on which Mr. Tripathi relies on, is quoted herein below:

"19. Inclusion of names in the electoral roll -

(1) Where, a notification regarding election to fill any vacancy has been issued by the Central Government under sub-section (1) or sub-section (2) of Section 15 of the Act, every person whose name is not included in the electoral roll as finally published under rule 17, may apply as provided hereinafter for the inclusion of his name in the roll.

(2) Every application under sub-rule (1) shall be made in duplicate in Form III to the President after the Central Government directs the date of election to be held by notification under section 15 of the Act and before the expiry of three days after the publication of the public notice as required under rule 20.

(3) The President shall immediately on receipt of the application referred to in sub-rule (1), cause one copy thereof to be posted at the notice Board of the office of the Cantonment Board with a notice inviting objections to such application within a period of three days from the date of such posting.

(4) After the expiry of the period referred to in sub-rule (3), the application and the objections received thereto shall be heard and disposed of in the manner laid down in rule 16.

(5) The President, on such hearing if satisfied that the applicant is entitled to be registered in the roll, shall direct the Chief Executive Officer to include the name of the applicant in the electoral roll.

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(6) Every direction made under sub-rule (5) shall be final.

(7) The Chief Executive Officer shall comply with the directions made under sub-rule (5) where no appeal has been preferred under these rules."

10. Sub-rule (1) of Rule 19 of the Rules provides that where a notification regarding election to fill any vacancy has been issued by the Central Government under sub-section (1) or sub-section (2) of Section 15 of the Act, every person whose name is not included in the electoral roll as finally published under Rule 17, may apply as provided in Rule 19 of the Rules for inclusion of his name in the electoral roll. Sub-rule (2) of Rule 19 states that every application under sub-rule (1) shall be made in duplicate in Form III to the President of the Cantonment Board after the Central Government directs the date of election to be held by notification under Section 15 of the Act and before the expiry of three days after the publication of the public notice as required under rule 20 of the Rules. Sub-rule (3) of Rule 19 of the Rules states that the President shall immediately on receipt of the application as referred to in sub-rule (1), cause one copy thereof to be posted at the notice Board of the office of the Cantonment Board with a notice inviting objections to such application within a period of three days from the date of such posting. Sub-rule (4) of Rule 19 provides that after the expiry of the period of three days period of inviting objection, the application and the objections received shall be heard and disposed of in the manner laid down in Rule 16, and sub-rule (5) of Rule 19 provides that the President, on such hearing if satisfied that the applicant is entitled to be registered in the roll, shall direct such person to be included in the electoral roll.

11. Hence, Rule 19 does not provide for preparation of fresh electoral roll, as contended by Mr. Tripathi, but provides that any person whose name has not been included in the electoral roll may apply in Form III to the President of the Cantonment within three days after publication of the public notice as required under Rule 20. The public notice under Rule 20 was published on 11th December, 2008 and the petitioners have not stated in the writ petition that any person, either the petitioners or any other person, whose name was not included in the electoral roll finally published under Rule 17, applied within three days in Form III as prescribed under the Rules, to the President of the Jabalpur Cantonment Board. In course of hearing, however, Mr. Tripathi filed a copy of letter dated 16.12.2008 which is not in Form III addressed to the Chief Executive Officer, generally stating that the electoral roll should be prepared for including the names of persons who have attained the age of 18 years. The said letter dated 16.12.2008 is not addressed to the President of the Jabalpur Cantonment Board and is not in Form III and does not state the names of persons who have not been included in the electoral roll and was not within three days of the public notice dated 11.12.2008. The letter dated 16.12.2008 was not an application in accordance with sub-rule (2) of

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Rule 19 of the Rules and, therefore, could not be considered by the President of the Jabalpur Cantonment Board under sub-rule (3) of Rule 19 of the Rules quoted above.

12. For the aforesaid reasons, we are not inclined to admit this writ petition and we accordingly dismiss this writ petition.

Petition dismissed.

I.L.R. [2009] M. P., 778

WRIT PETITION

Before Mr. Justice Rajendra Menon

23 January, 2009*

MIRZA SHARIF BEG

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Service Law - Correction of date of birth. - At the fag end of service when notice of superannuation is issued - Held - Such correction can be accepted only when prayer is made within a reasonable time and it is shown that the employee concerned has cogent and irrefutable proof and evidence available with him. - Documents produced are mostly those which are obtained after notice of superannuation - Genuineness of documents doubtful - Correction can not be ordered - Petition dismissed. (Para 10)

सेवा विधि - जन्मतिथि में सुधार - सेवा के अन्तिम छोर पर जब अधिवर्षिता का सूचनापत्र जारी किया गया - अभिनिर्धारित - ऐसा सुधार केवल तब स्वीकार किया जा सकता है जब प्रार्थना युक्तियुक्त समय के भीतर की गई हो और यह दर्शित होता हो कि सम्बन्धित कर्मचारी के पास अकाट्य और अखण्डनीय सबूत और साक्ष्य उपलब्ध है - पेश दस्तावेज अधिकांशतः वे हैं जो अधिवर्षिता के सूचनापत्र के बाद अभिप्राप्त किये गये हैं - दस्तावेजों का असली होना शंकास्पद - सुधार का आदेश नहीं दिया जा सकता - याचिका खारिज।

Cases referred :

(2003) 6 SCC 483, (2006) 6 SCC 537, 2005(1) MPLJ 233, (1993) 2 SCC 162.

Rakesh Sharma, for the petitioner.

V.P. Nema, G.A., for the respondents/State.

ORDER

RAJENDRA MENON, J. :- Petitioner has filed this petition challenging the order Annexure P-2, dated 26/09/2008, issued by the Jail Superintendent, Central Jail, Indore, informing the petitioner that in the service record maintained, his date of birth is recorded as 17/01/1949 and, therefore, he shall attain 60 years on 31/01/2009 and will be superannuated.

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2. It is the case of the petitioner that his date of birth is wrongly mentioned in the service book, the correct date of birth is 01/01/1960 and, therefore, he shall attain the age of superannuation only on 01/01/2020 and, therefore, his retirement is not sustainable. Facts that have come on record indicates that petitioner entered the service on 06/01/1977 and in his service book the date of birth is entered as 17/01/1949, it is the case of the petitioner that he had submitted the school leaving certificate and marksheet of Class VIIth which was issued to him on 31/07/1974, vide Annexure P-1 and in this document his date of birth is recorded as 01/01/1960, it is his case that when he has received the notice Annexure P-2, he filed an affidavit Annexure P-3, pointing out that the date of birth is incorrectly entered in the service book and the same be corrected, this request of the petitioner was rejected vide Annexure P-4, on 21/10/2008 and it is stated that thereafter petitioner had represented and filed various documents to show that his date of birth is 01/01/1960, but as his claim is not being considered, petitioner has filed this petition.

3. Shri V.P. Nema, opposes the aforesaid prayer and submits that petitioner is challenging his retirement only when he has been issued with the notice of retirement, which is not permissible under M.P. Financial Code, Part I, Rule 84 & 85, only clerical mistake in the service book can be corrected and as there is no provision for correction of date of birth, as claimed by the petitioner, it is argued that the correction cannot be permitted, accordingly, respondents seek for dismissal of this petition.

4. Having heard learned counsel for the parties and on a perusal of the record it is clear that petitioner had entered the service on 06/01/1977 and at the time of entry into service, in the service book his date of birth is recorded as 17/01/1949, from 1977 onwards petitioner continued to work and it was only after Annexure P-2 was issued on 26/09/2008, that he raised objections with regard to correction of his date of birth. Nothing is brought to the notice of this Court to indicate that petitioner has ever sought for correction during his entire service period, petitioner seeks correction now on the ground that while entering service on 06/01/1977, he had produced the school leaving certificate issued by Ballabhdas Ishwardas Subhash Higher Secondary School, Khandwa, on 31/07/1974, in which his date of birth is recorded as 01/01/1960, it is stated that he had also filed a marksheet of class VIIth, in para 5.3 he shows this document as Annexure P-1. The document Annexure P-1 is seen to be a duplicate transfer certificate issued by Shri Ballabhdas Ishwardas Subhash Higher Secondary School, Khandwa, which indicates that the petitioner was a student of this institute from 20/08/1973 to 31/07/1974, even though in this certificate his date of birth is recorded as 01/01/1960, this certificate is shown to have been issued on 20/08/1988, if this certificate was issued only on 20/08/1988, it is not known as to how petitioner claims that the school leaving certificate is dated 31/07/1974. However, 31/07/1974, is the date of leaving of the school and there is nothing in the certificate to indicate that it was issued on the

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same date. On the contrary the seals and the date affixed after the signature at three places, in Annexure P-1, indicates that it was issued on 20/08/1988; i.e. after more than 10 years of petitioner's entry into service. That being so, contention of the petitioner that he has produced the certificate is not correct. Even though in para 5.3 petitioner make a contention that in the marksheet of Class VIIth also his date of birth is recorded, the said marksheet is not available on record. The other documents filed by the petitioner in support of his date of birth are his own affidavit Annexure P-3, the claim made by him in his representation, Annexure P-5 on 03/10/2008 and transfer certificate issued on 01/12/2008, these documents are obtained after the notice of retirement is issued and cannot be considered to be authentic documents for the purpose of holding that the petitioner's date of birth is 01/01/1960. Thereafter, petitioner has filed a sheet from the admission-discharge register, said to have been maintained by Hakimia Higher Secondary School Burhanpur, Annexure P-11, this is an attested document and it shows that petitioner had studied in this institute from class VIth to class VIIth between 10/08/1971 to 09/12/1972; if petitioner was a student of class VIIth on 09/12/1972, as can be seen from Annexure P-11, then it is not known as to how he was again studying in Class VIIth in Ballabhdas Ishwardas Subhash Higher Secondary School, Khandwa, as the certificate Annexure P-1, issued by this School shows petitioner to be a student of class VIIth (Hindi Medium) during the year 1974 and promoted to class VIIIth. However, both the certificates produced with the petition are issued after the notice of retirement is issued and, therefore, this is a case where petitioner is seeking correction of his date of birth and the authenticity and genuineness of the documents forming basis for this claim becomes highly doubtful. It is in the light of the aforesaid fact that have come on record that this Court is required to consider the matter.

5. The principles for reviewing and permitting correction of date of birth of an employee and the scope of judicial review is considered in various cases, in the case of *State of U.P. & Ors. Vs. Gulaichi (Smt.)*, (2003) 6, SCC, 483; it has been so laid down by the Supreme Court in para 8 & 9:

8. Normally, in public service, with entering into the service, even the date of exit, which is said as date of superannuation or retirement, is also fixed. That is why the date of birth is recorded in the relevant register or service book, relating to the individual concerned. This is the practice prevalent in all services, because every service has fixed the age of retirement, it is necessary to maintain the date of birth in the service records. But, of late a trend can be noticed, that many public servants, on the eve of their retirement raise a dispute about their records, by either invoking the jurisdiction of the High Court under Article 226 of the Constitution of India or by filing applications before the

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concerned Administrative Tribunals, or even filing suits for adjudication as to whether the date of birth recorded were correct or not.

9. Most of the States have framed statutory rules or in absence thereof issued administrative instructions as to how a claim made by a public servant in respect of correction of his date of birth in the service record is to be dealt with and what procedure is to be followed. In many such rules a period has been prescribed within which if any public servant makes any grievance in respect of error in the recording of his date of birth, the application for that purpose can be entertained. The sole object of such rules being that any such claim regarding correction, of the date of birth should not be made or entertained after decades, especially on the eve of superannuation of such public servant. In the case of *State of Assam v. Daksha Prasad Deka*, 1970(3) SCC 624, this Court said that the date of the compulsory retirement "must in our judgment, be determined on the basis of the service record and not on what the respondent claimed to be his date of birth, unless the service record is first corrected consistently with the appropriate procedure." In the case of *Government of Andhra Pradesh v. M. Hayagreev Sarma*, 1990(2) SCC 682, the A.P. Public Employment (Recording and alteration of Date of Birth) Rules, 1984 were considered. The public servant concerned had claimed correction of his date of birth with reference to the births and deaths register maintained under the Births, Deaths and Marriages Registration Act, 1886. The Andhra Pradesh Administrative Tribunal corrected the date of birth as claimed by the petitioner before the Tribunal, in view of the entry in the births and deaths register ignoring the rules framed by the State Government referred to above. It was inter alia observed by this Court :

"The object underlying Rule 4 is to avoid repeated applications by a government employee for the correction of his date of birth and with that end in view it provides that a government servant whose date of birth may have been recorded in the service register in accordance with the rules applicable to him and if that entry had become final under the rules prior to the commencement of 1984 Rules, he will not be entitled for alteration of his date of birth".

In *Executive Engineer, Bhadrak (R&B) Division, Orissa and others v. Rangadhar Mallik*, 1992(3) SCT 518 (SC) : 1993

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Supp. (1) SCC 763, Rule 65 of the Orissa General Finance Rules, was examined which provides that representation made for correction of date of birth near about the time of superannuation shall not be entertained. The respondent in that case was appointed on November 16, 1968. On September 9, 1986, for the first time, he made a representation for changing his date of birth in his service register. The Tribunal issued a direction as sought for by the respondent. This Court set aside the Order of the Tribunal saying that the claim of the respondent that his date of birth was November 27, 1938 instead of November 27, 1928 should not have been accepted on basis of the documents produced in support of the said claim, because the date of birth was recorded as per document produced by the said respondent at the time of his appointment and he had also put his signature in the service roll accepting his date of birth as November 27, 1928. The said respondent did not take any step nor made any representation for correcting his date of birth till September 9, 1986. In case of *Union of India v. Harnam Singh*, 1993(3) SCT 120 (SC): 1993(2) SCC 162 the position in law was again reiterated and it was observed:

"A Government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the Government servant must do so without any unreasonable delay."

An application for correction of the date of birth should not be dealt with by the Courts, Tribunals or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some case for years, within which time many officers who are below him in seniority waiting for their promotion, may lose the promotion for ever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. This is certainly an important and relevant aspect, which cannot be lost sight of by

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the Court or the Tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the Court or the Tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction must be issued or declaration made, the Court or the Tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant to prove about the wrong recording of his date of birth, in his service book. In many cases it is a part of the strategy on the part of such public servants to approach the Court or the Tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their date of birth in the service books. By this process, it has come to the notice of this Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The Court or the Tribunal must, therefore, be slow in granting an interim relief or continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and thereby caused injustice to his immediate junior.

(Emphasis Supplied)

6. The aforesaid judgment is again considered and followed in the case of *State of Gujarat & Ors. Vs. Vall Mohd, Dosabhai Sindhi*, (2006) 6, SCC, 537.
7. As far as the Rules in question are concerned, it may be seen that learned counsel for the petitioner has not relied on any statutory rules, which permits correction of date of birth at such a belated stage. On the contrary the rule relied upon by the respondents for rejecting the claim of the petitioner as contained in Annexure P-4, indicates that correction in date of birth is permissible only if there is clerical error in the service book and no other correction is permissible. Once

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the date of birth of the petitioner was recorded as 17/01/1949 according to petitioner's own showing in the service book on 06/01/1977, petitioner cannot seek correction in the absence of any statutory provisions being pointed out permitting such a correction. That apart when the principles laid down by the Supreme Court in the cases referred to hereinabove prohibits correction of date of birth at such a belated stage, when the employee is in the verge of retirement and when the documents adduced for seeking correction do not indicate without any doubt that the date of birth of the petitioner is the one as claimed by him, interference into the matter is not permissible.

8. A Division Bench of this Court considered these questions in the case of *Girish Nath Vs. Union of India*, 2005(1), M.P.L.J., 233, in the said case after taking note of the principles laid down in the case of *Gulaichi* (Supra) so also in the case of *Union of India Vs. Harnam Singh*, AIR, 1993(2), SCC, 162, it has been held by the learned Division Bench in para 6-7 as under :-

"The petitioner did not make any effort for change of date of birth within a reasonable time. Belatedly he approached the respondents for correction of date of birth in service record. The basis for the claim for correction of date of birth is the educational certificate. Why this certificate was not produced at the time of entry into the service record is not explained. The petitioner's belated request was rightly rejected by the respondents. The Tribunal after considering the facts, and following the law laid down by the Apex Court in the case of *Harnam Singh* (Supra) dismissed the petition. In view of the settled legal position extracted above, we do not find any merit in the contentions to interfere with the decision of the Tribunal.

9. From a complete reading of the aforesaid judgment it is clear that application seeking correction of date of birth submitted by an employee has to be considered by this Court not only keeping in view the interest of employee but to adverse chain reaction, it has into the entire system and the suffering and un-repairable injuries to the long list of co-employee.

10. Keeping in view the totality of facts, the circumstances and the principles laid down by the Supreme Court it is clear that prayer made for correction of date of birth can be accepted by Court or Tribunal only when prayer is made within a reasonable time and it is shown that the employee concerned has cogent and irrefutable proof and evidence available with him which warrants correction, in the present case, none of the aforesaid circumstances are in existence at the very fact that petitioner is seeking correction in his date of birth at the fag end of the career when the notice of superannuation is issued after he had kept quite for more than 31 years while he was in service. That apart the material adduced by the petitioner on the basis of which correction is sought does not impress this

Court and the nature of the evidence adduced is not such that it thrust credence to petitioner's contention i.e. his date of birth is 01/01/1960, if petitioner was in possession of all these documents evidencing his correct date of birth, his silence for the long period of 33 years, disentitles him from seeking indulgence and, relief from this Court exercising jurisdiction under Article 226 of the Constitution. That apart for the reasons already indicated hereinabove the documents produced are mostly those which are obtained after the impugned notice Annexure P-2 was issued and the genuineness becomes doubtful for the reasons already indicated in para 4 above, considering the totality and the facts and circumstances of the case this Court does not find any merits in the matter warranting admission of this petition.

11. Accordingly, finding no case made out for interference petition stands dismissed.

Petition dismissed.

I.L.R. [2009] M. P., 785

WRIT PETITION

Before Mr. Justice S.C. Sharma

5 February, 2009*

ARADHANA SINGH (KU.)

... Petitioner

Vs.

BOARD OF SECONDARY EDUCATION, M.P. & ors.

... Respondents

A. Constitution, Article 226 - Compensation - *Petitioner is a bright young student having excellent academic record, appeared in 12th class examination as a regular student - Her result declared after two years and she has lost two valuable academic years - In the facts and circumstances of the case, petitioner entitled for compensation of Rs.50,000 and costs of writ petition Rs.5,000.* (Para 8)

क. संविधान, अनुच्छेद 226 - प्रतिकर - याची, जो श्रेष्ठ शैक्षणिक रिकॉर्ड के साथ एक प्रतिभाशाली युवा छात्रा है कक्षा 12 की परीक्षा में नियमित छात्रा के रूप में सम्मिलित हुई - उसका परिणाम दो वर्ष बाद घोषित किया गया और उसने दो मूल्यवान शैक्षणिक सत्र खो दिये - मामले के तथ्यों और परिस्थितियों में याची 50,000 रुपये प्रतिकर और 5,000 रुपये रिट याचिका के खर्च प्राप्त करने की हकदार।

B. Constitution, Article 226 - Alternative remedy - Compensation - Civil Suit - *Whether compensation can be awarded in a writ petition when petitioner has alternative remedy of filing civil suit - Held - Petitioner can certainly claim compensation by filing a civil suit, however, in the light of various judgments passed by High Court granting compensation in identical facts and circumstances of the case - Compensation awarded.* (Para 4)

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खा. संविधान, अनुच्छेद 226 – वैकल्पिक उपचार – प्रतिकर – सिविल वाद – क्या रिट याचिका में प्रतिकर अधिनिर्णीत किया जा सकता है जबकि याची के पास सिविल वाद पेश करने का वैकल्पिक उपचार उपलब्ध हो – अभिनिर्धारित – याची निश्चित रूप से सिविल वाद पेश करके प्रतिकर का दावा कर सकती है, तथापि उच्च न्यायालय द्वारा समान तथ्यों और परिस्थितियों वाले मामलों में पारित प्रतिकर दिलाने के विभिन्न निर्णयों के आलोक में प्रतिकर अधिनिर्णीत किया गया।

Cases referred :

2003(4) MPLJ 252, 2001(1) MPWN 187, 2002(2) MPLJ 588, 2006(3) MPLJ 241, 2002(3) MPLJ 295.

Shrinivas Gajendragadkar, for the petitioner.

Raghvendra Dixit, for the respondents.

O R D E R

S.C. SHARMA, J. :-The petitioner before this Court who is a young girl student has filed this present writ petition for issuance of an appropriate writ, order or direction directing the respondent Board to correct the mark-sheet issued by the Board in respect of 10+2 (12th standard examination) for the academic session 2007-08 and has also prayed for compensation to the tune of Rs. 2,00,000/- for losing two academic years on account of mistake committed by the respondent Board. It has been stated that she is a bright young student having excellent academic record and in support of this averments she has enclosed mark-sheet of 10th standard issued by the Board of Secondary Education, M.P. Bhopal. In the aforesaid mark-sheet, the petitioner has received 409 marks out of 500 marks and she has received distinction in 5 subjects out of 6 subjects. The only subject in which she has not received distinction is Sanskrit (General). The contention of the petitioner is that in the year 2007 as a regular student she appeared in the 12th standard examination conducted by the respondent Board. A copy of the admit card issued by the respondents Board is enclosed as Annexure P/3. The petitioner has appeared in the examination which started from 10-03-2007 and concluded on 26-03-2007. The results of all other candidates were declared except the petitioner and the petitioner started representing before the authorities for declaration of the result. The Principal, Government School of Excellence, Morena vide his letter dated 14-09-2007 requested the Board of Secondary Education, M.P. Bhopal to declare the result of the petitioner. The petitioner has stated that institution was informed about the result only vide letter dated 03-09-2008 Annexure P/6 and mark-sheet was also issued to the petitioner declaring her unsuccessful in one of the subject and he has awarded supplementary in subject of Physics. The contention of the petitioner is that she has lost two full academic years i.e. 2007-08 and 2008-09 as her result was not declared by the respondents in time and now she will appear in the subject of Physics only in the year 2009 and shall be admitted to other graduate courses in the academic session 2009-2010. The petitioner has

prayed for issuance of an appropriate writ, order or direction, directing the respondents to declare her as pass in the Physics subject of 12th standard and also prays for award of compensation of Rs. 2,00,000/-.

2. The respondent Board has filed a reply and it has been admitted by the respondent Board that there was a delay in declaring the result of the petitioner. The respondent Board has categorically stated that because of mistake committed by one firm M/s. Data Machine Consultant Pvt. Ltd. New Delhi who was engaged by the Board to prepare the admission card and result for the examination 2007, the result of the petitioner was not declared. There was a mistake on the part of the said computer firm and the petitioner's result was withheld for inquiry. Later on the result of the petitioner was declared and the petitioner has been permitted vide order dated 06-01-2009 to appear in the special supplementary examination which is scheduled in the month of March, 2009. The respondents have also stated that as the mistake is not on their part and it is genuine mistake, the question of granting compensation does not arise. The respondents have also stated that in case, the petitioner is claiming compensation from the respondents, she is having an alternative remedy for preferring a Civil Suit before the Court of competent jurisdiction.

3. Heard learned counsel for the parties at length and perused the record.

4. In the present case it is not in dispute that the petitioner is a bright young student having excellent academic record as reflected from the mark-sheet of 10th Board Examination (Annexure P/2). She has received distinction in all main subjects and it is only the subject of Sanskrit (General) where she has not received distinction but she has received first division marks. The petitioner appeared in the 12th Board examination which was scheduled in the month of March 2007 i.e. from 10-03-2007 to 26-03-2007 from Government Multipurpose School of Excellence, Morena and the results of all students were declared except the petitioner. The petitioner submitted various representations to the authorities and the Principal of Government School of Excellence, Morena has also requested the Board vide its letter dated 14-09-2007 to declare the result of the petitioner. The result of the petitioner has been declared by the respondent Board only on 23-08-2008 and communicated to the School vide letter dated 03-09-2008. The respondent Board in all fairness has admitted that the result of the petitioner was not declared on account of mistake committed by a firm M/s Data Machine Consultant Pvt. Ltd. New Delhi engaged by the Board for preparing the admission card and result for the academic year 2007-08. The fact remains that on account of mistake, the result of the petitioner was not declared by the respondent Board in time and she lost two academic years i.e. 2007-08 and 2008-09. The petitioner is now being permitted only by an order dated 06-01-2009 to appear in the special supplementary examination to be scheduled in the month of March, 2009, thus the petitioner shall be appearing in the examination to be held in the month of March,

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2009 and in case she successful, she will be admitted to any other graduate course for the academic session 2009-2010. The petitioner before this Court is young girl student whose career at the initial stage has been crushed on account of mistake committed by the respondent Board. The respondent Board could have been more vigilant and could have pursued the matter with M/s. Data Machine Consultant Pvt. Ltd. New Delhi in the year 2007 itself when the result of the petitioner was not declared and the matter was pointed out to the respondent Board by the Principal of the School from where the petitioner appeared in the 12th standard, however, knowing fully well that the result of the petitioner was not declared, the respondent Board took two years time for declaring the result of the petitioner and the same has been declared on 13-09-2008. In the present case a contention has been raised by the learned counsel for the respondent Board that for claiming compensation, the petitioner has to avail the remedy of filing a Civil Suit. It is not in dispute that the petitioner can certainly claim compensation by filing a Civil Suit, however, in the light of the various judgments passed by this Court and other Courts granting compensation in identical facts and circumstances of the case, the petition is not being disposed of on the ground of availability of alternative remedy i.e. for filing of a Civil Suit. This Court in the case of *Harishankar Vs. Board of Secondary Education* 2003(4) M.P.L.J. 252 has granted a compensation of Rs. 25,000/- to the petitioner therein with costs quantifying the same at Rs. 1500/-. In the aforesaid case this Court has directed for declaration of result even though answer book of Biology subject was lost by the respondents by awarding average marks in Biology subject on the basis of marks obtained there in other papers of the group i.e. Physics, Chemistry, Hindi and English. In the present case as the answer books were valued; however, the mistake is on the part of the Board in not declaring the result of the petitioner in time. It is not a case where the answer book was not valued, the question of declaring the petitioner as pass in the subject of Physics does not arise. In the aforesaid case for loss of one academic year the compensation to the tune of Rs. 25,000/- was awarded. Paragraph 14 of the order passed by this Court reads as under:-

“In *Prem Ratan Agrawal Vs. Board of Secondary Education, Bhopal* (Supra) compensation of Rs. 25,000/- for waste of one year was awarded. Rs. 10,000/- were to be paid by the Board and Rs. 15,000/- by the valuer. In the instant case in my opinion, the petitioner is entitled for compensation for waste of full one year for no fault on his part. Compensation is quantified at Rs. 25,000/-. The Board is directed to pay Rs. 5,000/- Rs. 10,000/- are saddled on each of respondents No. 2 and 3. The board is directed to award the marks within 15 days from today and also to declare the result of the petitioner in accordance with the

regulations by addition of permissible grace marks in English (General) within the same period. Cost of this petition is quantified at Rs. 1,500/-. Each of respondent to pay Rs. 500/-."

5. Similarly, this Court in the case of *Santosh Kumar Rimjha Vs. Rani Durgavati University* 2001(I).M.P.W.N. (187) where revaluation was not done in time and result was not declared, a costs of Rs. 10,000/- was imposed upon the University. In the aforesaid case this Court has held as under:-

"On perusal of the return, I do not perceive any perceptible reason for causation of delay for revaluation as far as petitioner is concerned. It is expected from the University to conduct the examination fairly and get the papers valued impartially and objectively and publish the result expeditiously. The issue of revaluation and publication of result thereof are the integral part of publication of result. The functionaries of the University cannot be allowed to remain in slumber and act in a perfunctory manner to aggravate the tabulation in an aspirant student who deposits the fee and seeks for revaluation. The callousness at the instance of the University is not to be tolerated for the simple reason that it is dealing with young generation who is expected to carry the flag of this century. If their hopes are trammelled at the level of the University in this manner it can be regarded as mental cruelty. It is expected that the University shall forget, its past, give a decent burial to the incapacity which has come to light in this case, rise to the occasion and act in quite promptitude and the result of revaluation to the students who seek for the same within a period of sixty days from the date of receipt of the application. Such an act of the University would be commendable and usher in a state that alleviates the anguish of the students who carry the torch of posterity."

The sad story has to come to an end. Mr. Pareek has submitted that the facts and circumstances warrant for grant of compensation. In absence of any explanation from the University, in view of the uncontradicted facts, in the backdrop of feelings of the petitioner which have the effect of corroding, I am inclined to accept the contention of the learned counsel that the petitioner is entitled to compensation. Considering the facts and circumstances of the case the compensation is quantified at Rs. 10,000/- which shall be paid by the University to the petitioner within a period of six weeks from today."

6. In the case of *Prem Ratan Agrawal Vs. Board of Secondary Education, Bhopal and others* 2002 (2) M.P.L.J. 588 wherein the Board took

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four months time to rectify mistake and declaring petitioner as "passed" in first division with distinction in all subjects, this Court has awarded a sum of Rs. 10,000/- towards compensation. This Court in para 11, 12 and 13 has held as under:-

"11. As has been indicated before the facts are beyond the pale of controversy. In absence of any kind of dissension or disputation the core issued that arises for consideration is whether this Court should grant compensation as prayed for by the petitioner. Mr. Shukla, learned counsel for the petitioner has raised two prong attack, namely, the Board being languorous having caused delay in scrutiny is liable to pay compensation and secondly, the respondent No. 4 who enjoys the status of a teacher and put on a high pedestal, has evinced lackadaisical proclivity and therefore, is also accountable and susceptible to pay the damages. The salience facet of the case is whether this Court should ignore and brush aside the mistake occurred and totally shut its eye to the harrowing and searing experience experienced by the petitioner. There is no doubt that the petitioner was appalled and dismayed when he received the original marksheet. It is manifest that he applied for revaluation on 03-06-1999. It is also not in dispute that the Board issued the corrected marksheet on 25-10-1999 as is evident from the Annexure P/9. The Board has taken a stand, it is the mistake of the valuer. The Board has not disputed in regard to the time spent in rechecking/scrutiny/ retotalling. It does not require Solomon's wisdom to arrive at the conclusion that there has been delay at the level of the Board. It was a pure, simple and straight-forward case of rechecking of the answer scripts. It was absolutely elementary and uncomplicated. The Act did not require any kind of adroit effort. The Board may take a stand that it has enormous task to do but it cannot be forgotten that more the duty, more the alertness. Any institution which has to perform a sanguine duty of conducting examination has to conduct itself in an astute and perspicacious manner and cannot afford to put forth a stand which would appear sanctimonious though it does not have basic or fundamental sacrosanctity at its base. The Board has consumed four months to rectify the mistake. The delay caused by the Board, in my considered opinion is inexplicable and unjustified. Not for nothing it has been said he who causes delay runs the risks because delay is dangerous and belated action does not easily get effused. Delay is ordinarily regarded as dangerous. The Board would have done well to expedite the matter of rechecking and in that event,

the agony of the petitioner would irrefragably be diminished and possibly his one academic year would not have been lost. The loss caused to the petitioner cannot be made good by grant of compensation, but the Board has to be put to task. A statutory body has to remain awake and act with alacrity and should not take an ambivalent stance. It is its duty to ameliorate itself and conceive of positive paradigm. The Board cannot afford to pave the path of anfractuous and create a maze. It must understand the marrow of feelings and sensitivity of a young man. In the case at hand, as the Board has failed to do so, I am inclined to direct that it shall pay a compensation of Rs. 10,000/- (Rupees Ten Thousand only) to the petitioner within a period of two months from today.

12. Now to the second spectrum. The respondent No. 4 has prayed for exoneration. She has clearly admitted that mistake had taken place. The question that falls for consideration is whether such a mistake is a pardonable one. It cannot be forgotten that the respondent was chosen to evaluate the answer scripts of the students. The duty of a teacher by no stretch of imagination, can be marginalised. The teacher is given respect because he performs a noble duty. Fate of students is dependent upon the action of the teachers. While evaluating an answer paper a teacher has to be extremely alert, absolutely astute, totally conceited, thoroughly involved and perfectly poised. He cannot afford to forget that he is deciding the fate and future of younger generation and at that juncture, he cannot afford to behave in an asinine manner which will make the entire evaluation process a farce. His action must demonstrate concentration and display application of a focused mind. The respondent No. 4, it does not seem as adhered to any of these qualities. She has not been careful while entering the marks in the tabulation sheet and by such an act an aspirant young man has suffered. True, it is, she has felt the feeling of contrition and given assurance to amend herself. But should it be given weightage to give her total exoneration? I do not think so. The feeling of repentance has to be given its due weightage but the grievance of the petitioner has to be vindicated.

13. Considering the totality of the circumstances I am inclined to direct that the respondent No. 4 shall pay compensation of Rs. 15,000/- (Rupees Fifteen Thousand only) to the petitioner within a period of two months from today. The amount shall be sent by her by way of bank draft in the address of the petitioner. If she fails to pay, it will be the duty of the Secretary, School

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Education Department to deduct the aforesaid amount from the salary of the respondent No. 4 and send it to the petitioner. That apart, the respondent No. 4 shall not be given the duty of valuation of answer scripts for a period of three years from today. It is hereby made clear, in view of the aforesaid action being directed, no disciplinary action shall be taken against her."

7. In another case decided by this Court i. e *Rajlal Patel Vs. State of M.P. and others* 2006(3) M.P.L.J. 241 wherein for loss of one academic year on the mistake of the Board this Court has awarded a sum of Rs. 25,000/- towards compensation. Paragraph 10 and 11 reads as under:-

"10. The next plank of submission which requires to be dealt with is that whether because of large of scale activities of the Board relating to conducting of examination, such an act of negligence should be overlooked and condoned. Submission of Mr. Naman Nagrath, learned counsel is that when such enormous work is done mistakes are bound to occur. True it is, there cannot be a system which would have the perfection in entirety. True, it cannot have the pinkness of perfection. It cannot be in an apple pie order. But it cannot be forgotten-higher the responsibility, more the accountability. The Board is conducting examination for young students. For a student, his studies, the career prospects and above all the time factor matters. It is trite to say that no one has the power or prowess to arrest time. The petitioner could not undertake the examination of mathematics because of the fault of the Board as the Board sent the admit card not in accordance with the subjects mentioned in the nominal roll sent by the Principal of the concerned school. The same being brought to the notice of the Board by the Principal, there was no immediate awakening and the correction was sent for permitting the petitioner to appear in an supplementary examination in the erroneous address. What has been urged by Mr. Naman Nagrath is that the Board examination in the next academic year. It cannot be treated to be an absolute mitigating action. This might have saved the career of the petitioner. Indubitably, it has not put the clock back, it could not have. The time passed and lost is irredeemable. Submission of Mr. Naman Nagrath, learned counsel is that there has been redemption does not impress this Court. Be it stated with certitude and without any hesitation that the petitioner has lost his one year for the fault of the Board. The authorities who conduct examinations have to be more careful of the responsible and there has to be real check in many matters within the time frame so that the mistake of this

nature cannot occur. All mistakes cannot be put into one compartment. Mistakes may occur but the degree, gravity and the nature of the mistake are to be seen. If it is absolutely fundamental mistake by which a student's time and career is affected and he is deprived of appearing in any other entrance examination it cannot be regarded as a minor mistake. Mistakes which are rectifiable and are rectified in the proper time frame, no fault can be found with the Board. But in the case at hand the mistake committed by the Board made the student sit in the time machine for a period of one year. This is not exonerable. A public authority is required to act with care, promptness and with definite positive prospective. It is expected to act within legal, lawful and acceptable parameters. A responsible officer of the Board cannot act like a truant and behave as if he is in a state of fancy. Neither fancy nor humour have any roll in a serious matter like this where the career growth of a student is the subject matter. A student is the future hope of the nation. It has been said hope has hope and in my considered that hope was marred in the case of the petitioner. When the nominal roll was sent by a student who has a legitimate expectation that his admit card would come incorporating the subjects which he has studied. Such legitimate expectation is a lawful one. By the negligence and careless act of the respondent-Board the petitioner was deprived and denied of the opportunity to appear in the said subject as a consequence of which he was denuded of his legitimate expectation to appear in the examination and his time of one year was destroyed and paralyzed. The money cannot put the petitioner back in the situation in which he could have been in the Academic Session 2001-02. But in the adjudicatory system though the principle of relegation in time cannot be always applied because of the efflux of time but irrefragably the grant of compensation can be the mode to usher in a situation of mitigation. In the case of *Dr. Sandeep Singh Vs. State of Madhya Pradesh*, W.P. No. 3940/2005 this Court in paragraph 23 taking into consideration the loss of opportunity granted compensation. Paragraph 23 of the said decision reads as under:-

"23 Another facet which is really worth considering is that the candidates who could have been called for counselling because they were in the waiting list after 269, have not been called. They are the petitioners in W.P. Nos. 4040, 4313/2005 and 3981/2005. They could have been selected in respect of certain stream. They have lost the opportunity. As they have suffered they are to be

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granted compensation. I am inclined to fix compensation at the rate of Rs. 25,000/- for each of the petitioner in writ petitions as they have approached this Court subject to the condition that they are not selected after the selection process is undertaken on merits inter se the petitioners before this Court. I may hereby clarify that does not necessarily mean that the candidates who has not approached before the counselling was done would be entitled of the said relief."

11. Keeping in view the facts and circumstances of the case, I am disposed to think that the petitioner should be awarded a sum of Rs. 25,000/- towards compensation to be paid by respondent No. 2, Board of Secondary Education, Madhya Pradesh, Bhopal within a period of three months and it is so directed."

8. This Court in the case of *Amit Kumar Dubey Vs. Board of Secondary Education and others* 2002(3) M.P.L.J. 295 has awarded compensation of Rs. 5000/- in not publishing the result of the petitioner in time and in not forwarding the mark-sheet with promptness. Keeping in view the aforesaid judgments delivered from time to time as it is an admitted fact that the petitioner has lost two valuable academic years, she certainly entitled for compensation, the Board has conducted the examination for a young student who is studying with career prospects which are based upon time factors. It is trite to say that no one has the power to waste time of any student, the petitioner could have appeared in the examination of Physics in case her result was declared in time, however, the result has been declared only on 13-09-2008 and now she is being permitted to special supplementary examination which is scheduled in the month of March, 2009. In the present case there was no immediate awakening on the part of the Board and the Board has rectified its mistake only after a lapse of 2 years and therefore, the compensation in the facts and circumstances of the case is quantified as Rs. 50,000/-. The aforesaid amount shall be paid to the petitioner within a period of 30 days from the date of receipt of certified copy of this order. Costs of this writ petition of Rs. 5000/- shall also be paid by the respondent Board, in the facts and circumstances of the case, the present writ petition stands allowed. At this stage learned counsel for the respondent Board has argued before this Court that the delay in declaration of result cannot be attributed to the Board and it was M/s Data Machine consultant Pvt. Ltd. New Delhi appointed by the Board who is at fault in not declaring the result of the petitioner. The results of 12th standard of all other candidates were declared in the year 2007 except the petitioner and the Principal of the Government School of Excellence, Morena has requested the Board vide letter dated 14-09-2007 to look into the matter and to declare the result of the petitioner. The result of the petitioner has been declared on 03-09-2008 and therefore, the Chairman of the Board is directed to inquire into the matter about

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the delay which has taken place in declaration of the result as the mistake was noticed in time and the Principal, Government School of Excellence, Morena has requested the Board in time to declare the result of the petitioner then also why the authorities have kept quite over the matter for such a long time. The respondent Board shall be free to take action against its own officers as well as other agencies involved in the matter.

9. With the aforesaid observation, the present writ petition stands allowed and disposed of. No order as to costs.

Petition allowed.

I.L.R. [2009] M. P., 795

WRIT PETITION

Before Mr. Justice S.C. Sharma

5 February, 2009*

KAILASH SWARNKAR

Vs.

STATE OF M.P. & ors.

... Petitioner

... Respondents

A. Service Law - Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Section 33 - Appointment on the post of Stenographer - Reservation - Total number of posts of Stenographers are 110 - As per the instructions issued by the State Government dated 31.10.2003, total 6% reserved posts for the persons with disabilities - It comes to 6.6 as it is more than half it has to be counted in round figure as 7 - The total number of posts which ought to have been reserved for disabled persons should have been 7 instead of 6. (Para 9)

क. सेवा विधि - निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धारा 33 - आशुलिपिक के पद पर नियुक्ति - आरक्षण - आशुलिपिक के पदों की कुल संख्या 110 - राज्य सरकार द्वारा जारी अनुदेश तारीख 31.10.2003 के अनुसार निःशक्त व्यक्तियों के लिए 6 प्रतिशत आरक्षित पद - यह 6.6 आता है चूंकि यह आधे से अधिक है इसे पूर्ण अंक 7 के रूप में गिना जाना चाहिए - पदों की कुल संख्या, जो निःशक्त व्यक्तियों के लिए आरक्षित रखी जानी चाहिए, 6 के स्थान पर 7 होनी चाहिए थी।

B. Service Law - Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Section 33 - Appointment on the post of Stenographer - Reservation - Petitioner, who is a visually disabled person, claiming appointment on the post of Stenographer - Held - As per the policy of State Government, out of the total posts 6% are reserved for persons with disabilities i.e. 2% for visually disabled persons, 2% for hearing impaired persons and 2% for orthopaedically disabled persons - In the present case, 6 posts reserved for

*W.P. No.1581/2008(S) (Gwalior)

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persons with disabilities - 2 posts should have been filled up by the persons belonging to visual disabled category - High Court has arrived at a conclusion that the number of posts reserved should have been 7 instead of 6 - As still one post is to be filled up from visually disabled person, the respondent/State is directed to consider the case of petitioner against this one additional post. (Para 10)

ख. सेवा विधि - निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धारा 33 - आशुलिपिक के पद पर नियुक्ति - आरक्षण - याची, जो दृष्टिबाधित व्यक्ति है, ने आशुलिपिक के पद पर नियुक्ति का दावा किया - अभिनिर्धारित - राज्य सरकार की नीति के अनुसार कुल पदों में से निःशक्त व्यक्तियों के लिए 6 प्रतिशत पद आरक्षित अर्थात् 2 प्रतिशत दृष्टिबाधित व्यक्तियों के लिए, 2 प्रतिशत श्रवण बाधित व्यक्तियों के लिए और 2 प्रतिशत अस्थिबाधित व्यक्तियों के लिए - वर्तमान मामले में निःशक्त व्यक्तियों के लिए 6 पद आरक्षित - 2 पद दृष्टिबाधित श्रेणी के व्यक्तियों से भरे जाने चाहिए थे - उच्च न्यायालय इस निष्कर्ष पर पहुंचा कि आरक्षित पदों की संख्या 6 के स्थान पर 7 होनी चाहिए थी - चूंकि अभी भी दृष्टिबाधित व्यक्ति से एक पद भरा जाना है इसलिए प्रत्यर्थी/राज्य को इस एक अतिरिक्त पद के विरुद्ध याची के मामले पर विचार करने का निदेश दिया गया।

Cases referred :

(2008) 1 SCC 233, Civil Appeal No.3984/2007.

Alok Sharma, for the petitioner.

Praveen Newaskar, Dy.G.A., for the respondent Nos.1 & 2/State.

Harendra Sharma, for the respondent No.3.

ORDER

S.C. SHARMA, J. :-The petitioner before this Court who is a visually disabled person has filed this present petition claiming appointment on the post of Stenographer. He has also prayed for quashing of appointment of respondent No. 3.

2. In the present case, the petitioner has contended in the writ petition that he is a Visually disabled person on account of Heredo Macular Degeneration and his disability has been assessed as 65%, a certificate to that effect is enclosed as Annexure P/2. The petitioner has obtained a degree of Bachelor of Arts and has also qualified Typing Examination conducted by the M.P. Board of Shorthand and Typing Examination in the year 1991. The petitioner has also successfully cleared the Shorthand Examination from a recognized board and a certificate to that effect is also on record. The petitioner also belongs to the Other Backward Class and a certificate to that effect is also enclosed as Annexure P/7. It has been contended by the petitioner that the State of Madhya Pradesh keeping in view the provisions of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 issued circulars from time to time and even prior to enactment of the aforesaid Act, provided reservation for persons with disabilities. The circulars have been revised from time to time providing for a total reservation

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of 6% under the disabled category. The last executive instruction issued by the State Government dated 31.10.2003 clearly reflects that out of total 6% reserved posts for persons with disabilities, 2% is reserved for visually disabled persons, 2% for hearing impaired persons and 2% for orthopaedically disabled persons. Thus, 2% has been reserved for visually disabled persons. The petitioner has further stated that an advertisement was issued by the respondents No. 2 – Engineer-in-Chief, Water Resources Department, State of M.P. inviting applications for the post of Stenographer and Amins under the Special Recruitment Drive and in the same advertisement it was mentioned that 2 posts out of total 3 posts were to be filled up from disabled persons belonging to the general category and one vacancy was to be fulfilled by a disabled person belonging to Other Backward Class. The petitioner submitted his candidature to the aforesaid advertisement and a call letter was issued to him on 04.10.2006 (Annexure P/13). The petitioner did appear in the process of interview, however, he was not selected by the respondents for the post of Stenographer. The respondents have selected the respondent No. 3 – Sukh Dev Prajapati, a orthopaedically disabled person of OBC category. Out of total three posts reserved for persons with disabilities, following persons have been selected; (a) Shri Rajkumar Gupta, a orthopaedically disabled; (b) Ku. Anjana Ghanghere, a orthopaedically disabled; (C) Shri Sukh Dev Prajapati, a orthopaedically disabled.

3. The petitioner has further contended that under the Right to Information Act, 2005, an application was submitted to the respondents seeking information in respect of sanctioned strength of Stenographer and as per the information furnished by the respondents, the total number of posts of Stenographer are 110 in number. By the same information supplied under the Right to Information Act, 2005 it has also been stated that two posts were reserved for visually disabled persons. It has been further contended that three disabled persons prior to issuance of advertisement were in the department and out of which, Shri Suresh Prasad Tiwari, who is a visually disabled person was in the department, meaning thereby, the respondents out of total 110 posts of Stenographer have reserved six posts for persons with disabilities and out of this six posts, two posts were to be filled up by the visually disabled persons. As one post was already filled up by a person who is visually disabled, one vacancy out of three advertised was required to be filled up by a person who is visually disabled. The contention of the petitioner is that Shri Sukh Dev Prajapati, who is a member of OBC category has wrongly been appointed against the reserved quota of visually disabled category and therefore, his appointment deserves to be quashed. Learned counsel for the petitioner has also argued that out of total 110 posts, if proper percentage is calculated for persons with disabilities, the total number of posts should be seven and, therefore, even without disturbing the appointment of respondent no. 3 – Sukh Dev Prasad, the respondents should be directed to consider the case of the petitioner against

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one additional vacancy as they have wrongly computed the posts reserved for persons with disabilities to be six only.

4. The Respondents/State have filed a reply and it has been argued on behalf of the respondents/State that total six posts were reserved for persons with disabilities and three posts were filled up prior to issuance of advertisement. It has also been stated that the advertisement was issued for remaining three unfilled posts reserved for persons with disabilities and out of total this three posts, two were reserved for general category disabled person and one was reserved for OBC category disabled person. The respondents have further stated that interview of OBC category candidates took place on 28.10.2006 and since then there was only one vacant post under the disabled OBC category, a merit list was prepared and the private respondent secured 67 marks, whereas, the petitioner has secured only 46 marks, therefore, the respondent No. 3 has rightly been appointed on the post of Stenographer. The respondents have prayed for dismissal of the writ petition.

5. The respondent No. 3 has also filed a reply and it has been argued on behalf of respondent No.3 that the identity card in respect of petitioner was issued on 06.09.1993 and the same was valid only for five years and therefore, the petitioner is not eligible for appointment to the post of Stenographer. The respondent No. 3 has prayed for dismissal of the writ petition. Learned counsel for the respondent No.3 has also argued before this Court that the appointment was made in the year 2006 and now after serving the State Government for the last three years, the respondent No. 3 is at the verge of confirmation and no fruitful purpose shall be served by throwing out another disabled person on street. He has prayed for dismissal of the writ petition.

6. Heard learned counsel for the parties at length and perused the record.

7. In the present case, it is not disputed by the respondents/State that they are having a sanctioned strength of 110 posts of Stenographer under the Water Resources Department of the State of M.P. It is also not in dispute that the State Government keeping in view the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 have issued executives instructions from time to time providing reservation under the disabled category. Section 33 of the aforesaid Act of 1995 reads as under:-

“Reservation of posts. - Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent. For persons or class of persons with disability of which one percent each shall be reserved for person suffering from-

- (i) blindness or low vision;
- (ii) hearing impairment;

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(iii) locomotor disability or cerebral palsy.

In the post identified for each disability.

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such condition, at any, as may be specified in such notification, exempt any establishment from the provisions of this section."

8. The posts in question for the post of Stenographer have been reserved for the persons with disabilities as the post of Stenographer can be reserved for a person of disability and, therefore, the respondents/State have reserved six posts out of total 110 posts for the persons belonging to the disabled category. The apex Court in the case of *Bhudev Sharma vs. District Judge, Bulandshahr and another*, (2008) 1 SCC 233 while dealing with a case of blind candidate in paragraphs 3,4 and 5 held as under:-

"The appellant has relied on G.O. Dated 26.08.1993 which is Annexure P-I to this appeal. That G.O. states that the U.P. Government has reserved 2 percent posts for physically handicapped persons for direct recruitment in all groups of government services. The physically handicapped persons are those who are blind, deaf and dumb and otherwise handicapped. There were altogether 30 posts for which the selection was held. 2 percent of 30 is 0.6. Since 0.6 is more than half we round it off and hold that one out of the 30 posts is reserved for physically handicapped persons. Since there was no other physically handicapped person who applied, in our opinion, the appellant was entitled to the post of reserved for physically handicapped persons.

In this view of the matter, the appeal is allowed, the impugned judgment of the Division Bench is set aside and it is directed that the appellant be appointed on a Class III post in Bulandshahr Judgeship forthwith.

We are informed that the appellant is already working on the post in view of the interim order of this Court. Hence, he shall be regularised and allowed to continue working as a regular Class III employee and shall be given all the consequential benefits."

In the aforesaid case, their lordship has held that 0.6 is more than the half and, therefore, the same should be rounded off to 1 and one vacancy should be reserved for a physical disabled person.

9. In the present case, keeping in view the judgment delivered by the apex Court in the aforesaid case, as the total number of posts were 110 in number and

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6% of the aforesaid, comes to 6.6 and, therefore, instead of reserving six posts for persons with disabilities, seven posts should have been reserved by the respondents/State under the disabled category. The respondent No. 3 who have been selected under the OBC disabled category is certainly having more percentage of marks than the petitioner. As per the reservation provided by the State Government, out of six posts, three posts were already occupied under the reserved quota, out of which, two persons were from orthopaedically disabled category and one was under the visually disabled category. Thus, total three posts advertised by the respondents. One vacancy should have been earmarked for visually disabled person keeping in view the executive instructions issued by the State Government dated 30th January, 2002, wherein, it has been categorically provided that 2% of the posts shall be reserved for visually disabled persons in the State of Madhya Pradesh. The State Government after issuing the advertisement have filled up all the three posts by appointing persons from orthopaedically disabled category, which is certainly contrary to the executive instructions issued by the State Government. The apex Court in the case of *Mahesh Kumar Gupta and Others vs. Yashwant Kumar Ahirwar and Others*, Civil Appeal No. 3984 of 2007, in paragraph 12 has held as under:-

“Disability has drawn the attention of the worldwide community. India is a signatory to various International Treaties and conventions. The State, therefore, took a policy decision to have horizontal reservation with a view to fulfil its constitutional object as also its commitment to the international community. A disabled is a disabled. The question of making any further reservation on the basis of caste, creed or religion ordinarily may not arise. They constitute a special class. The advertisement, however, failed to mention in regard to the reservation for handicapped persons at the outset, but, as noticed hereinabove, the vacant posts were required to be filled up for two categories of candidates; one for Schedule Castes and Schedule Tribe candidates and other for handicapped candidates. Handicapped candidates have not been further classified as belonging to Scheduled Castes, Scheduled Tribes and general category candidates. It is a travesty of justice that despite the State clarified its own position in its order dated 1.01.2004 and stated that the posts were vacant under the handicapped quota but it completely turned turtle and took a diagonally opposite stand when a contempt petition was filed. In its reply in the said proceedings, reference was made to the aforementioned order dated 1.02.2004 but within a short time, viz., on 4.02.2004 it opined on a presumption that as the word “handicapped” was not mentioned in the heading of

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advertisement they were meant only for Scheduled Caste and Scheduled Tribe candidates. Rule of Executive Construction was given a complete go bye. Reasonableness and fairness which is the hall mark of Article 14 of the Constitution of India was completely lost sight of. The officers of the State behaved strangely. It prevaricated its stand only because a contempt proceeding was initiated. If the State was eager to accommodate the writ petition respondent, it could have done so. It did not take any measure in that behalf. It chose to terminate the services of some of the employees who had already been appointed. Such a course could not have been taken either in law or in equity. The State is expected to have a constitutional vision. It must give effect to the constitutional mandate. Any act done by it should give effect to the principles embodied in Article 39 of the Constitution of India should not ordinarily exist, 50%, as has been held by this Court in *Indra Sawhney v. Union of India* MANU/SC/0104/1993, reservation for women or handicapped persons would not come within the purview thereof."

Keeping in view the judgment delivered by the apex Court in the aforesaid case and also keeping in view the policy decision of the State Government to fill up 6% of the posts by appointing persons from disabled category, the respondents/State was under an obligation to fill up one vacancy out of the three posts advertised by appointing a visually disabled person. The question of making any further reservation on the basis of caste, creed or religion ordinarily does not arise as they have constituted a special class.

10. In the present case, in all fairness, out of six posts reserved for persons with disabilities, two posts should have been filled up by the persons belonging to visually disabled category, however, the respondents have filled up all three posts advertised by the persons belonging to orthopaedically disabled persons. As this Court has arrived at a conclusion that the number of posts reserved should have been seven instead of six, this Court is not passing any order putting an end to the services of respondent No. 3 – Sukh Dev Prasad in the peculiar facts and circumstances of the case as he is also an orthopaedically disabled person and is at the verge of confirmation after serving the State Government right from 2006. As still one post is to be filled up from visually disabled person, the respondents/State is directed to consider the case of the petitioner against this one additional post as the computation by the respondents/State of six posts was erroneous, in fact, total seven posts are required to be reserved under the disabled category and, therefore, the Respondents/State shall consider the case of the petitioner under the visually disabled category against this one additional post within a period of three months from the date of receipt of a certified copy of this order and shall

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pass necessary orders in the matter. In case, the petitioner is eligible for appointment as per his merit in the visually disabled category, the respondents shall grant him appointment to the post of Stenographer with all consequential benefits except back wages from the date the other persons have been granted appointments under the disabled category.

11. Shri Alok Sharma, learned counsel appearing for the petitioner has defended this matter as it was assigned to him by the High Court Legal Aid Services, Gwalior by the Legal Aid Officer vide letter dated 22nd February, 2008. The learned counsel has worked very hard in preparing this case and has left no stone unturned in producing the relevant material and relevant case law while arguing the matter. The efforts made by learned counsel deserves appreciation of this Court.

12. With the aforesaid, the writ petition stands allowed. No order as to costs.

Petition allowed.

I.L.R. [2009] M. P., 802

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

24 October, 2008*

MANOJ

... Appellant

Vs.

MUNICIPAL COUNCIL, MANDSAUR

... Respondent

Municipality (Transfer of Immovable Property) Rules, M.P. 1996, Rule 6 - Municipal Council has imposed additional condition that the highest bidder is required to deposit 1/4 amount immediately after conclusion of the bid and in case of failure on the part of the highest bidder in depositing the balance amount 1/4 amount deposited by the bidder shall stand forfeited automatically. - Held - Rule 6 empowers the Council to impose other conditions in addition to the condition mentioned in Rule 6 - Council has exercised power well within its jurisdiction - Suit for recovery of forfeited 1/4 amount was rightly dismissed by the trial court - Appeal dismissed. (Para 9)

नगरपालिका (स्थावर सम्पत्ति का अंतरण) नियम, म.प्र. 1996, नियम 6 - नगरपालिका परिषद ने अतिरिक्त शर्त अधिरोपित की कि उच्चतम बोली लगाने वाले को बोली पूरी होने के तुरन्त बाद 1/4 राशि जमा करना आवश्यक है और उच्चतम बोली लगाने वाले की ओर से शेष राशि जमा करने में असफल रहने की दशा में बोली लगाने वाले द्वारा जमा की गई 1/4 राशि स्वतः समपहृत हो जायेगी - अभिनिर्धारित - नियम 6 परिषद को नियम 6 में उल्लिखित शर्त के अतिरिक्त अन्य शर्तें अधिरोपित करने के लिए सशक्त करता है - परिषद ने शक्ति का प्रयोग उचित रूप से अपनी अधिकारिता के भीतर किया - विचारण न्यायालय द्वारा समपहृत 1/4 राशि की वसूली का वाद उचित रूप से खारिज किया गया - अपील खारिज।

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R.L. Patidar with R.K. Sharma, for the appellant.

None, for the respondent though served and SPC issued.

J U D G M E N T

N.K. MODY, J. :-Being aggrieved by the judgment and decree dated 24.12.2004 passed by IVth Additional District Judge, Mandsaur in Civil Suit No.19-A/2003; whereby the suit filed by the appellant for realization of a sum of Rs. 75,000/- was dismissed, present appeal has been filed.

2. Short facts of the case are that on 18.8.2003 appellant filed a suit against the respondent alleging that respondent Municipal Council, Mandsaur is owner of a shop situated at Samrat Market, behind Kalkamata Temple. It was alleged that respondent auctioned the shop. It was alleged that appellant also participated in the said auction which took place on 18.8.2000. It was alleged that appellant deposited a sum of Rs. 5,000/- as security and the highest bid of the appellant was for Rs.3,35,000/-, which was accepted by the respondent. It was also alleged that on 19.8.2000 appellant deposited a sum of Rs. 75,000/- towards premium. It was alleged that balance amount was required to be deposited within a period of 30 days. It was alleged that because of financial crises appellant could not manage the amount; hence appellant moved an application before respondent and prayed for refund of the amount showing the inability in depositing the remaining amount. Further case of the appellant was that instead of refunding the amount respondent forfeited the amount deposited by the appellant. It was alleged that the action of the respondent is illegal and deserves to be set aside. It was alleged that under Sub Rule IV of Rule 6 of M. P. Municipality (Transfer of Immovable Property) Rules 1996 (hereinafter referred to as the Rules) in case of failure on the part of the appellant the respondent was entitle to forfeit the security amount only and not of the amount deposited by the appellant towards premium. It was prayed that it be declared that the action of the respondent in forfeiting the amount of premium deposited by the appellant is illegal and decree be passed against the respondent for refund of the amount along with interest.

3. The suit was contested by the respondent by filing the written statement wherein, it was not disputed that the respondent is the owner of the said market. It was also not disputed that the appellant participated in public auction for taking shop on lease and deposited an amount of Rs.5,000/- as security. It was alleged that the auction was commenced on 18.8.2000 and the highest bid was of the appellant for a sum of Rs.3,35,000/-. It was alleged that as per the terms and conditions of the auction, which were well known to the appellant, 1/4th amount of the auction money was required to be deposited immediately after the auction and balance amount was to be deposited within a period of 30 days. It was alleged that inspite of lapse of time and also inspite of giving repeated reminders appellant failed to deposit the balance amount, hence the amount deposited by the appellant was forfeited, as per terms and conditions of the auction. It was prayed that the suit filed by the appellant be dismissed.

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4. After framing of the issues and recording of evidence, learned Trial Court dismissed the suit filed by the appellant, hence this appeal.

5. At the time of hearing of the appeal, notices were sent to the respondent, but the respondent remained absent inspite of receipt of notice. Thereafter SPC was also issued to the respondent, but was of no avail. In the circumstances this Court was left with no option except to hear the appellant and decide the appeal on merits.

6. Learned counsel for the appellant submits that learned Court below committed error in dismissing the suit filed by the appellant. It is submitted that learned Court below committed error in treating the entire amount deposited by the appellant as security amount. It is submitted that the security amount was of Rs.5,000/- and the balance amount of Rs.75,000/- deposited by the appellant was towards auction amount and was not security amount. It is submitted that even if any term and condition imposed by the respondent at the time of auction which was not in accordance with the Rules, then the same could not have been enforced and the suit filed by the appellant deserves to be decreed. It was prayed that appeal filed by the appellant be allowed and the judgment and decree passed by learned Court below be set aside.

7. In exercise of the powers conferred by State Government under Section 355 read with Section 109 of the M. P. Municipalities Act, 1961 (No. 37 of 1967), the State Government has framed the Rules known as M. P. Municipalities (Transfer of Immovable Property) Rules 1996. Sub Rule (IV) of Rule 6 read as under:-

यथास्थिति, उच्चतम बोली लगाने या उच्चतम प्रस्ताव करने वाला व्यक्ति जानकारी की सूचना प्राप्त होने की तारीख से 30 दिन के भीतर नीलाम या प्रस्ताव का 100 प्रतिशत मूल्य जमा करेगा ताकि उसकी बोली/प्रस्ताव को उपरोक्त शर्त कमांक (nks) में यथानिर्दिष्ट प्राधिकारी द्वारा स्वीकार किया जा सके। तथापि, प्रतिभूति निक्षेप की रकम का उक्त बोली/प्रस्ताव मूल्य में समायोजन किया जायेगा। यदि वह उक्त कालावधि के भीतर ऐसी रकम को नहीं चुकाता है तो उसकी प्रतिभूति निक्षेप को समपहृत कर लिया जाएगा।

8. As per sub Rule (IV), the highest bidder was required to deposit 100% of the auction/offer price within 30 days from the date of receipt of the notice of intimation that his bid has been accepted by the authorities as referred in Condition No. 2. It further lays down that the amount of security deposited shall be adjusted in the said auction/offer price and in case the highest bidder fails to pay such amount within the said period the security deposit shall be forfeited. In the present case ExP-1 is the terms and conditions of public auction on the basis of which shops situated at Samrat Market were auctioned. As per Clause VI of Ex.P-1, which lays down terms and conditions of auction, the highest bidder was required to deposit 1/4th amount of the auction immediately after the auction, failing which the security amount stands forfeited. As per Clause VIII of Ex.P-1 after depositing

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1/4th amount the balance amount of 75% was required to be deposited within the stipulated time mentioned in the intimation failing which 1/4th amount deposited stands forfeited automatically.

9. In the present case undisputedly petitioner deposited the security amount on 18.8.2000 and participated in auction on 19.8.2000. Appellant was the highest bidder for a sum of Rs.3,35,000/- and Rs. 75,000/- i.e. 25% of the bid amount was deposited by the appellant on 19.8.2000 and the balance amount was to be deposited after receipt of notice within stipulated time. It is no more in dispute that letters were issued by the respondent to the appellant from time to time, but appellant failed to deposit the balance amount. The only question for consideration which arises is whether the respondent Council was right in forfeiting 1/4th amount deposited by the appellant, which was not at all the security amount. It is true that as per sub Section (IV) of Rules 6 of the Rules, in case of failure on the part of highest bidder in depositing 100% of the auction price within a period 30 days, the security amount has to be forfeited. In the present case the security amount was Rs.5,000/- and the amount of Rs.75,000/- which was deposited by the appellant was 1/4th amount of the highest bid. Therefore, it cannot be said that this amount was the amount of security. As per Ex.P-1 which is the terms and conditions of auction, it was specifically made clear that 1/4th amount deposited by the highest bidder shall be forfeited. So far as Rule 6 of the Rules is concerned, it empowers the Council to impose other conditions in addition to the conditions mentioned in Rule 6 of the Rules which the Council may think fit. In the present case while fixing the terms and conditions it was made clear by the Council that the highest bidder is required to deposit 1/4th amount immediately after conclusion of the bid and in case of failure on the part of the higher bidder in depositing the balance 75% amount, 1/4th amount deposited by the highest bidder shall stand forfeited automatically. This condition imposed by the Municipal Council, Mandsaur is in addition to the conditions imposed by Rule 6 of the Rules for which the respondent was empowered under the Rules. It is not the case of the appellant that appellant was unaware with the condition that 1/4th bid amount deposited by the appellant shall be forfeited. It is also not the case of appellant that appellant was not intimated by the respondent to deposit balance amount. On the contrary, case of the appellant is that because of financial crises appellant could not deposited the auction amount. There is nothing on record to show that later on whether the suit shop was re-auctioned or not and if re-auctioned, then for what amount and on what date.

10. In the facts and circumstances of the case since the respondent was empowered to impose conditions in addition to the conditions mentioned in Rule 6 of the Rules, therefore, in the opinion of this Court, no illegality has been committed by the learned Court below in dismissing the suit filed by the appellant, as the respondent was within its rights to impose the conditions for forfeiting the 1/4th of the auction amount.

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11. In view of this the appeal filed by the appellant stands dismissed. No order as to costs.

Appeal dismissed.

I.L.R. [2009] M. P., 806

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

26 November, 2008*

MAGAN & anr.

... Appellants

Vs.

MANSUKHBHAI & ors.

... Respondents

A. Motor Vehicles Act (59 of 1988), Section 173 - Appeal against dismissal of claim on ground that name of deceased did not find in FIR - Held - There was enough evidence to show that deceased died in the said accident - Dismissal of claim set-aside - Appeal allowed. (Para 22)

क. मोटर यान अधिनियम (1988 का 59), धारा 173 - दावा खारिजी के विरुद्ध अपील इस आधार पर कि एफआईआर में मृतक का नाम नहीं पाया गया - अभिनिर्धारित - यह दर्शाने के लिए पर्याप्त साक्ष्य थी कि मृतक की मृत्यु कथित दुर्घटना में हुई - दावे की खारिजी अपास्त - अपील मंजूर।

B. Motor Vehicles Act (59 of 1988), Section 173 - Cross-objection by owner without complying mandatory provision of Section 173 whereby he is required to deposit amount towards payment of award - Held - Cross-objection not maintainable. (Para 29)

ख. मोटर यान अधिनियम (1988 का 59), धारा 173 - स्वामी द्वारा प्रत्याक्षेप धारा 173 के आज्ञापक उपबंध का अनुपालन किये बिना जिसके द्वारा उसे अधिनियम की राशि के संदाय के लिए राशि जमा करना अपेक्षित है - अभिनिर्धारित - प्रत्याक्षेप पोषणीय नहीं।

C. Motor Vehicles Act (59 of 1988), Section 149 - Deceased was travelling in goods vehicles - Insurer exonerated by claims tribunal - Appeal against exoneration of insurer - Contented that contents of FIR could not be relied as which were contrary to evidence adduced - Held - FIR was lodged and produced by sole eye witnesses who is one of claimants - Contents of FIR and documents binding upon claimants. (Para 32)

ग. मोटर यान अधिनियम (1988 का 59), धारा 149 - मृतक मालवाहक वाहन में यात्रा कर रहा था - बीमाकर्ता को दावा अधिकरण द्वारा विमुक्त किया गया - बीमाकर्ता की विमुक्ति के विरुद्ध अपील - यह प्रतिवाद किया गया कि एफआईआर की अन्तर्वस्तु पर विश्वास नहीं किया जा सकता क्योंकि वह पेश साक्ष्य के प्रतिकूल थी - अभिनिर्धारित - एकमात्र प्रत्यक्षदर्शी साक्षी, जो दावेदारों में से एक है, के द्वारा एफआईआर दर्ज कराई गई और पेश की गई - एफआईआर और दस्तावेजों की अन्तर्वस्तु दावेदारों पर बन्धनकारी है।

MAGAN Vs. MANSUKHBHAI**Cases referred :**

2005(I) MPWN Note 91, 1994 ACJ 708, 1994 ACJ 1303, 1998 ACJ 1303, 2004 ACJ 297, 2004 ACJ 2094, 2004 ACJ 1903, 2004 ACJ 428, 2008 ACJ 1388, 2008 AIR SCW 3251, 2007 ACJ 1928, 2008 ACJ 1149, 2006(II) MPJR 320, 2006 ACJ 1352, 2007 ACJ 2877, 2008(II) MPWN Note 4.

Sanjay Patwa, for the appellants.

Kirti Joshi, for the respondent No.2.

H.C. Jindal with *Monesh Jindal*, for the respondent No.3.

O R D E R

N.K. Mody, J. :- This order shall also govern disposal of M.A. Nos. 259, 260, 451, 452, 453, 454, 456, 457, 458, 459 and 460 of 2007, as all these appeals have arisen out of one accident and by one award and in all the appeals parties are one and the same except the claimants.

2. The impugned award is dated 30.10.2006 passed by Additional MACT, Jobat, whereby the claim petitions filed by the legal representatives of 11 deceased and one injured were decided, out of which Claim Case No. 129/04 and 128/04 were dismissed and rests were allowed and compensation was awarded, however, Respondent No. 3 was exonerated.

3. Short facts common in all the cases are that the claim petitions were filed alleging that on 17.9.2004 at about 6:00am Respondent No. 1 was going on highway on a truck bearing registration No. GJ-3Y 8395, which was owned by Respondent N. 2 and insured with Respondent No. 3. It was alleged that the offending truck was in high speed being driven rashly and negligently with the result when it was passing through village Sahila, at that time, it dashed 12 persons, with the result 11 persons died and one Harisingh sustained grievous injuries. It was alleged that since the accident occurred because of rash and negligent driving of Respondent No. 1, therefore, claim petitions be allowed and compensation be awarded.

4. Claim petitions were contested by Respondent Nos. 1 and 2, wherein all the allegations made in the claim petitions were denied and it was alleged that since the offending vehicle is insured, therefore, in case the claim petition succeeds then Respondent No. 3 is liable for payment of compensation. Claim petitions were also contested by Respondent No. 3 by filing independent written statement, wherein allegations made in the claim petitions were denied and it was alleged that the offending vehicle was a goods vehicle, while it was carrying passengers, which was in violation of terms of the policy of the insurance. It was alleged that in the facts and circumstances of the case, Respondent No. 3 is not liable for payment of compensation. It was prayed that claim petitions be dismissed. After framing of issues and recording of evidence learned Tribunal allowed the claim petitions filed by the appellants except the Claim Petition Nos. 129/04 and 128/04 and awarded compensation, however exonerated Respondent No. 3 on the ground

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that offending vehicle was goods vehicle, therefore, Respondent No. 3 is not liable for payment of compensation, as there was violation of terms of the policy. Being aggrieved by the inadequacy of the amount of award and also by rejection of the Claim Petition Nos. 128/04 and 129/04 and also by the direction of exoneration of Respondent No. 3, present appeals have been filed.

5. Being aggrieved by the direction whereby respondent No.3 was exonerated, respondent No.2 has also filed the cross-objections in all the appeals except MA. No.259/07 and 260/07, which are arising out of claim case No.129/04 and 128/04, as in both the aforesaid appeals the claim petition filed by the claimants were dismissed.

6. Learned counsel for the appellants in all the appeals submit that against the award passed in Claim Petition No. 128/04, appeal filed by the appellant is M.A. No. 260/07. It is submitted that in Claim Petition No. 128/04 deceased was Rakesh aged 4 years. It is submitted that the claim petition has been dismissed only on the ground that the name of deceased has not been mentioned in the FIR, which cannot be a ground of dismissal of claim petition.

7. Learned counsel further submits that so far as another claim petition No. 129/04 is concerned against which the appeal filed is numbered as M.A. No. 259/07, was dismissed on the ground that certified copy of post mortem report of deceased Ramtubai has not been filed. Learned counsel submits that since the death certificate was filed and the death of Ramtubai was not disputed, even by respondents, therefore, there was no justification in dismissing the claim petition only on the ground that certified copy of the postmortem report has not been filed by the appellant. It is submitted that appellant examined Than Singh, who has proved the certificate. Thus it is amply proved that Ramtubai died in the said motor accident. Learned counsel submits that in the facts and circumstances of the case learned Tribunal committed error in dismissing both the claim petitions.

8. So far as the amount of compensation is concerned, learned counsel submits that in case of child death, learned tribunal awarded a sum of Rs.77,000/-, in Claim Petition No. 122/04 wherein the deceased was Raghunath aged 8 years and Rs.82,000/- in Claim Petition No. 126/04, wherein the deceased was Ku. Hatri aged 10 years. It is submitted that similarly in Claim Case No. 124/04, where the deceased was Laxman aged 4 years, learned Tribunal awarded Rs.67,000/- only. Learned counsel further submits that in other death cases the income of the deceased has been assessed @ Rs. 15,000/- per annum and after deducting 1/3 amount towards personal expenses, the amount of loss of dependency has been calculated. Learned counsel further submits that since the accident is of the year 2004, therefore, the income of the deceased has been assessed on notional basis, which is grossly inadequate and the same deserves to be enhanced. In the matters of child death learned counsel submits that after taking into consideration notional income and also after deducting 1/3rd amount towards personal expenses, multiplier of 15 ought to have been applied.

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9. So far as exoneration of Respondent No. 3 is concerned, learned counsel for the appellants submit that case of the appellants before learned Tribunal was that the accident occurred at the time when the deceased were sitting by the side of the road. It is submitted that learned Tribunal has discarded the evidence adduced by the appellants, only on the ground that in the FIR which was lodged by Harisingh who is appellant in M.A. No. 456/07, it is mentioned that all the deceased persons were travelling in the offending truck. It is submitted that the findings of learned Tribunal is contrary to the evidence adduced by the appellants.

10. Learned counsel further submits that learned Tribunal committed error in placing reliance on the contents of the FIR, which were contrary to the evidence adduced by the appellants. Learned counsel placed reliance on a decision in the matter of *Nanhu Singh Vs. Jaheer* - 2005 (1) MPWN Note 91, wherein the Division Bench of this Court has held that, in claim petition Tribunal cannot rely on evidence of criminal case or FIR version. It has to assess evidence given in claim case only. Further reliance was placed on a decision of Division Bench of this Court in the matter of *Dhanwanti Vs. Kulwant Singh*- 1994 ACJ 708, wherein the Division Bench of this Court has held that, evidence recorded in criminal court and the findings arrived at therein are not applicable in claim cases. It was further held that FIR is not a substantive piece of evidence. It can be used only for the purposes of corroboration or contradiction of the maker only. Reliance was also placed on the decision in the matter of *Mataji Bewa Vs. Hemanta Kumar Jeena*- 1994 ACJ 1303, wherein Orissa High Court held that, contents of charge sheet cannot be treated as an evidence in claim proceedings and the Tribunal must rely upon the evidence led before it. Learned counsel further placed reliance on a decision in the matter of *Dr. B. D. Bagri Vs. Daulat Ram* - 1998 ACJ 1303, wherein Punjab and Haryana High Court has held that, Tribunal cannot draw inference from the contents of the FIR to foist liability on drivers of the vehicles involved in the accident and the Tribunal has to decide the matter on the strength of the evidence led in the case.

11. On the strength of the aforesaid decisions learned counsel submits that the findings of learned Tribunal wherein the Respondent No. 3 was exonerated is illegal and deserves to be set aside. Learned counsel submits that even if this Court is of the view that the deceased and the injured were travelling in the offending vehicle in breach of the terms of the policy then too, so far as the appellants are concerned insurance company is liable for payment of compensation and at the most right of recovery can be given to it. For this contention reliance is placed on a decision of Gwalior Bench of this Court in the matter of *Jugal Kishore Vs. Ramlesh Devi* - 2004 ACJ 297, wherein a Full Bench of this Court held that, insurance company has to satisfy the award in favour of third party and recover the amount from the insured. Reliance was also placed on a decision of Hon'ble Apex Court in the matter of *National Insurance Co. Ltd. Vs. Challa*

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Bharathamma – 2004 ACJ 2094, wherein the Hon'ble Apex Court in the matter where the autorickshaw met with accident resulting in death of two persons and third sustained injuries and insured had not obtained permit to ply the vehicle, held, that insurance company is not liable, however, insurance company directed to deposit the amount and recover the same from the insured by initiating proceedings before the executing court. Reliance was also placed in the matter of *Pramod Kumar Agrawal Vs. Mushtari Begum*– 2004 ACJ 1903, wherein the passengers were travelling in goods vehicle and Hon'ble Apex Court has held that, risk of passenger carried for hire or reward in a truck is not covered and insurance company is not liable for death of fare-paying passenger, however, insurance company shall pay the amount of compensation to the claimants and recover the same from the owner by initiating proceedings before the executing court. Reliance was also placed in the matter of *National Insurance Co. Ltd. Vs. Baljit Kaur*– 2004 ACJ 428, wherein also in a case where gratuitous passengers were travelling in a goods vehicle, Hon'ble Apex Court directed that, insurance company shall satisfy the award in favour of the claimant and recover the amount from the owner in execution proceedings. Lastly reliance was placed on a decision of Hon'ble Apex Court in the matter of *New India Assurance Co. Ltd. Vs. Darshana Devi*– 2008 ACJ 1388; wherein the deceased was sitting on mudguard of tractor when he fell down due to its rash and negligent driving, Hon'ble Apex Court held that, liability of insurance company is statutory, its defence is limited but held that in a situation in exercise of jurisdiction under Article 142 of the Constitution of India, read with article 136 thereof suitable directions can be issued for doing complete justice to the parties.

12. Learned counsel for the appellants submits that Ex.D-1 is the policy in which there is a clause under a heading of AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY, which reads as under :-

“Nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the motor vehicles Act 1988. But the insured shall repay to the Company all sums paid by the company, which the Company would not have been liable to pay but for the said provision.”

13. Learned counsel for the appellant further placed reliance on a decision in the matter of *Oriental Insurance Co. Vs. Zaharunisha*, Reported in 2008 AIR SCW 3251, wherein in a case where the deceased died in a road accident, when scooterist hit his bicycle and the accident occurred due to rash and negligent driving of scooter and also admitted as he was holding license for driving heavy motor vehicle, Hon'ble Apex Court has held that act of driving totally different class of vehicle was in violation of Section 10(2) of M.V. Act and Insurance Company cannot be held liable. It was further held that in a case where the

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insurers, relying upon the provisions of violation of law by the assured, take an exception to pay the assured or a third party, they must prove a wilful violation of the law by the assured. In some cases, violation of criminal law, particularly violation of the provisions of the M.V.Act, may result in absolving the insurers but, the same may not necessarily hold good in the case of a third party. In any event, the exception applies only to acts done intentionally or 'so recklessly as to denote that the assured did not care what the consequences of his act might be'. The provisions of sub-section (4) and (5) of Section 149 of the M.V.Act may be considered as to the liability of the insurer to satisfy the decree at the first instance. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

14. Learned counsel submits that in the circumstances the appeal filed by the appellants be allowed and the amount awarded be enhanced and the findings of learned Tribunal relating to exoneration of respondent No.3 for payment of compensation be set aside.

15. Miss Kirti Joshi, learned counsel for respondent No.2 submits that the FIR which has been lodged on the complaint of Harsingh is in Gujarati language, which is marked as Ex.P/1. It is submitted that Ex.P/2 is the statement of Harsingh, which was recorded by the police, which is also in Gujarati language, while Harsingh was resident of State of M.P. and was an illiterate. It is submitted that since Gujarati language was a foreign language for Harsingh, therefore, on the basis of Ex.P/1 and P/2 it can not be held that Harsingh was travelling in the offending vehicle alongwith other who died in the accident. It is submitted that cross-objections filed by the respondent No.2 be allowed and the directions whereby respondent No.3 has been exonerated be set aside.

16. Learned counsel for respondent No. 3 submits that Harisingh was the only person who survived in the accident and lodged the complaint in which it was stated by him that all the passengers were sitting in the offending vehicle along with him. It is submitted that to avoid the liability Respondent No. 3 Insurance Company has examined Ram Prasad a Development Officer of Company who has proved Ex.D-1, which is the policy, according to which Insurance Company is not liable for payment of compensation, if the persons are travelling in the offending truck. It is submitted that the appeals be dismissed. Learned counsel further submits that the reliance was placed by the appellants themselves on the FIR and at this stage the appellants cannot be permitted to take the plea that the contents of the FIR are not admitted to the appellants. For the aforesaid contentions reliance was placed on a decision of the Hon'ble Apex Court in the matter of *Oriental Insurance Co. Ltd. Vs. Premlata Shukla*— 2007 ACJ 1928, wherein on the basis of FIR lodged by passengers in van, criminal case was registered against driver of truck, but had to be closed as the truck and its driver could not be traced. Thereafter claimants filed claim petition against the driver, owner and insurance company of van and Tribunal on the basis of evidence including FIR held that van driver was not driving rashly and negligently and dismissed the claim.

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application, while High Court relied upon the deposition of two witnesses and held that as FIR was not legally proved, driver of van should be held guilty of rash and negligent driving and further held that FIR had been relied upon by the parties on both sides and the claimants had made a reference to it in their claim application. FIR was exhibited as both the parties are intended to rely upon the FIR, irrespective of the fact that contents of the document have been proved or not. Therefore, the Tribunal was justified in placing the reliance on the contents of FIR. Further reliance was placed on a decision of the Hon'ble Apex Court in the matter of *National Insurance Co. Ltd. Vs. Prema Devi*— 2008 ACJ 1149, wherein the Hon'ble Apex Court has taken into consideration the liability of the Insurance Company, where the passengers were travelling in goods vehicle as gratuitous passengers and it was observed that, insurance company seeks to avoid its liability on the ground that owner of vehicle had not taken policy for such passenger and there was no requirement under law for obtaining a policy covering such passenger, therefore, claimant may recover the compensation amount from owner of vehicle. Lastly reliance was placed on a decision in the matter of *State of Madhya Pradesh Vs. Babulal Sharma* – 2006 (II) MPJR 320, wherein this Court has taken a view that no relief can be granted beyond ambit of pleadings. On the strength of the aforesaid decisions learned counsel for Respondent No. 3 submits that learned Tribunal has rightly awarded the compensation and exonerated the Respondent No. 3.

17. Learned counsel further submits that so far as the condition mentioned in the policy Ex.D-1 is concerned it is related to Section 141 of the Motor Vehicle Act.

18. Learned counsel for respondent No. 3 submits that no illegality has been committed by the learned tribunal in dismissing the claim case No. 129/04, wherein the compensation was claimed on account of death of Ramtubai against which MA. No.259/07 has been filed, as the postmortem report of Ramtubai was not filed. Learned counsel further submits that similarly the claim case No.128/04 has also rightly been dismissed as the name of deceased Rakesh was not shown in FIR, against which MA. No.260/07 is filed. So far as other cases are concerned, learned counsel submits that looking to the injuries sustained by Harsingh, learned tribunal has rightly awarded a sum of Rs.36,500/- in claim case No.127/04, against which MA. No.456/07 has been filed. So far as other death cases are concerned, learned counsel submits that the amount awarded by the learned tribunal is just and proper, which requires no interference.

19. So far as exoneration of respondent No. 3 Insurance Company is concerned, learned counsel submits that the date of accident is 17/09/04 at about 6:00 AM and the FIR was also lodged on that very day, at about 4:45 PM. It is submitted that the FIR was lodged at Police Station Sayla by Harsingh himself, who sustained injuries. It is submitted that in the FIR Harsingh has stated at length that he was travelling in the offending truck along with deceased passengers. It is submitted that in the claim petition nothing has been stated by the appellant that in what

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circumstances the accident took place. Learned counsel further submits that in exercise of powers conferred by Motor Vehicles Act, has been framed. As per Sub-rule (1) of 220 an application for compensation arising out of an accident of the nature specified under the Act shall be in Form M.P.M.V.R.(COMP-A), of which proforma is given. It is submitted that the claim petition filed by the appellants was not on the requisite proforma. Learned counsel further submits that the FIR Ex.P/1 speaks in volume that the deceased and injured were travelling in the offending truck, which was not meant for carrying passengers. Learned counsel placed reliance on a decision in the matter of *United India Insurance Co. Ltd. Vs. Hussain Sab*, Reported in 2006 ACJ 1352, wherein in a case where death of two passengers took place when they were travelling in a truck and truck met with an accident and the claimants contended that deceased were returning from place of work and were hit by the truck, while the FIR produced by the claimants and other documents relating to the criminal case, which disclose that deceased were travelling in goods vehicle as passengers, Karnataka High Court has held that the deceased were passengers in the goods vehicle and insurance company is exempted from liability. It was also held that the documents produced by claimants bind them.

20. So far as cross-objections filed by the respondent No.2 are concerned, learned counsel for respondent No.3 submits that the cross-objections filed by respondent No.2 itself is not maintainable as respondent No.2 has not complied with the mandatory requirement of Section 173 of the Motor Vehicles Act whereby the respondent No.2 is required to deposit requisite amount towards the payment of award. For this contention reliance is placed on a decision in the matter of *Anuradha Kaushik Vs. Varun Ground Water Development Corporation*, Reported in 2007 ACJ 2877, wherein Divisional Bench of this Court while considering the maintainability of the cross-objection in a case where the awarded amount was deposited by the Insurance Company has held that the cross-objections filed by the owner or driver of offending vehicle are not maintainable without making statutory deposit. It is submitted that the cross-objections filed by the respondent No. 2 be dismissed only on this short ground.

21. On the strength of this, learned counsel submits that no illegality has been committed by the learned Court below in exonerating the respondent No.3.

22. So far as dismissal of Claim Petition Nos. 128/04 and 129/04 in which the compensation was claimed by the appellant Nagarsingh on account of death of his son Rakesh aged 4 years and wife Ramtubai aged 30 years, which is under challenge in MA. Nos. 259/07 and 260/07 is concerned, from perusal of the record it is evident that the claim petitions were dismissed only on the ground that the name of deceased Rakesh aged 4 years did not find place in FIR and certified copy of postmortem report of Ramtubai was not filed. From perusal of the record it appears that enough evidence is on record to show that Rakesh and Ramtubai died in the said accident, therefore, there was no justification on the part of learned tribunal in dismissing the claim petition.

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23. So far as amount of compensation is concerned, on account of injuries sustained by appellant Harsingh in claim case No.127/04, wherein the learned Tribunal has awarded a sum of Rs.36,500/- is concerned; Harsingh sustained fracture of ulna bone and was hospitalized from 19/09/04 to 22/09/04, breakup of which is as under:

Rs.30,000/-	Towards general damages.
Rs.6,500/-	Towards medical expenses.

24. In the opinion of this Court, looking to the injuries sustained by the appellant Harsingh, amount awarded by the learned tribunal is on lower side, as on number of heads no amount has been awarded and on some of heads the amount awarded is on lower side. In view of this, appellant Harsingh is entitled for the following amount:-

Rs.25,000/-	Towards grievous injuries.
Rs.10,000/-	Towards medical expenses.
Rs.5,000/-	Towards special diet.
Rs.5,000/-	Towards expenses incurred on attenders.
Rs.6,500/-	Towards pain and sufferings.
Rs.5,000/-	Towards transport expenses.
Rs.10,000/-	Towards loss of income.

Rs.66,500/-	Total

25. Thus, the appellant Harsingh is entitled for total sum of Rs.66,500/-, instead of Rs.36,500/-.

26. So far as amount of compensation in other cases are concerned, appellant Harsingh has filed claim case Nos. 124/04, 123/04, 122/04 and 126/04 of which respective appeals are MA. Nos.453/07, 454/07, 457/07 and 460/07. On account of death of child the claim petition Nos. 124/04, 122/04 and 126/04 are filed by Harisingh of which respective MA. Nos. are 453/07, 457/07 and 460/07. Another case of child death is claim case No.128/04 of which MA. No. is 260/07 in which deceased Rakesh was aged 4 years and claimant is Nagarsingh who also lost his wife and sole survivor is Nagarsingh. In all the cases the amount awarded is grossly inadequate. In case of child death the compensation ought to have been awarded after taking in to consideration the notional income @ Rs.1,500/- per year and after deducting 1/3rd towards personal expenses, multiplier of 15 ought to have been applied. On other heads also suitable amount ought to have been awarded. Thus in case of child death, which are MA. Nos. 260/07, 453/07, 457/07 and 460/07 appellant is entitled for the following amount:

Rs.1,50,000/-	Towards loss of dependency.
Rs.10,000/-	Towards loss of love and affection.
Rs.2,000/-	Towards funeral expenses.
Rs.3,000/-	Towards transport expenses.

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Rs.3,000/-

Towards loss of estate.

Rs.1,68,000/-

Total

27. Chart of which is as under:

Sr. No.	MA. No.	Claim No.	Deceased	Claimant	Awarded by Tribunal	Awarded by this Court	Enhanced amount
1.	260/07	128/04	Rakesh aged 4 Yrs.	Nagarsingh	Dismissed	1,68,000/-	1,68,000/-
2.	453/07	124/04	Laxman aged 4 Yrs.	Harsingh	67,000/-	1,68,000/-	1,01,000/-
3.	457/07	122/04	Raghunath aged 8 Yrs.	Harsingh	77,000/-	1,68,000/-	91,000/-
4.	460/07	126/04	Ku. Hatri aged 10 Yrs.	Harsingh	82,000/-	1,68,000/-	86,000/-

28. So far as other MA. Nos.449/07, 259/07, 451/07, 452/07, 454/07, 458/07 and 459/07 are concerned, learned tribunal has taken in to consideration the notional income and after deducting 1/3rd towards personal expenses and after applying multiplier of 10 awarded the loss of dependency and further awarded a sum of Rs.9,000/- on account of other heads, while in MA. No.259/07 the claim petition was dismissed. It appears that on account of other heads the amount awarded by the learned tribunal is on lower side. In all the appeals, appellants are entitled for total sum of Rs.2,00,000/-, chart of which is as under:-

Sr. No.	MA. No.	Claim No.	Deceased/ Injured	Claimant	Awarded by Tribunal	Awarded by this Court	Enhancement (in Rs.)
1.	449/07	125/04	Ramsingh, aged 18 Yrs.	Magan	1,79,000/-	2,00,000/-	21,000/-
2.	259/07	129/04	Ramtubai, aged 30 Yrs.	Nagarsingh	Dismissed	2,00,000/-	2,00,000/-
3.	451/07	119/04	Patliya, aged 22 Yrs.	Sursingh	1,69,000/-	2,00,000/-	31,000/-
4.	452/07	120/04	Nevla, aged 15 Yrs.	Abla	1,59,000/-	2,00,000/-	41,000/-
5.	454/07	123/04	Thavlibai, aged 30 Yrs.	Harsingh	1,77,000/-	2,00,000/-	23,000/-
6.	458/07	121/04	Dhundhribai, aged 18 Yrs.	Vesta	1,69,000/-	2,00,000/-	31,000/-
7.	459/07	130/04	Buddhibai, aged 20 Yrs.	Mathu	1,69,000/-	2,00,000/-	31,000/-

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29. So far as the cross-objections filed by the respondent No. 2 are concerned, since the requisite amount of award has not been deposited by respondent No.2, which is the mandatory requirement of Section 173 of the Act, therefore, the same can not be taken into consideration and is hereby dismissed.

30. So far as exoneration of respondent No. 3 is concerned, it is true that the claim case can not be decided only on the strength of FIR or on the strength of record of criminal case, but at the same time the fact stated in FIR can not be ignored where the claimant himself placed reliance on the FIR. In the claim petition the claimants have not stated that in what circumstances the accident took place, while the claimants were duty bound to state the circumstances in which the accident took place, as per the proforma which is prescribed under the motor vehicles Rules, 1994.

31. In the present case Harsingh, who is not only the informer but also the injured and was travelling with his wife Thavlibai and sons Raghunath, Laxman and daughter Ku. Hatri and all of them died in the said accident, himself has lodged the complaint. Ex.P/1 which is in Gujarati language of which translated copy is Ex.P/1(A). Ex.P/2 is the statement of Harsingh, which was also recorded on the same day. Ex.P/3 is the charge sheet of which copy is Ex.P/3(C). Ex.D/1 is the hindi translation of statement of Harsingh, which has also been filed by the appellant as Ex.P/2 which is in Gujarati language. In the statement given by harsingh to the police it has been stated that on 16/09/04 at about 04:00 pm, he was going with his wife Thavlibai, daughter Hatri, sons Laxman and Raghunath and also his brother-in-law Patliya, Sursingh, sister-in-law Ghughri, Budhiben and Madhav. It was also stated by him that along with him Ramsingh, Madan and Nevla were also travelling. It was stated that all of them came from their village by bus to Dahod. It was further stated that with other labourers all of them came from Dahod to Barodra in a truck and at about 2:00 AM all of them boarded the offending truck for going to Morbi. It was further stated that because of rash and negligent driving the offending Matador turtle down, with the result he sustained injuries and other persons died.

32. In the present case appellants have produced the FIR and marked it in their evidence. It is solitary principal of law that the documents and its contents produced as evidence will bind the party who has produced the same. There is no duty on the part of the opponent to prove the contents of the documents produced by the other side. In the instant case, the first information report and the other documents relating to criminal case have been produced by the petitioners as their evidence. The said document binds the appellants. Had the first information report and the other documents are produced by the respondents, perhaps there would have been the duty on the part of the respondents to prove the documents produced by them by examining the relevant witness. Therefore, the contention that the first information report and other documents relating to criminal case are inadmissible and that the respondent No.3 has not proved the contents is untenable. It is to be

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noted that the strict rules of evidence do not apply to trials and inquiry relating to the Motor Accidents Claims Tribunal. In the matter of *Arun Kumar Patel Vs. Smt. Terasi Saket*, Reported in 2008 (II) MPWN Note-4, wherein Divisional Bench of this Court has taken into consideration the law laid down by the Hon'ble Apex Court in the matter of *Premalata* (Supra) and has held that it is binding upon claimant. In the present case the FIR was lodged immediately after the accident and the statement was also recorded within two days.

33. In the facts and circumstances of the case, this Court is of the view that learned tribunal has committed error in dismissing the claim petition Nos. 129/04 and 128/04, which are under challenge in M.A. No. 259/07 and 260/07. This Court is also of the view that the amount awarded by the learned tribunal in other claim appeals is on lower side, which requires enhancement. Each of the appellants shall be entitled for enhanced/awarded amount, as indicated above. Enhanced/awarded amount shall carry interest @ 7.5% pa. from the date of application.

34. So far as question of exoneration of respondent No. 3 is concerned, it appears that no illegality has been committed by the learned tribunal in holding the respondent Nos. 1 & 2 liable and exonerating respondent No. 3, as the offending truck in which the appellant Harsingh and deceased were travelling was not meant for carrying passengers.

35. In view of this, all the appeals stands partly allowed. A copy of this order be placed in the record of connected appeals. No order as to costs.

Appeal partly allowed.

I.L.R. [2009] M. P., 817

APPELLATE CIVIL

Before Mr. Justice S.K. Gangele

1 December, 2008*

UNITED INDIA INSURANCE CO. LTD.

... Appellant

Vs.

SMT. GAYATRI YADAV & ors.

... Respondents

A. Motor Vehicles Act (59 of 1988), Section 173 - *Compensation - Liability of Insurance Company - Offending vehicle used for murdering the deceased - Claims Tribunal held Insurance Company liable for compensation - Held - Insurance Company is not liable for compensation because the vehicle was used contrary to the terms and conditions of the Insurance Policy - Award fixing the liability of Insurance Company set-aside - However, the liability of other non- applicants will be same as per the award - If any amount paid by Insurance Company to the claimants, it can be recovered from the owner of the vehicle - Appeal allowed.* (Para 14)

*M.A. No. 263/2007 (Gwalior)

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क. मोटर यान अधिनियम (1988 का 59), धारा 173 — प्रतिकर — बीमा कम्पनी का दायित्व — उल्लंघनकारी वाहन का प्रयोग मृतक की हत्या करने में किया गया — दावा अधिकरण ने बीमा कम्पनी को प्रतिकर के लिए दायी ठहराया — अभिनिर्धारित — बीमा कम्पनी प्रतिकर के लिए दायी नहीं है क्योंकि वाहन का प्रयोग बीमा पॉलिसी के निबंधनों और शर्तों के विपरीत किया गया — बीमा कम्पनी का दायित्व नियत करने वाला अधिनिर्णय अपास्त — तथापि, अधिनिर्णय के अनुसार अन्य अनावेदकों का दायित्व वही रहेगा — यदि बीमा कम्पनी द्वारा दावेदारों को कोई रकम अदा की गई हो तो यह वाहन के स्वामी से वसूली जा सकती है — अपील मंजूर।

B. Practice & procedure - Civil - Findings recorded by the criminal Court cannot be treated as binding in the civil cases - Acquittal of the accused persons in the criminal case on account of witnesses turned hostile - It cannot be held that for the purpose of deciding the claim case, the judgment passed by the criminal Court is binding. (Para 13)

ख. पद्धति और प्रक्रिया — सिविल — दाण्डिक न्यायालय द्वारा अभिलिखित निष्कर्ष सिविल मामलों में बाध्यकारी नहीं माने जा सकते — दाण्डिक मामले में अभियुक्तों की दोषमुक्ति साक्षियों के पक्षद्रोही हो जाने के कारण — यह अभिनिर्धारित नहीं किया जा सकता कि क्लेम मामले को विनिश्चित करने के प्रयोजन के लिए दाण्डिक न्यायालय द्वारा पारित निर्णय बाध्यकारी है।

Cases referred :

AIR 1995 MP 122, AIR 2000 SC 1930, 2001(3) TAC 591 MP, 2003(1) TAC 229 Patna, 2006 ACJ 1824, 2006 ACJ 2165, 2007(3) TAC 11 SC, MACD 2008 (SC) 106, 2008(1) TAC 259 MP, (2005) 4 SCC 370, 2000 ACJ 801, 2006 ACJ 57.

Kumari Vandana Kekre, for the appellant/Insurance Co.

D.D. Bansal, for the respondent Nos. 1 to 6.

None, for the respondent No. 7.

Jitendra Tyagi, for the respondent No. 8.

ORDER

S.K. GANGELE, J. :- The appellant-Insurance Company has filed this appeal under Section 173 of the Motor Vehicles Act, 1988 against the award dated 07-12-2006, passed by the 1st Additional Motor Accident Claims Tribunal, Shivpuri, in Claim Case No.82/2006.

2. Claimants filed an application before the Claims Tribunal for compensation on account of death of Prakash Yadav. Claimants are wife, sons, daughters and mother of the deceased. They pleaded that on 25-9-2004, the non-applicant No.2 dashed Prakash Yadav by his tractor at around 12 'o' clock in the night. In the aforesaid accident, Prakash Yadav was died. The report of the case was lodged vide crime No.81/2004 and police registered a case under Section 302, 34, 294 IPC. The Fourth Additional Sessions Judge vide judgment dated 17-2-2005, passed in Case No.269/2004, acquitted the accused from the charge of murder. It is further pleaded that the tractor bearing registration No.MP33-M/7065 was insured by the

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appellant-Insurance Company, hence, the Insurance Company is also liable for payment of compensation. The claimants claimed total compensation of Rs.10,82,000/-.

3. The non-applicant No.2 denied the accident. He further pleaded that there was no accident caused by his tractor. He has already been acquitted by the Criminal Court. Subsequently, the claimants filed the present application for getting compensation. The appellant-Insurance Company in its written statement stated that the police registered a case under Section 302, 34, 294 IPC. The tractor was used as a weapon to kill the deceased Prakash Yadav. It was a case of murder. Hence, the vehicle was used in contravention to the Insurance Policy. Consequently, the Insurance Company is not liable for payment of compensation.

4. The Claims Tribunal after appreciation of evidence and documents on record has held that the accident occurred due to rash and negligent driving of the driver of the tractor. The driver had valid licence. The tractor was insured by the Insurance Company. The deceased was died due to accident and awarded a total compensation of Rs.4,39,000/-. The Tribunal further held that the Insurance Company would also liable for payment of compensation because the deceased was third party.

5. Learned counsel for the appellant-Insurance Company has submitted that the tractor was used as a weapon to kill the deceased Prakash Yadav and the death of the deceased did not occur due to accident. In such circumstances, the Insurance Company is not liable to pay compensation to the claimants. In support of her contentions, learned counsel for the appellant-Insurance Company relied on the following judgments :-

1. AIR 1995 MP 122 (*M.P.State Road Transport Corporation Vs. Vaijanti and others*);

2. AIR 2000 SC 1930 (*Smt. Rita Devi and others Vs. New India Assurance Co. Ltd. and another*);

3. 2001 (3) T.A.C. 591 (M.P.) (*Kaushalya Bai and others Vs. Ramkishan Kirar and others*);

4. 2003 (1) T.A.C. 229 (Pat.) (*Ranju Rani Alias Ranju Devi and others Vs. Branch Manager, New India Assurance Company Ltd.*);

5. 2006 ACJ 1824 (*Ramesh Vs. State of Maharashtra*);

6. 2006 ACJ 2165 (*Jyothi Ademma Vs. Plant Engineer, Nellore Thermal Station and another*);

7. 2007 (3) T.A.C. 11 (SC) (*Oriental Insurance Company Ltd. Vs. Premlata Shukla and others*);

8. MACD 2008 (SC) 106 (*Naresh Giri Vs. State of M.P.*) and;

9. 2008 (1) T.A.C. 259 (M.P.) (*Smt. Afsana and others Vs. Kedar Nath Sharma and others*)

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6. Contrary to this, learned counsel for the claimants submitted that the deceased was died due to accident. The criminal court has acquitted the accused persons from the offence of murder, hence, the Tribunal has rightly passed the award.

7. As per the pleadings of the claimants, deceased was died on account of accident caused by the tractor. The accident is dated 25.9.2004 at around 12 'o' clock in the night. The report of the incident was lodged on 26.9.2004 at around 7.00 in the morning. It was lodged by Virendra Singh Yadav. It has been mentioned in the F.I.R. that on 25.9.2004 at around 9 'o' clock in the night, there was a quarrel between Prakash Yadav and Lakhan, Panchu. Thereafter Lakhan Singh left the spot along with Prakash, Panchu and Santu on his Swaraj Tractor No.722 saying that he was going to lodge a report. Thereafter, at around 12 'o' clock his brother Prakash had gone to a nearby pond to wash his hands. When he was washing his hands, at that time Lakhan Singh came driving his tractor on which Prakash, Panchu and Santu were sitting, they shouted to kill Prakash Yadav and Lakhan Singh dashed Prakash Yadav by the tractor and he was died. On the basis of the aforesaid report, a case under Section 302 of the IPC was registered. The witness Virendra Singh also in his statement before the police mentioned the same fact. The copy of the statement given by Virendra Singh to police has been filed as Ex.P/13 and copy of the F.I.R. has been filed as Ex.P/1. He admitted his signature on the report of the F.I.R.(Ex.P/1) in his evidence before the Claims Tribunal. He further admitted that he had lodged a correct report at the police station and further admitted that there was a quarrel between Lakhan Singh, Panchu, Santu and his brother Prakash Yadav on 25.9.2004 at around 9 'o' clock in the night.

8. Before the trial Court in criminal case, all the witnesses have become hostile, hence, the accused persons Santu, Prakash, Panchu and Lakhan Singh have been acquitted from the charge under Section 302 of IPC by the Sessions Court. The wife of the deceased in her statement before the Claims Tribunal also admitted the fact that Lakhan Singh had dashed her husband by tractor [लखन ने मेरे पति पर ट्रैक्टर चढ़ा दिया था]. Except two witnesses, nobody has been examined before the Claims Tribunal on behalf of the claimants. The Insurance Company examined one Rakesh Kumar Shukla, who was working at the relevant time as Administrative Officer of the United Insurance Company Limited. He stated that the tractor was insured by the Insurance Company for the purpose of agriculture and in the present case the tractor was used for killing the deceased.

9. From the aforesaid oral evidence of the wife of the deceased and also brother of the deceased, it is clear that Lakhan Singh had dashed the tractor on the deceased. It has clearly been mentioned in the F.I.R. that the intention was to kill the deceased. Lakhan Singh intentionally drove the tractor and hit the deceased by the tractor. From the aforesaid facts of the case, it is clear that the tractor was used by Lakhan Singh as a weapon to kill the deceased. It was not a simplicitor accident. Although, the accused persons have been acquitted by the criminal court,

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as clear from the judgment of the criminal court. The acquittal is on account of facts that the witnesses had been turned hostile. In such circumstances, the findings recorded in the criminal case cannot be held to be a conclusive findings in Claim Case under the provisions of the Motor Vehicles Act.

10. The Constitution Bench of the Hon'ble Supreme Court in the case of *Iqbal Singh Marwah and another Vs. Meenakshi Marwah and another*, reported in (2005) 4 SCC 370, with regard to binding nature of findings recorded in criminal proceedings in civil case has held as under :-

“Coming to the contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein.”

11. Further Hon'ble Supreme Court in the case of *Rita Devi and others V. New India Assurance Co. Ltd. and another*, reported in 2000 ACJ 801 with regard to deciding the fact that whether a murder be an accident in any given case ? has held as under :-

“9. A conjoint reading of the above two sub-sections of section 163-A shows that a victim or his heirs are entitled to claim from the owner/insurance company a compensation for death or permanent disablement suffered due to accident arising out of the use of the motor vehicle, without having to prove wrongful act or neglect or default to prove wrongful act or neglect or default of any one. Thus, it is clear, if it is established by the claimants that the death or disablement was caused due to an accident arising out of the use of motor vehicle then they will be entitled for payment of compensation. In the present case, the contention of the insurance company which was accepted by the High Court is that the death of the deceased (Dasrath Singh) was not caused by an accident arising out of the use of motor vehicle. Therefore, we will have to examine the actual legal import of the words 'death due to accident arising out of the use of motor vehicle'.

10. The question, therefore, is : can a murder be an accident in any given case ? There is no doubt that 'murder', as it is understood, in the common parlance is a felonious act where death

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is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But, there are also instances where murder can be by accident on a given set of facts. The difference between a 'murder' which is not an accident, and a 'murder' which is an accident depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder."

12. The Division Bench of Kerala High Court in the case of *Krishnan Sreemathy and others V. Padmanabhan Gangadharan and another*, reported in 2006 ACJ 57, with regard to 'accident' has held as under :-

4. "The word 'accident' is not defined in the Motor Vehicles Act or Workmen's Compensation Act. therefore, the word 'accident' should be understood in the popular and ordinary sense as denoting an untoward event which is not expected or designed. The meaning of 'accident' in Oxford English Dictionary is 'unfortunate event, disaster, mishap; as also anything that happens without foresight or expectation; an unusual event, which proceeds from unknown cause or is an unusual effect in non-cause; a contingency, a casualty'. In Webster's 3rd New International Dictionary, 'accident' has been defined as 'sudden event or change without intent or volition through carelessness, unawareness, ignorance or a combination of causes and producing an unfavourable result; an unexpected happening causing loss or injury which is not due to any fault or misconduct on the part of the person injured but from the consequences of which he may be entitled to some legal reliefs'. In Chamber's 20th Century Dictionary 'accident' has been defined to mean 'an unforeseen or unexpected event, a chance'. Lord Atkinson has observed as follows in *Clover, Clayton & Co. Ltd. v. Hughes*, 1910 AC 242:

"I think the meaning put upon the word 'accident' in *Fenton v. Thorley*, 1903 AC 443, must now be accepted in all cases turning on the construction of the phrase 'injury by accident' used in the Workmen's Compensation Act, 1906, as its true meaning, namely, 'an unlooked for mishap or an untoward event which is not expected or designed'. It must exclude disease. What is 'unlooked for' or 'unexpected' must, in every case, exist either in the external influences to which the sufferer is subjected or in the effect upon him which those influences produce."

UNITED INDIA INSURANCE CO. LTD. Vs. SMT. GAYATRI YADAV

The test whether an occurrence is unexpected so as to be an accident is whether it is unexpected by the person who suffers from it and not whether it would be expected by medical men or persons other than the deceased or injured person. A Division Bench of this court in *Mathew Joseph v. Johnny Sunny*, 1995 ACJ 1183 (Kerala), held that "the term 'accident' for the purpose of the law relating to compensation for personal injuries sustained by workmen and the employer's liability in that behalf includes any injury which is not designed by the workmen himself and it is of no consequence that the injury was designed and intended by the person inflicting the same."

13. From the evidence on record of the case, it is clear that the vehicle was used to murder the deceased. As has held by the Constitution Bench of the Hon'ble Supreme Court that the findings recorded by the criminal court cannot be treated as binding findings in the civil cases. Looking to the acquittal of the accused persons in the criminal case on account of witnesses turned hostile, it cannot be held that for the purpose of deciding the claim case, the judgment passed by the Sessions Court is binding. As held by Hon'ble Supreme Court in the case of *Rita Devi* (supra) that a murder is felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. From the facts of the case it is clear that there was a quarrel between Lakhan Singh and other persons and deceased and thereafter to take revenge the deceased was killed, it is clear from the version of the F.I.R. In such circumstances, the vehicle was used as a weapon. For the purpose of deciding the claim application the Court can draw an inference that for what purpose the vehicle was used.

14. Looking to the above facts of the case, this Court comes to the conclusion that the tractor was used to kill the deceased, in such circumstances, in my opinion, the Insurance Company is not liable for payment of compensation because the vehicle was used contrary to the terms and conditions of the Insurance Policy. Consequently, the appeal filed by the Insurance Company is hereby allowed. It is held that the Insurance Company is not liable for payment of compensation. The impugned award fixing the liability of the Insurance Company is hereby set aside. It is hereby made clear that the liability of other non-applicants will be same as per the award. If any amount paid by the Insurance Company to the claimants, it can recover the same from the owner of the vehicle. No order as to cost.

Appeal allowed.

SUMERSINGH Vs. SMT. HEMKUWARBAI

I.L.R. [2009] M. P., 824

APPELLATE CIVIL*Before Mr. Justice Shantanu Kemkar*

8 December, 2008*

SUMERSINGH & ors.

... Appellants

Vs.**SMT. HEMKUWARBAI & ors.**

... Respondents

Civil Procedure Code (5 of 1908), Section 96 - Suit for seeking relief to declare sale deeds and Will executed by mother to be void - Alleged that deeds were got executed on the pretext of loan transaction when executant was old and suffering from cancer - Suit decreed - Appeal filed - Held - The deeds were registered and read over to executant at the time of execution - Payment of consideration also proved by witness - Executant became widow around 35 years prior to execution of deeds and managed her land and worldly affairs - She executed two sale deeds and kept some property with her for bad days - This itself demonstrates that she was well aware of worldly affairs and was in good mental condition - Through evidence it is proved that plaintiff neglected and was not taking care of executant prior to and even after suffering of her from ailment of cancer - Execution of sale deed and Will duly proved - Judgment and decree of trial Court set-aside - Appeal allowed. (Paras 13 & 14)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 96 — माँ द्वारा निष्पादित विक्रय विलेखों और वसीयत को शून्य घोषित करने का अनुतोष प्राप्त करने के लिए वाद — यह अभिकथित किया गया कि ऋण संयवहार के बहाने विलेख निष्पादित कराये गये जब निष्पादनकर्ता वृद्ध और केंसर से पीड़ित थी — वाद डिक्री किया गया — अपील पेश — अभिनिर्धारित — विलेख रजिस्ट्रीकृत थे और निष्पादन के समय निष्पादनकर्ता को पढ़वाये गये — प्रतिफल का संदाय भी साक्षियों द्वारा साबित किया गया — विलेखों के निष्पादन के लगभग 35 वर्ष पूर्व निष्पादनकर्ता विधवा हो गयी थी और उसने अपनी भूमि और सांसारिक कामकाज संभाला — उसने दो विक्रय विलेख निष्पादित किये और कुछ सम्पत्ति बुरे दिनों के लिए अपने पास रख ली थी — यह स्वमेव दर्शाता है कि वह सांसारिक कामकाजों से अच्छी तरह परिचित थी और अच्छी मानसिक दशा में थी — साक्ष्य से यह साबित होता है कि वादी ने निष्पादनकर्ता की उसके केंसर रोग से पीड़ित होने के पूर्व और बाद में भी उपेक्षा की और उसकी देखभाल नहीं की — विक्रय विलेख और वसीयत का निष्पादन सम्यक् रूप से साबित — विचारण न्यायालय का निर्णय व डिक्री अपास्त — अपील मंजूर।

Cases referred :

AIR 1963 SC 1203, 2007 AIR SCW 6787.

*P.V. Bhagwat, for the appellants.**Himanshu Joshi with Usha Chouhan, for the respondent No.1**None, for the respondent Nos.2 & 3.*

SUMERSINGH Vs. SMT. HEMKUWARBAI**J U D G M E N T**

SHANTANU KEMKAR, J. :- This is defendants first appeal filed u/S.96 of the Civil Procedure Code against the Judgment and Decree dt.24.10.97 passed by the First Additional District Judge, Shujalpur, Dist. Shajapur in Civil Suit No.81-A/95.

2. The plaintiff/respondent no.1 filed a suit for declaration and injunction seeking relief to declare the two sale deeds dt.06.04.95 executed by her mother Ratankuwarbai in favour of appellant nos.1 & 2 and to declare Will executed on the same day by her mother in favour of appellant no.3, to be null and void and not binding on her and to declare her as the sole owner of the suit land.

3. The plaintiff/respondent no.1 case as per the plaint filed on 19.9.95 was that the suit land situated at village Dadia Khedi was owned by her father Devisingh and her uncle Mehetabsingh. After the death of her father Devisingh, in December 1961 the suit land of his share was transferred in the name of her mother Ratankuwarbai. It is stated by the plaintiff that though name of her mother Ratankuwarbai was recorded in the land but she also being legal heir of deceased Devisingh was having joint ownership right over the suit land with her mother. It is stated that after the death of her mother on 21.07.95 she became the sole owner of the suit land. It was alleged by the first respondent/plaintiff that 3 to 4 months prior to death of her mother Ratankuwarbai she was suffering from Cancer and on account of cancer she died. In order to meet the expenses of her treatment she took Rs.5,000/- from the appellants/defendant nos.1, 2 & 3. The defendants no.1, 2 & 3. on the pretext of the transaction of loan of Rs.5,000/- got executed from the deceased Ratankuwarbai the sale deeds dt. 06.04.95 without consideration and the Will dt.06.04.95, and got the same registered in the office of Sub-Registrar Kala Pipal. She further alleged in the plaint that she being co-owner of the suit property the sale deeds and the Will executed by the deceased Ratankuwarbai are not binding on her. It is her case that taking undue advantage of ill health of Ratankuwarbai the defendant nos.1, 2 & 3 without paying consideration got the sale deeds executed in their favour and also got the Will executed from her representing it to be a document for loan of Rs. 5,000/- which she took from the appellants for her treatment.

4. The defendants no.1, 2 & 3's case as set out in their written statement was that the plaintiff's mother Ratankuwarbai became sole owner of the land on her husband's death according to the law of succession which was in force at the relevant point of time. It is stated by defendant nos.1, 2 & 3 that the sale deeds were for proper consideration of Rs.94,500/- which was paid to Ratankuwarbai at her residence prior to the registration of the sale deeds. They denied commission of any fraud by them with Ratankuwarbai. It is also stated that Ratankuwarbai was in their relation and they were taking her care, therefore, she executed a Will in favour of the defendant no.3. She executed the sale deeds as she was in need of money. The money she received as sale consideration was spent by her in

treatment of her ailment of cancer. It was also stated that the plaintiff never cared for her mother and she even did not turn up to look after her during the period of her ailment and also did not attend her last rites.

5. On the basis of the above pleadings the Trial Court framed eight issues. The plaintiff examined herself as P.W.1 and Govind Kuwarbai as P.W.2. In rebuttal the defendants/appellants examined defendant no.2 Manoharsingh (D.W.1), Laxmansingh (D.W.2), Antarsingh (D.W.3); Dilipsingh (D.W.4) (wrongly mentioned as D.W.1). The Trial Court on the basis of the evidence held that since Devisingh died before 08.12.1961 his wife Ratankuwarbai became the sole owner in view of the law prevailing at that time. As regards the validity of the documents, the Trial Court held that Ratankuwarbai was in a state of depression as she was suffering from cancer and the sale deeds which were executed from her were without consideration. The Court below also held the Will to be not proved. Accordingly it held that the sale deeds and Will executed by the plaintiff's mother Ratankuwarbai are not binding on the plaintiff. The plaintiff's suit was accordingly decreed by the Trial Court holding the sale deeds and the Will to be null and void.

6. Heard Shri P.V.Bhagwat learned counsel for the appellants, Shri Himanshu Joshi and Smt. Usha Chouhan learned counsel for respondent no.1. Perused the record.

7. Shri P.V.Bhagwat learned counsel for the appellants has submitted that the Trial Court has committed error in holding that since Ratankuwarbai was suffering from cancer therefore she was under the state of depression. According to him though the Trial Court had recorded a finding that the defendants/appellants were looking after Ratankuwarbai, erred in not giving due weightage to the same as it was a circumstance in favour of the appellants justifying executing of Will in favour of the defendant no.3. He also contended that by the documentary and oral evidence led on behalf of the appellants it was duly proved by them that the sale deeds were executed for consideration of Rs.94,500/- which was duly received by the plaintiff and the sale deeds were duly registered before the Sub Registrar. He argued that since Ratankuwarbai was in need of money she sold land for lump sum amount which was utilised by her in her treatment. He also argued that from the evidence on record it was duly established that the plaintiff did not perform her obligation as a daughter and never cared for her mother Ratankuwarbai and even did not come to meet her during her period of suffering from ailment; thus according to him the entire conduct of the plaintiff as is clear from the evidence on record justifies the execution of the sale deeds and Will by the deceased Ratankuwarbai in favour of the appellants.

8. On the other hand it has been contended by learned counsel for the first respondent/plaintiff that the appellants in the garb of executing the documents of loan transaction of Rs.5000/- got executed two sale deeds and a Will from Ratankuwarbai. According to him the sale deeds executed by the defendant nos.1,

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2 & 3 from the plaintiff were without consideration and as such the Trial Court has rightly declared the same to be null and void. He also argued that the Will also has rightly been held by the Trial Court to be not proved.

9. At the time of execution of the sale deeds and the Will the deceased Ratankuwarbai was aged 60 years. Admittedly she was an illiterate lady and was suffering from cancer. In the circumstances while appreciating the evidence it is to be kept in mind that the ordinary presumption that a person understands the documents to which he has affixed his thumb would not apply in this case. The Supreme Court in *Mst. Kharbuja Kuer v. Jangbahadur Rai & Ors.* [AIR 1963 SC 1203] has held that the burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardahnashin lady to establish that the said document was entered into by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the documents were explained to her and she understood it but also by other evidence, direct and circumstantial. Shri P.V.Bhagwat learned counsel for the appellants has placed reliance on the Judgment of Supreme Court in case of *Savithri & Ors. v. Karthyayani Amma & Ors.* [2007 AIR SCW 6787] in which the Supreme Court rejected the plea of undue influence in executing the Will by Testator a cancer patient living with his sister in favour of sister, her son and grandson who are looking after him holding that the execution of Will is natural. The Supreme Court also held that the plea of coercion of suspicious circumstances in executing the Will has to be proved by the party alleging coercion.

10. In order to decide the controversy the evidence led by the parties is to be scanned in terms of this legal position.

11. Plaintiff Hemkuwarbai (P.W.1) in her deposition has stated that her father Devisingh died 35 years ago she was infant child of six months. She stated that 4 to 5 months prior to the death of her mother, by cancer it was known to her mother that she is suffering from cancer. She stated that her mother Ratankuwarbai took loan of Rs.5000/- from defendant no.2 Manoharsingh. She also deposed that under the garb of documentation of this transaction of Rs.5000/- appellants no.1 and 2 got executed the documents of sale deeds and Will from her mother Ratankuwarbai. Ratankuwarbai visited Ahmadabad for her treatment with Manorsingh and her aunt Govindkuwarbai (P.W.2). They returned after one month from Ahmadabad. She admitted that she never visited her mother after getting knowledge of her being suffering from cancer. In her cross examination she stated that the defendant nos.1, 2 & 3 are her cousins. Govindkuwarbai (P.W.2) stated that the plaintiff Hemkuwarbai is her niece. She also deposed that Ratankuwarbai was suffering from cancer and she visited her place of residence at Rajgarh and was worried about her ailment. On her consolation she went back to her village and after arranging money for her treatment she along with Manoharsingh came

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to Rajgarh and thereafter she along with Ratankuwarbai and Manoharsingh visited Ahmadabad for treatment of Ratankuwarbai. She stated that only Rs.5,000/- were spent in her treatment which includes up and down journey fare of all the three persons.

12. Manoharsingh (D.W.1) in his deposition has stated that plaintiff Hemkuwarbai was married at village Lasudia. He stated that he and his brother Sumersingh purchased land from Ratankuwarbai for Rs.94,500/- by two separate sale deeds Ex. D/1 and Ex. D/2 which were registered for Rs.37,000/- and 57,500/- . He stated that the price of the land was given to Ratankuwarbai in the presence of Antarsingh at her residence. He also deposed as to of which denominations the currency notes were paid to the deceased Ratankuwarbai. The amount so paid to her was counted by her. He further stated that since they were taking care of Ratankuwarbai she made a Will (Ex.D/3) in favour of Indersingh. It is also stated by him that at the time when the sale deeds Ex.D/1 and D/2 and the Will Ex.D/3 were registered Ratankuwarbai was in good condition. He further deposed that the price of land paid by them for purchase of the land from Ratankuwarbai was spent by Ratankuwarbai for her treatment. He denied the suggestion that at the time when the sale deeds and the Will were executed, deceased Ratankuwarbai was under depression. He also denied that in the garb of preparing documents for the loan transaction of Rs.5,000/- they got executed the sale deeds and Will from the deceased Ratankuwarbai. He deposed that he went with deceased Ratankuwarbai to Ahmadabad for her treatment and stayed along with her at Ahmadabad for 25 days. In his cross examination he stated that Ratankuwarbai was accompanied by Antarsingh from her village to execute the registration of the deeds. Laxmansingh (D.W.2) is the witness to the registration of the documents. He has deposed that the part of the land was sold by Ratankuwarbai to Sumersingh and Manoharsingh and in regard to the rest of land a Will was executed by her in favour of Indersingh. He proved his signatures on sale deeds Ex. D/1 and D/2 as also on the Will Ex. D/3. He also deposed that he asked Ratankuwarbai whether she has received the amount on this she told to him that she has received full amount of the land sold by her. He also stated that mental condition of Ratankuwarbai was good at the time of registration of the documents. In his cross examination he stated that Ratankuwarbai informed to her that she has sold the land to Sumersingh and Manoharsingh for Rs.94,000/- and the amount has already been received by her at her residence. It was also informed to him by Ratankuwarbai that since Indersingh is taking care of her therefore she is giving land to him by Will. He also stated that Antarsingh (D.W.3) was present at the time of registration of the sale deeds and will and informed him that the money was given to Ratankuwarbai in his presence. He deposed that the Sub Registrar while registering the documents read over the documents to everyone in his presence. Antarsingh (D.W.3) witness of the documents in his deposition has

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stated that in his presence Ratankuwarbai received Rs.94,500/- from the defendants at her residence. He stated that he accompanied Ratankuwarbai for going to Sub Registrar's office at Kalapipal to execute the registration of the documents. He also stated that in his presence Ratankuwarbai handed over the possession of the land to defendant nos.1, 2 & 3. Dilip (D.W.4) stated that he has been given the land for cultivation by Ratankuwarbai and he is still in possession of the same.

13. Admittedly deceased Ratankuwarbai was aged 60 years at the time of execution of the sale deeds and was suffering from cancer. She became widow around 35 years prior to the execution of the sale deeds Ex.D/1, D/2 and the Will Ex. D/3. For about 35 years she herself was managing her land and worldly activities. During such a long period she already had the experience of worldly affairs. On going through the evidence of the defendant witnesses I find that all the witnesses namely D.W.1, D.W.2 and D.W.3 have un-equivocally deposed that Ratankuwarbai was living at Dadia Khedi all alone after the death of her husband. Plaintiff was not taking care of her mother and the defendant nos.1, 2 & 3 were looking after her. The defendant nos.1, 2 & 3 are not strangers but nephews of deceased. When she was in need of money she visited P.W.2 for monetary help. However P.W.2 as is clear from her evidence stated that she would accompany her to Ahmadabad only if she arrange for money. On this the deceased Ratankuwarbai sold part of the land for consideration of Rs.94,500/- to defendant nos.1 & 2. She with a view to keep some property with her for her bad days did not sold the entire land but sold only part of it and in regard to the rest of the land she made a Will in favour of defendant no.3 who was taking care of her, this itself demonstrates that she was well aware of worldly affairs and also was in good mental condition. The documents Ex. D/1, D/2 and D/3 are registered documents. The execution of these documents is duly proved by the attesting witnesses D.W.2 and D.W.3. The evidence on record shows that deceased Ratankuwarbai visited Sub Registrar's office and the Sub Registrar read over the documents to her in the presence of witnesses and the defendant nos.1, 2 & 3. The witnesses of the sale deeds and the Will have been examined by the defendants to prove the due execution of the same, the payment of the consideration of sale. The sale deeds contains recital that the deceased Ratankuwarbai has received Rs.37,000/- and Rs. 57,500/- respectively in cash. The conduct of deceased Ratankuwarbai in not selling the entire property and making Will of part of the property itself shows that she was in full sense at the time when the transaction was done. Nothing has come in the cross examination of the defendants witnesses to hold that the documents Ex.D/1, D/2 and D/3 have been got executed by the defendant nos.1, 2 and 3 from the deceased Ratankuwarbai under the pretext of documents for loan transaction of Rs.5000/-.

14. In view of the overwhelming evidence about payment of consideration for

MUKESH KUMAR SANGHVI Vs. SAIFUDDIN

the sale, the execution of the sale deeds, execution of the Will, the participation of Ratankuwarbai for the registration of the documents and other attending circumstances including the fact that the plaintiff was neglecting and was not taking care of deceased Ratankuwarbai prior to and even after suffering of her from the ailment of cancer, I am of the view that the Judgment and Decree passed by the learned Trial Court holding the documents Ex.D/1, D/2 and D/3 to be null and void is not sustainable.

15. Accordingly the appeal is allowed. The impugned Judgment and Decree of the Trial Court is set aside with costs throughout. The respondent no.1/plaintiff's suit stands dismissed: Counsels fees as per schedule, if certified.

Appeal allowed.

I.L.R. [2009] M. P., 830

APPELLATE CIVIL

Before Mr. Justice Shantanu Kemkar

10 December, 2008*

MUKESH KUMAR SANGHVI

... Appellant

Vs.

SAIFUDDIN & ors.

... Respondents

Civil Procedure Code (5 of 1908), Order 21 Rule 58 - Suit for specific performance - Decree of refund of money passed - In execution attachment and auction of judgment debtor's property - Objection under Order 21 Rule 58 filed by appellant alleging that he purchased same property in court auction of other civil suit - Identity of property sold in auction of other suit disputed by respondent/decreed holder - Objection rejected without opportunity to adduce evidence - Held - Provision gives statutory and substantial right to a party to get his claim or objection to attachment of property to be adjudicated - Since identity of property was in dispute, the Executing Court erred in rejecting objection without opportunity to adduce evidence and by merely observing that the property is different and sale has not been confirmed in other proceeding - Matter remanded for fresh adjudication after opportunity to lead evidence - Appeal allowed. (Paras 12, 13, 15 & 17)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 58 - विनिर्दिष्ट पालन के लिए वाद - रकम वापसी की डिक्री पारित - निष्पादन में निर्णीत ऋणी की सम्पत्ति की कुर्की और नीलामी - अपीलार्थी द्वारा आदेश 21 नियम 58 के अधीन आपत्ति यह अभिकथित करते हुए पेश की गई कि उसने वही सम्पत्ति अन्य सिविल वाद की न्यायालयीन नीलामी में क्रय की है - प्रत्यर्थी / डिक्रीदार द्वारा अन्य वाद की नीलामी में विक्रय की गई सम्पत्ति की पहचान विवादित की - आपत्ति साध्य पेश करने के अवसर के बिना खारिज की गई - अभिनिर्धारित - उपबंध पक्षकार को सम्पत्ति की कुर्की के अपने दावे या आपत्ति का न्यायनिर्णयन करा पाने का कानूनी और सारवान अधिकार प्रदान करता

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है - चूंकि सम्पत्ति की पहचान विवादित थी, निष्पादन न्यायालय ने साक्ष्य पेश करने का अवसर दिये बिना और केवल यह मानते हुए कि सम्पत्ति मित्र है और अन्य कार्यवाही में विक्रय की पुष्टि नहीं की गई है, आपत्ति खारिज करने में त्रुटि की - साक्ष्य पेश करने का अवसर देने के बाद नये सिरे से न्यायनिर्णयन के लिए मामला प्रतिप्रेषित - अपील मंजूर।

Cases referred :

Indian Appeal 1913 (XLI), AIR 1929 Nag 305, AIR (31) 1944 Nag 305, F.A. No.165/2005, 1997(I) MPWN 131, 1978(I) MPWN 182, AIR 1985 AP 261.

A.S. Garg with Maqbool Mansoori, for the appellant.

P.K. Saxena with P.M. Jain, for the respondent Nos.1 to 4.

None, for the respondent Nos.5 to 8.

J U D G M E N T

SHANTANU KEMKAR, J. :- This first appeal filed under S.96 of the Code of Civil Procedure (for short C.P.C.) is directed against the order dt.21.04.07 passed by the 1st Additional District Judge, Dhar in Execution Case No.18-A/2002-04 by which the appellant's objection filed under Order XXI Rule 58 of the C.P.C. has been rejected.

2. Brief facts necessary for disposal of this appeal are that one Omprakash S/o. Hiralal filed a Civil Suit No.28-B/2002 against respondent no.8 Raghunath Oil Mills for recovery of Rs.30,000/-. In the said suit an order under Order XXXVIII Rule 5 of the C.P.C. in nature of attachment before judgment was passed by the executing court on 05.03.02 attaching the properties of the Raghunath Oil Mills which are subject matter of the present execution case. The said suit no.28-B/02 was ultimately decreed in favour of Omprakash. In the execution filed by the decree holder Omprakash a proclamation was issued in execution case no.28-B/02-06 and the attached property was sold in the auction to appellant Mukesh Kumar.

3. When the matter stood thus, in an another Civil Suit No.18-A/02 filed by the respondent no.2 Saifuddin seeking specific performance of the contract the relief of specific performance of contract was denied to the plaintiff of the said suit Saifuddin. However a money decree for refund of Rs.31,55,000/- was passed in his favour and against the defendants of the said suit including Raghunath Oil Mills, Badnawar. In the execution of the said money decree after obtaining the permission of the executing court under Order XXI Rule 72 of the C.P.C., decree holder Saifuddin participated in the auction proceedings. Before the property could be sold in this execution proceedings no.18-A/02-04, the appellant submitted his objection under Order XXI Rule 58 of the C.P.C. stating therein that the property which has been attached and to be auctioned this execution case was already attached before Judgment in the civil suit no.28-B/02 and has been auctioned in execution case no.28-B/02-06 and as such cannot be auctioned.

4. The dispute between the appellant and the first respondent is in regard to

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the identity of the property purchased by the appellant in the auction held in the execution case no.28-B/02-06. The case of the appellant is that he has purchased the property description of which is land situated at survey no.2647, ward no.14, Shraddhanand Marg, Badnawar of house no.96-97 consisting of East-West 44 feet, North-South 60 feet. The boundaries of which are in East house of Kamlesh Kumar and Serakuwarbai Sanghvi, in West house of Md. Saifuddin Mulla, in North Shraddhanand Marg, in South Mahavir Colony (emphasis supplied).

5. According to the appellant the same property with only difference about the East-West measurement has been attached and has been put to auction in the execution case no.18-A/02-04 by the Ist Additional District Judge, Dhar. According to him when he objected the attachment by filing an objection under Order XXI Rule 58 of the C.P.C. the Ist Additional District Judge, Dhar has illegally rejected his objection by holding that since the sale in his favour has not yet been confirmed and the property which has been purchased by the appellant objector in execution case no.28-B/02-06 and the property which is being attached and in the process of auction in this execution case no.18-A/02-04 are different, the objection has no merit and both the auctions can proceed.

6. The case of the appellant is that the executing Court has committed error in dismissing his objection on merit without holding inquiry by recording evidence. He stated that the executing court ignoring the fact that the property which was being attached and put to auction was already attached and auctioned in favour of the appellant in execution case no.28-B/02-06 by the Civil Judge, Class I, Badnawar. He submits that only on account of little difference in the dimensions the finding of the executing court that the property which has been attached and put to auction in the present execution is different then the property which was auctioned in execution case no.28-B/02-06, is wholly misconceived. He, accordingly, prayed for release of the property put to auction in execution case no.18-A/02-04. The appellant has also filed an IA No.11166/08 under Order 41 Rule 27 of the C.P.C. along with copies of application filed by the first respondent under Order XXI Rule 91, 92 and 93 of the C.P.C. before Civil Judge Class I, Badnawar, the order dt.16.04.07 passed by the Civil Judge, Class-I, Badnawar and the sale certificate dt.17.05.07.

7. The case of the first respondent decree holder is that actually the appellant had purchased the property which was put to auction by the proclamation dt. 08.09.06 issued in execution case no.28-B/02-06 by the Civil Judge, Class I, Badnawar. In the said sale proclamation the description of the property was shown as eastern side of the house situated on land bearing survey no.2647 Rathod Traders, Shraddhanand Marg, Badnawar adjacent to Nala, East-West 44 feet and South-West 60 feet with boundaries in East Nala and road in West remaining portion of the same house in North public way Shraddhanand Marg in South Mahavir Colony(emphasis supplied). However instead of the said property of which

proclamation was issued the appellant got changed the description of the property and instead of the property of which proclamation was issued he got issued the sale certificate in his name of different property by playing fraud with the executing court at Badnawar. According to him the appellant himself being the counsel in the case, he could not have participated in the auction of the attached property. He alleged that the conduct of appellant who is a practicing Advocate in participating and purchasing the property in the auction in the matter in which he himself is a counsel is illegal and is impermissible in view of the prohibition contained under Order XXI Rule 73 of the C.P.C. He submits that the sale can be held only in terms of the proclamation issued and in the sale certificate. The description of the property could not have been changed as has been done by the executing court at the behest of the appellant.

8. In support of the aforesaid contentions Shri P.K.Saxena learned senior counsel appearing for the first respondent decree holder placed reliance on the Judgment of privy counsel reported in Indian appeals 1913 (volume XLI) 38 *Thakur Burmha & Ors. v. Jiban Ram Marwari & Ors.*, in which their Lordships have held that if by a mistake the wrong property was attached and an order made to sell it, the only course open to the decree holders on the discovery of the mistake was to commence the proceedings over again. They could not turn an authority to sell one property into an authority to sell another and a different one. He also relied the case of *Sunderabai v. Bapuna & Ors.* (AIR 1929 Nagpur 305) in which it has been held that the pleader of a decree holder cannot bid at auction sale directly or indirectly and if he does so the sale is altogether void. Learned senior counsel for the first respondent also placed reliance on the Judgment passed in case of *Dagdulal Trilok and another v. Rameshwar Ram & Ors.* (AIR (31) 1944 Nagpur 305) in which it has been held that the sale certificate is not conclusive. It only affords prima facie evidence of title and it can always be shown that the sale certificate is wrong even when there is no ambiguity in it. A Court sale is nothing but an offer and an acceptance, the offer being made by the Court in the sale proclamation. The drawing up of the sale certificate is only a ministerial act and not a judicial, one and so, if it does not correspond with what was offered for sale and purchased it is of no avail. The crucial documents are the schedule of property in the application in attachment, the order directing the sale and the sale proclamation.

9. Having heard learned senior counsel for the parties I find that the controversy involved in this appeal rotates to the question as to whether the property purchased by the appellant in the auction held in execution case no.28-B/02-06 at Badnawar is the same property which is subject matter of attachment and auction in the impugned proceedings of execution case no.18-A/02-04 or is a different property and as to whether the approach of the court below in deciding the question without affording opportunity to the parties to lead evidence is proper. Since for the reasons stated hereunder I am remitting the matter to the Court below for

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fresh adjudication of the appellant's objection after affording opportunity to the parties to lead evidence, I feel that the grounds raised by the first respondent at the time of hearing of the appeal need not be gone into in this appeal.

10. On going through the records of the execution case no.18-A/02-04 and 28-B/02-06, the documents filed by the parties, I find that there is a serious dispute between the parties as to the identity of the property purchased by the appellant in execution case no.28-B/02-06. The appellant is contending that he has purchased the same property in execution case no.28-B/02-06 which has been attached and put to auction in the present execution case no.18-A/02-04. However the first respondent is disputing the said contention and is alleging manipulation in the description of the property by the appellant in the execution case no.28-B/02-06. Having regard to the serious dispute between the parties about the identity and the boundaries of the property which the appellant has purchased in the auction in execution case no.28-B/02-06 and the property which has been attached and put to auction in the present execution case no.18-A/02-04 in my considered view the appellants objection filed under Order 21 Rule 58 of the C.P.C. was required to have been decided by the executing court by holding an inquiry about the controversy after affording the parties to lead their respective evidence.

11. In order to appreciate as to whether an inquiry is necessary requirement for adjudicating the claim or objection, it would be appropriate to quote Order XXI Rule 58 of the C.P.C. Order XXI Rule 58 of the C.P.C. reads thus:

Adjudication of claims to, or objections to attachment of property.-(1)Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained-

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2) the Court shall, in accordance with such determination,-

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- (a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or
- (b) disallow the claim or objection; or
- (c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or
- (d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, any, an order so refusing to entertain the claim or objection shall be conclusive.]

12. On close reading of provisions contained in Order XXI Rule 58 of the C.P.C. it is clear that it gives a statutory and substantial right to a party to get his claim or objection to be adjudicated. The aforesaid provision makes it clear that when claim is preferred or any objection is made invoking provisions of Rule 58 of Order XXI of the C.P.C. the Court has power either to dismiss such an application in limine on the ground that the property attached had already been sold out or when it holds that the claim or the objection was designedly made to delay the proceedings. Sub-clause 5 of Rule 58 of Order XXI of the C.P.C. empowers the party against whom the Court has passed an order under proviso to sub-rule (1) by refusing to entertain the claim or objection, to file a suit to establish the right which he claims to the property in dispute. However, if the claim or objection is not dismissed under Clause (1) (a) or (b) of Rule 58 the questions including right, title or interest in the property attached arising between the parties to proceeding are required to be determined by the Court dealing with the claim or objection and not by a separate suit.

13. Thus a duty is cast on the Court to hold an inquiry to adjudicate the claim or objection to the attachment of the property. The determination of the adjudication necessarily implies and cast a mandatory duty upon the executing Court to give an opportunity to the parties to adduce all necessary evidence in support of the claim or to resist such claim, and pass appropriate orders either by allowing the claim or objection and release the property from attachment either wholly or to such extent as to think fit or disallow the claim or objection or continue the attachment subject to any mortgage, charge or other interest in favour of any

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person or pass such order as in the circumstances of the case it deems it fit. Sub-clause 4 of Rule 58 provides that where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to same conditions as to appeal or otherwise as if it were a decree.

14. A learned Single Judge of this Court at Principle seat Jabalpur had an occasion to deal with the similar situation while deciding F.A. No.165/05 *Laxmi Sarda v. M/s. Khushalchnd & Company and ors.* vide Judgment dt.23.09.08. His Lordship placing reliance on corpus Juris Secumdam (Vol. II) 49 explaining the word 'adjudicate' as "to adjudicate in its strictest sense; to determine finally; to settle in the exercise of judicial authority to determine in the exercise of judicial power; to solemnly or deliberately determine by judicial power upon a hearing of the rights and interests of the parties involved on the issues, and the evidence to be taken and submitted according to some prescribed method, or in the absence thereof, the usual method of procedure known to the statutes or the common law, and after a hearing in respect of the matters in issue to decide and decree what are the respective rights of the parties as they may appear from the law and evidence adduced." He further held that the term 'adjudicate' which finds place in Order XXI Rule 58 includes recording the evidence as well. In yet another case *Jagdishchandra v. M/s. Gokuldas* 1997(1)MPWN 131 it has been held that when a claim filed under Order XXI Rule 58 of the C.P.C. for release of the property attached in the execution proceedings, the same cannot be rejected summarily without taking evidence in the case. Similar was the view taken in the case of *Ramkishandas v. Ramjidas and another* 1978(1) MPWN 182. Also see *K.Venkarayappa v. Ellen Industries* (AIR 1985 A.P. 261).

15. Without taking recourse of holding inquiry, the executing court rejected the objection of the appellant filed by him under Order XXI Rule 58 of the C.P.C. by merely observing that the sale has not been confirmed in his favour in execution case no.28-A/02-06 and the dimensions of the property being different both the auctions can proceed. Having regard to the nature of the objection, the dispute between the parties about the identity, description and boundaries of the property as is evident from the various correspondence between the Ist Additional District Judge, Dhar and the Civil Judge, Class-1, Badnawar, best course which was open for the Ist Additional District Judge, Dhar to have decided the controversy about the identity and description of the property which was auctioned and sold in favour of the appellant as also the property which has been attached and put to auction by him, by holding an inquiry. Having not done so in my considered view the Court below has misdirected itself in deciding the objection on the basis of irrelevant grounds.

16. In the circumstances the impugned order is not sustainable. Accordingly I have no option but to remit the matter to the executing court to decide the controversy involved between the parties by holding an inquiry after affording opportunity of leading evidence to the parties. However, in these proceedings at

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the instance of the appellant I do not feel appropriate to make any observations about the contentions raised by learned senior counsel for the first respondent about the allegations that the appellant being a counsel in the matter he could not have participated or purchased property in the auction in his name in execution proceeding of execution case no.28-A/02-06. I keep the question open to be raised before the appropriate court at the appropriate stage, in accordance with law, if permissible.

17. In the circumstances I am of the view that the appeal deserves to be allowed and the matter deserves to be remanded to the Ist Additional District Judge, Dhar before whom the execution case no.18-A/02-04 is pending, for adjudication and fresh decision on the objection of the appellant and for deciding the controversy between parties as to which property has been attached and put to auction in case no.28-B/02-06, and if the property is found to be the same property which has been attached and put to auction in execution case no.18-A/02-04, to decide as to which party has a preferential claim over it. Let the matter be examined by the executing court after affording opportunity of leading evidence to the parties. Till the question is decided by the executing Court the parties shall maintain the status quo. Parties to appear before the Ist Additional District Judge, Dhar on 19.01.2009.

18. The court below shall decide the objection as referred to above as expeditiously as possible. The parties shall fully cooperate the executing court for early disposal of the objection. No orders as to the costs.

C.C. within seven days.

Appeal allowed.

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APPELLATE CIVIL

Before Mr. Justice R.S. Jha

6 January, 2009*

NAMAMAL

Vs.

PRAKASHCHAND JAIN

... Appellant

... Respondent

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - Bona fide requirement of shop - Availability of alternative suitable accommodation - Eviction can not be denied on the ground that alternative suitable accommodation shall become available if landlord undertakes extensive reconstruction of premises vacated by another tenant - In the matter of choosing out of more than one accommodation available to the landlord his subjective choice shall be respected - Landlord has no alternative suitable accommodation - Judgment & decree of eviction passed by first appellate court affirmed - Appeal dismissed. (Paras 10 & 11)

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स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – दुकान की वास्तविक आवश्यकता – उपयुक्त वैकल्पिक स्थान की उपलब्धता – बेदखली से इस आधार पर इंकार नहीं किया जा सकता कि उपयुक्त वैकल्पिक स्थान उपलब्ध हो सकता है यदि भूस्वामी अन्य किरायेदार द्वारा रिक्त किये गये स्थान में विस्तृत पुनर्निर्माण कर लेवे – भूस्वामी को उपलब्ध एक से अधिक स्थान में से चुनने के मामले में उसकी व्यक्तिपरक पसन्द का आदर किया जाएगा – भूस्वामी के पास कोई उपयुक्त वैकल्पिक स्थान उपलब्ध नहीं – प्रथम अपीलीय न्यायालय द्वारा पारित बेदखली के निर्णय और डिक्री की पुष्टि की गई – अपील खारिज।

Cases referred :

AIR 2008 SC 1749, (1996) 5 SCC 344, 2003 (1) SCC 462, 2000(3) MPLJ 343, (1996) 5 SCC 353, (1999) 6 SCC 222.

S.P. Tripathi, for the appellant.

S.B. Patel, for the respondent.

J U D G M E N T

R.S. JHA, J. :-The appellant/tenant being aggrieved by judgment and decree dated 17.1.2005 passed by the First Appellate Court in Civil Appeal No.44-A/2004 whereby the judgment and decree passed by the First Civil Judge, Class-II, Jabalpur, in Civil Suit N.57-A/98 dated 2.2.2001 has been reversed and the suit filed by the landlord/plaintiff for eviction of the appellant on the ground mentioned in Section 12(1)(f) of the M.P. Accommodation Control Act, 1961 (hereinafter referred to as 'the Act') has been allowed.

2. The second appeal was admitted by this Court on the following two substantial questions of law:-

"1. Whether suppression on the part of the plaintiff/landlord regarding the premises vacated by Saukat Rai is fatal to the alleged need and the plaintiff is liable to be non suited ?

2. Whether the premises vacated by Saukat Rai is equally suitable in comparison to the suit premises and the plaintiff is liable to be non suited ?"

3. In respect of the substantial questions of law, which are intricately interlinked, it is submitted by the learned counsel appearing for the appellant that the landlord/respondent did not make any specific averment in the plaint regarding the alternative premises vacated by one Saukat Rai and which was in the possession of the landlord/plaintiff inspite of the fact that the aforesaid accommodation was suitable for the needs set up by him for establishing the business of his son. It is submitted that the trial court, in para-29 of its judgment, has discussed this aspect in detail and recorded a finding that adjacent to the tenanted premises there was a passage which was 4' x 16 ft. besides which the accommodation vacated by Saukat Rai admeasuring 5' x 16 ft. was available with the landlord and in case the respondent/landlord demolishes the wall and reconstructs it, he would have an

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area of 9' x 16 ft. available to him for the purpose of starting the business of his son which area is equal to the area which had been let out to the appellant. It is submitted that the trial court, after taking into consideration the aforesaid facts and circumstances, dismissed the suit filed by the respondent/landlord, but the First Appellate Court reversed the judgment and decree of the trial court by recording a finding that the accommodation available with the respondent/landlord was not a suitable alternative accommodation. It is submitted by the learned counsel for the appellant that the finding recorded by the appellate court is perverse and is not based on the evidence on record wherein the landlord P.W-1 and his son Pankaj (P.W-2) have clearly stated in their evidence that the accommodation vacated by Saukat Rai and the passage adjacent to it were available. In such circumstances, it is submitted that the impugned judgment and decree of the appellate court deserves to be set aside and the judgment and decree of the trial court, dismissing the suit filed by the landlord, deserves to be reaffirmed:

4. On the other hand the learned counsel appearing for the respondent/landlord has taken this Court through paras-11 and 13 of the impugned judgment of the lower appellate court as well as the evidence of the landlord P.W-1 and his son Pankaj (P.W-2) and on that basis has submitted that no fault can be found with the finding recorded by the First Appellate Court to the effect that no suitable alternative accommodation was available with the landlord inasmuch as the accommodation available with him was only a passage with a latrine and bathroom and a 5' x 16 ft. shop vacated by Saukat Rai which was neither equal or an alternative suitable accommodation for the purpose of starting the business for his son. It is further submitted that the First Appellate Court has rightly reversed the finding recorded by the trial court as an accommodation which would become available to the landlord only after reconstruction or major modification, cannot be said to be an alternative suitable accommodation available with the landlord. Apart from the aforesaid, it is submitted by the learned counsel for the respondent that in case where a reversing judgment of the appellate court is based on cogent appreciation of evidence and documents on record, this Court cannot interfere with such a finding in view of the judgment of the Supreme Court in the case of *Kashmir Singh vs. Harnam Singh and others*, AIR 2008 SC 1749 specifically para-10 therein. The learned counsel for the respondent/landlord has also relied upon the judgment of this Court reported in *Kailash Chandra Shankarlal Trivedi vs. Punjab National Bank Ltd. and others*, 2000 (3) MPLJ 343, wherein this Court, after relying upon several judgments of the Supreme Court, has laid down the law that the sufficiency or suitability of an accommodation as an alternative to the one sought to be vacated is the choice of a landlord and the Court cannot substitute its own choice or view for the purpose of recording a finding that some accommodation available with the landlord, though differently situated, is suitable or sufficient for the purpose of his need.

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5. I have heard the learned counsel for the parties at length and have also perused the judgment of the trial court specifically para-29 of the impugned judgment of the Appellate Court and have also gone through the evidence available on record specifically that of the landlord P.W-1 and his son Pankaj (P.W-2). From a perusal thereof it is apparent that the shop let out to the appellant/tenant is stated to be admeasuring 9' x 16 ft. It is also undisputed that adjacent to the aforesaid shop there is a passage admeasuring 4' x 16 ft. and adjacent to the passage there is a shop vacated by Saukat Rai admeasuring 5' x 16 ft. which is in the possession of the landlord. However, it is also clear that the aforesaid area which is available to the landlord is not a single shop admeasuring 9' x 16 ft. and in fact the landlord would have to undertake extensive reconstruction to convert it into a shop and to demolish the walls of the latrine and bathroom as well as the passage. Admittedly, the accommodation vacated by Saukat Rai is admeasuring only 5' x 16 ft. whereas the accommodation in possession of the appellant is 9' x 16 ft. In such circumstances, the finding recorded by the trial court to the effect that the landlord has an alternative suitable accommodation which is in his possession and which had been vacated by Saukat Rai is perverse. It is also apparent that the trial court while dismissing the suit has stated that in case the respondent/landlord demolishes the wall as well as the latrine and bathroom and converts the area available with him into a shop, he would then have an alternative suitable accommodation and has also gone on to state that the landlord should undertake the aforesaid exercise instead of seeking eviction of the premises occupied by the appellant/tenant.

6. On the other hand, the first Appellate Court has clearly discussed the evidence on record and has recorded a conclusion that as the shop vacated by Saukat Rai is not equal to or a suitable alternative accommodation for the purposes of starting the business for the landlord's son nor is it equal in area to the shop rented out to the appellant. Apparently the conclusion, recorded by the trial court, is perverse and is contrary to the uncontroverted evidence on record that the shop vacated by Saukat Rai is a little more than half the size of the disputed tenanted premises.

7. In view of the aforesaid facts and circumstances and the analysis of the evidence on record, I am of the considered opinion that the finding, recorded by the First Appellate Court, regarding non-availability of a suitable alternative accommodation with the landlord is perfectly justified and is in accordance with law and that the First Appellate Court has rightly reversed the finding recorded by the trial court in this regard.

8. In the case of *Kashmir Singh* (supra) the Supreme Court in para-10 has held that in case the appellate court has given satisfactory reasons for reversing the finding recorded by the trial court and even in cases where in the given set of circumstances two inference of facts are possible, the one drawn by the lower appellate court will not be interfered by the High Court in Second Appeal in the following terms:-

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"10. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in Second Appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, one drawn by the lower appellate court will not be interfered by the High Court in Second Appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence."

9. In the case of *Meenal Eknath Eshirsagar (Mrs) vs. Traders & Agencies and another*, (1996) 5 SCC 344 and *Prativa Devi (Smt) vs. T. V. Krishnan*, 1996 (5) SCC 353 the Supreme Court has held that it is for the landlord to decide how he desires to beneficially enjoy his property and it is not for the courts to dictate to him the manner in which he should enjoy or utilize his property. Similar view has also been taken by this Court in *Kailash Chandra Shankarlal Trivedi* (supra).

10. In the case of *Akhilshwar Kumar and Others vs. Mustaqim and others*, (2003) 1 SCC 462, the Supreme Court has held that once the bonafide requirement of a landlord is established, as in the present case wherein there is a concurrent finding of fact to that effect and which is not assailed by the appellant in the present appeal, then the choice of the accommodation which would be more suitable for his requirement has to be left to the subjective choice of the landlord and the Court cannot thrust its own choice upon him and while discussing the availability of other alternative accommodation has held as under in para-4:-

"4. So is the case with the availability of alternative accommodation, as opined by the High Court. There is a shop in respect of which a suit for eviction was filed to satisfy the need of Plaintiff 2. The suit was compromised and the shop was got vacated. The shop is meant for the business of Plaintiff 2. There is yet another shop constructed by the father of the plaintiffs which is situated over a septic tank but the same is almost inaccessible inasmuch as there is a deep ditch in front of the shop and that is why it is lying vacant and unutilized. Once it has been proved by a landlord that the suit accommodation is required bona fide by him

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for his own purpose and such satisfaction withstands the test of objective assessment by the court of facts then choosing of the accommodation which would be reasonable to satisfy such requirement has to be left to the subjective choice of the needy. The court cannot thrust its own choice upon the needy. Of course, the choice has to be exercised reasonably and not whimsically. The alternative accommodations which have prevailed with the High Court are either not available to Plaintiff 1 or not suitable in all respects as the suit accommodation is. The approach of the High Court that an accommodation got vacated to satisfy the need of Plaintiff 2, who too is an educated unemployed, should be diverted or can be considered as a relevant alternative accommodation to satisfy the requirement of Plaintiff 1, another educated unemployed brother, cannot be countenanced. So also considering a shop situated over a septic tank and inaccessible on account of a ditch in front of the shop and hence lying vacant, cannot be considered a suitable alternative to the suit shop which is situated in a marketing complex, is easily accessible and has been purchased by the plaintiffs to satisfy the felt need of one of them."

Similarly in the case of *Shiv Sarup Gupta vs. Dr. Mahesh Chand Gupta*, (1999) 6 SCC 222, wherein the landlord had other suitable accommodation available with him and on that ground the High Court had reversed the finding of the trial court, the Supreme Court while setting aside the judgment of the High Court and affirming the choice of the landlord in respect of the accommodation held as under in para-13:-

"13. Once the court is satisfied of the bona fides of the need of the landlord for the premises or additional premises by applying objective standards then in the matter of choosing out of more than one accommodation available to the landlord his subjective choice shall be respected by the court. The court would permit the landlord to satisfy the proven need by choosing the accommodation which the landlord feels would be most suited for the purpose; the court would not in such a case thrust its own wisdom upon the choice of the landlord by holding that not one but the other accommodation must be accepted by the landlord to satisfy his such need. In short, the concept of bona fide need or genuine requirement needs a practical approach instructed by the realities of life. An approach either too liberal or too conservative or pedantic must be guarded against."

A perusal of the aforesaid judgments of the Supreme Court makes it clear that mere availability of another accommodation with the landlord does not

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disqualify him from claiming eviction specially in a case like the present one where it is an admitted fact that the shop vacated by Saukat Rai is quite small and, as it exists today, is not suitable for starting the business of the landlord's son.

11. In view of the aforesaid law laid down by the Supreme Court, I am of the considered opinion that in the instant case as the premises vacated by Saukat Rai is admittedly not equal in dimension to the shop occupied by the appellant/tenant, the landlord cannot be denied eviction on the ground that an alternative suitable accommodation shall become available to him if he undertakes extensive reconstruction by demolishing the wall of the latrine and bathroom adjacent to the area vacated by Saukat Rai, specially when his need would be satisfied if the shop in occupation of the appellant/tenant is made available to him.

12. In view of the aforesaid facts and circumstances, I do not find that any substantial question of law arises for adjudication in the present appeal. The appeal being meritless is, accordingly, dismissed. The judgment of the appellate court whereby the appellant/tenant has been directed to vacate the premises as the respondent has established his ground under section 12(1)(f) of the Act is upheld. A decree be drawn up accordingly.

13. In the facts and circumstances of the case, there shall be no order as to the costs.

Appeal dismissed.

I.L.R. [2009] M. P., 843

APPELLATE CIVIL

Before Mr. Justice Shantanu Kemkar

21 January, 2009*

SITABAI

Vs:

STATE OF M.P. & anr.

... Appellant

... Respondents

Land Acquisition Act (1 of 1894), Section 23 - Matters to be considered in determining compensation. - Assessment of market value - Compensation awarded on the basis of average of market price preceding 3 years of transaction recorded in Registrar Office - Held - Reference Court erred in determining compensation by averaging the price recorded in Registrar Office - Sale deeds showing market price of land in near proximity just prior to acquisition were available - Compensation should be determined on the basis of price of higher sale deed and adding 15% p.a. as appreciation of the rate of land - Appeal allowed. (Paras 12 to 14)

भूमि अर्जन अधिनियम (1894 का 1), धारा 23 - प्रतिकर अवधारित करने में विचार में ली जाने वाली बातें - बाजार मूल्य का निर्धारण - रजिस्ट्रार कार्यालय में दर्ज

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पूर्ववर्ती 3 वर्षों के संव्यवहार के औसत बाजार मूल्य के आधार पर प्रतिकर अधिनिर्णीत किया गया – अभिनिर्धारित – रिफरेंस न्यायालय ने रजिस्ट्रार कार्यालय में दर्ज मूल्य का औसत करके प्रतिकर अवधारित करने में त्रुटि की – अर्जन के ठीक पूर्व निकटस्थ भूमि का बाजार मूल्य दर्शित करने वाले विक्रय विलेख उपलब्ध थे – प्रतिकर उच्चतर विक्रय विलेख के मूल्य और भूमि की दर में 15 प्रतिशत प्रतिवर्ष की वृद्धि जोड़कर अवधारित किया जाना चाहिए – अपील मंजूर।

Cases referred :

(2004) 2 SCC 283, (1968) 2 SCJ 869, (1995) 2 SCC 495, AIR 2001 SC 1117, 1989 All India Land Acquisition & Compensation Cases Vol. 3 Page 1.

M.D. Arya, for the appellant.

Rashmi Pandit, Dy.G.A., for the respondent No.1.

Shailendra Mukati, for the respondent No.2.

ORDER

SHANTANU KEMKAR, J. :- Heard.

All these appeals under Section 54 of the Land Acquisition Act (for short the Act) are arising out of common land acquisition proceedings and involve common questions of law and facts. For the convenience the facts of F.A.No.40 of 2001 are taken.

2. This appeal by the land owner is directed against award dated 09.10.2000 passed by the Additional District Judge, Khachrod in M.J.C. No.34/1996.

3. Briefly stated the State Government exercising the powers conferred upon it under Section 4 of the Act issued a notification dated 12.10.1990 for acquisition of the land situated in Village Banbana and Village Makla, Tehsil Khachrod, District Ujjain. The acquisition of the land was for the construction of 800 KV Electricity Sub-station by the National Thermal Power Corporation Limited India. The total land acquired for the purpose is 106.469 Hectares. For village Banbana 89.78 Hectares land was acquired and for village Makla 16.78 Hectares of land was acquired and the possession of the land was taken on 17.12.1990.

4. The land owners submitted their objections. Then followed the proceedings for determination of compensation payable to the land owners by the Land Acquisition Officer { for short L.A.O. } under Section 11 of the Act. The L.A.O. vide order dated 07.11.1992 awarded compensation to the land owners of Village Banbana at the rate of 21,466/- per Hectare and for village Makla at the rate of Rs.25,654/- per Hectare. Dissatisfied with the determination of the compensation by the L.A.O. the land owners sought reference invoking the provisions of Section 18 of the Act. The prayer was acceded to by the Collector and references in all the 3 cases as prayed for by the land owners were made to the Civil Court (hereinafter referred to as Reference Court). The Reference Court vide its award dated 09.10.2000 enhanced the compensation by partly allowing the claim of the land owners by determining the market value of the land for village Banbana at the

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rate of Rs.25,000/- per hectare and for village Makla Rs.29,000/- per hectare. The Reference Court also granted other statutory benefits provided under the Act namely solatium, interest etc.

5. Feeling aggrieved by the compensation determined by the Reference Court the appellants have filed these appeals claiming enhancement of the compensation.

6. Heard the learned counsel for the parties and perused the record.

7. It has been argued by Shri M.D.Arya learned counsel for the appellants that the appellants having filed the certified copies of the Sale-Deeds Exs. P/6 & P/7 to demonstrate that prior to the date of notification under Section 4 of the Act the land situated at village Banbana was sold vide registered Sale-Deeds dated 30.03.1989 and 31.03.1989 for Rs.35,365/- per Hectare and Rs.47,337/- per Hectare respectively, the Reference Court has committed error in not relying the same and committed error in placing reliance on the sale and purchase Register of the office of Registrar of documents produced by the respondents and has committed a further error in calculating the market value on the basis of the average of the market price preceding 3 years of the transaction as recorded in the said Register. He submits that by calculating the market value on the basis of 3 years average from the price of the land recorded in the said the sale and purchase Register, the assessment of market value by the Reference Court to the tune of Rs.25,000/- per Hectare for village Banbana and Rs.29,000/- per Hectare for village Makla is erroneous.

8. Shri M.D.Arya, learned counsel for the appellants in support of his submissions placed reliance in the judgment of the Supreme Court in case of *Krishni Utpadan Mandi Samitti Sahaswan, District Badaun Vs. Bipin Kumar and another* (2004) 2 SCC 283; *Sri Rani M. Vijayalakshamma, Rao Bahadur, Ranee of Vuyyur Vs. The Collector of Madras* (1968) 2 S.C.J. 869, *Bakhtawar Singh and another Vs. Union of India and another* (1995) 2 SCC 495.

9. Smt. Rashmi Pandit, learned Deputy Govt. Advocate for respondent No.1 and Shri Shailendra Mukati, learned counsel for respondent No.2 on the other hand argued that the compensation arrived at by the Reference Court is based on sound appreciation of evidence and has been made by applying correct principles, it needs no enhancement.

10. It is now well settled that while determining the compensation for such compulsory acquisition the relevant factors, are the purpose for which the land was acquired, potentiality of the land, its location, its potential use, market price of the land sold in near proximity just prior to the acquisition, and the appreciation of the value of the land for every subsequent year. The Courts for making assessment can safely take into account the documentary as well as the oral evidence led by the parties in support of these factors. The Courts have also to take into consideration in order to avoid element of speculation for fixation of

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market value with reference to comparable sales as to whether the sale is within the reasonable time of the date of notification, whether it is a bonafide sale, whether it is for the land adjacent to the land acquired and whether it possess similar advantages.

11. In the case of *U.A.O. & M.R.O. Vs. Harsalilal* A.I.R. 2001 SC 1117, the Supreme Court has held that the certified copy of the Sale-deed relating to similar lands situated in the vicinity can be relied upon without examining vendee or vendor or anybody else connected with the sale. The Supreme Court in the case of *Krishi Utpadan Mandi Samiti Sahaswan, District Badaun Vs. Bipin Kumar and another* (supra) noticing the evidence of high potentiality held that the increase of 15% per year on the sale-deed comparable can be taken for assessment of the market value on the date of notification under Section 4 of the Act and observed that the same cannot be said to be unreasonable. In the case of *Sri Rani M. Vijayalakshamma, Rao Bahadur, Rance of Vuyyur Vs. The Collector of Madras* (supra) the Supreme Court has observed that the Sale-deed representing highest value out of the different transactions has to be preferred and average of two sale-deeds should not be taken. Similar is the view taken by the Supreme Court in case of *Bakhtawar Singh and another Vs. Union of India and another* (supra) in which it has been held that for determination of market value on the basis of comparable sale transaction application of principle of average price is illegal.

12. The determination of the compensation by the Reference Court by averaging the price which was recorded in the office of Registrar in the sale and purchase register prior to 3 years of the date of notification for arriving the market value of the acquired land cannot be accepted more particularly when the Sale-deeds Exs.P/6 and P/7 were available before it.

13. In the present case, the appellant examined village Patwari Phoolsingh (PW-1), Rameshwar (PW-2), Ashok Kumar (PW-3) and Sawarmal (PW-4). (PW-3) and (PW-4) are the purchasers of lands vide Sale-deeds Exs. P/6 and P/7. They have proved the Sale-deeds Exs. P/6 and P/7 executed on 31.03.1989 and 30.03.1989, respectively. Sale-deed Ex.P/7 demonstrate the market value of per Hectare of land at village Banbana to be Rs.35,365/-. Ex.P/6 is the Sale-deed of 31.03.1989 according to which the market value per Hectare of the land at village Banbana is Rs.47,337/-. Applying the ratio of Supreme Court market price of the higher of the Sale-deeds has to be taken which is market price as per the Sale-deed Ex.P/6 in respect of the land which is for Rs.47,337/- per Hectare.

14. The Sale-deed Ex.P/6 is of 1 year 6 months and 12 days prior to the date of notification. The appreciation of the market value to the extent of 15% per year of the land in between the period of execution of the Sale-deed Ex.P/6 and the date of notification under Section 4 of the Act, having regard to the fact that it is situated near Nagda an industrial town, near the Ujjain-Nagda Highway in the light of the judgment passed by the Supreme Court in *Krishi Utpadan Mandi Samiti Sahaswan, District*

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Badaun Vs. Bipin Kumar and another (supra) can be accepted as rate of increase of the price of the land from the date of sale-deed to the date of notification. Thus, taking into consideration sale-deed Ex.P/6 by which on 31.03.1989 the market value of land was Rs.47,337/- per Hectare and adding 15% per annum as appreciation of the rate of the land for 1 year, 6 months and 12 days the market value of acquired land of Banbana comes to Rs.47,337 + Rs.10,888/- = Rs.58225/- per Hectare.

15. Though, there is no sale-deed in respect of the market value of Village Makla but it is not in dispute that village Makla and village Banbana are contiguous. The acquisition of the entire land was for establishment of 1 single unit of Power Sub-station. Thus, the lands of both the villages being contiguous, similarly situated and having being acquired under the same notification for the same purpose market value which has been assessed on the basis of the sale-deed in respect of village Banbana can safely be taken to be the market value of the land acquired of village Makla. [See *Nandram and others Vs. The State of Haryana* a judgment of the Supreme Court reported in 1989 All India Land Acquisition and Compensation Cases Vol. 3 Page 1.

16. In the aforesaid facts and circumstances, and after taking into consideration of the evidence available on record the sale-deed Ex.P/6 dated 31.03.1989 by which 1.014 Hectare land was sold for Rs.48,000/- the per Hectare market value of the land comes to Rs.47,337/-. As already observed for determination of market value the appreciation of price at the rate of 15% per annum for 1 year 6 months and 12 days is taken into consideration which comes to Rs.10,888/-.

17. Accordingly, in view of the aforesaid discussion the appeals are allowed with cost. The impugned award passed in all the 3 cases which are subject matter of these appeals is modified to the extent that per Hectare market value of the acquired land is assessed to Rs.47,337 + Rs.10,888/- = Rs.58,225/-. In other words, the appellants whose land was acquired in these proceedings are entitled to claim compensation at the rate of Rs.58225/- per Hectare. In addition the appellants are also entitled for other statutory compensation payable under the Act which shall be worked out on the basis of the rate determined by this Court along with interest at the rate awarded by the Reference Court.

18. Counsel fees Rs.1,000/- in each appeal to the counsel for the appellants, if certified. A decree be drawn accordingly.

Appeal allowed.

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I.L.R. [2009] M. P., 848
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar
 8 September, 2008*

NIRMAL & ors.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Narcotics Drugs and Psychotropic Substances Act (61 of 1985), Section 52-A - 23 quintal of poppy husk loaded in truck without license or permit seized from appellants - As per provisions u/s 52-A samples were drawn, inventory prepared and photographs were taken in the presence of executive magistrate, but property was not finally disposed of - Held - Neither photograph, seizure memo, inventory, packets of sample were produced before the trial court and proved as primary evidence nor original property which was not disposed of was produced before trial court - Prosecution failed to establish quantity and identity of seized property - Conviction & sentence of appellants set-aside - Appeal allowed. (Paras 7 & 8)

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 52-ए - ट्रक में लायसेंस या परमिट के बिना लदी 23 क्विंटल पॉपी हस्क अपीलार्थियों से अभिग्रहीत - धारा 52-ए के उपबंधों के अनुसार कार्यपालक मजिस्ट्रेट की उपस्थिति में नमूने निकाले गये, माल सूची तैयार की गई और छायाचित्र लिये गये, किन्तु सम्पत्ति का अंतिम रूप से व्ययन नहीं किया गया - अभिनिर्धारित - न तो छायाचित्र, अभिग्रहण पत्र, माल सूची, नमूने के पैकेट विचारण न्यायालय के समक्ष पेश कर प्राथमिक साक्ष्य के रूप में साबित किये गये और न मूल सम्पत्ति, जो व्ययनित नहीं की गई, विचारण न्यायालय के समक्ष पेश की गई - अभियोजन अभिग्रहीत सम्पत्ति की मात्रा और पहचान साबित करने में असफल रहा - अपीलार्थियों की दोषसिद्धि और दण्डादेश अपास्त - अपील मंजूर।

B. Narcotics Drugs and Psychotropic Substances Act (61 of 1985), Section 52-A - Disposal of seized narcotics, drugs and psychotropic substances - Provision is meant for disposal of the property during the pendency of the trial - Disposal means final disposal and the property would not remain in custody of Police, Excise Department or Central Narcotics Bureau. (Para 6)

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 52-ए - अभिग्रहीत स्वापक औषधि और मनःप्रभावी पदार्थों का व्ययन - उपबंध का अर्थ विचारण के दौरान सम्पत्ति के व्ययन से है - व्ययन का अर्थ अंतिम व्ययन है और सम्पत्ति पुलिस, आबकारी विभाग या केन्द्रीय स्वापक ब्यूरो की अभिरक्षा में नहीं रहेगी।

C. Narcotics Drugs and Psychotropic Substances Act (61 of 1985), Section 52-A, Criminal Procedure Code, 1973, Sections 6 & 20 - In the sub-section (2) of Section 52-A of the Act the word used 'any magistrate' means any executive or judicial magistrate as defined in Code u/ss 6 & 20. (Para 6)

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ग. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 52-ए, दण्ड प्रक्रिया संहिता, 1973, धाराएँ 6 व 20 - अधिनियम की धारा 52-ए की उपधारा (2) में प्रयुक्त शब्द 'कोई मजिस्ट्रेट' का अर्थ संहिता की धारा 6 व 20 में परिभाषित किसी कार्यपालक या न्यायिक मजिस्ट्रेट से है।

D. Narcotics Drugs and Psychotropic Substances Act (61 of 1985), Section 52-A - *The purpose of Section 52-A is to allow the disposal of property at the earliest point of time during the course of investigation so that same may not be vulnerable to theft, substitution, constraints of proper storage, space or any other kind of destruction, after following the procedure mentioned in sub-section (2) of Section 52-A of the Act.* (Para 7)

घ. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 52-ए - धारा 52-ए का उद्देश्य अनुसंधान के दौरान सर्वप्रथम अवसर पर अधिनियम की धारा 52-ए की उपधारा (2) में उल्लिखित प्रक्रिया का पालन करने के बाद सम्पत्ति का व्ययन अनुज्ञात करना है ताकि वह चोरी, प्रतिस्थापन, किसी प्रकार के नाश या स्थान या समुचित संग्रहण के दबाव के कारण असुरक्षित न हो सके।

Case referred :

2004 SCC (Cri.) 2028.

D.D. Vyas with Ajay Vyas, for the appellants.

Mamta Shandiyal, for the respondent.

J U D G M E N T (ORAL)

S.L. KOCHAR, J. :- The appellants have filed this appeal, challenging the impugned judgment dated 01.11.2007 of the learned Special Judge (under NDPS Act), Neemuch passed in Special NDPS Case No.20/2004; whereby the appellants have been convicted under Section 8/15 of the Narcotics Drugs & Psychotropic Substances Act, 1985 (for short "the Act"), sentenced to undergo RI for ten years and fine amount of Rs.1,00,000/- to each appellant, in default of payment of fine they shall suffer additional RI for one year.

2. The prosecution case in brief, as unfolded before the Trial Court, is that on 5.3.2004 Assistant Sub Inspector (Shri P.S. Kushram) of P.S. Singoli received information from informer that from the side of village Turkia Singoli a truck bearing no. RJ-13G-5925 would carry poppy husk illegally. This information was recorded in daily diary and in presence of panch witnesses (Mangilal and Devilal) a memorandum, showing reason for not obtaining search warrant, was prepared, same was also entered in daily diary. Shri Kushram for further action, along with police force and panch witnesses, in a jeep reached at triangular of Kadwasa. They were waiting for coming of truck and after some time the said truck came to Kadwasa triangular. Truck was stopped and 10 to 12 persons jumped out and ran away, out of them 3 were caught by the police force, rest escaped successfully. All the three disclosed their names as Nirmal, Ganesh and Karulal. They also

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disclosed that they were bringing poppy husk along with Balu, Shantilal, Mannalal, Prithviraj, and Anil, from godown situated in Turkia Singoli and the name of the driver was Ramlal, who is resident of Jodhpur. Appellants were not having valid licence or permit for transportation of poppy husk. Appellants along with loaded truck were brought to the Police Station, where bags were weighed and total weight was 23 quintal. Out of 73 bags, from each bag two samples, each of 250 gram, were taken and sealed. Seal of Police Station was used and on the packet of samples signed slips of the witnesses and police officers were pasted. Seizure memo of poppy husk was prepared. Appellants were arrested and apprised with reason for their arrest. In the Police Station Crime No. 24/04 was registered, vide F.I.R. Ex.P/34. A detailed report as per provision under Section 57 of "the Act" was sent to the superior police officials. 73 packets were sent to Forensic Science Laboratory with draft letter Ex.P/6 and facsimile seal sent through Constable Manohar. After handing over the sample to the in-charge of Laboratory, its receipt was received i.e. Ex.P/7. During the course of investigation for disposal of the property, steps were taken as per provision under Section 52-A of "the Act". The copy of the order-sheet to this effect recorded by Executive Magistrate 1st Class, is Ex.P/40. Forensic Science Laboratory report Ex.P/37 was received. On completion of investigation, appellants were charge sheeted for commission of offence under Section 8/15 of "the Act".

3. Appellants refuted the charges. They have not examined any witness in defence whereas prosecution has examined, in total, 12 witnesses and adduced several documents to establish its case. Learned Trial Court, after hearing both the parties, found the prosecution case proved and convicted the appellants as shown herein-above.

4. Having heard learned counsel for the parties and after perusing the entire record, it emerged that the prosecution has failed to produce the seized property during the course of recording of statement of prosecution witnesses to establish its identity, quantity and authenticity as well as truthfulness of seizure, sealing and pasting of slips containing signatures of panch witnesses as well as police officials and accused persons. Supreme Court, in case of *Jitendra and another V/s State of M.P.* [2004 Supreme Court Cases (Criminal) 2028], has held that non production of seized contraband article in Court, is fatal to the prosecution and same causes prejudice to the defence. It is also held by the Supreme Court that when best evidence was available, the same should have been produced before the Court for the purposes of marking articles.

5. The learned Trial Court has not taken into consideration the provision of Section 52-A of "the Act" in its proper spirit and prospective, which reads as under :-

52-A. Disposal of seized narcotic drugs and psychotropic substances.-(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances their vulnerability to theft, substitution, constraints of proper storage space or any other relevant

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considerations, by notification published in the official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substance which shall as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest Police Station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substance containing such details relating to their description, quality, quantity, mode of packing, marks, members or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared;
or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

6. The aforesaid provision of disposal of seized narcotic drugs and psychotropic substances is meant for disposal of the property during the pendency of the trial and meaning of disposal means final disposal, and the property would not remain in Police custody or in the custody of the Court or in custody of Excise Department Or Central

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Narcotics Bureau, Neemuch (M.P.). Sub-section 1 of Section 52-A of "the Act" is assigning reason for disposal of the property and for which notification would be published by the Central Government for the official gazette specifying such narcotic drugs or psychotropic substances or clause of narcotic drugs or clause of psychotropic substances. Notification shall also specify the Officer and the manner of disposal from time to time. Before disposal of the seized property, the concerned agency will follow the procedure prescribed in Sub-section 2, 3 and 4 of Section 52-A of "the Act", after producing the substance before any magistrate. Any magistrate means any executive or judicial magistrate, as defined in Criminal Procedure Code under Section 6 and 20. The inventory of the property would be prepared and learned magistrate shall certify the correctness of inventory or in his presence photographs of such drugs or substances will be taken and certified by the learned magistrate or representative samples of such drugs or substances in presence of magistrate will be taken and magistrate will certify the correctness of list of samples. Sub-section 3 of Section 52-A of "the Act" is issuing mandate for allowing the application filed by the police or prosecution under Sub-section 2 of Section 52-A of "the Act" as early as possible and Sub-section 4 of Section 52-A of "the Act" is giving status to inventory, photographs, list of samples as a primary evidence in respect of such offence, in which the narcotic drugs or psychotropic substances were seized, during the course of trial for proving the prosecution case.

7. In the instant case, the property was produced before learned Executive Magistrate i.e. Additional Tehsildar and Executive Magistrate, Tappa Singoli (in Case No.3/Inspection/04) on 23.6.2004. Prior to that, on 14.6.2004 application under Section 52-A of "the Act" was filed by the Station House officer of P.S. Singoli. The application was allowed. Contents of Order-sheet dated 23.6.2004 Ex. P/40 proved by PW-7 G.S. Baghel, Investigating Officer, shows that Executive Magistrate himself visited the Police Station and found 73 bags poppy husk loaded in a truck bearing No. RJ-13G-5925. Photographs of all the bags were taken. He found the bags sealed properly. All the bags were opened and poppy husk found therein, were poured on the ground, one heap was made after mixing the entire poppy husk of 72 bags and 2 samples, each of 250 gram, were taken from the heap of the poppy husk. Samples were sealed, signed and chits were affixed on the packets duly signed by Executive Magistrate; they were marked as Article X-1 and X-2. The photograph of opened heap of poppy husk was also taken, thereafter same were filled in 73 bags and weighed. After weighment, all the bags were sealed and loaded in a truck. The learned Executive Magistrate directed the Station House Officer, Singoli, to produce the entire Dodachura and article before the Court. After performance of above mentioned procedure as per provision under Section 52-A of "the Act", there was no need to produce the entire property i.e. 73 bags of poppy husk, before the Trial Court and there is no material on record to indicate that the property was produced before the Trial

Court at any point of time. The first page of Final Report, in column no.11, as per provision under Section 173 of the Criminal Procedure Code, is showing the description of seized property i.e. 73 bags of poppy husk, in total, 23 quintal, 14 packets of sample of poppy husk each containing 250 gram poppy husk, one truck bearing No. RJ-13G-5925 valuing Rs. 2,50,000/-. In this Final Report it is nowhere mentioned that property was produced before the Court at the time of filing of the charge sheet. It is also not mentioned, where property was kept? The charge sheet was filed on 31.8.2004 and proceeding of disposal of property as per Ex.P/40 was held on 23.6.2004. Order sheet dated 31.8.2004 is showing that learned Special Magistrate, while taking the charge sheet, also directed for depositing of case property but it is nowhere mentioned, where property was to be deposited? In Final Report column no. 11-A at serial no.20, the filing of the copy of the proceeding under Section 52 of "the Act" is mentioned but merely this much is not sufficient to prove the prosecution case. If property was disposed of as per provision under Section 52-A of "the Act" then, before the Trial Court, prosecution is required to file and prove inventory, photographs, samples taken in presence of the magistrate, list of property prepared and certified by the magistrate and all these will be taken and treated as primary evidence in respect of such offence, but in the instant case the proceeding conducted by the learned Executive Magistrate dated 23.6.2004 is only exhibited as Ex.P/40 before the Court but photographs of the 73 bags, 2 samples taken, marked articles X-1 and X-2, photograph of heap of poppy husk after mixing the poppy husk of all the 73 bags on the ground and photographs of again filling and photographs of again filled 73 bags which were sealed, were not produced before the Trial Court at the time of examination of prosecution witnesses and all these photographs and documents as well as inventory were not exhibited as primary evidence before the Trial Court. The purpose of Section 52-A of "the Act" is to allow the disposal of the property at the earliest point of time during the course of investigation so that same may not be vulnerable to theft, substitution, constraints of proper storage, space or any other kind of distinction, after following the procedure mentioned in Sub-section 2 of Section 52-A of "the Act", by which the evidence has to be preserved to establish the prosecution case regarding quantity, kind of drugs or psychotropic substances, its identity with the seizure memo and the statement of the prosecution witnesses who will prove the photographs, seizure memo, inventory, packets of sample etc., but neither all these documents were produced by the prosecution before the Court and proved as primary evidence nor original property, which was not disposed of, and given in possession of the Police, was produced in the Court. There was no final disposal of the property, as per provision under Section 52-A of "the Act", is also clear from the direction issued by the learned Trial Court in paragraph-44 of the impugned Judgment that investigation was going on against absconding accused Balu, Shantilal, Mannalal, Prithviraj, Anil and driver Ramlal, as per provision under Section 173 (8) of the Criminal Procedure Code. It is also

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directed by the learned Trial Court that after arrest and production of these accused persons before the Court, Order will be passed regarding seized poppy husk, it's sample and truck, up to that time all the seized property in the case and the record be preserved safely and on the first page of the record note to this effect shall be made in red colour. This direction in paragraph-44 is also establishing the fact that seized property "poppy husk" and samples as well as truck were not finally disposed of and lying somewhere but not produced in the Court during the course of examination of prosecution witnesses.

8. It is clear from the above mentioned discussion and the record that neither the Police nor learned Executive Magistrate as well as the learned Trial Court understood the real implication of Section 52-A of "the Act" and failed to follow the required procedure. The Central Government, in exercise of powers conferred by Sub-section 1 of Section 52-A of "the Act", has issued notification No. 381 (E) dated 29.5.1989 specifying the narcotic drugs and psychotropic substances for the purposes of disposal as per provision under sub-section 2 of Section 52-A of "the Act".

9. In view of the above discussion, this appeal is allowed, conviction and sentence of the appellants are hereby set aside. Appellants are in jail right from the date of their arrest i.e. 5.3.2004. The learned Trial Court is directed to release them forthwith, if not wanted in any other criminal case.

Office is directed to send a copy of this judgment along with the record to the trial Court for immediate compliance.

Appeal allowed.

I.L.R. [2009] M. P., 854

APPELLATE CRIMINAL

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

21 October, 2008*

LAKHAN SINGH RAJPOOT & ors.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Section 498-A - Cruelty - Deceased in her dying declaration stated that she was being harassed on account of bringing insufficient dowry articles - Offence u/s 498-A proved. (Para 12)

क. दण्ड संहिता (1860 का 45), धारा 498-ए - क्रूरता - मृतक ने अपने मृत्युकालिक कथन में कथन किया कि उसे अपर्याप्त दहेज लाने के कारण परेशान किया जा रहा था - धारा 498-ए के अधीन अपराध साबित।

B. Penal Code (45 of 1860), Section 304-B - Dowry death -

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Prosecution case is that sister-in-law poured kerosene oil and set the deceased ablaze - Not a case that death has occurred in abnormal circumstances - No evidence that soon before her death she was subjected to cruelty - Conviction u/s 304-B set-aside - However, conviction & sentence of sister-in-law u/s 302 maintained - Appeal partly allowed. (Para 13)

ख. दण्ड संहिता (1860 का 45), धारा 304-बी - दहेज मृत्यु - अभियोजन का मामला यह है कि ननद ने मिट्टी का तेल उड़ोला और मृतक को आग लगा दी - यह मामला नहीं कि मृत्यु असामान्य परिस्थितियों में हुई - कोई साक्ष्य नहीं कि उसकी मृत्यु से कुछ समय पहले उसके साथ क्रूरता की गई - धारा 304-बी के अधीन दोषसिद्धि अपास्त - तथापि, ननद की धारा 302 के अधीन दोषसिद्धि और दण्डादेश कायम रखे गये - अपील अंशतः मंजूर।

H.S. Dubey, for the appellants.

R.S. Patel, Addl.A.G., for the respondent/State.

J U D G M E N T (ORAL)

The Judgment of the Court was delivered by **K.S. CHAUHAN, J.** :- This criminal appeal under Section 374(2) Cr.P.C. has been preferred by the appellants being aggrieved by the judgment, finding and sentence dated 21.02.2000 passed by the Additional Sessions Judge, Gadarwara, District Narsinghpur in Sessions Trial No. 74/99 whereby the appellants have been convicted under Section 498-A and 304-B of I.P.C. and sentenced to 3 years R.I. and to pay a fine of Rs.500/-, in default of payment of fine to undergo R.I. for 3 months and R.I. for 10 years and to pay a fine of Rs.500/-, in default of payment of fine to undergo R.I. for 3 months respectively. Appellant No. 4 Shashi Bai Rajpoot @ Guddi has also been convicted under Section 302 I.P.C. and sentenced to R.I. for life and pay a fine of Rs.500/-, in default of payment of fine to undergo R.I. for 3 months. The jail sentences to run concurrently.

2. The brief facts of the case in short are that Dhanwanti Bai lodged Dehati Nalish on 3rd March, 1999 to the effect that she was married with Manoj Kumar Rajpoot. Her husband, father-in-law, brother-in-law and sister-in-law used to harass her on account of insufficiency of dowry articles. On 2nd March, 1999 at about 12 noon her husband came after consuming liquor. Some quarrel took place in between Dhanwanti Bai, her husband and sister-in-law Shashi Bai Rajpoot @ Guddi. At night she was sleeping in her room. There was light of the electric bulb. At about 1.30-2.00 a.m. her sister-in-law Shashi Bai Rajpoot @ Guddi came into her room, poured kerosene oil and burnt her. She made alarm. Fire was extinguished. She was admitted in Gadarwara Hospital. Crime No.0/99 under Section 307/498-A/34 of I.P.C. was registered. Her medical examination was done. Her dying declaration Ex.P-12 was recorded by Dr. T.D. Choudhary. On the next day marg was registered. She died later on. Inquest report was prepared. Panchanama of dead body was also prepared. According to the opinion of autopsy surgeon, the cause of death was shock due to burns. Offence under Section 304-

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B and 302 of I.P.C. were added. Map was prepared. The statements of the witnesses were recorded under Section 161 of Cr.P.C. After completing the usual investigation, charge sheet was filed in the Court of J.M.F.C., Gadawara who committed the case to the Sessions Court for trial.

3. The appellants stood charged under Sections 498-A and 304-B, I.P.C. and appellant No.4 was also charged under Section 302 of I.P.C. The appellants abjured the guilt and claimed to be tried mainly contending that they have been falsely implicated. Prosecution examined as many as 6 witnesses and appellants also examined 3 witnesses in their defence. After appreciating the evidence, trial Court found them guilty under Section 498-A and 304-B of I.P.C. and appellant No.4 Shashi Bai Rajpoot @ Guddi under Section 302 I.P.C. and sentenced thereto as stated hereinabove in para no. 1 of the judgment. Being aggrieved by the impugned judgment, finding and sentence the instant appeal has been preferred on the grounds mentioned in the memo of appeal.

4. Learned counsel for the appellants submitted that the trial Court has not appreciated the evidence in the proper perspective. Dhanwanti Bai was not in a position to speak hence she was unable to give dying declaration. There is no other evidence except dying declaration. Her father has given evidence that no demand of dowry was made by appellants, therefore, the offences under Section 498-A and 304-B of I.P.C. are not made out. Learned counsel further submitted that trial Court has committed an illegality in relying upon the dying declaration of deceased Dhanwanti Bai and convicting appellant no.4 under Section 302 of I.P.C. therefore, the finding of guilt is erroneous which deserves to be set aside and the appellants are entitled for acquittal.

5. On the contrary, Shri R.S. Patel, learned Additional Advocate General appearing on behalf of the State supported the impugned judgment, finding and sentence passed by the trial Court mainly contending that prosecution has proved the case beyond reasonable doubt against the appellants and they have been rightly convicted and sentenced, therefore, no interference is called for.

6. The main point for consideration in this appeal is that whether the trial Court has committed any error in convicting and sentencing the appellants under Sections 498-A and 304-B of I.P.C. and further the appellant No.4 under Section 302 of I.P.C.?

7. The case of the prosecution hinges on the Dehati Nalish (Ex.P/15) and dying declaration (Ex.P/12). In Dehati Nalish (Ex.P/15) she has clearly stated that her husband and relatives used to harass her on account of bringing insufficient dowry articles. On 02.03.1999 at 12 noon her husband Manoj Kumar Rajpoot came after consuming liquor and some quarrel took place in between the deceased, her husband Manoj Kumar Rajpoot and sister-in-law Shashi Bai Rajpoot @ Guddi. At night she was sleeping in her room. There was light of electric bulb. At about

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1:30- 2:00 a.m. her sister-in-law Shashi Bai Rajpoot @ Guddi entered into her room, poured kerosene and burnt her. This Dehati Nalish was taken down by D.S.Pandey (PW-6) who has clearly stated in para 3 of his deposition that such Dehati Nalish was lodged by Dhanwanti Bai. Thus the contents of Dehati Nalish have been proved by D.S.Pandey (PW-6).

8. Her dying declaration Ex. P/12 was recorded by Dr. T.D. Chaudhary (PW-3). He has clearly stated that she was in a position to give statement. He has so certified on dying declaration itself. On perusal of dying declaration Ex.P/12 it is manifestly clear that it has been recorded in question and answer form. At the last the certificate has also been given by doctor that she remained in her full senses throughout the recording of the dying declaration.

9. In dying declaration she has clearly stated that her sister-in-law Shashi Bai Rajpoot @ Guddi poured kerosene oil and burnt her. It has also been mentioned that her husband and her relatives used to harass her on account of insufficiency of dowry articles. The lengthy and piercing cross-examination has been done to Dr.T.D.Chaudhary but nothing is elicited as to discredit his testimony. Thus the facts which she mentioned in Dehati Nalish EX.P/ 15 has also been mentioned in her dying declaration EX.P/ 12. The dying declaration has been made voluntarily and hence trustworthy. The conviction may be based on such dying declaration alone and no further corroboration is required.

10. No doubt, the appellants by producing the defence evidence have tried to prove that deceased burnt herself but the same is not acceptable in the light of Dehati Nalish Ex.P/15 and dying declaration Ex.P/12. Ganpat Soni (DW-2) has himself admitted in his deposition that deceased was indicating that she has been burnt by the persons belonging to her in-laws house. Thus the defence of self burning is not acceptable.

11. Mullu Singh (PW-I) is the father of deceased who has stated that there was no demand of dowry and she was not being harassed. He has been declared hostile by the prosecution thus he does not support the afore said facts.

12. So far as the offence under Section 498-A I.P.C. is concerned, deceased herself stated in Dehati Nalish (Ex.P/15) and dying declaration (Ex.P/12) that she was being harassed on account of bringing insufficient dowry articles. Therefore, the offence under Section 498-A I.P.C. is proved.

13. So far as the offence under Section 304-B I.P.C. is concerned, there is no evidence that soon before her death she was subjected to cruelty. Her father Mullu Singh (PW-I) has not supported such facts. The offence of Section 304-B I.P.C. is proved on the basis of circumstantial evidence. So far as the present case is concerned, the prosecution case is that Shashi Bai Rajpoot @ Guddi poured kerosene oil and ablazed her, therefore this is not the case where death has occurred in the abnormal circumstances. This is a case based on direct evidence

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which is in the form of Dehati Nalish (Ex.P/15) and dying declaration (Ex.P/12). The conclusion of dowry death is drawn on the basis of circumstantial evidence whereas this case is based on the direct evidence relating to intentional killing by appellant No.4 Shashi Bai Rajpoot @ Guddi. Therefore, all the ingredients required to prove offence under Section 304-B I.P.C. are not made out. Therefore, the finding regarding guilt under Section 304-B I.P.C. is erroneous which deserves to be set aside.

14. So far as the conviction under Section 302 I.P.C. is concerned, there is sufficient evidentiary material available against appellant No.4 Shashi Bai Rajpoot @ Guddi who poured the kerosene oil and burnt Dhanwanti Bai. Therefore, the finding of guilt under Section 302 I.P.C. is well merited and is hereby maintained.

15. The sum and substance of the aforesaid discussion is that the trial Court has committed an illegality in convicting the appellants under Section 304-B of I.P.C. hence the same is hereby set aside. But so far as the conviction under Section 498-A and that of appellant No.4 Shashi Bai Rajpoot @-Guddi under Section 302 of I.P.C. is concerned, the same is well merited hence hereby affirmed.

16. We have been apprised that appellant No. 1 Lakhan Singh Rajpoot has suffered 4 months and 4 days R.I., appellant No.2 Gopal Singh Rajpoot has suffered 9 months, Manoj has suffered 4 years R.I. Thus the period already undergone by them would meet the ends of justice.

17. Consequently, the appeal is partly allowed. The conviction and sentence passed by trial Court under Section 304-B I.P.C. against appellants is hereby set aside but their conviction under Section 498-A I.P.C. is maintained and appellants No. 1 to 3 are directed to be released on the period already undergone. So far as the appellant No.4 Shashi Bai Rajpoot @ Guddi is concerned, her conviction and sentence under Section 302 I.P.C. is also hereby maintained. Therefore, the appeal of appellant No.4 Shashi Bai Rajpoot @ Guddi is hereby dismissed.

18. Since the appellant Nos.1 to 3 are on bail, their bail bonds are discharged and they be set at liberty.

Appeal partly allowed.

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I.L.R. [2009] M. P., 859

APPELLATE CRIMINAL*Before Mr. Justice S.L. Kochar & Mrs. Justice S.R. Waghmare*

3 November, 2008*

KARAN SINGH & ORS.

... Appellants

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

... Respondent

A. Penal Code (45 of 1860), Section 300 Exception 4 - Murder or culpable homicide not amounting to murder - Appellant No.1 dealt a blow by handle of axe on the head of deceased - Deceased suffered one lacerated wound on left temporal bone, no other external injury was found - Held - Plea of right of private defence was taken by the appellant for the first time in his accused statement - Appellant failed to prove right of private defence as no report was lodged by him and no injury was caused to him - Incident occurred all of a sudden in heat of passion when deceased caught son of accused - The act of causing solitary blow on the head of deceased would fall under Clause 4 of exception of Section 300 IPC, punishable u/s 304 Part-I - Offences punishable u/s 304 Part-I and not u/s 302 IPC - Appeal partly allowed. (Paras 8, 9 & 10)

क. दण्ड संहिता (1860 का 45), धारा 300 अपवाद 4 - हत्या या हत्या की कोटि में न आने वाला सदोष मानव वध - अपीलार्थी क्र. 1 ने कुल्हाड़ी के हथ्थे से मृतक के सिर पर प्रहार किया - मृतक को बांयी टेम्पोरल बोन में एक कटा-फटा घाव हुआ, कोई अन्य बाह्य क्षति नहीं पायी गयी - अभिनिर्धारित - प्राइवेट प्रतिरक्षा के अधिकार का अभिवचन अपीलार्थी द्वारा प्रथम बार अभियुक्त कथन में लिया - अपीलार्थी प्राइवेट प्रतिरक्षा का अधिकार साबित करने में असफल रहा क्योंकि उसके द्वारा कोई रिपोर्ट दर्ज नहीं करायी गई और उसे कोई क्षति कारित नहीं हुई - घटना आवेश की तीव्रता में अचानक घटित हुई जब मृतक ने अभियुक्त के पुत्र को पकड़ा - मृतक के सिर पर एकमात्र प्रहार कारित करने का कृत्य भा.द.सं. की धारा 300 के अपवाद के खण्ड 4 के अन्तर्गत आयेगा, जो धारा 304 भाग I के अन्तर्गत दण्डनीय है - अपराध भा.द.सं. की धारा 304 भाग I के अन्तर्गत दण्डनीय न कि धारा 302 के - अपील अंशतः मंजूर।

B. Penal Code (45 of 1860), Section 324 r/w 34 - Appellant No.1 & 3 were convicted u/s 324/34 - Conviction challenged on ground that incident occurred all of a sudden and both the parties entered into free fight - Held - No evidence on record that appellants had pre-meeting of mind, pre-meditation and pre-plan for causing simple injury or any kind of injury to complainant party - It is true that appellants have not sustained any injury but force was used by complainant party by catching hold of appellant No.2 - Therefore, appellants would be liable for their individual act - Conviction & sentence u/s 324/34 set-aside - Appellant No.1 acquitted from the charge - However, appellant No.3 is convicted u/s 323 IPC and sentenced to period already undergone - Appeal partly allowed. (Para 8 & 10)

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खं. दण्ड संहिता (1860 का 45), धारा 324 सहपठित 34 – अपीलार्थी क्र. 1 व 3 को धारा 324/34 के अन्तर्गत दोषसिद्ध किया गया – दोषसिद्धि को इस आधार पर चुनौती दी गई कि घटना अचानक घटित हुई और दोनों पक्षकार खुली लड़ाई में शामिल हुए – अभिनिर्धारित – अभिलेख पर कोई साक्ष्य नहीं कि अपीलार्थियों का परिवादी पक्ष को साधारण क्षति या अन्य किसी प्रकार की क्षति कारित करने का मस्तिष्कों का पूर्व-मिलन, पूर्व-चिन्तन और पूर्व-योजना थी – यह सही है कि अपीलार्थी को कोई क्षति नहीं आयी किन्तु परिवादी पक्ष द्वारा अपीलार्थी क्र. 2 को पकड़कर बल का प्रयोग किया गया था – इसलिए अपीलार्थी उनके व्यक्तिगत कृत्य के लिए दायी होंगे – धारा 324/34 के अन्तर्गत दोषसिद्धि और दण्डादेश अपास्त – अपीलार्थी क्र. 1 आरोप से दोषमुक्त – तथापि, अपीलार्थी क्र. 3 को भा.द.सं. की धारा 323 के अन्तर्गत दोषसिद्ध किया गया और पहले से मुगते जा चुके कारावास का दण्डादेश दिया – अपील अंशतः मंजूर।

Ahsan Siddique, for the appellants.

Girish Desai, Dy.A.G., for the respondent/State.

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

The Judgment of the Court was delivered by **S.L. KOCHAR, J. :-** The appellants have preferred this appeal against the impugned Judgment dated 19.8.1999 passed in S.T. No.128/96 by learned Additional Sessions Judge, Aagar, district Shajapur (M.P.), whereby convicted the appellants as under :-

(i) Appellant Karan Singh has been convicted under Section 302 of the Indian Penal Code (for short “the IPC”), sentenced to RI for life and fine of Rs.1,000/-. He has also been convicted under Section 324/34 and sentenced to RI for six months. Substantive jail sentences of appellant Karan Singh shall run concurrently.

(ii) Appellant Kalu Singh has been convicted under Section 324 of “the IPC”, sentenced to RI for six months.

(iii) Appellants Dule Singh and Chatar Singh have been convicted under Section 324/34 of “the IPC” and both have been sentenced to RI for six months.

2. According to the prosecution case, 4 to 5 days prior to the date of incident i.e. on 5.5.1996 complainant PW-2 Shiv Singh fixed fencing on the embankment of his field. On 5.5.1996 complainant Shiv Singh was taking his she-buffalo in the morning at 10:00 A.M., at that time he saw that appellant no.2 Dule Singh was removing the fencing. Shiv Singh reached near the embankment and objected removal of fencing by Dule Singh, on which Dule Singh told him that fencing was not fixed after taking their consent, therefore, he would not allow the same. Dule Singh continued to remove fencing and on objection raised by complainant Shiv Singh (PW-2); he hurled filthy abuses in the name of mother and sister and also threatened him to kill. At this juncture appellant Karan Singh having handle of axe, Kalu Singh with Farsi, deceased-appellant Chatar Singh having Lathi reached in the field of the complainant PW-2 Shiv Singh and surrounded Shiv Singh.

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Appellant Kalu Singh dealt a Farsi blow causing injury on right cheek of Shiv Singh; the wound started bleeding. Shiv Singh fell on the ground, thereafter Dule Singh caused him injury on his left hand and shoulder by Lathi. Deceased appellant Chatar Singh also used Lathi for assaulting complainant. Shiv Singh raised cry, on which his uncle deceased Bhagwan Singh, PW-3 Ramlal and mother PW-5 Ganga Bai reached on the spot to save him. PW-3 Ramlal caught hold of Kalu Singh but appellant Karan Singh successfully dealt a blow by handle of axe on the head of Bhagwan Singh resulting into his fall in the field. After assault all the four, with their weapons, fled away towards their well. Bhagwan Singh was brought underneath the mango tree; he was dead. PW-2 Shiv Singh went to Police Station and lodged the report at 11:30 A.M. vide Ex.P/2, recorded by Station House Officer PW-10 Mahendra Singh Gaur. Shri Gaur reached on the spot and prepared inquest report Ex.P/5 of the dead body of Bhagwan Singh; he also effected the seizure of blood stained and controlled earth, bamboo stick, branches of Babool tree and blood stained stones from the spot through seizure memo Ex.P/3. He also prepared spot map Ex.P/15 and sent dead body for postmortem examination, which was conducted by PW-9 Dr. A.S. Khan. Postmortem report is Ex.P/14. Complainant PW-2 Shiv Singh was medically examined by PW-1 Dr. Sanjay Khandelwal, his MLC report is Ex.P/1. All the four accused persons were nabbed and on their disclosure statements, vide Ex.P/6 to P/9, the weapons of offence were seized through seizure memo Ex.P/18 to P/21. The seized weapons, clothes of deceased, blood stained and controlled earth, were sent for examination to Forensic Science Laboratory. Forensic Science Laboratory report was filed in the Court, vide Ex.P/22. On axe, Farsi, blood stained earth, stone and clothes of deceased Bhagwan Singh, simple blood was found. Serologist report was also filed but exhibit was not marked on it; according to this report human blood was found on stone and clothes of the deceased, rest articles were not sufficient for test. On due investigation, charge sheet was filed against the four accused persons under Section 302, 302/34, 324, 324/34, 294 and 506 Part-II of "the IPC".

3. Appellants refuted the charges. The defence of deceased appellant Chatar Singh was of false implication; he was the guest of appellant Karan Singh and not residing in the village of other appellants and complainant party i.e. village Bhanpura, and the defence of other appellants was that appellant Dule Singh had gone to remove the fencing after taking permission from Parvat Singh, the father of Shiv Singh, at that time he was assaulted by Shiv Singh, whereas according to Kalu Singh; he reached on the spot and tried to save his brother-appellant Dule Singh but he was caught by PW-3 Ramlal and he had not assaulted anybody. The defence of appellant no.1 Karan Singh was that his son appellant Dule Singh was lying on the ground because of assault by complainant Shiv Singh and his son Kalu Singh was caught by PW-3 Ramlal, at that juncture he saw deceased Bhagwan Singh reaching on the spot by running having Lathi and was also tried to

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dealt a Lathi blow on the head of Kalu Singh. At that moment, in defence of his son Kalu Singh he dealt a solitary Lathi blow to Bhagwan Singh. Appellants examined DW-1 Prabhulal in their defence. The learned trial Court found the prosecution case proved, convicted the appellants as described herein-above.

4. Learned counsel for the appellants has submitted that appellants acted in right of private defence of their person and complainant was the aggressor, therefore, case of the appellants is fully covered by law of private defence. In alternative, he has also submitted that offence under Section 302 of "the IPC" would not be made out against the appellant Karan Singh because incident occurred all of a sudden and both the parties entered into free fight, in which solitary blow was given in a sudden quarrel by appellant Karan Singh causing injury to Bhagwan Singh, therefore, appellant no.1 Karan Singh would be liable for commission of offence under Section 304 Part-I of "the IPC".

5. On the other hand, learned counsel for the State has supported the impugned judgment and finding of the trial Court and also submitted that eyewitnesses and injured witness PW-2 Shiv Singh, the complainant, were not cross-examined by the defence pleading acting in right of private defence of their person. He has also submitted that fencing was fixed 4 to 5 days prior to the date of incident, therefore, appellant Dule Singh was not having any right to remove the same and proper course for him was to go and complain to the authority, if there was any kind of encroachment of his land. It is also submitted that none of the appellants have sustained even a single scratch on their person, they have also not lodged any report and also there is no medical evidence in their support, therefore, the defence taken by appellant Karan Singh, for the first time in his accused statement, was after thought and same is not spelled out from the material available on record.

6. Having heard the learned counsel for the parties and after perusing the evidence available on record, oral as well as documentary, we are of the considered view that no case of right of acting in private defence of their person is made out in favour of the appellants. Appellants have not sustained any injury in the said incident and they had also not lodged any report against encroachment of their land or any kind of attack made on Dule Singh by complainant Shiv Singh (PW-2), who sustained as many as five injuries on his person. He (Shiv Singh) was medically examined by PW-1 Dr. Sanjay Khandelwal, who proved his medical report Ex.P/1 and also described in the Court injuries found by him on the person of Shiv Singh. According to statement of Dr. Khandelwal, Shiv Singh suffered two incised injuries; one on right cheek and another on right eyebrow, rest three injuries were bruise on right shoulder, left shoulder and left side of the waist. Dr. Khandelwal, in cross-examination paragraph-4, clarified that injury no.2 on right eyebrow was not incised wound but it was lacerated wound and injury no.1 could be caused by sharp edged weapon, rest injuries could be caused by hard and blunt object.

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7. According to complainant-injured witness (PW-2) Shiv Singh, when he had seen appellant Dule Singh removing the fencing from his field; he reached over there and asked as to why he was removing the fencing, at which Dule Singh abused him filthily in the name of his mother and sister and also threatened him, immediately thereafter appellant Karan Singh and Kalu Singh reached over there having axe and Farsi. After their reaching, deceased-appellant Chatar Singh also reached on the spot having Lathi and they started assaulting him. Further say of this witness is that Kalu Singh caused him injury by Farsi on his right cheek and eyebrow, appellant Dule Singh assaulted him by Lathi causing injury on his waist and Chatar Singh also caused him injury by Lathi. Shiv Singh (PW-2) has also deposed that at his outcry PW-3 Ramlal and his mother PW-5 Ganga Bai reached on the spot and appellant Karan Singh dealt an axe blow on the head of Bhagwan Singh resulting into his fall in the field, thereafter all the appellants started assaulting him. On intervention of Ramlal (PW-3) appellants ran away. Bhagwan Singh, in injured condition, was brought from the field and kept underneath the mango tree; he was dead, thereafter he along with Ramlal and Gokul Singh reached at Police Station, Aagar and he lodged the report Ex.P/2. He admitted the contents of FIR and his thumb impression on FIR. In cross-examination paragraph-4 Shiv Singh (PW-2) has stated that when he objected removal of fencing by Dule Singh; Dule Singh dealt him two Lathi blows, thereafter they grappled with each other. In the meanwhile appellant Kalu Singh reached there and assaulted him by Lathi, because of which he fell in the field. In paragraph-6, he has repeated the specific overt act, as stated in examination-in-chief and also stated that he could not see whether axe blow was caused by sharp side or blunt side. The statement of Shiv Singh regarding causing injury by all the four accused persons to deceased is nothing but an exaggeration because the autopsy surgeon had found only one injury on the skull caused by hard and blunt object and according to the FIR, lodged by this witness Shiv Singh, Karan Singh was having handle of the axe and not the axe, therefore, it is clear that in Court he has improved his version. PW-3 Ramlal, in cross-examination paragraph-4, has deposed that when Dule Singh was removing the fencing, (PW-2) Shiv Singh reached near him and assaulted him by rope, thereafter both grappled; at that juncture he and deceased Bhagwan Singh rushed towards the place of incident. They were sitting about 200 paces from the place of incident, whereas appellant Kalu Singh and Chatar Singh were sitting about 300 to 400 paces and Kalu Singh reached on the spot from different direction. They all reached on the spot from different-different directions. Appellant Kalu Singh was caught by him, at that moment he saw that deceased Bhagwan Singh was also having a small branch of "Khakhra" tree at 4 to 5 cubit of him, at that moment Karan Singh having Lathi in his hand dealt a blow on the head of Bhagwan Singh and Bhagwan Singh fell on the ground. PW-3 Ramlal has not been declared hostile by the prosecution and after cross-examination there is no re-examination of this witness by the prosecution, therefore, prosecution is bound by the statement of Ramlal.

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8. PW-4 Gokul Singh has stated that fencing was fixed on their land and incident occurred in the field of Parvat Singh i.e. father of PW-2 Shiv Singh. In cross-examination of Gokul Singh, it has come that fencing was fixed some 10 days prior to the date of incident and when Karan Singh made a complaint to Parvat Singh; Parvat Singh told him that they had fixed "Bagar" (fencing) on their land and if they (accused party) are having any objection, they will remove the same and would get the demarcation of land from Patwari, thereafter the fencing would be fixed. In the light of the statement of PW-3 Ramlal, in cross-examination appellant no.3 Dule Singh was not having any business to go and remove the fencing fixed before 10 days of the incident, if he had any grievance he could lodge a report with the Revenue Authority and get the land demarcated but he took the law in his hand and started demolishing the fencing. In view of the statement of Ramlal, in cross-examination, Dule Singh was given beating by rope by Pw-2 Shiv Singh, thereafter both grappled and members of both the families one after another reached on the spot and took part in the incident. In the said incident, they caused injuries to PW-2 Shiv Singh and also to Bhagwan Singh. As stated by Ramlal (PW-3); he caught appellant Kalu Singh and deceased Bhagwan Singh was also having branch of "Khakhra" tree and he was also running towards the place of incident, at that juncture Karan Singh gave a blow by Lathi. The overt act of Karan Singh causing injury on the head of Bhagwan Singh by Lathi is fully corroborated by medical evidence. PW-2 injured witness Shiv Singh has also stated that he was not able to say whether sharp side or blunt side of axe was used by the Karan Singh? In this situation the statement of Ramlal (PW-3) appears to be reliable, who has given complete picture of incident and specific overt act of both the parties. This is true that appellants have not sustained any injury but force was used by Shiv Singh (PW-2) as well as Ramlal (PW-3) by catching hold of Kalu Singh. Therefore, in the considered view of this Court the appellants would be liable for their individual act. There is no evidence on record that they had pre-meeting of mind, pre-meditation and pre-plan for causing simple injury or any kind of injury to Shiv Singh (PW-2). The learned trial Court has convicted appellant Karan Singh under Section 302 of "the IPC" simplicitor. This also shows that appellants were not having any kind of common intention for causing injury, therefore, they would be liable for their individual act. As discussed herein-above, it is also clear that incident occurred all of a sudden and in a heat of passion, in a sudden quarrel, appellant Karan Singh gave a solitary Lathi blow causing injury on the head of deceased Bhagwan Singh, who succumbed to this injury. Autopsy surgeon PW-9 Dr. A.S. Khan found only one depressed lacerated wound on left temporal bone, no other external injury was seen by Dr. Khan on the person of deceased and it is also not a prosecution case that other accused persons had also assaulted the deceased except some exaggeration made by PW-2 Shiv Singh. On internal examination Dr. Khan found fracture of left parieto temporal bone and bones were divided in three pieces, out of which one piece pierced inside the brain, damaging

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brain membranes and brain matter came out of the fracture. The deceased died because of shock due to head injury. Dr. Khan proved postmortem report Ex.P/14.

9. The defence of appellant Karan Singh that deceased Bhagwan Singh raised Lathi for causing injury to appellant Kalu Singh is not substantiated by any suggestion given to prosecution eyewitnesses. This defence was taken by him for the first time in his accused statement and as discussed herein-above appellants had not sustained any injury and incident occurred in the field of complainant party, no report was lodged by the appellants regarding any grievance against complainant party. Under these circumstances in the considered opinion of this Court appellant Karan Singh would not get any benefit of right of private defence of person of appellant no.2 Kalu Singh. Since the incident occurred all of a sudden and appellant reached on the spot in piecemeal. Appellant Karan Singh dealt a solitary blow in a heat of passion when he saw his son Dule Singh grappled with Shiv Singh and another son Kalu Singh caught by Ramlal (PW-3). Appellant Karan Singh had also not taken any undue advantage, therefore, his act of causing solitary blow on the head of deceased Bhagwan Singh would fall under Clause-4 of exception of Section 300 of "the IPC", punishable under Section 304 Part-I of "the IPC".

10. In the result this appeal is allowed in part. Conviction and sentence of the appellant no.1 Karan Singh under Section 302 and 324/34 of "the IPC" as well as conviction and sentence of appellant no.3 Dule Singh under Section 324/34 of "the IPC" are hereby set aside, instead thereof appellant no.1 Karan Singh is convicted under Section 304 Part-I of "the IPC" and sentenced to RI for seven years and fine of Rs.2,000/-; in default of payment of fine he shall suffer additional RI for three months. Conviction of appellant no.2 Kalu Singh under Section 324 of "the IPC" is maintained but his sentenced is reduced to the period already undergone (113 days). Appellant no.3 Dule Singh is convicted under Section 323 of "the IPC" causing simple injury by Lathi to PW-2 Shiv Singh and sentenced to the period already undergone (113 days). The appellants are on bail. Appellant no.1 Karan Singh is directed to surrender himself before the trial Court on 30th January 2009 and trial Court is directed to send him to jail for undergoing remaining part of jail sentence. Bail bond and surety bond of appellant no.2 Kalu Singh and appellant no.3 Dule Singh stand discharged. On failure of appellant no.1 Karan Singh to appear on a given date before the trial Court, the trial Court is directed to take suitable action against him and his surety, under intimation to this Court.

Appeal partly allowed.

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I.L.R. [2009] M. P., 866

APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mr. Justice K.S. Chauhan

4 November, 2008*

AMBARAM

Vs.

STATE OF M.P.

... Appellant

... Respondent

Penal Code (45 of 1860), Section 376 - Sentence - Life imprisonment
- Father continuously committed rape with his own daughter - If the protector himself becomes violator, the degree of vulnerability becomes more greater and, accordingly, leniency in passing the sentence finds no place in such a case - Appellant rightly sentenced to life imprisonment by trial court - Appeal dismissed. (Para 21)

दण्ड संहिता (1860 का 45), धारा 376 - दण्डादेश - आजीवन कारावास - पिता ने अपनी स्वयं की पुत्री के साथ लगातार बलात्संग किया - यदि रक्षक स्वयं अतिक्रामक बन जाता है तो असुरक्षा की श्रेणी अधिक गुरुतर हो जाती है और तदनुसार ऐसे किसी मामले में दण्डादेश पारित करने में नरमी का कोई स्थान नहीं है - विचारण न्यायालय द्वारा अपीलार्थी को आजीवन कारावास का दण्डादेश उचित रूप से दिया गया - अपील खारिज।

S.K. Garg, for the appellant.

R.S. Patel, Addl.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 judgment of conviction and order of sentence dated 30/3/2000 passed by learned Sessions Judge, Hoshangabad, in Sessions Trial No.11/2000 convicting the appellant under Sections 376(1), 342 and 506 later part, IPC and sentencing him to suffer life imprisonment, one year RI and five years RI respectively with a further stipulation that all the sentences shall run concurrently, the appellant has preferred this appeal under Section 374 (2) of Code of Criminal Procedure, 1973.

2. In brief, the case of prosecution is that appellant is the father of prosecutrix and the age of prosecutrix is 16 years. Krishna Bai who was mother of the prosecutrix died 6-7 years earlier to the incident, since then she is residing with her father/appellant. Although prosecutrix has been married but since Gauna ceremony was not solemnised, she was residing with her father at his work place. Appellant is employed in brick furnace nearby Gurukul Ashram at Bhopal-Hoshangabad Road.

3. It is the further case of prosecution that two months prior to 9/11/1999 appellant used to beat prosecutrix by Danda and was also electrocuting her. It is

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also said that appellant committed rape over the prosecutrix in the night and was giving threat to her not to say the incident to anybody otherwise she will be killed, hence, she did not tell anybody about the vile act of the appellant. The grand-mother of prosecutrix and mother of appellant namely Radha Bia was residing separately with her second son Atmaram who is brother of appellant. One day prior to Deepawali festival of the year 1999 appellant carried prosecutrix to his mother's and brother's place. It is said that when appellant was not there, prosecutrix narrated the incident to her grand-mother and uncle Atmaram and also to Satyasindhu of Gurukul Ashram. On the next day viz 9/11/1999 prosecutrix along with her uncle Atmaram and Satyasindhu of Gurukul Ashram went to Police Station and lodged first information report.

4. On lodging of first information report, criminal law was set in motion. Prosecutrix was referred to medical examination where lady doctor, Dr. Smt. Smita Saxena after examining the prosecutrix externally and internally found that she was having injuries of Danda and the duration is 2-3 days to several months. Lady doctor also found the injuries and marks of nails and electric current. Lady doctor further found injuries on the private part of the prosecutrix. According to lady doctor, prosecutrix was brutally beaten and was subjected to rape. The slide of her Vaginal discharge was prepared and her petticoat as well as panty were seized and these articles were sent for chemical examination. Investigating agency in furtherance to its investigation, recorded the statement of the witnesses; arrested accused and sent him for medical examination.

5. After the investigation was over, a charge sheet was submitted in the committal Court which on its turn committed the case to the Court of Session where appellant was tried.

6. Learned Sessions Judge, on the basis of the averments made against the appellant in the charge sheet, framed charges punishable under Section 376(1), 342 and 506 later part, IPC which he denied and requested for trial.

7. Prosecution examined as many as nine witnesses and placed Ex.P/1 to P/14, the documents on record. The defence of appellant is of false implication, however, he did not choose to examine any witness in support of his defence.

8. Learned Sessions Judge, after scrutinising the oral and documentary evidence placed on record, came to hold that the charges framed against the appellant are proved and, eventually, convicted him and passed the sentences which we have already mentioned herein above.

9. In this manner, present appeal has been filed by the appellant assailing his judgment of conviction and order of sentence.

10. We have heard Shri S.K. Garg, learned counsel for the appellant and Shri R.S. Patel, learned Additional Advocate General for respondent/State.

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11. Having heard learned counsel for the parties, we are of the view that this appeal deserves to be dismissed.

12. This case is one of rarest of the rare case and one could admire that appellant's devil of lust became so powerful that in order to satisfy his lascivious activity by crossing all the shame, limitation and dignity, he committed rape over his own daughter.

Mathew has said :

“Whoever looketh on a woman to lust after her hath committed adultery with her already in his heart.”

13. In the present case, prosecutrix has specifically stated that her mother had died at the time when she saw only five springs of her life and since then she is residing with appellant who is her father. Specifically she has stated that both of them were living alone in the house. According to her, she had been married to Chhagan of village Sethguriya but Gauna ceremony has not been performed, hence she did not go to her husband's house and is residing with the appellant even after the marriage.

14. Prosecutrix has stated that she was electrocuted by the appellant and was also beaten by Danda. Prosecutrix has also stated that irrespective of time, appellant happened to commit rape over her repeatedly. She has also stated that appellant was confining her in the house and after bolting the house from the outside, used to go to his work place. He was also not permitting prosecutrix to interact with any other person. Since all the time appellant confined prosecutrix in the house and was not permitting her to meet anybody, she did not state the vile act of appellant to anybody. Specifically prosecutrix has stated that appellant committed rape over her against her will and wishes and whenever she tried to refrain or resisted, she was beaten by appellant.

15. According to this witness, after one month, a day earlier to Deepawali festival, appellant carried prosecutrix to her grand-mother's place who was residing with her uncle Atmaram and at that place there was an occasion for her to narrate the incident to her grand-mother. Her grand-mother thereafter narrated the incident to her uncle also and thereafter she went to lodge report along with Satyasindhu of Gurukul Ashram and her uncle Atmaram and from where she was sent for medical examination. It has also been stated by her that on account of beating by appellant, she received injuries on her back, hands, thighs and legs. According to her, when the rape was committed by her father, blood also came out from her private part. In cross-examination, this witness has stated that appellant after confining her inside the house and by inserting lock from the outside, happened to go to his work place and, therefore, she was not able to narrate the incident to anybody. It has also been stated by her that she used to scream as well as slammed the door but nobody came there for her help because the houses of

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other persons are far away. It has also been stated by her that whenever appellant went to evacuate, he used to go after bolting the door from outside. Further she has stated that after tying her hands and legs she was subjected to rape.

16. On scanning the testimony of the prosecutrix, we find that there is specific evidence of her that she was confined inside the house where she was living along with her father and was not permitted to go outside. Even when appellant happened to go to his work place, he used to bolt the door from outside so that prosecutrix may not flee away. She was also subjected to rape against her will and wishes and was also beaten. After x-raying the testimony of prosecutrix, we do not find anything in order to hold that she is a liar or not stating the truth. In absence of any material and evidence to the contrary why a daughter will give evidence against her own father. According to us, the testimony of prosecutrix inspires full confidence.

17. The evidence of prosecutrix is also corroborated by medical evidence. According to Dr. Smita Saxena (P.W.1), prosecutrix was having old injuries' marks on her forehead, she was having abrasions on her right and left cheeks which were in healing condition and these abrasions may come by nails. On the lower lip also there was a mark of abrasion which was in healing condition. On the right shoulder also bruise marks were found. Similarly on the neck region also there were abrasions which may come by nails, these abrasions were in the process of healing. The injuries were caused within ten days. On the both ends of collar bone there were lacerated injuries. On the back of prosecutrix there were bruises which were 15 in number and they were caused between 3 to 10 days. The doctor also found several abrasions on the entire back. Not only this, several abrasions 5 to 7 cm on left breast, upper portion of abdomen and on both the side of waist were also found. There were three abrasions on each buttock which were appearing to be ten days older and the skin nearby these injuries became dark. On feet several marks of bruises were found which were healed.

18. On examining the private part of the prosecutrix, it was found by the lady doctor that hymen was torn in shape of 3 'O' clock and one more lacerated wound in the position of 4 to 6 'O' clock which was inside the vagina, was found. There was swelling on the vagina and on touching the private part, prosecutrix was complaining the pain. According to lady doctor, one finger was easily entering inside the vagina but prosecutrix was complaining pain on inserting two fingers. The lady doctor prepared two slides of vagina discharge of prosecutrix, sealed it and handed over to the constable for chemical examination. Petticoat and panty of the prosecutrix which she was wearing were also sealed and were handed over to Constable for chemical examination.

19. According to lady doctor, prosecutrix was brutally beaten and the injuries which were found on her, were 2-3 days to 1-2 months older. The lady doctor specifically stated that positive symptom of committing rape was found by her on

DACCAN LUBES TERFE (M/S) Vs. M/S CHAKRADHAR CONSTRUCTION

examining the prosecutrix. The lady doctor has also stated that the external injuries which were found on the person of the prosecutrix, may come by Danda and nails. The place where colour of skin became dark, that injury may come by administering electric current. The lady doctor has proved his report Ex.P/1.

20. Thus, on the basis of the evidence of prosecutrix which is corroborated by medical evidence also we are of the view that the charges including charge of Section 376(1), IPC have been proved and learned trial Court did not commit any error in convicting appellant for the offences punishable under Section 376(1), 342 and 502 later part, IPC. The conviction of appellant is, accordingly, affirmed.

21. The hallmark of relationship between father and daughter is worldwide known and it is beyond expectation of any daughter that adultery in this sweet relation finds any place. If the protector himself becomes violator, the degree of vulnerability becomes more greater and, according to us, leniency in passing the sentence finds no place in such a case. Ordinarily, the adequate sentence for the offence under Section 376(1), IPC is between 7 to 10 years, but, looking to the act of the appellant who is father of prosecutrix and since in order to satisfy his lust and lascivious activity, he committed rape over his own daughter who was helpless and was residing alone with him, we are of the view that learned trial Court did not commit any error in sentencing him to suffer life imprisonment for the offence under Section 376(1), IPC.

22. The Supreme Court in *State of H.P. V. Asha Ram*, 2006 Cri. L.J. 139, enhanced the sentence from five years RI to life imprisonment where accused committed rape over his own daughter. Thus, on the point of sentence also we do not find any justification to pass lesser sentence.

23. For the reasons stated herein above, we do not find any merit in this appeal and the same is hereby dismissed.

Appeal dismissed.

I.L.R. [2009] M. P., 870
APPELLATE CRIMINAL
Before Mr. Justice N.K. Mody
6 November, 2008*

DACCAN LUBES TERFE (M/S)
Vs.

... Appellant

M/S CHAKRADHAR CONSTRUCTION

... Respondent

A. Negotiable Instruments Act (26 of 1881), Section 138 -
Dishonor of cheque - Complaint by partnership firm through one of partners
- Held - Complaint is maintainable. (Para 8)

क. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 - चेक का अनादरण

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— भागीदारों में से एक भागीदार द्वारा भागीदारी फर्म की ओर से परिवाद — अभिनिर्धारित — परिवाद पोषणीय है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 391 - Application to submit additional documents filed in appeal after dismissal of complaint - Contented that documents were in possession of previous counsel who did not file before trial court - Held - On previous occasion also on the same ground appellant was permitted to submit documents - Provision is not to fill up lacuna but to subserve the ends of justice - Application dismissed.
(Para 10)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 391 — अतिरिक्त दस्तावेज पेश करने के लिए आवेदन परिवाद की खारिजी के बाद अपील में पेश — यह प्रतिवादित किया गया कि दस्तावेज पूर्ववर्ती वकील के कब्जे में थे जिसने विचारण न्यायालय के समक्ष पेश नहीं किये — अभिनिर्धारित — पूर्ववर्ती अवसर पर भी इसी आधार पर अपीलार्थी को दस्तावेज पेश करने के लिए अनुज्ञात किया गया — उपबंध कमी को पूरा करने के लिए नहीं है बल्कि न्याय के उद्देश्य का हित साधन करने के लिए है — आवेदन खारिज।

C. Negotiable Instruments Act (26 of 1881), Section 138 - Dishonor of cheque - Alteration in date of issuance of cheque - Cheque presented for encashment even after 5 months of altered date - No explanation about revalidation of cheque and delay in presentation - Held - Complaint rightly rejected by court below - Appeal dismissed.
(Para 11)

ग. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 — चेक का अनादरण — चेक जारी करने की तारीख में परिवर्तन — चेक परिवर्तित तारीख के भी 5 माह बाद भुनाने के लिए प्रस्तुत किया गया — चेक के पुनर्वैधीकरण और प्रस्तुत करने में विलम्ब के बारे में कोई स्पष्टीकरण नहीं — अभिनिर्धारित — अधीनस्थ न्यायालय ने परिवाद उचित रूप से खारिज किया — अपील खारिज।

Cases referred :

V-1995(2) Crimes Page 636, IX-1996(3) Crimes Page 402, AIR 2001 SC Page 2120.

Pranay Shukla, for the appellant.

Arvind Gokhle, for the respondent.

ORDER

N.K. Mody, J. :-Being aggrieved by the judgment dated 31.10.07 passed by JMFC, Indore in Criminal Case No.3386/07, whereby a private complaint filed by the appellant under Section 138 of Negotiable Instruments Act (which shall be referred hereinafter as "Act") was dismissed, the present appeal has been filed.

2. Short facts of the case are that the appellant/firm filed a complaint under Section 138 of the Act on 30.09.2000 through its partner Manik Rao Patel alleging that against the supply made by appellant/firm, respondent issued cheque of

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Rs.2,50,000/- bearing cheque No.4152893 date 30.06.2003 of Akola-Janata Commercial Co-Operative Bank Ltd, Akola Branch, Jalgaon. It was alleged that the aforesaid cheque was presented by the appellant/firm through its banker Bank of India, Branch Setha Bazar, Indore for collection on 16.12.2003. But the same was returned with a memorandum issued by the concerned bank to the effect "stop payment". It was alleged that thereafter a notice of demand was issued by the appellant/firm which was duly served on the respondent. But inspite of that the cheque amount was not paid. It was alleged that by not clearing the cheque respondent has committed an offence which is punishable under Section 138 of the Act. It was prayed that after taking cognizance the respondent be punished.

3. After taking cognizance and also after framing of charge and recording of evidence, learned trial Court dismissed the complaint filed by the appellant/firm against which the present appeal has been filed.

4. During the course of hearing IA No.4759/08 has been filed by the appellant/firm wherein it was prayed that appellant/firm be permitted to submit additional documents copies of which are enclosed along with the application. In the application it is submitted that all the relevant documents relating to the transaction were handed over by the appellant/firm to the counsel for the appellant. But the same was not filed for the best reasons known to the advocate. It is submitted that since the appellant/firm changed the advocate and after knowing the fact that the documents has not been filed, the appellant/firm contacted the advocate and obtained some of the documents which were filed by the appellant/firm before the learned Court below. It was further submitted that after dismissal of the complaint again appellant/firm contacted the lawyer and obtained rest of documents which are being filed along with the application. It was submitted that in the facts and circumstances of the case appellant/firm be permitted to adduce further evidence to support its case on merits.

5. Learned counsel for the appellant/firm submits that the learned Court below has dismissed the complaint on two grounds. Firstly that the complaint has been filed through partner of the appellant/firm who has no locus at all and the partners has not been joined to file the complaint. Secondly on the ground that the relevant documents has not been filed by the appellant/firm to show the complete transaction. Learned counsel submits that since the complaint has been filed by the appellant/firm which is a partnership firm through Manik Rao Patel one of the partner of the appellant/firm of which the partnership-deed has been filed as Ex.P/10, therefore, the findings of the learned Court below that the partner Manik Rao Patel was having no locus to file the complaint is illegal. For this contention reliance is placed on a decision in the matter of *Brijlal V. Jugal Kishore* reported in V-1995 (2) Crimes Page 636, wherein the complaint was filed by the partnership firm through its partner under Section 138 of Negotiable Instruments Act, Bombay High Court held that the complaint suffers no illegality of not being filed by proper

person. Further reliance was placed on a decision in the matter of *Ganesh Sukhlal Joshi versus M.A. Bharati* Reported in IX-1996 (3) Crimes page 402 wherein the complaint was filed by one of the partners of firm under Section 138 of the Act, Bombay High Court held that there was no difficulty for complainant partner to file complaint in his capacity as partner of firm and the finding that complaint was not properly filed is erroneous and cannot be sustained.

6. So far as the findings of the learned trial Court relating not to file the necessary documents are concerned, learned counsel for the appellant submits that originally Shri CP Singh was the counsel for the appellant to whom all the relevant documents were given by the appellant/firm at the time of filing of the complaint. It is submitted that the fact that the documents has not been filed by the counsel for the appellant before the learned Court below came to the notice of appellant for the first time when Shri Manik Rao Patel partner of the appellant/firm appeared before the learned Court below for cross examination on 20.12.2006. It is submitted that at that time Shri CP Singh was not the counsel of the appellant. The moment appellant came to know that the necessary document has not been filed, appellant through its partner approached to the concerned advocate and obtained some of the documents which were filed by the appellant before the learned Court below alongwith application with a prayer to allow the appellant/firm to produce the documents in evidence. It is submitted that the said application was dismissed by the learned trial Court against which a revision petition was filed by the appellant which was allowed by the revisional Court vide order dated 31.10.2007 and appellant/firm was directed to produce the documents in additional evidence. It is submitted that it is only after dismissal of the complaint appellant/firm again approached to Shri CP Singh advocate who has handed over the rest of the documents which are being filed along with the application. In the facts and circumstances of the case learned counsel for the appellant submits that the application filed by the appellant under Section 391 Cr.P.C. be allowed and appellant be permitted to adduce the evidence. It is submitted that in the facts and circumstances of the case after setting aside the judgment passed by the learned Court below, case be remitted back to the learned Court below with a direction to allow the appellant to adduce further evidence.

7. Learned counsel for the respondent submits that the judgment passed by the learned court below is based on due appreciation of evidence adduced by the parties. It is submitted that the appellant cannot be allowed to fill up the lacune. Learned counsel submits that in the facts and circumstances of the case the application and the appeal filed by the appellant/firm be dismissed.

8. From perusal of the record, it is evident that the complaint was filed by the appellant/firm through its partner Manik Rao Patel. The partnership deed Ex.P/10 is on record. Keeping in view the provisions of Partnership Act and the law laid down in the matter of *Brijlal V. Jugal Kishore* (supra) this Court is of the view

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that the findings of the learned Court below that Manik Rao Patel was having no locus standi to file the complaint is illegal and cannot be allowed to sustain. Since the complaint was filed by the appellant/firm through its partner, therefore, there was no justification on the part of the learned Court below in dismissing the complaint.

9. So far as the application filed by the appellant under Section 391 Cr.P.C. is concerned, Section 391 Cr.P.C. reads as under:

Appellate Court may take further evidence or direct it to be taken-

1. In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

10. From perusal of the record, it is evident that initially when the complaint was filed on 20.02.2004 no document was produced by the appellant/firm to show that transaction of Rs.2,50,000/- as the appellant was a firm and according to the appellant the cheque amount was towards the supply of articles by the appellant/firm. Even if it is assumed for the sake of argument that this fact was not in the notice of appellant/firm that the documents has not been filed by the advocate of the appellant/firm and this fact came to the notice on 20.12.06 when Manik Rao Patel appeared before the learned Court below for his cross-examination, then too, the application was allowed by the revisional Court and the appellant/firm was permitted to adduce additional evidence. After dismissal of the complaint it is alleged in the application again appellant/firm approached to the former counsel of the appellant/firm and collected the rest of the documents. In the matter of *Rambhau v. State of Maharashtra* AIR 2001 S.C. Page 2120 wherein the Hon'ble Apex Court has held that "the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under S. 391 since the same avoids a de novo trial. It is not to fill up the lacuna but to sub-serve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, S.391 is thus akin to O.41, R.27 of the C.P. Code."

11. In view of the aforesaid position it can safely be said that by moving the application appellant/firm intends to fill up the lacuna which may not be permitted at this stage. In view of this application stands dismissed. So far as the merits of the case is concerned the cheque is of Rs.2,50,000/- which was bearing the dated 30.09.2000 initially. Thereafter the date was altered as 30.06.03 and the cheques was submitted for collection on 02.12.03 i.e. after 5 months from the date mentioned the cheque, for which there is no sufficient explanation on the part of the appellant. Even in the complaint it is not stated by the appellant/firm that the cheque was dated 30.09.2000 initially which was later on altered as 30.06.03 and revalidated.

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In the facts and circumstances of the case this Court is of the view that no illegality has been committed by the learned Court below in dismissing the complaint filed by the appellant/firm. In view of this appeal has no force hence appeal stands dismissed.

CC as per rules.

Appeal dismissed.

I.L.R. [2009] M. P., 875

APPELLATE CRIMINAL

Before Mr. Justice R.S. Garg & Mr. Justice U.C. Maheshwari

17 November, 2008*

DALLU BASORE

Vs.

STATE OF M.P.

.... Appellant

... Respondent

Penal Code (45 of 1860), Sections 201 & 302 - Murder - Life imprisonment - Cause of death throttling - Allegation that at 3 p.m. there was hot exchange of words between deceased and appellant and thereafter matter was settled - At 8 p.m. appellant along with other accused persons was seen shifting dead body of deceased from house of one accused to the house of appellant - Nail marks found on the neck of deceased - Appellant's both palms are amputated below wrist - Held - Trial court acquitted other accused persons - If there is none else who can be connected with alleged crime then it would almost be impossible for a man who does not have the palms to firstly throw an able bodied man on the ground and thereafter throttle him with the help of legs - A man without palms could not help and assist in shifting the body from one house to another - The observation of trial court in relation to nail marks caused by toe nails is not only fanciful but is absolutely perverse and shocks the human understanding and prudence - Conviction and sentence set-aside - Appellant acquitted of all charges.

(Paras 8, 9, 11, 13, 14 & 16)

दण्ड संहिता (1860 का 45), धाराएँ 201 व 302 - हत्या - आजीवन कारावास - मृत्यु का कारण गला घोटना - अभिकथन कि दोपहर 3 बजे मृतक और अपीलार्थी के मध्य उग्र शब्दों का आदान-प्रदान हुआ और उसके बाद मामला शान्त हो गया - रात 8 बजे अपीलार्थी अन्य अभियुक्तों के साथ मृतक के शव को एक अभियुक्त के घर से अपीलार्थी के घर लाते हुए देखा गया - मृतक की गर्दन पर नाखून के निशान पाये गये - अपीलार्थी की दोनों हथेलियाँ कलाई के नीचे कटी हुई हैं - अभिनिर्धारित - विचारण न्यायालय ने अन्य अभियुक्तों को दोषमुक्त किया - यदि अन्य कोई नहीं है जो कथित अपराध से संसक्त हो सकता है तब किसी व्यक्ति, जिसकी हथेलियाँ नहीं हैं, के लिए यह प्रायः असंभव होगा कि प्रथमतः किसी शारीरिक रूप से सक्षम व्यक्ति को जमीन पर पटके और तत्पश्चात् पैरों की मदद से उसका गला घोटें - हथेलियाँ विहीन व्यक्ति शरीर को

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एक स्थान से दूसरे स्थान पर ले जाने में मदद और सहायता नहीं कर सकता — पैर की उंगली के नाखूनों द्वारा कारित नाखून के निशान के सम्बन्ध में विचारण न्यायालय के संग्रक्षण न केवल विचित्रतापूर्ण हैं बल्कि आत्यंतिक रूप से विपर्यस्त हैं और मानवीय समझ एवं प्रज्ञा पर आघात करते हैं — दोषसिद्धि और दण्डादेश अपास्त — अपीलार्थी सभी आरोपों से दोषमुक्त।

S.K. Garg, for the appellant.

R.S. Patel, Addl.A.G., for the respondent/State.

J U D G M E N T (ORAL)

The Judgment of the Court was delivered by **R.S. GARG, J.** :- The appellant Dattu s/o Gokul Basore being aggrieved by the judgment dated 30.8.2008 passed by the learned First Additional Sessions Judge, Damoh in Sessions Trial No.219/2005 convicting the appellant under Section 302 I.P.C. and sentencing him to undergo life imprisonment and pay fine of Rs.500/-, in default of fine to undergo R.I. for four months, and also convicting him under Section 201 I.P.C. sentencing him to undergo R.I. for 7 years and pay fine of Rs.500/-, in default of fine to undergo further R.I. for four months, the substantive jail sentence to run concurrently, has filed this appeal.

2.- The prosecution case in brief is that complainant Achhelal Ahirwar (P.W.2) lodged a report (Ex.P/3) at Police Station Nohta, District Damoh on 28.8.2005 at about 10.45 p.m. that on the said date at about 3.00 p.m. when he went to the bus stand he found that his son Reenu and the accused Dattu were having hot exchange of words in relation to a sum of Rs.500/-. He tried to patch up the matter and, thereafter, both of them left the spot with an assurance to the complainant that they would settle their matter. Upto 7.00 p.m. when his son did not come back then he informed about the fact to P.W.10 Chouda Ahirwar, P.W.9 Ganesh Ahirwar, P.W.6 Khanju Ahirwar and his own nephew P.W.7 Simbhu. Each of them went to Khamaria and at about 8.00 p.m. he was informed that the accused persons Mathura Basore, Chironji Basore, Prahlad Basore and the present appellant Dattu Basore were shifting the dead body of Reenu from the house of accused Chironji to the house of Dattu. When the four accused persons had found that they were seen they ran away from the said spot. After receiving the information P.W.2 Achhelal Ahirwar, P.W.9 Ganesh and P.W.7 Simbhu went to the house of Dattu and found that the dead body was lying in supine condition. It was found by them that the murder was committed by throttling. After receiving the report the police registered the offence and proceeded for investigation. The police authorities went to the place where the dead body was found, issued notices to the witnesses and prepared different panchanamas/memos. Certain articles were also recovered from the spot. The dead body was sent for post mortem. The post mortem was conducted by Dr. K. Awaya (P.W.1) who reported that the cause of the death was internal hemorrhage and throttling/asphyxia. The post mortem report is available on record at Ex.P/2. Panchanama of the spot was prepared,

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the inquest was prepared and on conclusion of the investigation challan was submitted before the Court. Four accused persons were arrested and were produced for their trial. As the accused persons denied commission of the offence they were subjected to trial. After the trial the learned Court below except convicting the present appellant acquitted all the accused persons.

3. Shri Garg, learned counsel for the appellant after taking us through the evidence available on record and findings recorded by the Court below submitted that the findings recorded by the Court below are patently perverse. The Court below has not looked into the fact that the accused does not have the palms and as both of the palm are amputated below wrist the accused could not commit the murder, the dead body was being shifted from the house of Chironji to the house of Dallu and if the accused Chironji was to be acquitted then there was no evidence to connect Dallu in the alleged crime. That the Court below was absolutely perverse in its approach in observing that if the nail marks were found on and around the neck then such nail marks could be caused by toe nails. It is submitted by him that it would be almost impossible for a persons who does not have hands to firstly put the deceased on ground and, thereafter, throttle him with the help and assistance of the legs/feet.

4. Shri R. S. Patel, learned Additional Advocate General for the State, supported the case of the prosecution and also supported the findings recorded by the learned Court below.

5. Undisputedly there are no eyewitnesses to the incident. The prosecution case hinges upon the testimony of P.W.2 Achhelal who had seen the accused in the company of the deceased and statements of P.W.9 Ganesh and P.W.7 Simbhu who had stated that they had seen that the dead body of the deceased was being shifted from the house of Chironji to the house of Dallu. Apart from that there is no other evidence to connect the accused with the alleged crime.

6. So far as statements of P.W.7 Simbhu and P.W.9 Ganesh are concerned those are the statements where they simply say that the body of the deceased was being shifted from the house of Chironji to the house of Dallu. Recovery of the body from the house of Dallu cannot connect the accused with the alleged crime because undisputedly from the statement of P.W.7 Simbhu and P.W.9 Ganesh it would clearly appear that the dead body was being shifted from the house of Chironji to the house of Dallu. It is not even the prosecution case that the murder was committed in the house of Dallu and the dead body was recovered from Dallu's house after the murder was committed in Dallu's house. It appears that the learned Court below while referring the place of recovery as place of offence lost sight of the fact that the prosecution case was that the body was being shifted from the house of Chironji to the house of Dallu.

7. If the witnesses were saying that the body was being shifted from the house of Chironji to the house of accused Dallu then the prosecution agency/police were

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obliged to go to the house of Chironji and make further investigation whether the murder was committed in the house of Chironji or not. There is no evidence on record that the police agency made a thorough investigation on the lines suggested by Simbhu P. W. 7 and Ganesh P. W. 9.

8. It has also come on the record that the house of accused Dallu is in dilapidated condition. P.W.10 Chauda Ahirwar in paragraph 20 clearly stated that the house of the accused Dallu from where the dead body was recovered was lying in an abandoned condition and nobody was living in the said house. It has also come on the record that the accused Dallu does not have palms. When this argument was raised before the learned Court below surprisingly the Court in its zeal to convict the accused recorded an absurd finding that after providing liquor to the deceased the accused murdered him and nail marks found on and around the neck could be caused by toe nails.

9. In our considered opinion the finding is not only perverse but it is contrary to the common understanding of a prudent man. We are sorry to record that the Court below did not try to appreciate that if there is none else who can be connected with the alleged crime then it would almost be impossible for a man who does not have the palms to firstly throw an able bodied man on the ground and, thereafter, throttle him with the help of the legs.

10. In our considered opinion the learned Court below was absolutely unjustified in recording the findings in paragraph 25.

11. The learned Court below has acquitted the co-accused Chironji s/o Gokul Basore. If the body of the deceased was being shifted from the house of Chironji and was being kept in the house of Dallu then undisputedly the murder of the deceased was committed before the body was kept in the house of Dallu. The murder might have been committed at some third place or in the house of Chironji. If Chironji had been acquitted then the present appellant obviously could not be convicted. This also has to be seen and is to be taken into its true perspective that the body was being shifted from the house of Chironji to the house of Dallu and a person who does not have palms could not help and assist in shifting the body from one house to another.

12. The findings recorded by the Court below in relation to the involvement of the accused only on the basis of the fact that at about 3.00 p.m. the deceased was seen in the company of deceased cannot be upheld. It is nobody's case that after the bus stand incident for the entire period the deceased was in company of the accused.

13. In our considered opinion the Court below was absolutely unjustified in convicting the accused. We set aside the findings recorded by the Court below, allow the appeal and acquit the appellant of all the charges.

14. Before parting with the case, we propose to observe that in a criminal matter the benefit of every doubt has to go to the accused. There is no burden upon the accused to discharge any liability and the prosecution is required to prove the

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allegations made by them. The conviction of a person cannot be recorded on the basis of whims of a particular judge or on a particular understanding. We are also forced to observe that recording of the conviction by a Judge is no guarantee that the judge is honest and acquittal recorded by the Judge cannot lead to an allegation that the Judge is not conducting himself fairly. When in case like present the accused is convicted then a wrong message is conveyed to the Society and the people who are interested in the matter start believing that the Judges/the Courts do not appreciate the true facts and are deciding the matter on their own whims and fancies. The observation made by the learned Judge in relation to the nail marks caused by the toe nails is not only fanciful but is absolutely perverse and shocks the human understanding and prudence. Even while acquitting the accused, we must observe that acquittal or conviction should be recorded on the strength of the evidence available on the record. There must be proper blending of facts, law and understanding. If people start doubting understanding of the Court then that would be a serious dent to the respect of the Court. If the public loses confidence in the system then that again would be a bad day for all of us.

15. We direct that a copy of this judgment be sent to the concerned Judge for his future guidance and a copy be kept in his service record.

16. The accused is in jail, he be set at liberty. The release warrant be issued immediately for releasing the accused, if not required in any other case.

Appeal allowed.

I.L.R. [2009] M. P., 879.

APPELLATE CRIMINAL

Before Mrs. Justice Sushma Shrivastava

24 November, 2008*

SHIVNATH DHOBHI

... Appellant

Vs.

STATE OF M.P.

... Respondent

Sugar Dealers Licencing Order, M.P. 1963, Clause 3(1), Essential Commodities Act, 1955, Section 3/7 - Dealer - 67 bags of sugar found in house of appellant - In absence of evidence, mere recovery not sufficient to raise a presumption that appellant was engaged in business of purchase, sale or storage of sugar in quantity exceeding 50 quintals at one time - Single, casual or solitary transaction of storage of sugar would not make him a dealer - Conviction & sentence u/s 3/7 of the Act set-aside - Appeal allowed. (Para 16)

शक्कर व्यापारी लायसेंस आदेश, म.प्र. 1963, खण्ड 3(1), आवश्यक वस्तु अधिनियम, 1955, धारा 3/7 - व्यापारी - अपीलार्थी के घर में शक्कर के 67 बोरे पाये गये - साक्ष्य के अभाव में केवल बरामदगी यह उपधारणा करने के लिए पर्याप्त नहीं कि अपीलार्थी एक

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समय में 50 विवंटल से अधिक मात्रा में शक्कर के क्रय, विक्रय या संग्रह के कारोबार में रत था - शक्कर के संग्रहण का एकल, आकस्मिक या अकेला संव्यवहार उसे व्यापारी नहीं बना देता - अधिनियम की धारा 3/7 के अन्तर्गत दोषसिद्धि और दण्डादेश अपास्त - अपील मंजूर।

Case referred :

AIR 1964 SC 1533.

A.K. Pathak, for the appellant.

S.K. Rai, G.A., for the respondent/State.

J U D G M E N T

MRS. SUSHMA SHRIVASTAVA, J. :-Appellant has preferred this appeal challenging his conviction and order of sentence passed by Special Judge, Sidhi in Special Case No.14/89, decided on 3.5.1994.

2. Appellant has been convicted under Section 3/7 of Essential Commodity Act, 1955 (hereinafter referred to as 'Act') for storing more than 50 quintals of sugar for sale without licence in violation of Madhya Pradesh Sugar Dealers Licencing Order, 1963 and sentenced to rigorous imprisonment for three months by the impugned judgment.

3. According to prosecution, on 24.8.89 as per directions of S.D.O. Gopadbanas R.K. Mathur, Food Inspector O.P. Pandey alongwith Tahsildar and Food Inspector Rajeev Dubey searched the house of the appellant situated at village Sonvarsha in presence of panch witnesses and found that 67 bags of sugar were lying there. On enquiry, appellant informed that the sugar belonged to co-accused Gyanendra Singh @ Gole Singh and Gajendra Singh @ Gajju Singh, who kept it in the house of appellant in his absence for three-four days. The appellant and the other two co-accused persons had no licence for business of sugar as required by Clause 3(1) of Madhya Pradesh Sugar Dealers Licencing Order, 1963. A Panchnama was, therefore, prepared and 67 bags of sugar found in the house of appellant were seized. The seized sugar was weighed and found to be 66.21 quintals. Food Inspector O.P. Pandey prepared inspection note and submitted it to the Collector, Sidhi, who made a report in writing to the Police. On the basis of report of the Collector, Sidhi, submitted through Food Inspector O.P. Pandey, an offence was registered against the appellant and the other two co-accused persons at Police Station Kotwali, Sidhi under Section 3/7 of the Act and was investigated. After due investigation, appellant and the two other co-accused persons were prosecuted under Section 3/7 of the Act and were put to trial before the Special Judge, Sidhi.

4. Appellant and co-accused persons abjured the guilt and pleaded innocence.

5. Learned Special Judge, after trial and upon appreciation of the evidence adduced in the case, acquitted co-accused persons Gyanendra Singh @ Gole Singh and Gajendra Singh @ Gajju Singh, but found the appellant guilty under Section 3/7 of the Act for storing 66.21 quintals of sugar for sale without licence in contravention of the Madhya Pradesh Sugar Dealer Licencing Order, 1963,

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convicted and sentenced him as aforesaid by the impugned judgment, which has been challenged in this appeal.

6. Learned counsel for the appellant submitted that the trial court gravely erred in convicting the appellant on the basis of inconsistent and discrepant prosecution evidence erroneously discarding the defence evidence. He further submitted that the learned trial judge failed to consider that the seized sugar belonged to the co-accused persons and appellant had no control over the same. He also submitted that the trial court did not consider that there was no evidence on record that appellant was engaged in the business of purchase or sale or storage for sale of sugar and erroneously held him guilty under Section 3/7 of the Act for contravening Clause 3(1) of Madhya Pradesh Sugar Dealers Licencing Order, 1963.

7. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellant and submitted that there was ample evidence on record that appellant had stored for sale 67 bags of sugar containing 66.21 quintals in quantity without any licence; under Clause 3(3) of the Madhya Pradesh Sugar Dealers Licencing Order, 1963 if a person stores sugar in any quantity exceeding 50 quintals at one time, he shall be deemed to store the sugar for purpose or sale.

8. Perused the evidence on record. Food Inspector O.P. Pandey (P.W-4) deposed in his evidence that on 24.8.89 on search being effected at appellant's house at village Sonvarsha, 67 bags of sugar were found in his house for which he had no licence, as required under Madhya Pradesh Sugar Dealers Licencing Order, 1963. The bags of sugar were, therefore, seized vide seizure memo (Ex.P-2) in presence of panch witnesses and on being weighed its weight was found to be 66.21 quintals as per certificate (Ex.P-8) issued by warehouse.

9. The factum of recovery of sugar in huge quantity from appellant's house was also substantially corroborated by the evidence of P.W-1 Kasi and P.W-2 Badri, who also appended his signature on seizure memo (Ex.P-2). It is also borne out from the evidence of D.W-1 Mangaliya, examined on behalf of appellant that the sugar was found and seized from the appellant's house, though a plea was put forward that the sugar belonged to co-accused Gyanendra @ Gole. Be that as it may, the factum of recovery of 67 bags of sugar containing 66.21 quintals of sugar from appellant's house at village Sonvarsha was clearly established from the evidence on record.

10. As per submissions made by learned counsel for the State, as appellant had stored at his house more than 50 quintals of sugar without licence, under Clause 3(3) of the Madhya Pradesh Sugar Dealers Licencing Order, 1963 he would be deemed to have stored the sugar for the purpose of sale; his conviction under Section 3/7 of the Act for contravention of the Clause 3(1) of Madhya Pradesh Sugar Dealers Licencing Order, 1963 was, therefore, proper; whereas it was strenuously submitted by learned counsel for the appellant that there was no evidence on record that appellant was carrying on business of purchase or sale

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of sugar as a dealer, he could not be held guilty for contravening Clause 3(1) of Madhya Pradesh Sugar Dealers Licencing Order, 1963. Placing reliance on the dictum laid down by the Apex Court in the case of *Manipur Administration Vs. M. Nila Chandra Singh* reported in AIR 1964 Supreme Court 1533 learned counsel for the appellant submitted that the presumption under Clause 3(3) of the Madhya Pradesh Sugar Dealers Licencing Order, 1963 is with regard to storing the sugar for sale and not with regard to carrying of business as a dealer.

11. It would be profitable to refer to various provisions of Madhya Pradesh Sugar Dealers Licencing Order, 1963 issued under Section 3(1) of the Act. Clause 3(1) of the Madhya Pradesh Sugar Dealers Licencing Order, 1963 reads as under:-

"No person shall carry on business as a dealer except under and in accordance with the terms and conditions of licence issued in this behalf by the licencing authority."

Clause 3(3) of the Madhya Pradesh Sugar Dealers Licencing Order, 1963 reads thus :-

"For the purpose of this clause, any person who stores sugar in any quantity exceeding 50 quintals at any one time shall, unless the contrary is proved, be deemed to store the sugar for the purpose of sale."

The word 'dealer' has been defined under Clause 2(a) of the Madhya Pradesh Sugar Dealers Licencing Order, 1963 as under:-

"Dealer' means any person engaged in the business of purchase, sale or storage for sale, of sugar in quantities exceeding 50 quintals at any one time, but does not include an industrial undertaking which is engaged in the manufacture or production of sugar and which is registered or licensed under the Industries (Development and Regularization) Act, 1951."

12. It is explicit from the aforesaid provisions of Madhya Pradesh Sugar Dealers Licencing Order, 1963 prevailing at the relevant time that the licence under Clause 3(1) was required for carrying on business of sugar as a dealer and 'dealer' meant any person engaged in the business of purchase, sale or storage for sale of sugar in quantity exceeding 50 quintals at one time. Thus, it is necessary that before a person could be held guilty for contravening Clause 3(1) of the Madhya Pradesh Sugar Dealers Licencing Order, 1963 he should be engaged in the business of purchase or sale or storage for sale of sugar as a dealer. The Apex Court in the case of *Manipur Administration Vs. M. Nila Chandra Singh* (supra) while dealing with the similar provisions of Manipur Foodgrains Dealers Licencing Order (1958) has held as under:-

"In dealing with the question as to whether the respondent is guilty under Section 7 of the Essential Commodities Act, it is necessary to decide whether he can be said to be a dealer within

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the meaning of clause 3 of the Order. A dealer has been defined by clause 2(a) and that definition we have already noticed. The said definition shows that before a person can be said to be a dealer it must be shown that he carries on business of purchase or sale or storage for sale of any of the commodities specified in the Schedule, and that the sale must be in quantity of 100 mds. or more at any one time. It would be noticed that the requirement is not that the person should merely sell, purchase or store the foodgrains in question, but that he must be carrying on the business of such purchase, sale, or storage; and the concept of business in the context must necessarily postulate continuity of transactions. It is not a single casual or solitary transaction of sale, purchase or storage that would make a person a dealer. It is only where it is shown that there is a sort of continuity of one or the other of the said transactions that the requirements as to business postulated by the definition would be satisfied. If this element of the definition is ignored, it would be rendering the use of the word "business" redundant and meaningless."

13. The Apex Court while dealing with the presumption clause, as provided in Manipur Foodgrains Dealers Licencing Order (1958), also held that the statutory presumption to be raised under clause 3(2) is a rebuttable and limited presumption that an individual would be deemed to store the food grains for the purpose of sale if found storing more than specified quantity of food grains at one time and nothing more; and the prosecution would still have to show that the storage of food grains for the purpose of sale was made by him for the purpose of carrying on business of storage of the said food grains. It would be useful to refer to following observations made by their Lordships in the aforesaid case of *Manipur Administration Vs. M. Nila Chandra Singh* (supra) :-

"Having reached this conclusion on the strength of presumption, the prosecution would still have to show that the store of the foodgrains for the purpose of sale thus presumed was made by him for the purpose of carrying on the business of store of the said foodgrains. The element of business which is essential to attract the provisions of Clause 3(1) is thus not covered by the presumption raised under Clause 3(2). That part of the case would still have to be proved by the prosecution by other independent evidence."

14. The provisions of Madhya Pradesh Sugar Dealers Licencing Order, 1963 are similar and akin to the provisions of Manipur Foodgrains Dealers Licencing Order (1958), which were interpreted by the Apex Court in the case of *Manipur Administration Vs. M. Nila Chandra Singh* (Supra). Therefore, in the light of aforesaid observations made by the Apex Court, in order to attract Clause 3(1) of

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the Madhya Pradesh Sugar Dealers Licencing Order, 1963, a person should carry on business of sugar as a dealer, i.e. he should be engaged in the business of purchase, sale or storage for sale of sugar in quantity exceeding 50 quintals at any one time and he cannot be held guilty for contravening Clause 3(1) of the Madhya Pradesh Sugar Dealers Licencing Order, 1963, merely on the basis of storage of sugar in any quantity exceeding 50 quintals at one time or merely on the basis of presumption drawn under Clause 3(3) of the Madhya Pradesh Sugar Dealers Licencing Order, 1963, of storage of sugar for the purpose of sale; it has to be further proved that he was engaged in the business of sugar as a dealer.

15. Now advertng to the facts of the instant case, there is no evidence on record that the appellant carried on the business of sugar as a dealer or was engaged in the business of purchase, sale or storage of sugar in the quantity exceeding 50 quintals at one time. The evidence of the Food Inspector O.P. Pandey (P.W-4) is silent on the point. Even the other two witnesses, namely, Kasi (P.W-1) and Badri (P.W-2) nowhere stated in their evidence that the appellant carried on the business of purchase, sale or storage of sugar for sale or was a dealer of sugar. The mere fact that bulk of sugar exceeding 50 quintals at one time was recovered from the house of the appellant was not sufficient in absence of any specific evidence to raise a presumption that appellant was engaged in the business of storage of sugar for sale. On the other hand, it was reflected from the evidence of prosecution witnesses as well as from the panchnama (Ex.P-1) prepared by the Food Inspector O.P. Pandey (P.W-4) that the bulk of sugar found in appellant's house in quantity exceeding 50 quintals, as per statement of the appellant, belonged to the co-accused persons. Even if this plea is not accepted, the only presumption that can be raised under Clause 3(3) of the Madhya Pradesh Sugar Dealers Licencing Order, 1963 on the basis of recovery of bulk of sugar exceeding 50 quintals is that appellant had stored the sugar for the purpose of sale, but as held by the Apex Court in the case of *Manipur Administration Vs. M. Nila Chandra Singh* (Supra), single, casual or solitary transaction of storage for sale of sugar would not make him a dealer.

16. In the wake of aforesaid and in absence of any evidence to the effect that appellant carried on business of sugar as a dealer, he cannot be held guilty under Section 3/7 of the Essential Commodity Act 1955 for contravening Clause 3(1) of the Madhya Pradesh Sugar Dealers Licencing Order, 1963. The conviction of the appellant under Section 3/7 of Act, therefore, cannot be sustained.

17. Accordingly, the appeal is allowed. The conviction of the appellant under Section 3/7 of the Act and the sentence awarded to him are hereby set aside and he is acquitted of the charge.

Appellant is on bail. His bail bonds shall stand discharged.

Appeal allowed.

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I.L.R. [2009] M. P., 885

APPELLATE CRIMINAL*Before Mr. Justice R.C. Mishra*

18 December, 2008*

BENIRAM & anr.

... Appellants

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

... Respondent

A. Penal Code (45 of 1860), Section 96 - *Private defence - When presumption that injuries have been caused by accused in exercise of his right of private defence can be drawn - Law explained.*

In absence of any other cogent and creditworthy evidence as to the counter account, learned trial judge concluded that appellants were the aggressors. This finding was justified in view of the fact that the number of injuries, described by the medical experts, was not the only criterion for determining who the aggressor was [*State of M.P. Vs. Ramesh* (2005) 9 SCC 705]. As explained by the Apex Court, it cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons a presumption must necessarily be raised that the accused persons have caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probablise the version of the right of private defence. (Para 13)

क. दण्ड संहिता (1860 का 45), धारा 96 - प्राइवेट प्रतिरक्षा - कब यह उपधारणा की जा सकती है कि अभियुक्त द्वारा क्षतियाँ अपने प्राइवेट प्रतिरक्षा के अधिकार के प्रयोग में कारित की गई हैं - विधि स्पष्ट की गई।

B: Penal Code (45 of 1860), Section 324 - *Simple hurt - Injury on head alleged to be caused by axe - Lacerated wound found in M.L.C. - Held - Injury could be caused by blunt side of axe - It will fall under second category of conflict between oral and medical evidence as explained in Thaman Kumar's case [(2003) 6 SCC 380] - Trial Court did not commit any illegality in ignoring absence of any incised wound.* (Para 14)

ख. दण्ड संहिता (1860 का 45), धारा 324 - साधारण उपहति - सिर पर क्षति कथित रूप से कुल्हाड़ी द्वारा कारित - एम.एल.सी. में कटे-फटे घाव पाये गये - अभिनिर्धारित - क्षति कुल्हाड़ी की मोथरी ओर से कारित की जा सकती थी - यह मौखिक और चिकित्सीय साक्ष्य के बीच विरोध की द्वितीय श्रेणी के अन्तर्गत आयेगा जैसा कि थामन कुमार के मामले [(2003) 6 SCC 380] में स्पष्ट किया गया है - विचारण न्यायालय ने किसी चिरे हुए घाव के अभाव को अनदेखा करने में कोई अवैधता नहीं की।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 71 - *Double punishment - Appellant No.2 convicted u/s 323 as well as u/s 323/34 IPC for*

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causing injury to one person - Held - Section 71 prohibits double punishment for same offence - Conviction of appellant No.2 u/s 323/34 IPC not legal.

(Para 15)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 71 - दोहरा दण्ड - अपीलार्थी क्र. 2 को एक व्यक्ति को क्षति कारित करने के लिए भा.द.सं. की धारा 323 के अन्तर्गत और धारा 323/34 के अन्तर्गत भी दण्डित किया - अभिनिर्धारित - धारा 71 एक ही अपराध के लिए दोहरे दण्ड का प्रतिषेध करती है - अपीलार्थी क्र. 2 की भा.द.सं. की धारा 323/34 के अन्तर्गत दोषसिद्धि वैध नहीं।

Cases referred :

AIR 2006 SC 1769, (2005) 9 SCC 705, (2003) 6 SCC 380, AIR 1972 SC 1764.

Rakesh Khare, for the appellants.

L.D.S. Baghel, G.A., 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 31/03/2001 passed by First Additional Sessions Judge, Seoni in S.T No.2/2000 whereby each one of the appellants was convicted and sentenced as under : -

Convicted under Section	Sentenced to
447 of the Indian Penal Code (for brevity 'the Code')	pay a fine of Rs.300/-.
323 of the Code	undergo S.I. for two months and to pay a fine of Rs.300/- and in default, to suffer S.I. for 15 days.

In addition, the appellant no.2 Chainsingh also stands convicted under Section 323 read with S.34 of the Code and sentenced to undergo simple imprisonment for two months and to pay fine of Rs.300/- and in default, to suffer S.I. for 15 days.

2. Prosecution story, in short, may be narrated as under :-

(i) On 01/08/1998 at about 5 p.m., after entering into house of Bijanlal (PW1), a she-calf belonging to appellant no.1 Beniram (for short 'A1') had eaten rice. On being asked to take care of the cattle, A1 started hurling filthy abuses; trespassed into Parchhi of the house; dragged Bijanlal to the courtyard and assaulted him repeatedly with an axe. At this point of time only, the appellant no.2 Chainsingh (hereinafter referred to as 'A2') arrived at the spot. He also dealt successive blows with a lathi on Bijanlal. Archana (PW3), the daughter-in-law of Bijanlal's younger brother and her sister-in-law Jasanbai (PW2) came forward to intervene but Jasanbai was also hit on her back by A1 with handle of the axe.

(ii) It was upon the FIR lodged by Archana that a case under

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Sections 326 and 323 read with S.34 of the Code was registered against the appellants. Injured Bijanlal and Jasanbai were immediately taken to the hospital where they were examined by Dr. S.N. Soni (PW8).

(iii) Injuries sustained by Bijanlal included fracture in the mid-shaft of right radius bone.

3. In addition to the offence of house trespass to commit offence punishable with life imprisonment, A1 was charged with the offences under Sections 326 and 323 of the Code for causing grievous hurt to Bijanlal with an axe and simple hurt to Jasanbai by using blunt side of the weapon whereas charges of the offences under Sections 326 read with 34 and 323 of the Code for sharing a common intention to inflict grievous injury with an axe to Bijanlal and for causing injuries to Bijanlal only with a lathi were framed against A2. They denied the respective charges. According to them, it was the complainant party that was aggressor and they had acted in self-defence. For this, attention was invited to the fact that both of them were subjected to medical examination with reference to a counter report (Ex.D-5) lodged by A2 against Bijanlal and his companions.

4. The prosecution sought to prove the charges by examining as many as 11 witnesses whereas defence was substantiated by calling Constable Vijay Baghel (DW1), Chandanlal (DW2) and Dr. A.K. Sarawgi (DW3). However, learned trial Judge, losing sight of the fact that Dr. A.K. Sarawgi had already been examined as a prosecution witness, permitted the appellants to examine him as a defence witness despite a well-settled position of law on the point that such a juxtaposition is not contemplated under Section 233 of the Code of Criminal Procedure (See. *State of M.P. vs. Badri Yadav* AIR 2006 SC 1769).

5. Upon consideration of the entire evidence on record, learned trial Judge, for the reasons assigned in the impugned judgment, rejected the plea of self-defence. Nevertheless, he acquitted the appellants of the major offences punishable under Sections 450 and 326 of the Code. Instead both of them were adjudged guilty for criminal trespass and also for causing injuries to Bijanlal with axe and lathi respectively. A2 was further convicted for having a common intention with A1 to inflict injuries to Bijanlal with an axe.

6. Learned counsel for the appellants has strenuously urged that the order of conviction is not sustainable in the wake of -

(i) apparent inconsistencies between the evidence of the injured and the prosecution version as recorded in the FIR (Ex. P-1) at the instance of eyewitness Archana (PW3).

(ii) variance between ocular and medical evidence.

(iii) non-explanation of the injuries received by the appellants.

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In response, learned Government Advocate has submitted that the impugned convictions are well-merited.

7. With a view to appreciating rival contentions in the right perspective, it is necessary to first consider the medical evidence available on record.

8. Dr. S.N. Soni (PW8) proved existence of the following injuries, as described in the report (Ex.P-8), on the person of Bijanlal : -

(i) Lacerated wound on mid of scalp about 3" x ½" x bone deep.

(ii) A punctured wound in a diameter of ½" on right arm with contusion.

(iii) One contusion on right forearm just below elbow.

(iv) An incised wound on right middle finger ½ cm x ½ cm.

In his opinion, the injuries no.(ii) and (iv) above could be caused by a sharp and pointed object.

9. Radiologist Dr. A.K. Sarawgi (PW9) confirmed the grievous nature of injury no.(iii) above by stating that he had noticed fracture on the mid-shaft of the right radius bone. It was this medical expert only who corroborated the fact that on 02/08/1998 at about 3.50 p.m., the under-mentioned injuries were found on the body of A1 :-

(i) A lacerated wound 2½ cm x ½ cm x fascia deep just above hair line of mid-forehead with marginal edema.

(ii) Abrasion superficially epidermis above left wrist 3" x ½" vertically placed with upward trailing.

(iii) Abrasion 2 x ½ cm over dorsum of right middle finger, mid-phalange with dried serum.

According to the medical expert, A1 also complained of pain in right shoulder and left forearm. He categorically stated that A2 had not sustained any external injury.

10. As per statement of Bijanlal (PW1), after dragging him out of the house, the appellants jointly assaulted him with axe and lathi respectively and when Archana and Jasanbai tried to save him, A1 struck a lathi blow on the back of Jasanbai. First informant Archana (PW3) as well as injured Jasanbai (PW2) also corroborated the factum of the joint attack on Bijanlal with axe and lathi. However, their statements suffered from the following discrepancies with reference to the other evidence adduced by the prosecution : -

(i) As asserted by Bijanlal and supported by Jasanbai and Archana, A1 had dealt an axe blow on his head whereas the injury found on his scalp was in the form of a lacerated wound.

(ii) The statements of Bijanlal, Jasanbai and Archana are

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consistent on the point that A2 had assaulted him with lathi on right hand and right leg but no injury on the right leg was detected in the medical examination.

(iii). According to Bijanlal and Archana, A1 was the author of the injury sustained by Jasanbai on her back whereas Jasanbai clearly stated that the injury was caused by A2 only.

(iv). As admitted by Dr. S.N. Soni (PW8), the punctured wound noticed by him on Bijanlal's right arm could not be caused by axe (Article A1) or lathi (Article A2) seized by Head Constable Jitendra Singh (PW11) from the possession of the appellants respectively.

(v). Amongst the eyewitnesses named in the FIR, Doolanbai (PW4) alleged that Jasanbai was beaten by both the appellants whereas Durga Prasad (PW10) clearly admitted that he was not able to see the beating of Jasanbai.

11. Vijay Baghel (DW1) supported the plea of defence by admitting that before sending the appellants to hospital for medical examination, the report (Ex.D-5) was recorded at S.No.76 of the Rojnamcha of P.S. Barghat only upon the information furnished by A1, who was in an injured condition.

12. Adverting to the legality of the impugned convictions, it may be observed that the evidence of Bijanlal (PW1), corresponding medical evidence and the eyewitness account given by first informant Archana (PW3) and other witnesses viz. Jasanbai (PW2), Doolanbai (PW4) and Durga Prasad (PW10) were cumulatively sufficient to establish the offence of voluntarily causing hurt to Bijanlal. This apart, the evidence of these witnesses also proved the guilt of the appellants in respect of the offence of criminal trespass punishable under Section 447 of the Code beyond a reasonable doubt.

13. Although, Chandanalal (DW2) came forward to substantiate the defence version yet, his assertion that A2 had also received injury on hand, did not gather support from the medical evidence. In absence of any other cogent and creditworthy evidence as to the counter account, learned trial Judge concluded that appellants were the aggressors. This finding was justified in view of the fact that the number of injuries, described by the medical experts, was not the only criterion for determining who the aggressor was (*State of M.P. vs. Ramesh* (2005) 9 SCC 705). As explained by the Apex Court, it cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence.

14. Since the injury on Bijanlal's head could be caused by blunt side of the axe being carried by A1, it fell under the second category of conflict between oral testimony and medical evidence as enumerated by the Apex Court in *Thaman Kumar vs. State*

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of Union Territory of Chandigarh (2003) 6 SCC 380. Accordingly, the learned trial Judge did not commit any illegality in ignoring the absence of any incised wound corresponding to the axe blow allegedly dealt by A1. However, having recorded the finding that the injury on Bijanlal's head was inflicted by using blunt side of an axe, the learned trial Judge ought to have convicted the appellants respectively for the offences punishable under Sections 324 and 324 read with S.34 of the Code (*Jai Narain Mishra vs. State of Bihar* AIR 1972 SC 1764 referred to). Further, in the effort to separate chaff from the grain, he rightly came to the conclusion that charges of the offences under Sections 450, 326 and 323 of the Code for causing injuries to Jasanbai could not be regarded as proved in the face of the discrepancies highlighted above. Learned trial Judge, therefore, proceeded to convict the appellants under Sections 447 and 323 of the Code for the offences of criminal trespass and causing hurt to Bijanlal with axe and lathi respectively. He further convicted A2 under Section 323 read with S.34 of the Code for sharing a common intention with A1 to cause injuries to Bijanlal with an axe. Thus, viewed from any angle, none of the contentions raised against the impugned convictions deserves acceptance.

15. While passing sentences, learned ASJ completely overlooked that both the offences for which A2 was found guilty related to assault upon a single person and further, by virtue of the principle of joint liability, embodied in Section 34 of the Code, A2 was liable for the criminal act done by A1 in the same manner as if it were done by him alone. This had led to a ridiculous result inasmuch as A1, after being held guilty of causing the head injury to Bijanlal with an axe, was subjected to single punishment whereas A2, who was found guilty of inflicting injuries by means of a lathi received double punishment, that too in contravention of Section 71 of the Code. This Section, which is in consonance with the rule of double jeopardy enshrined in Article 20(2) of the Constitution of India, prohibits double punishment for the same criminal act.

16. To sum up, only the impugned sentences passed against A2 for the offence under Section 323 read with S.34 are not legal as being violative of S.71 of the Code. However, no useful purpose would be served in sending the appellants again to jail in view of the fact that they have already suffered imprisonment for a period of 16 days for the offence under Section 323 of the Code allegedly committed as early as on 01/08/1998. Interest of justice would be met if the custodial sentence is reduced to the period already undergone by the appellants and the fine amount is enhanced to Rs.1,000/-. Besides this, the fine sentence under Section 447 of the Code deserves to be affirmed as appropriate.

17. In the result, the appeal is allowed in part. The impugned convictions are hereby affirmed. The fine sentence under Section 447 of the Code is maintained and the custodial sentence under Section 323 of the Code is reduced to the period already undergone by the appellants but the fine amount is enhanced from Rs.300/- to Rs.1000/-. The defaulter shall suffer imprisonment for a period of one month.

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18. The impugned sentences of fine and imprisonment passed against A2 Chainsingh for the offence punishable under Section 323 read with S.34 are set aside. The fine amount, if deposited, may be adjusted against the enhanced amount of fine for the offence under Section 323 of the Code.

Appeal partly allowed.

Appeal partly allowed.

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CRIMINAL REVISION

Before Mr. Justice Rakesh Saxena

11 September, 2008*

REKHCHAND

... Applicant

Vs.

STATE OF M.P.

... Non-applicant

A. Wild Life (Protection) Act (53 of 1972), Sections 9 & 49-A - Prohibition of hunting - To prove that accused hunted any wild animal - Merely a person is found in possession of leather of wild animal - It cannot be presumed that he hunted or killed animal especially in absence of evidence that leather was of a recently killed animal. (Paras 7 & 8)

क. वन्य जीव (संरक्षण) अधिनियम (1972 का 53), धाराएँ 9 व 49-ए - शिकार का प्रतिषेध - यह साबित करने के लिए कि अभियुक्त ने किसी वन्य पशु का शिकार किया - केवल एक व्यक्ति वन्य पशु के चमड़े के कब्जे में पाया गया - यह उपधारित नहीं किया जा सकता कि उसने पशु का शिकार किया या उसे मारा विशेषतः इस साक्ष्य के अभाव में कि चमड़ा हाल में मारे गये किसी पशु का था।

B. Wild Life (Protection) Act (53 of 1972), Section 39 - Possession of any animal article, without licence or making declaration to Chief Wild Life Warden, is punishable u/s 39 of the Act - No charge for that offence was framed by the trial court - It would not be just & proper to remand the case for fresh trial after about 12-13 years of the commission of the offence.

(Para 9)

ख. वन्य जीव (संरक्षण) अधिनियम (1972 का 53), धारा 39 - लायसेंस या मुख्य वन संरक्षक को घोषणा किये बिना किसी पशु वस्तु का कब्जा अधिनियम की धारा 39 के अन्तर्गत दण्डनीय है - विचारण न्यायालय द्वारा उस अपराध का कोई आरोप विरचित नहीं - यह न्यायसंगत एवं उचित नहीं होगा कि अपराध किये जाने के लगभग 12-13 वर्ष बाद नये सिरे से विचारण के लिए मामला प्रतिप्रेषित किया जाए।

Shahid Beg, for the applicant.

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

REKHCHAND Vs STATE OF M.P.**ORDER**

RAKESH SAKSENA, J. :-Applicant has filed this revision against the order dated 20.1.1998, passed by Second Additional Sessions Judge, Chhindwara in Criminal Appeal No. 33/97, affirming the judgment dated 25.2.1997, passed by Judicial Magistrate First Class, Amarwada in Criminal Case No.457/1995, convicting the applicant under Section 9 and 49A read with Section 51 of the Wild Life (Protection) Act, 1972 and sentencing him to rigorous imprisonment for one year with fine of Rs. 5000/-.

2. According to prosecution, on 29.1.1995, K.P. Dhurve, Sub Inspector, on receiving information from an informer that applicant possessed leather of leopard, searched his house in presence of witnesses Ramdas, Punaram and Ramdeen and seized a leather of leopard vide seizure memo Ex. P/2. After obtaining the opinion from Dr. S.R. Suryawanshi, he registered a case under Section 9, 49A read with Section 51 of the Wild Life (Protection) Act, 1972 (for brevity 'the Act') against him and after investigation, filed charge sheet in the court.

3. Learned trial Court, relying on the evidence of Dr.S.R.Suryawanshi (PW-1), Ramdeen (PW-2) and K.P. Dhurve (PW-4), held the applicant guilty of the aforesaid offence and convicted and sentenced him accordingly.

4. The appeal preferred by the applicant was dismissed by Second Additional Sessions Judge, Chhindwara..

5. Learned counsel for the applicant submits that from the evidence and material on record, no offence under Sections 9 and 49 read with Section 51 of the Act is made out. As such, the conviction of applicant is illegal and deserves to be set aside. He submits that there is absolutely no evidence on record to show that applicant hunted or killed the leopard.

6. Sections 9 of the Act provides:-

"9. Prohibition of hunting.- No person shall hunt any wild animal specified in Schedules I, II, III and IV except as provided under section 11 and section 12."

Section 49A of the Act defines "scheduled animal", "scheduled animal article" and "specified date". It reads:-

"49A. Definitions.- In this Chapter,-

(a) "Scheduled animal" means an animal specified for the time being in Schedule I or Part II of Schedule II;

(b) "Scheduled animal article" means an article made from any scheduled animal and includes an article or object in which the whole or any part of such animal [has been used but does not include tail feather of peacock, an article or trophy made therefrom and snake venom or its derivative];

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(c) "specified date" means-

(i) in relation to a scheduled animal on the commencement of the Wild Life (Protection) (Amendment) Act, 1986, the date of expiry of two months from such commencement;

(ii) in relation to any animal added or transferred to Schedule I or Part II of Schedule II at any time after such commencement, the date of expiry of two months from such addition or transfer;

(iii) in relation to ivory imported into India or an article made from such ivory, the date of expiry of six months from the commencement of the Wild Life (Protection) (Amendment Act, 1991. "

7. On perusal of the evidence on record, it is apparent that none of the witness including the Investigating Officer K.P. Dhurve (PW-4) stated that the applicant killed or hunted the leopard. The only allegation made against him is that the leather of a leopard was found in his possession. In order to establish the commission of offence under Section 9 of the Act, it is necessary to prove that accused hunted any wild animal specified in Schedules I, II, III and IV except as provided under Sections 11 and 12 of the Act. Merely by finding a person in possession of a leather of wild animal, it cannot be presumed that he hunted or killed the animal, especially in the absence of the evidence that the leather was of a recently killed animal. Dr. S.R. Suryawanshi (PW-1) could not say about the duration as to when and how the leopard, skin of which he examined, died. There is no evidence on record to show that there was any wound or mark of violence on the skin.

8. In the absence of evidence establishing the fact of hunting or killing the wild animal by the accused, he cannot be held guilty under Section 9 read with Section 49A of the Act.

9. It is true that the possession of any animal article, without license or making declaration to Chief Wild Life Warden, is punishable under Section 39 of the Act, but, unfortunately, no charge for that offence was framed by the trial Court, therefore, in my opinion, it would not be just and proper to remand the case for fresh trial after about 12-13 years of the commission of the offence.

10. Taking into consideration the above circumstances, I am of the view that the conviction of the applicant under Section 9, 49A read with Section 51 of the Act is illegal and deserves to be set aside. Accordingly the impugned judgment of conviction and sentence, passed by the court below, is set aside. Applicant is acquitted.

11. Applicant is on bail. His bail bond and surety bond stand discharged.

12. Revision allowed.

Revision allowed.

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I.L.R. [2009] M. P., 894

MISCELLANEOUS CRIMINAL CASE*Before Mr. Justice S.S. Dwivedi*

20 January, 2009*

GORDHAN

... Applicant

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

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Ayurvigyan Parishad Adhiniyam, M.P. 1987, Section 24 - Quashing of charges - Applicant is having BAMS degree - Allopathic injection found in his clinic - Case u/s 24 of Adhiniyam and Section 420 of IPC registered against him and charge-sheet filed - Held - State Government issued Gazette notification wherein authorized all registered medical practitioners who are having BAMS degree to use allopathic medicine - For having possession of some allopathic medicine, applicant can not be held guilty for contravention of Section 24 of the Adhiniyam - No fruitful purpose will be served by continuing the charge-sheet against the applicant as it will cause miscarriage of justice - Charges against applicant quashed - Application allowed. (Paras 7 to 11)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, आयुर्विज्ञान परिषद अधिनियम, म.प्र. 1987, धारा 24 - आरोपों का अभिखण्डन - अपीलार्थी के पास बीएएमएस की डिग्री - उसके चिकित्सालय में एलोपैथिक इंजेक्शन पाया गया - उसके विरुद्ध अधिनियम की धारा 24 एवं भा.द.सं. की धारा 420 के अन्तर्गत मामला दर्ज किया गया और आरोप पत्र पेश किया गया - अभिनिर्धारित - राज्य सरकार ने गजट अधिसूचना जारी की जिसमें सभी रजिस्ट्रीकृत चिकित्सा व्यवसायियों, जिनके पास बीएएमएस की डिग्री है, को एलोपैथिक दवाईयों का प्रयोग करने के लिए प्राधिकृत किया गया - कुछ एलोपैथिक दवाईयों का कब्जा रखने के लिए आवेदक को अधिनियम की धारा 24 के उल्लंघन का दोषी नहीं ठहराया जा सकता - आवेदक के विरुद्ध आरोप पत्र जारी रखने से किसी लाभप्रद प्रयोजन की पूर्ति नहीं होगी बल्कि यह न्याय की विफलता कारित करेगा - आवेदक के विरुद्ध आरोप अभिखण्डित - आवेदन मंजूर।

*P.K. Shukla with M.S. Chouhan, for the applicant.**C.R. Karnik, Dy.G.A., for the non-applicant/State.***ORDER**

S.S. DWIVEDI, J. :-The applicant has filed this petition under Section 482 of the Criminal Procedure Code for quashment of the charge sheet filed against the applicant before the Judicial Magistrate First Class, Jaora registered as Criminal Case No. 1414/06 for the offence punishable under Section 24 of The Madhya Pradesh Ayurvigyan Parishad Adhiniyam, 1987 (hereinafter referred to as 'The Act').

2. Brief facts of the case are the Medical Officer posted at Primary Health Centre, Piplouda lodged the FIR on 19.03.06 at Police Station-Piplouda that the applicant-accused

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being the registered Medical practitioner in Ayurvedic Medicine and Surgery is having allopathic medicine in his Clinic also for which he has not been legally authorised. The allopathic injection, were found in the Clinic belonged to the applicant. On this information, the police had registered a case under Section 420 of the IPC and under Section 24 of The Act and after due investigation the charge sheet has been filed.

3. The learned Trial Court after hearing both the parties came to the conclusion that prima-facie charge under Section 24 of the Act of 1987 is made out against the applicant and had framed the charge against the applicant. Aggrieved by which the applicant has preferred Criminal Revision No.66/2007 before the 2nd Additional Sessions Judge, Jaora. The learned Revisional Court by order dated 23.7.07 dismissed the revision aggrieved by which the applicant came up before this Court by this petition under Section 482 of the Cr.P.C.

4. Having heard the learned counsel for the applicant as well as the Dy. Govt. Advocate for the State and perused the record.

5. It is submitted by the learned counsel for the applicant that the Chief Medical Officer, Ratlam by a letter dated 14.6.06 informed the police officer of Police Station-Piplouda that a person having the degree of bachelor of Ayurved with Modern Medicine & Surgery and registered as a medical practitioner then he is authorised under Section 24 of the Act to use the allopathic medicine also for which Govt. of M.P. has also authorised such medical practitioner for the use of allopathic medicine. In view of the aforesaid information given by the Chief Medical Officer, Ratlam to the police concerned. The concerning charge as framed by the Trial court is automatically come to an end and the learned Trial Court as well as the Revisional court has ignored the aforesaid information given by the Chief Medical Officer. It is also submitted by the counsel for the applicant that the State of M.P has also issued the notification under the Drug and Cosmetic Act, 1940 on 19th June, 2003 wherein authorised all the registered medical practitioners who are having the degree of Ayurvedic Medicine and Surgery to use the allopathic medicine, and the copy of the notification Annexure P/8 is also submitted by the counsel for the applicant with this petition for perusal and in view of the aforesaid notification also the possession of allopathic medicine which was found in the clinic of the applicant is not come within the purview of Section 24 of the Act concerned and both the courts below have wrongly come to the conclusion, a prima-facie charge under Section 24 of the Act is made out against the applicant, therefore, prayed for setting aside of the impugned order and for quashment of the charge sheet filed against the applicant.

6. The learned Dy. Govt. Advocate for the State supported the impugned order passed by the Trial Court and submits that all these documents filed by the applicant may be considered by the Trial Court at the time of trial and at this stage the concerning charge is not held to be without any substance, therefore, no grounds

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are available for the quashment of the proceeding concerned, hence prayed for dismissal of the petition.

7. On perusal of the documentary evidence produced by the applicant it is apparent that admittedly the applicant is having a valid degree of bachelor of Ayurvedic Medicine and Surgery issued by the Vikram University, Ujjain wherein all the necessary subject of surgery and medicines are mentioned as the subject of the concerning degree. The applicant has also filed a certificate issued by the Chief Medical Officer, Ujjain for the completion of period internship of the applicant in various department of District Hospital, Ujjain. The applicant has also filed Annexure P/7, the registration certificate issued by the competent authority of the State of M.P. by which the applicant is authorised for the medical practice in Ayurvedic and Unani procedure. The Annexure P/8 is the Gazette notification issued by the Govt. of M.P. whereby the Govt. of M.P. has authorised all the medical practitioners having BAMS degree; to use the allopathic medicines also to the extent that they get the necessary training during their BAMS course.

8. Thus, on perusal of the aforesaid documents specially Annexure P/8 the copy of the Govt. Gazette for which the judicial notice can be taken without any formal proof. It is apparent that the applicant being the medical practitioner of Ayurvedic and Unani procedure is legally authorised to use the allopathic medical, also is not held to be liable for illegal possession of allopathic medicines in contravention of the any of the section of the Act concerned. Therefore, the submission made by the counsel for the applicant appears to be just and proper that *prima-facie* for having the possession some allopathic medicine by the applicant, he cannot be held guilty for any contravention of the provision of the 24 of the Act concerned.

9. The learned Govt. Advocate is not able to produce any contrary view against the publication of the gazette by the State of M.P. dated 19th June, 2003 whereby a medical practitioner having BAMS degree cannot use the allopathic medicine during the treatment of the patients.

10. In view of the aforesaid discussion, *prima-facie* charge under Section 24 of the Act is not made out against the applicant and therefore, the charge sheet filed by the State against the applicant is liable to be quashed and no fruitful purpose will be served by continuing the aforesaid charge sheet against the applicant. It will also cause the miscarriage of justice.

11. Resultantly, the petition filed by the applicant is allowed. The charge sheet filed by the State against the applicant for the offence under Section 24 of the Act is hereby quashed.

A copy of this order be sent to the Trial Court with the original record. Petition is disposed of accordingly.

Petition disposed of.