

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



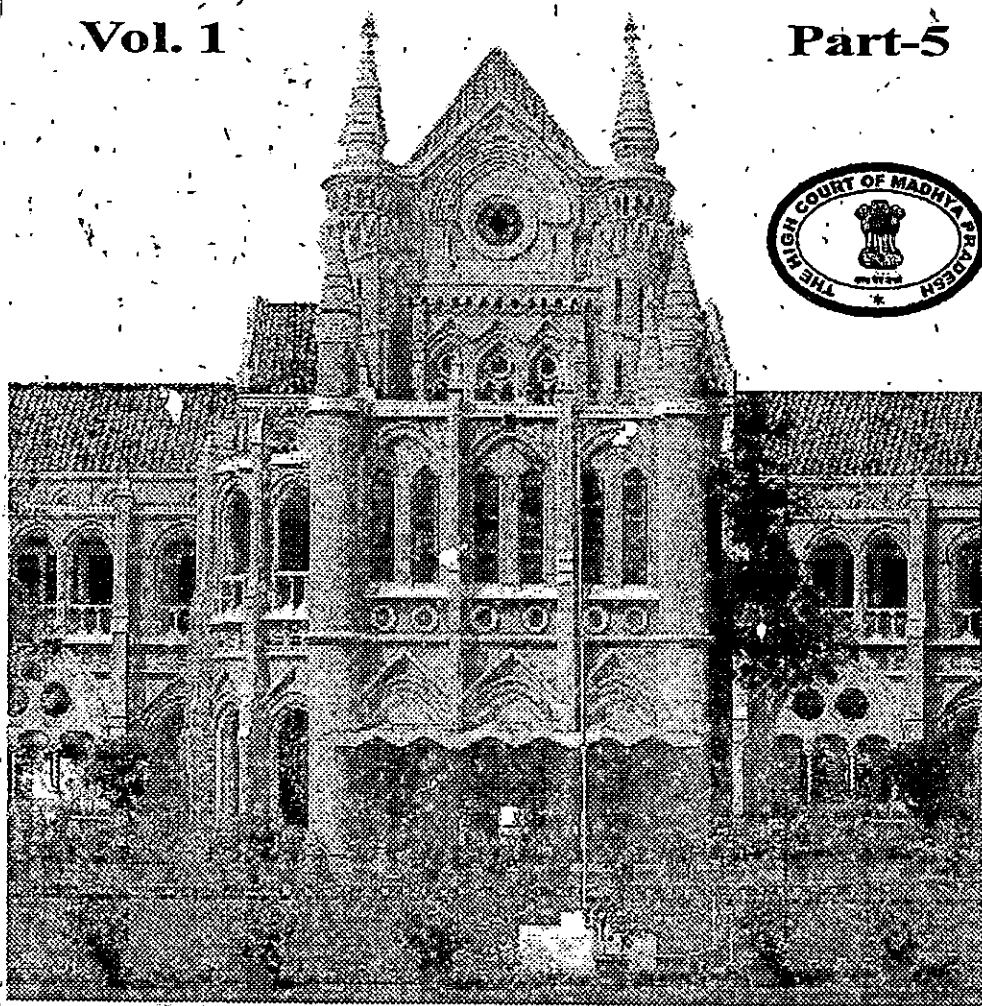
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Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(e) & (f) - Suit house required by plaintiff for his own need - Plaintiff residing with his parents but due to dispute between his wife and mother require separate house - Held - Mother examined as witness and categorically stated about the dispute - No need for examination of wife - Merely because plaintiff is residing with his parents during pendency of suit, bonafide need for separate residence will not extinguish - Appeal dismissed. [Babulal Gupta (Dr.) v. Anoop Padliya] ... 1367

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - Bona fide requirement - Absence of pleading of non-availability of alternative accommodation - Sufficient evidence on record that plaintiff does not possess any other alternative suitable accommodation - Held - Absence of pleading would not be fatal - Appeal allowed. [Sujata Sarkar (Smt.) v. Anil Kumar Duttani] 1374

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - Bona fide requirement - Plaintiff required entire building for establishing modern hospital - Requirement of son not satisfied with the part of accommodation which had fallen vacant - No accommodation available with him sufficient for the purposes of establishing hospital - Once bona fide requirement is proved by plaintiff, it is not open for Courts to decide sufficiency or insufficiency of accommodation. [Sujata Sarkar (Smt.) v. Anil Kumar Duttani] ... 1374

Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, (27 of 1996), Section 2(1)(d) - See - Building and Other Construction Workers' Welfare Cess Act, 1996, Section 2(d) [Gannon Dunkerley & Co. Ltd. v. State of M.P.] ... 1280

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Cantonment Electoral Rules, 2007, Rules 12, 13 & 28, Constitution, Article 226 - Locus standi - Petitioner did not raise any objection to any entry in preliminary electoral roll - Held - He cannot raise contention that even persons making flying visit or casually staying have been included in final electoral rolls. [Manu Bhai Tripathi v. Union of India] ...1225

Cantonment Electoral Rules, 2007, Rule 20 - See - Cantonments Act, 2006, Section 15 [Azmatullah v. Union of India] ...1311

Cantonment Electoral Rules, 2007, Rule 28(1) - Qualification of electorals - Resident and Resided - A person is resident of a particular place only if he maintains a house or portion of house - A person can physically reside in a particular place without maintaining a house or a portion of house - Section 28(1) does not use the word resident - Held - Once a person has temporarily resided in cantonment for a period of six months immediately preceding the qualifying date and is not otherwise disqualified is entitled to be enrolled as electoral - Persons making flying visit are not entitled to be included in electoral rolls. [Manu Bhai Tripathi v. Union of India] ...1225

Chartered Accountants Act (38 of 1949), Sections 2(d), 24, 24A, 26 & 28, Criminal Procedure Code, 1973, Sections 4, 5 & 190 - Applicant lodged the report against accused alleging that he without being registered Chartered Accountant, was practicing before Income Tax and Sales Tax department as a representative of assessee, preparing reports and issuing certificates as Chartered Accountant - Police took cognizance, registered crime and filed charge sheet - Magistrate framed charges - Revisional court allowed the revision and remanded the case - Revision before High Court - Held - Prima facie case against accused u/ss. 24, 24A & 26 of the Act is made out - Since specific provisions are made for breach of provisions of Act, the accused can be prosecuted under specific provisions of the Act and not under provisions of I.P.C. - U/s 2(d) of the Act, complaint does not include police report - U/s 28 of the Act, Chartered Accountant's Institute or under order of council or by Central Government can file complaint - Filing of complaint under the Act by the police not proper - Revision dismissed. [Institute of Chartered Accountants of India v. Vimal Kumar Surana] ...1477

और इस प्रकार उपकर अवधारण में कोई संदिग्धता विद्यमान नहीं है। (गन्नोन डंकरले एंड कं.लि. वि. म.प्र. राज्य) ...1280

छावनी अधिनियम (2006 का 41), धारा 15, छावनी निर्वाचन नियम, 2007, नियम 20 - छावनी बोर्ड के चुनाव की अधिसूचना - छावनी बोर्डों के अध्यक्षों की अनुशंसाओं पर केन्द्र सरकार ने विधानसभा चुनाव के आधार पर बोर्ड के चुनाव की तारीख दो बार परिवर्तित की - अभिनिर्धारित - केन्द्र सरकार के पास बोर्ड के चुनाव की तारीख परिवर्तित करने के लिए अधिसूचना जारी करते समय चुनाव की तारीख मुलतवी करने के लिए वैध और न्यायसंगत कारण थे। (अजमतउल्ला वि. यूनियन ऑफ इंडिया) ...1311

छावनी निर्वाचन नियम, 2007, नियम 12, 13 व 28, संविधान, अनुच्छेद 226 - सुने जाने का अधिकार - याची ने प्राथमिक निर्वाचक नामावली में किसी प्रविष्टि के बारे में कोई आपत्ति नहीं उठाई - अभिनिर्धारित - वह यह प्रतिविरोध नहीं कर सकता कि त्वरित मुलाकात करने वालों या आकस्मिक रूप से ठहरने वालों को अंतिम निर्वाचक नामावली में सम्मिलित किया गया है। (मनू भाई त्रिपाठी वि. यूनियन ऑफ इंडिया) ...1225

छावनी निर्वाचन नियम, 2007, नियम 20 - देखें - छावनी अधिनियम, 2006, धारा 15, (अजमतउल्ला वि. यूनियन ऑफ इंडिया) ...1311

छावनी निर्वाचन नियम, 2007, नियम 28(1) - निर्वाचकों की अर्हता - निवासी और निवास किया - कोई व्यक्ति केवल तब किसी विशिष्ट स्थान का निवासी है यदि वह कोई गृह या गृह का भाग रखता है - व्यक्ति कोई गृह या गृह का भाग रखे बिना शारीरिक रूप से किसी विशिष्ट स्थान में निवास कर सकता है - धारा 28(1) शब्द निवासी प्रयुक्त नहीं करती है - अभिनिर्धारित - जब किसी व्यक्ति ने छावनी में अर्हकारी तारीख के ठीक पूर्व की छः माह की कालावधि तक अस्थायी रूप से निवास कर लिया हो और अन्यथा अनर्ह नहीं है तो निर्वाचक के रूप में नामांकित किये जाने का हकदार है - त्वरित मुलाकात करने वाले व्यक्ति निर्वाचक नामावली में अन्तर्विष्ट किये जाने के हकदार नहीं हैं। (मनू भाई त्रिपाठी वि. यूनियन ऑफ इंडिया) ...1225

चार्टर्ड अकाउंटेंट अधिनियम (1949 का 38), धाराएँ 2(डी), 24, 24ए, 26 व 28, दण्ड प्रक्रिया संहिता, 1973, धाराएँ 4, 5 व 190 - आवेदक ने अभियुक्त के विरुद्ध रिपोर्ट दर्ज करायी कि उसने रजिस्ट्रीकृत चार्टर्ड अकाउंटेंट हुए बिना आयकर और विक्रयकर विभाग के समक्ष निर्धारित की प्रतिनिधि के रूप में कार्य किया, रिपोर्ट तैयार की और चार्टर्ड अकाउंटेंट के रूप में प्रमाण पत्र जारी किये - पुलिस ने संज्ञान लिया, अपराध पंजीबद्ध किया और आरोप पत्र पेश किया - मजिस्ट्रेट ने आरोप विरचित किये - पुनरीक्षण न्यायालय ने पुनरीक्षण मंजूर की और मामला प्रतिप्रेषित किया - उच्च न्यायालय के समक्ष पुनरीक्षण - अभिनिर्धारित - अभियुक्त के विरुद्ध अधिनियम की धारा 24, 24ए व 26 के अधीन प्रथम दृष्ट्या मांगला बनता है - चूंकि अधिनियम के उपबंधों के उल्लंघन के लिए विनिर्दिष्ट उपबंध निर्मित किये गये हैं इसलिए अभियुक्त को अधिनियम के विनिर्दिष्ट उपबंधों के अधीन अभियोजित किया जा सकता है न कि भा.द.सं. के उपबंधों के अधीन - अधिनियम की धारा 2(डी) के अधीन परिवाद में पुलिस रिपोर्ट सम्मिलित नहीं है - अधिनियम की धारा 28 के अधीन चार्टर्ड अकाउंटेंट संस्थान या परिषद के आदेश के अधीन या केन्द्र सरकार द्वारा परिवाद पेश किया जा सकता है - पुलिस द्वारा अधिनियम के अधीन परिवाद पेश करना उचित नहीं - पुनरीक्षण खारिज। (इंस्टीट्यूट ऑफ चार्टर्ड एकाउंटेंट्स ऑफ इंडिया वि. विमल कुमार सुराना) ...1477

Civil Procedure Code (5 of 1908), Section 9 - Challenge as to validity of sale deed - In life time of owner of property, his probable heirs do not have any right or title in his property - Owner sold his property and never challenged such transaction in his life time - Appellant had no authority to challenge the same. [Bipta Bai (Smt.) v. Smt. Shipra Bai] ...1402

Civil Procedure Code (5 of 1908), Section 11 - Res judicata - First order of transfer from Municipal Council to DUDA quashed by High Court - In subsequent writ petition challenging the order of transfer from Municipal Council to DUDA it was directed that Transfer Grievances Cell shall reconsider the case of petitioner - Held - Petitioner ought to have insisted for quashment of the subsequent transfer order - Instead petitioner subjected himself to the decision of State Government - Petitioner deemed to have waived the plea of res judicata. [S.B. Singh v. State of M.P.] ...1266

Civil Procedure Code (5 of 1908), Section 100 - Substantial question of law - "Whether the lower appellate court erred in law in reversing the judgment & decree passed by the Trial Court" - Held - Framed question of law could not be treated to be substantial question of law u/s 100. [Bipta Bai (Smt.) v. Smt. Shipra Bai] ...1402

Civil Procedure Code (5 of 1908), Order 14 Rule 1 - See - Wakf Act, 1995, Sections 6-A (As amended by M.P. Amendment) & 54 [Asif Ansari v. Waqf Mahal Umrao Jehan] ...1319

Civil Procedure Code (5 of 1908), Order 21 Rule 29, Transfer of property Act, 1882, Section 52 - Stay of execution pending suit between decree holder and judgment debtor - Applicability of the rule to transferee lis pendente lite - Held - Rule 29 of Order 21 CPC deals with cases wherein a suit has been instituted by the judgment debtor against the decree holder and has no relevance to cases of lis pendens wherein transfer of property has been effected by the judgment debtor to a third party during the pendency of the proceedings. [Dilip Kumar v. Vijay Bahadur Singh] ...1408

Civil Procedure Code (5 of 1908), Order 21 Rules 98, 100, 101 & 102, Transfer of property Act, 1882, Section 52 - Rules not applicable to transferee pendente lite - Whether purchaser pendente lite has a right to cause obstruction in a decree - Held - A purchaser pendente lite has no right to offer resistance or cause obstruction and as his rights have not been crystallized in a decree, Rule 102 of Order 21 of the Code comes into operation and hence, he cannot resist execution during the pendency of the proceedings. [Dilip Kumar v. Vijay Bahadur Singh] ...1408

Civil Procedure Code (5 of 1908), Order 26 Rule 1 - Order allowing or disallowing an application u/O 26 R 1 CPC is a discretionary order, but if a judge proceeds on a wrong principle in a matter within its jurisdiction, his

सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 — विक्रयपत्र की वैधता को चुनौती — सम्पत्ति के स्वामी के जीवनकाल में उसके संभाव्य वारिसों को उसकी सम्पत्ति में कोई अधिकार या स्वत्व नहीं होता — स्वामी ने सम्पत्ति विक्रय कर दी और उसके जीवनकाल में ऐसे संव्यवहार को कभी भी चुनौती नहीं दी — अपीलार्थी को उसे चुनौती देने का कोई प्राधिकार नहीं था। (बिपता बाई (श्रीमति) वि. शिप्रा बाई)

...1402

सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 — पूर्व न्याय — नगर पालिका परिषद से डीयूडीए में स्थानांतरण का प्रथम आदेश उच्च न्यायालय द्वारा अभिखण्डित — नगर पालिका परिषद से डीयूडीए में स्थानांतरण के आदेश को चुनौती देने वाली पश्चात्पूर्ती रिट याचिका में यह निदेशित किया गया कि स्थानांतरण शिकायत प्रकोष्ठ याची के मामले पर पुनर्विचार करे — अभिनिर्धारित — याची को पश्चात्पूर्ती स्थानांतरण आदेश को अभिखण्डित करने के लिए आग्रह करना चाहिए था — इसके स्थान पर याची ने स्वयं को राज्य सरकार के निर्णय के अधीन रखा — याची द्वारा पूर्व न्याय के अभिवचन को अधित्यक्त कर दिया समझा गया। (एस.बी. सिंह वि. म.प्र. राज्य)

...1266

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 — विधि का सारवान प्रश्न — "क्या निम्न अपीलीय न्यायालय ने विचारण न्यायालय द्वारा पारित निर्णय व डिक्री को उलटने में विधि की त्रुटि की" — विरचित विधि का प्रश्न धारा 100 के अन्तर्गत विधि का सारवान प्रश्न होना नहीं माना जा सकता। (बिपता बाई (श्रीमति) वि. शिप्रा बाई)

...1402

सिविल प्रक्रिया संहिता, (1908 का 5), आदेश 14 नियम 1 — देखें — वक्फ अधिनियम, 1995, धाराएँ 6-ए (म.प्र. संशोधन द्वारा यथा संशोधित) व 54, (असिफ अंसारी वि. वक्फ महल उमराव जेहान)

...1319

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 29, सम्पत्ति अन्तरण अधिनियम, 1882, धारा 52 — डिक्रीदार और निर्णीत ऋणी के मध्य वाद के लम्बित रहते निष्पादन पर रोक — वादकालीन अंतरिती को नियम की प्रयोज्यता — अभिनिर्धारित — सि. प्र.सं. के आदेश 21 का नियम 29 उन मामलों के लिए है जिनमें निर्णीत ऋणी द्वारा डिक्रीदार के विरुद्ध कोई वाद संस्थित किया गया है और विचाराधीन वाद के उन मामलों से कोई सम्बद्धता नहीं रखता जिनमें निर्णीत ऋणी द्वारा कार्यवाहियों के लम्बित रहने के दौरान तृतीय पक्ष को सम्पत्ति का अंतरण किया गया है। (दिलीप कुमार वि. विजय बहादुर सिंह)

...1408

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 98, 100, 101 व 102, सम्पत्ति अन्तरण अधिनियम, 1882, धारा 52 — वादकालीन अंतरिती को लागू न होने वाले नियम — क्या वादकालीन क्रेता को डिक्री में बाधा उत्पन्न करने का अधिकार है — अभिनिर्धारित — वादकालीन क्रेता को प्रतिरोध करने या बाधा कारित करने का कोई अधिकार नहीं है और चूंकि उसके अधिकार किसी डिक्री में स्फटित नहीं किये गये हैं इसलिए संहिता के आदेश 21 का नियम 102 प्रवृत्त होता है और इसलिए वह कार्यवाहियों के लम्बित रहने के दौरान निष्पादन का प्रतिरोध नहीं कर सकता। (दिलीप कुमार वि. विजय बहादुर सिंह)

...1408

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 1 — सि.प्र.सं. के आदेश 26 नियम 1 के अन्तर्गत किसी आवेदन को स्वीकार या अस्वीकार करने का आदेश एक विवेकाधीन आदेश है, किन्तु यदि एक न्यायाधीश उसकी अधिकारिता के किसी मामले में गलत सिद्धांत पर कार्यवाही

order may be set-aside by an appellate Court. [Annapurna Dubey (Smt.) v. Champalal @ Chaua] ...*28

Civil Procedure Code (5 of 1908), Order 26 Rule 1 - Plaintiff 80 years old lady patient of heart and arthritis diseases - Application for examination on commission filed supported by affidavit and certificate of Doctor that she is a patient of arthritis and is unable to walk - No reply to the application and counter affidavit has been filed by defendant - Trial Court rejected the application only on the ground that it cannot be inferred that plaintiff is seriously ill - Held - Court may permit any party to examine on commission if he or she is sick or infirm and is unable to attend the Court - Explanation to Rule 1 of Order 26 empowers a Court to accept a certificate purporting to be signed by Registered Medical Practitioner as a evidence of the sickness or infirmity without calling the medical practitioner as a witness - Trial Court adopted a wrong approach of law and in arbitrary manner dismissed the application - High Court set-aside the order and remanded the matter to trial Court. [Annapurna Dubey (Smt.) v. Champalal @ Chaua]...*28

Constitution, Articles 14, 16 & 309 - Contingency Paid Employees - Time Bound Promotion - Contingency paid and work charged employees are considered to be forming a common class - The benefit of time bound promotion which is extended to work charged employees is also to be extended to contingency paid employee - Petition allowed. [Tejulaal Yadav v. State of M.P.] ...1326

Constitution, Articles 14 & 21 - See - Labour Laws (Amendment) and Miscellaneous Provisions Act, M.P. 2002 [Labour Bar Association, Satna v. State of M.P.] ...1207

Constitution, Article 226 - Disputed questions of fact - Mere existence of disputed questions of fact ipso facto does not prevent a writ court from determining disputed question of fact. [Somnath (Dr.) v. State of M.P.]...1306

Constitution, Article 226 - See - Cantonment Electoral Rules, 2007, Rules 12, 13 & 28 [Manu Bhai Tripathi v. Union of India] ...1225

Constitution, Article 311 - Departmental Enquiry and Discrimination - Allegations against the petitioner are not similar to the other two employees - No case of discrimination made out. [Shambhunath Mishra v. State of M.P.] ...1335

Constitution, Article 311 - Departmental Enquiry and Judicial Review - Merely because certain persons were punished by imposing minor penalty and others have been punished with major penalty then that would not be a ground for judicial review. [Shambhunath Mishra v. State of M.P.]...1335

Contempt of Courts Act (70 of 1971), Section 15(3) - Criminal Contempt - Contemnor, S.H.O. Police Station came in Court and dragged away three persons who were waiting for the delivery of judgment in their

करता है तो अपीलीय न्यायालय द्वारा उसका आदेश अपास्त किया जा सकता है। (अन्नपूर्णा दुबे (श्रीमति) वि. चम्पालाल उर्फ छौआ) ---*28

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 1 - वादी, 80 वर्ष की महिला हृदय और गठिया रोग की रोगी - कमीशन पर परीक्षा के लिए शपथपत्र और चिकित्सक के प्रमाणपत्र से समर्थित आवेदन पेश किया गया कि वह गठिया की रोगी है और चलने-फिरने में असमर्थ है - प्रतिवादी द्वारा आवेदन का कोई जवाब और प्रति-शपथपत्र पेश नहीं किया गया - विचारण न्यायालय ने केवल इस आधार पर आवेदन खारिज किया कि यह निष्कर्ष नहीं निकाला जा सकता कि वादी गम्भीर रूप से बीमार है - अभिनिर्धारित - न्यायालय किसी पक्षकार को कमीशन पर परीक्षा करने के लिए अनुज्ञात कर सकता है यदि वह बीमार या अशक्त है और न्यायालय में उपस्थित होने में असमर्थ है - आदेश 26 के नियम 1 का स्पष्टीकरण न्यायालय को रजिस्ट्रीत चिकित्सा व्यवसायी द्वारा हस्ताक्षरित होना तात्पर्यित किसी प्रमाणपत्र को चिकित्सा व्यवसायी को साक्षी के रूप में बुलाये बिना बीमारी या अशक्तता के साक्ष्य के रूप में ग्रहण करने के लिए सशक्त करता है - विचारण न्यायालय ने विधि का गलत दृष्टिकोण अपनाया और मनमाने ढंग से आवेदन खारिज किया - उच्च न्यायालय ने आदेश अपास्त किया और मामला विचारण न्यायालय को प्रतिप्रेषित किया। (अन्नपूर्णा दुबे (श्रीमति) वि. चम्पालाल उर्फ छौआ) ---*28

संविधान, अनुच्छेद 14, 16 व 309 - आकस्मिकता निधि से वेतन पाने वाले कर्मचारी - समयबद्ध पदोन्नति - आकस्मिकता निधि से वेतन पाने वाले और कार्यभारित कर्मचारियों को समान वर्ग निर्मित करने के लिए विचार में लिया गया - समयबद्ध पदोन्नति का लाभ, जो कार्यभारित कर्मचारियों तक विस्तारित है, आकस्मिकता निधि से वेतन पाने वाले कर्मचारी तक भी विस्तारित किया गया है - याचिका मंजूर। (तेजलाल यादव वि. म.प्र. राज्य) 1326

संविधान, अनुच्छेद 14 व 21 - देखें - श्रमिक विधियाँ (संशोधन) और विविध उपबंध अधिनियम, म.प्र. 2002 (लेबर बार एसोशियेशन, सतना वि. म.प्र. राज्य) 1207

संविधान, अनुच्छेद 226 - तथ्य के विवादित प्रश्न - केवल तथ्य के विवादित प्रश्नों का अस्तित्व स्वयमेव ही रिट न्यायालय को तथ्य के विवादित प्रश्न का अवधारण करने से निवारित नहीं करता। (सोमनाथ (डॉ.) वि. म.प्र. राज्य) 1306

संविधान, अनुच्छेद 226 - देखें - छावनी निर्वाचन नियम, 2007, नियम 12, 13 व 28 (मनू भाई त्रिपाठी वि. यूनियन ऑफ इंडिया) 1225

संविधान, अनुच्छेद 311 - विभागीय जाँच एवं विभेद - याची के विरुद्ध आरोप अन्य दो कर्मचारियों के समान नहीं हैं - विभेद का कोई मामला नहीं। (शम्भूनाथ मिश्रा वि. म.प्र. राज्य) 1335

संविधान, अनुच्छेद 311 - विभागीय जाँच एवं न्यायिक पुनर्विलोकन - केवल इसलिए कि कुछ व्यक्तियों को लघु शास्ति अधिरोपित करते हुए दण्डित किया गया और अन्य व्यक्तियों को गुरुतर शास्ति से दण्डित किया गया तब न्यायिक पुनर्विलोकन के लिए यह कोई आधार नहीं होगा। (शम्भूनाथ मिश्रा वि. म.प्र. राज्य) 1335

न्यायालय अवमान अधिनियम (1971 का 70), धारा 15(3) - दाण्डिक अवमानना - अवमाननाकर्ता थाना प्रभारी न्यायालय में आया और तीन व्यक्तियों, जो अपने दाण्डिक मामले में निर्णय घोषित किये जाने की प्रतीक्षा कर रहे थे, को घसीटकर बाहर ले गया, उन्हें अभिरक्षा में रखा

criminal case, took them in custody and thereafter registered a false case against them - Matter referred by lower Court to High Court - Held - Contemnor has unable to satisfy why without permission of the Court he dragged away three persons from the Court - He did not care for the personal liberty of these persons, violated the human right and registered a false case against them - He committed contempt of lawful authority of the Court and had also created false reports and false documents to cover up his illegalities - High Court found him guilty. [In Reference v. Kailash Nahta] ...1342

Contempt of Courts Act (70 of 1971), Section 15(3) - Criminal Contempt - Sentence - Contemnor tendering unconditional apology and seeking mercy - Held - Present is not a case where after committing the wrong, the wrong doer had come to the Court seeking mercy of the Court but present is a case where after committing misconduct and misdeed, the contemnor to cover his misconduct, has created false documents, registered a false case and took the innocent persons in the custody - Act is not pardonable - 3 months sentence awarded. [In Reference v. Kailash Nahta] 1342

Criminal Procedure Code, 1973 (2 of 1974), Sections 4, 5 & 190 - See - Chartered Accountants Act, 1949, Sections 2(d), 24, 24A, 26 & 28 [Institute of Chartered Accountants of India v. Vimal Kumar Surana] ...1477

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - See - Protection of Women from Domestic Violence Act, 2005, Sections 12 & 28 [Madhusudan Bhardwaj v. Mamta Bhardwaj] ...1506

Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3) & 190 - Private complaint and application u/s 156(3) filed against applicant - Magistrate directed police to investigate and register FIR - Revision - Held - Section 156(3) mandates that any Magistrate being empowered u/s 190 may order investigation - After receiving the report of investigation, two options are available to Magistrate either to register offence or not - Merely issuing process u/s 156(3) would not amount to take cognizance u/s 190 - Seeking quashment or setting-aside impugned order would be challenging an interlocutory order - Revision not maintainable - Revision dismissed. [Ayyub Ahmad v. State of M.P.] ...1484

Criminal Procedure Code, 1973 (2 of 1974), Section 164 - Confessional statement - Confessional statement against co-accused can be used as corroborative evidence - It can be made even during trial and evidence already recorded may be used to corroborate it. [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

Criminal Procedure Code, 1973 (2 of 1974), Section 164 - Confessional statement - Taking statement of accused on oath prohibited. [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

और उसके बाद उनके विरुद्ध मिथ्या मामला पंजीबद्ध किया — निम्न न्यायालय द्वारा मामला उच्च न्यायालय को सुपुर्द किया गया — अभिनिर्धारित — अवमाननाकर्ता यह समाधान करने में असमर्थ रहा कि क्यों न्यायालय की अनुमति के बिना वह न्यायालय से तीन व्यक्तियों को घसीटकर बाहर ले गया — उसने इन तीन व्यक्तियों की व्यक्तिगत स्वतंत्रता की परवाह नहीं की, मानवाधिकार का हनन किया और उनके विरुद्ध मिथ्या मामला पंजीबद्ध किया — उसने न्यायालय के विधिपूर्ण प्राधिकार की अवमानना की और अपनी अवैधानिकताओं को छिपाने के लिए मिथ्या रिपोर्टों और मिथ्या दस्तावेजों की रचना की — उच्च न्यायालय ने उसे दोषी पाया। (इन रेफरेन्स वि. कैलाश नाहटा) ...1342

न्यायालय अवमान अधिनियम (1971 का 70), धारा 15(3) — दाण्डिक अवमानना — दण्डादेश — अवमाननाकर्ता ने शर्तारहित क्षमायाचना निविदत्त की और दया की माँग की — अभिनिर्धारित — वर्तमान मामला ऐसा नहीं है जहाँ गलती करने के बाद दोषकर्ता न्यायालय की दया की माँग करते हुए न्यायालय के पास आया हो बल्कि वर्तमान मामला ऐसा मामला है जहाँ अवचार और अपकर्म करने के बाद अवमाननाकर्ता ने अपने अवचार को छिपाने के लिए मिथ्या दस्तावेजों की रचना की, मिथ्या मामला पंजीबद्ध किया और निर्दोष व्यक्तियों को अभिरक्षा में लिया — कृत्य क्षमनीय नहीं — 3 माह का कारावास अधिनिर्णीत किया। (इन रेफरेन्स वि. कैलाश नाहटा) ...1342

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 4, 5 व 190 — देखें — चार्टर्ड अकाउंटेंट अधिनियम, 1949, धाराएँ 2(डी), 24, 24ए, 26 व 28, (इंस्टीट्यूट ऑफ चार्टर्ड एकाउंटेंट्स ऑफ इंडिया वि. विमल कुमार सुराना) ...1477

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 — देखें — घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 12 व 28 (मधुसूदन भारद्वाज वि. ममता भारद्वाज) ...1506

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3) व 190 — आवेदक के विरुद्ध प्राइवेट परिवार और आवेदन अन्तर्गत धारा 156(3) प्रेश — मजिस्ट्रेट ने पुलिस को अन्वेषण करने और एफ.आई.आर. पंजीबद्ध करने के निदेश दिये — पुनरीक्षण — अभिनिर्धारित — धारा 156(3) यह आदेश देती है कि कोई मजिस्ट्रेट धारा 190 के अधीन सशक्त किये जाने से अन्वेषण का आदेश दे सकता है — अन्वेषण की रिपोर्ट प्राप्त करने के बाद मजिस्ट्रेट के पास दो विकल्प हैं या तो अपराध पंजीबद्ध करे या न करे — केवल धारा 156(3) के अधीन आदेशिका जारी करना धारा 190 के अधीन संज्ञान लेने की कोटि में नहीं आयेगा — आक्षेपित आदेश के अभिखण्डन या अपास्त करने की माँग करना एक अन्तर्वर्ती आदेश को चुनौती देना होगा — पुनरीक्षण पोषणीय नहीं — पुनरीक्षण खारिज। (अयूब अहमद वि. म.प्र. राज्य) ...1484

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 — संस्वीकृति कथन — सह-अभियुक्त के विरुद्ध संस्वीकृति कथन संपोषक साक्ष्य के रूप में प्रयुक्त किया जा सकता है — यह विचारण के दौरान भी किया जा सकता है और पूर्व में अभिलिखित साक्ष्य इसकी सम्पुष्टि करने के लिए प्रयुक्त की जा सकती हैं। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 — संस्वीकृति कथन — शपथ पर अभियुक्त का कथन लेना निषिद्ध है। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

Criminal Procedure Code, 1973 (2 of 1974), Section 164 - Recording of statement of accused - Non-consideration of the same merely on the ground that some police personnels were standing outside the Court - Approach of Court not correct - Court ought to independently examine the kind of threat or pressure on the accused/witness - Even if endorsement of certificate by Magistrate below statement is not in proper form, it does not necessarily mean that any threat was given to witness. [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

Criminal Procedure Code, 1973 (2 of 1974), Section 164 - Warning - It is necessary to warn accused that it was not necessary for him to make statement and it could be used against him - If warning is not given, such confession cannot be acted upon. [Madhu Sonkar (Smt.) v. State of M.P.]... 1445

Criminal Procedure Code, 1973 (2 of 1974), Section 164(3) - Failure to comply with Section 164(3) will not make the confession inadmissible in evidence. [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

Criminal Procedure Code, 1973 (2 of 1974), Section 195 - Allegation that accused without being registered Chartered Accountant appeared before Income Tax, Sales Tax Authority, submitted documents as Chartered Accountant and cheated authorities - Held - Income Tax or Sales Tax department has not filed complaint - Cognizance of offence can be taken only on the complaint filed by the Income Tax / Sales Tax Authorities who are falling within category of "Court" as per provision u/s 195 - Revision dismissed. [Institute of Chartered Accountants of India v. Vimal Kumar Surana] ...1477

Criminal Procedure Code, 1973 (2 of 1974), Sections 204 & 397 - Complaint u/ss 420 & 468 IPC filed against accused - Magistrate after satisfaction directed registration of offence u/s 420 IPC - Revisional Court allowed the revision and acquitted the accused - Revision before High Court - Held - Magistrate having taken cognizance, it was not within the jurisdiction of revisional Court to have assessed the probative value of the material before the trial Court - The mens-rea was there or not has to be decided by the trial Court and not the revisional Court - Impugned order set-aside - Revision allowed. [Ajay Kumar v. Vijay Kumar] ...1493

Criminal Procedure Code, 1973 (2 of 1974), Section 319 - Proceeding under M.P. Excise Act for illegal transportation of liquor initiated against non-applicants - Application for impleading applicant alleging that he was in charge and posted at the distillery and has issued permit - Application allowed - Order challenged - Held - Order of impleading applicant as accused is passed after 9 years of offence - Trial court allowed the application on the ground of role of applicant appears to be doubtful - Not enough for impleading a person as accused who is none else but the witness of the prosecution - Order set-aside. [Abdul Rauf v. State of M.P.]...1534

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 — अभियुक्त का कथन अभिलिखित करना — उसे केवल इस आधार पर विचार में न लेना कि कुछ पुलिस कर्मचारी न्यायालय के बाहर खड़े हुए थे — न्यायालय का दृष्टिकोण उचित नहीं — न्यायालय को स्वतंत्र रूप से अभियुक्त/साक्षी पर भय या दबाव के प्रकार की जाँच करनी चाहिए — यद्यपि मजिस्ट्रेट द्वारा कथन के नीचे किया गया प्रमाण पत्र का पृष्ठांकन उचित प्ररूप में नहीं है, तथापि इसका अनिवार्य रूप से यह अर्थ नहीं होता कि साक्षी को कोई धमकी दी गयी थी। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 — चेतावनी — अभियुक्त को यह चेतावनी देना आवश्यक है कि उसके लिए यह आवश्यक नहीं है कि कथन करे और यह उसके विरुद्ध प्रयुक्त नहीं किया जा सकता — यदि चेतावनी नहीं दी गई है, तो ऐसी संस्वीति पर कोई कार्यवाही नहीं की जा सकती। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164(3) — धारा 164(3) का अनुपालन करने में विफलता संस्वीकृति को साक्ष्य में अग्रह नहीं बनायेगी। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195 — अभिकथन कि अभियुक्त ने रजिस्ट्रीकृत चार्टर्ड अकाउंटेंट हुए बिना आयकर, विक्रयकर प्राधिकारी के समक्ष उपस्थित हुआ, चार्टर्ड अकाउंटेंट के रूप में दस्तावेज पेश किये और प्राधिकारियों के साथ छल किया — अभिनिर्धारित — आयकर या विक्रयकर विभाग ने परिवाद पेश नहीं किया — अपराध का संज्ञान केवल आयकर/विक्रयकर प्राधिकारियों द्वारा पेश परिवाद पर लिया जा सकता है जो धारा 195 के उपबंधानुसार "न्यायालय" की श्रेणी में आते हैं — पुनरीक्षण खारिज। (इंस्टीट्यूट ऑफ चार्टर्ड एकाउंटेंट्स ऑफ इंडिया वि. विमल कुमार सुराना) ...1477

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 204 व 397 — अभियुक्त के विरुद्ध भा.द.सं. की धारा 420 व 468 के अन्तर्गत परिवाद पेश किया गया — मजिस्ट्रेट ने समाधान हो जाने के बाद भा.द.सं. की धारा 420 के अन्तर्गत अपराध पंजीबद्ध करने का निदेश दिया — पुनरीक्षण न्यायालय ने पुनरीक्षण मंजूर की और अभियुक्त को दोषमुक्त किया — उच्च न्यायालय के समक्ष पुनरीक्षण — अभिनिर्धारित — मजिस्ट्रेट के संज्ञान लेने के बाद विचारण न्यायालय के समक्ष की सामग्री के प्रमाणक महत्व का मूल्यांकन करने के लिए यह पुनरीक्षण न्यायालय की अधिकारिता में नहीं था — आपराधिक मनःस्थिति थी या नहीं इसका विनिश्चय विचारण न्यायालय द्वारा किया जाना चाहिए न कि पुनरीक्षण न्यायालय द्वारा — आक्षेपित आदेश अपास्त — पुनरीक्षण मंजूर। (अजय कुमार वि. विजय कुमार) ...1493

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 — अनावेदकों के विरुद्ध शराब के अवैध परिवहन के लिए म.प्र. आबकारी अधिनियम के अन्तर्गत कार्यवाही प्रारम्भ की गई — आवेदक को पक्षकार बनाने के लिए आवेदन यह अभिकथन करते हुए पेश किया गया कि वह प्रभारी था और डिस्टलरी में पदस्थ था एवं परमिट जारी किया — आवेदन मंजूर — आदेश को चुनौती — अभिनिर्धारित — आवेदक को अभियुक्त के रूप में पक्षकार बनाने का आदेश अपराध के 9 वर्ष बाद पारित किया गया — विचारण न्यायालय ने आवेदन इस आधार पर मंजूर किया कि आवेदक का आचरण शंकास्पद प्रतीत होता है — किसी व्यक्ति को अभियुक्त के रूप में पक्षकार बनाने के लिए पर्याप्त नहीं जो और कोई नहीं बल्कि अभियोजन साक्षी है — आदेश अपास्त। (अब्दुल रउफ वि. म.प्र. राज्य) ...1534

Criminal Procedure Code, 1973 (2 of 1974), Sections 362 & 482, Penal Code, 1860, Sections 68 & 69 - *Inherent powers of High Court - Can the Court after pronouncing the final judgment alter, reopen or modify it in exercise of inherent powers for extending the time for deposit of the fine amount - Held - Stipulated period to deposit the amount of fine in a final order can not be extended with the aid of Section 482 of Cr.P.C. - Appropriate remedy is to avail the provision of Section 68 of I.P.C. [Prahlaad Singh v. State of M.P.]* ...1537

Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 - *Criminal Revision - Criminal revision filed by co-accused dismissed by Court without considering facts and by making general observation - Held - Said order has no binding effect. [Gyanendra Tripathi v. State of M.P.]* ...1515

Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 - *Scope of Revision - Interference - Where material evidence has been overlooked by trial Court, interference can be made in exceptional cases - However, where findings lead to acquittal do not suffer from infirmity and another view on the prosecution was possible, an evidence will not be sufficient ground to warrant interference. [Madhu Sonkar (Smt.) v. State of M.P.]* ...1445

Criminal Procedure Code, 1973 (2 of 1974), Sections 427 & 428 - *Applicant was undergoing sentence for another offence and was convicted for offence u/s 5/14 of M.P. Security Act - In appeal against conviction under M.P. Security Act he claimed set off period under detention during investigation and trial - Rejection - Revision - Held - The words "same case" in Section 428 do not suggest that set off would be available only if the period undergone as an undertrial prisoner in connection with the same case in which he was later convicted and sentenced to a term imprisonment - Period of set off is available irrespective of whether the period of imprisonment was undergone by accused in connection with that case or any other case - Applicant entitled to set off - Revision allowed. [Basu @ Basantsingh v. State of M.P.]* ...1489

Criminal Procedure Code, 1973 (2 of 1974), Sections 427(2) - *Sentence on offender already sentence for another offence - A person already undergoing a sentence of imprisonment for life - Subsequently, sentenced to imprisonment for a term or imprisonment for life - There is no requirement for any direction of the Court as subsequent sentence will automatically run concurrently with previous sentence. [Sanjeev Meena v. State of M.P.]*...1531

Criminal Procedure Code, 1973 (2 of 1974), Section 463 - *Apply to Courts of appeal, reference and revision. [Madhu Sonkar (Smt.) v. State of M.P.]* ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 362 व 482, दण्ड संहिता, 1860, धाराएँ 68 व 69 — उच्च न्यायालय की अन्तर्निहित शक्तियाँ — क्या न्यायालय अंतिम निर्णय सुनाये जाने के बाद जुर्माना राशि जमा करने के लिए समय बढ़ाने के लिए अन्तर्निहित शक्तियों के प्रयोग में उसे परिवर्तित, पुनर्विचारित या उपांतरित कर सकता है — अभिनिर्धारित — अंतिम आदेश में जुर्माने की राशि जमा करने के लिए नियत अवधि द.प्र.सं. की धारा 482 की सहायता से नहीं बढ़ायी जा सकती — समुचित उपचार भा.द.सं. की धारा 68 के उपबंध का उपयोग करना है। (प्रहलाद सिंह वि. म.प्र. राज्य) ...1537

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 — दाण्डिक पुनरीक्षण — सह-अभियुक्त द्वारा पेश दाण्डिक पुनरीक्षण न्यायालय द्वारा तथ्यों को विचार में लिये बिना और साधारण प्रेक्षण करते हुए खारिज की गई — अभिनिर्धारित — कथित आदेश कोई बंधनकारी प्रभाव नहीं रखता है। (ज्ञानेन्द्र त्रिपाठी वि. म.प्र. राज्य) ...1515

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 — पुनरीक्षण का विषयक्षेत्र — हस्तक्षेप — जहाँ विचारण न्यायालय द्वारा तात्त्विक साक्ष्य को अनदेखा कर दिया गया है, वहाँ आपवादिक मामलों में हस्तक्षेप किया जा सकता है — तथापि जहाँ दोषमुक्ति के निष्कर्ष दुर्बलता से ग्रस्त नहीं हैं और अभियोजन पर दूसरा दृष्टिकोण संभव है, वहाँ साक्ष्य हस्तक्षेप करने के लिए पर्याप्त आधार नहीं होगी। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 427 व 428 — आवेदक भिन्न अपराध के लिए दण्डादेश भुगत रहा था और म.प्र. सुरक्षा अधिनियम की धारा 5/14 के अधीन अपराध के लिए दोषसिद्ध किया गया — म.प्र. सुरक्षा अधिनियम के अधीन दोषसिद्धि के विरुद्ध अपील में उसने अन्वेषण और विचारण के दौरान निरोध की कालावधि मुजरा करने का दावा किया — नामजूर — पुनरीक्षण — अभिनिर्धारित — धारा 428 में शब्द "वही मामला" यह सुझाव नहीं देता है कि मुजरा केवल तभी उपलब्ध होगा यदि उसी मामले के सम्बन्ध में विचाराधीन कैदी के रूप में भुगती गयी कालावधि जिसमें वह बाद में किसी अवधि के कारावास के लिए दोषसिद्ध और दण्डादिष्ट किया गया था — मुजरा की कालावधि उपलब्ध है इस पर विचार किये बिना कि क्या कारावास की अवधि अभियुक्त द्वारा उस मामले के सम्बन्ध में भुगती गयी या अन्य किसी मामले के सम्बन्ध में — आवेदक मुजरा का हकदार — पुनरीक्षण मंजूर। (बासू उर्फ बसंत सिंह वि. म.प्र. राज्य) ...1489

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 427(2) — किसी अन्य अपराध के लिए पूर्व में दण्डादिष्ट अपराधी को दण्डादेश — कोई व्यक्ति पूर्व से आजीवन कारावास का दण्डादेश भुगत रहा हो — उसे बाद में किसी अवधि के कारावास या आजीवन कारावास के दण्डादेश से दण्डित किया गया — तब न्यायालय के किसी निर्देश की आवश्यकता नहीं है क्योंकि पश्चात्वर्ती दण्डादेश स्वतः पूर्ववर्ती दण्डादेश के साथ-साथ चलेगा। (संजीव मीना वि. म.प्र. राज्य) ...1531

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 463 — अपील, निर्देश और पुनरीक्षण न्यायालयों को लागू होती हैं। (मधू सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

Criminal Procedure Code, 1973 (2 of 1974), Section 463 - Non-compliance fatal. [Madhu Sonkar (Smt.) v. State of M.P.] ...1445

Essential Commodities Act (10 of 1955), Section 6-A - Confiscation of essential commodity - Held - U/s 6-A of the Act, before passing any order of confiscation, Collector has to give an option to the owner of the vehicle to pay, in lieu of its confiscation, a fine not exceeding the market price of the essential commodity sought to be carried by said vehicle and not to the price of the vehicle concerned. [Rajmohan Kapoor v. State of M.P.] ...1497

Essential Commodities Act (10 of 1955), Section 6-B - Issue of show-cause notice before confiscation of essential commodity - Held - U/s 6-B of the Act, no order for confiscation of vehicle etc. can be passed by the Collector, if the owner of the vehicle etc. proves to the satisfaction of the Collector that vehicle etc. was used in carrying the essential commodity without his knowledge or connivance by his agent. [Rajmohan Kapoor v. State of M.P.] ...1497

Evidence Act (1 of 1872), Section 32 - Dying declaration - Absence of certificate of Doctor - Naib Tahsildar admitted that declarant was fully conscious and fit to give statement - Doctor also certified at the foot of declaration that declarant remained fully conscious during his statement - It cannot be said that dying declaration cannot be accepted. [Dayaram v. State of M.P.] ...1422

Evidence Act (1 of 1872), Section 32 - Dying declaration - Absence of signature or thumb impression of deceased - Deceased suffering lacerated wounds with multiple fractures in his both hands - Naib Tahsildar who recorded dying declaration could not obtain signature or thumb impression due to fractures - Held - No animus or ill-will of Naib Tahsildar towards the appellants - Dying declaration could not be discarded. [Dayaram v. State of M.P.] ...1422

Evidence Act (1 of 1872), Section 32 - Dying declaration - More than one dying declaration - If some inconsistencies are noticed between one dying declaration and the other, the Court has to examine the nature of inconsistencies, namely whether they are material or not. [Bharat Singh v. State of M.P.] ...1427

Evidence Act (1 of 1872), Section 32 - Dying declaration - On the basis of a reliable dying declaration, conviction can be based. [Basantlal v. State of M.P.] ...1431

Evidence Act (1 of 1872), Section 32 - See - Penal Code, 1860, Section 302 [Dayaram v. State of M.P.] ...1422

Evidence Act (1 of 1872), Section 114 - Presumption - Suit filed for bonafide requirement of son - Son examined as witness - Plaintiff could not

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 463 - अनुपालन घातक है। (मधु सोनकर (श्रीमति) वि. म.प्र. राज्य) ...1445

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 6-ए - आवश्यक वस्तु का अधिहरण - अभिनिर्धारित - धारा 6-ए के अधीन, अधिहरण का कोई आदेश पारित करने के पूर्व कलेक्टर को वाहन के स्वामी को उसके अधिहरण के बदले में आवश्यक वस्तु, जिसका उक्त वाहन द्वारा वहन किया गया, के बाजार मूल्य से और न कि संबंधित वाहन के मूल्य से अनधिक जुर्माना अदा करने का विकल्प देना चाहिए। (राजमोहन कपूर वि. म.प्र. राज्य) ...1497

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 6-बी - आवश्यक वस्तु के राज्यसात्करण के पूर्व कारण बताओ सूचना पत्र जारी करना - अभिनिर्धारित - अधिनियम की धारा 6-बी के अधीन कलेक्टर द्वारा वाहन इत्यादि के अधिहरण का कोई आदेश पारित नहीं किया जायेगा, यदि वाहन इत्यादि का स्वामी कलेक्टर को यह समाधानपूर्वक साबित कर देता है कि वाहन इत्यादि का प्रयोग उसके अभिकर्ता द्वारा आवश्यक वस्तु को ले जाने में उसके ज्ञान अथवा मौनानुकूलता के बिना किया गया। (राजमोहन कपूर वि. म.प्र. राज्य) ...1497

साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - चिकित्सक के प्रमाण पत्र का अभाव - नायब तहसीलदार ने यह स्वीकार किया कि घोषणाकर्ता बयान देने के लिए पूर्णतः सचेतन और स्वस्थ था - चिकित्सक ने भी घोषणा के निचले भाग में प्रमाणित किया कि घोषणाकर्ता उसके बयान के दौरान पूर्णतः सचेतन रहा - यह नहीं कहा जा सकता कि मृत्युकालिक कथन स्वीकार नहीं किया जा सकता। (दयाराम वि. म.प्र. राज्य) ...1422

साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - मृतक के हस्ताक्षर या अंगुष्ठ चिह्न का अभाव - मृतक के दोनों हाथों में कई फ्रेक्चर सहित कटे-फटे घाव हुए - नायब तहसीलदार, जिसने मृत्युकालिक कथन अभिलिखित किया, फ्रेक्चर के कारण हस्ताक्षर या अंगुष्ठ चिह्न अभिप्राप्त नहीं कर सका - अभिनिर्धारित - नायब तहसीलदार का अपीलार्थियों के प्रति कोई विद्वेष या दुर्भावना नहीं - मृत्युकालिक कथन को अमान्य नहीं किया जा सकता। (दयाराम वि. म.प्र. राज्य) ...1422

साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - एक से अधिक मृत्युकालिक कथन - यदि एक मृत्युकालिक कथन और दूसरे मृत्युकालिक कथन में कुछ असंगतियाँ हैं तो न्यायालय को असंगतियों की प्रकृति की जाँच करनी होगी अर्थात् क्या वे तात्त्विक हैं अथवा नहीं। (भारत सिंह वि. म.प्र. राज्य) ...1427

साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - विश्वसनीय मृत्युकालिक कथन के आधार पर दोषसिद्धि आधारित हो सकती है। (बसंतलाल वि. म.प्र. राज्य) ...1431

साक्ष्य अधिनियम (1872 का 1), धारा 32 - देखें - दण्ड संहिता, 1860, धारा 302 (दयाराम वि. म.प्र. राज्य) ...1422

साक्ष्य अधिनियम (1872 का 1), धारा 114 - उपधारणा - पुत्र की वास्तविक आवश्यकता के आधार पर वाद पेश - पुत्र की साक्षी के रूप में परीक्षा की गई - वादी की स्वयं की

examine herself on account of her old age and ill-health - Held - Extensive evidence has been brought on record through oral and documentary evidence - No withholding of evidence - Non-examination of plaintiff not fatal. [Sujata Sarkar (Smt.) v. Anil Kumar Duttani] ...1374

Forest Act (16 of 1927), Section 52-B - Appellate authority remanding the matter by reversing the order of confiscation of vehicle with a direction to pass a fresh order - Order challenged in revision - Revisional Court ordered to release the vehicle on furnishing bank guarantee - Order challenged - Held - After passing the order by the appellate authority, no order of confiscation was in existence - In the facts & circumstances, order of release of the vehicle was proper and revisional Court did not exceed its jurisdiction. [State of M.P. v. Bhanu Pratap Singh] ...1249

Forest Act (16 of 1927), Sections 52, 52-A & 52-B - In exercise of power u/s 52-A(6), appellate authority remanding the matter by reversing the order of confiscation with a direction to the authorized officer to pass a fresh order - Held - Order would tantamount to attaching finality to the proceedings before appellate authority - Therefore, against the order revision u/s 52-B is maintainable. [State of M.P. v. Bhanu Pratap Singh] ...1249

General Clauses Act (10 of 1897), Section 14 - Power conferred to be exercisable from time to time - Once the Central Government has power to postpone the elections for a period of 40 days under the proviso to Rule and there is no prohibition decipherable from the Rule, therefore, the power may be exercised by Central Government on repeated occasions, from time to time, if condition enumerated in the proviso exists. [Azmatullah v. Union of India]...1311

Hindu Succession Act (30 of 1956) [As amended by Hindu Succession (Amendment) Act, 2005 w.e.f. 09.09.2005], Sections 6 & 23; General Clauses Act, 1897, Section 6 - Amendment Act 2005 does not contain the saving clause which would mean that omitted Section 23 of the Act of 1956 is not saved for pending cases - In view of the decision of S.C. in Kolhapur Canesugar Works Ltd [AIR 2000 SC 811], Section 6 of the General Clauses Act has no application - Appeal is a continuance of the suit, therefore, amended Section 6 would be applicable - Plaintiff is also entitled to sue for partition in respect of a dwelling house of a Joint Hindu Family being a coparcener. [Prabhudayal (Dead) through LRs. v. Smt. Ramsiya] ...1351

Hindu Succession Act (30 of 1956) [As amended by Hindu Succession (Amendment) Act, 2005 w.e.f. 09.09.2005], Sections 6 & 23 - Section 23 of the Act has been omitted by Section 4 of the Amendment Act of 2005 - From the date of enforcement of amended provision to the Act the female heir of a coparcener can ask for partition of the dwelling house because according to Section 6 of the Act her status is also that of a coparcener. [Prabhudayal (Dead) through LRs. v. Smt. Ramsiya] ...1351

परीक्षा उसकी वृद्धावस्था और अस्वस्थता के कारण नहीं की जा सकी - अभिनिर्धारित - मौखिक और दस्तावेजी साक्ष्य के द्वारा विस्तृत साक्ष्य अभिलेख पर लायी गई - कोई साक्ष्य नहीं रोका गया - वादी की परीक्षा न कराना घातक नहीं। (सुजाता सरकार (श्रीमति) वि. अनिल कुमार दत्तानी) ...1374

वन अधिनियम (1927 का 16), धारा 52-बी - अपीलीय प्राधिकारी ने वाहन के अधिहरण का आदेश उलटते हुए नवीन आदेश पारित करने के निदेश के साथ मामला प्रतिप्रेषित किया - आदेश को पुनरीक्षण में चुनौती दी गई - पुनरीक्षण न्यायालय ने बैंक गारंटी प्रस्तुत किये जाने पर वाहन निर्मुक्त करने का आदेश दिया - आदेश को चुनौती - अभिनिर्धारित - अपीलीय प्राधिकारी द्वारा आदेश पारित किये जाने के बाद अधिहरण का कोई आदेश अस्तित्व में नहीं था - तथ्यों और परिस्थितियों में वाहन निर्मुक्त करने का आदेश उचित था और पुनरीक्षण न्यायालय ने अपनी अधिकारिता का अतिक्रमण नहीं किया। (म.प्र. राज्य वि. भानू प्रताप सिंह) ...1249

वन अधिनियम (1927 का 16), धाराएँ 52, 52-ए व 52-बी - धारा 52-ए(6) के अधीन शक्तियों के प्रयोग में अपीलीय प्राधिकारी ने अधिहरण का आदेश उलटते हुए प्राधिकृत अधिकारी को नवीन आदेश पारित करने के निदेश के साथ मामला प्रतिप्रेषित किया - अभिनिर्धारित - आदेश अपीलीय प्राधिकारी के समक्ष कार्यवाहियों से अंतिमता संलग्न करने के तुल्य होगा - इसलिए आदेश के विरुद्ध धारा 52-बी के अधीन पुनरीक्षण पोषणीय है। (म.प्र. राज्य वि. भानू प्रताप सिंह) ...1249

साधारण खण्ड अधिनियम (1897 का 10), धारा 14 - समय-समय पर प्रयोग किये जाने के लिए प्रदत्त शक्ति - एक बार जब केन्द्र सरकार के पास नियम के परन्तुक के अधीन चुनावों को 40 दिन की कालावधि के लिए मुलतवी करने की शक्ति है और नियम से सांकेतिक अर्थ निकालने योग्य कोई प्रतिषेध नहीं है, इसलिए केन्द्र सरकार द्वारा समय-समय पर पुनरावृत्त अवसरों पर शक्ति का प्रयोग किया जा सकता है यदि परन्तुक में बतायी गई शर्त अस्तित्व में है। (अजमतउल्ला वि. यूनियन ऑफ इंडिया) ...1311

हिन्दू उत्तराधिकार अधिनियम (1956 का 30) [हिन्दू उत्तराधिकार (संशोधन) अधिनियम, 2005 द्वारा यथासंशोधित 09.09.2005 से प्रभावी], धाराएँ 6 व 23, साधारण खण्ड अधिनियम, 1897 धारा 6 - संशोधन अधिनियम 2005 में व्यावृत्ति खण्ड अन्तर्विष्ट नहीं है जिसका अर्थ यह होगा कि 1956 के अधिनियम की विलोपित धारा 23 लम्बित मामलों के लिए व्यावृत्त नहीं की गई है - उच्चतम न्यायालय के कोल्हापुर केनसुगर वर्क्स लि. [AIR 2000 SC 811] में दिये गये निर्णय को दृष्टिगत रखते हुए साधारण खण्ड अधिनियम की धारा 6 लागू नहीं होती - अपील वाद की निरंतरता है इसलिए संशोधित धारा 6 लागू होगी - वादी भी एक सहदायिक होने से संयुक्त हिन्दू परिवार के निवास गृह के सम्बन्ध में विभाजन का वाद लाने की हकदार है। (प्रमूदयाल (मृतक) द्वारा विधिक प्रतिनिधि वि. श्रीमति रामसिया) ...1351

हिन्दू उत्तराधिकार अधिनियम (1956 का 30) [हिन्दू उत्तराधिकार (संशोधन) अधिनियम, 2005 द्वारा यथासंशोधित 09.09.2005 से प्रभावी], धाराएँ 6 व 23 - अधिनियम की धारा 23 संशोधन अधिनियम 2005 की धारा 4 द्वारा विलोपित कर दी गई है - अधिनियम के संशोधित उपबंध के प्रवर्तन की तारीख से किसी सहदायिक की महिला वारिस निवास गृह के विभाजन की माँग कर सकती क्योंकि अधिनियम की धारा 6 के अनुसार उसकी प्रास्थिति भी एक सहदायिक की है। (प्रमूदयाल (मृतक) द्वारा विधिक प्रतिनिधि वि. श्रीमति रामसिया) ...1351

Labour Laws (Amendment) and Miscellaneous Provisions Act, M.P. 2002 (26 of 2003), Constitution, Articles 14 & 21 - Power to try offences under Labour Laws - By amendment, power to try offences under labour laws was taken away from Labour Court and conferred on regular Courts - Held - Provisions of Act 2002 struck down being ultra-vires as it failed to achieve purpose - They are arbitrary and rather defeats the provisions of existing enactment - Petition allowed. [Labour Bar Association, Satna v. State of M.P.]... 1207

Law of Torts - Compensation - Determination - Held - Under the tort, the Acts do not provide the principle on which damages are to be assessed - The English Act merely say that "damages may be awarded as are proportioned to the injury resulting from the death to the dependants respectively" - The Indian Act similarly says that "the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively." [Chairman, M.P.S.E.B., Jabalpur v. Mulu @ Moolchandra] ... 1415

Law of Torts - Death by negligence - Deceased died due to electrocution. - Appellants stated that a squirrel came in contact with wires resulting to a short circuit due which wire snapped from the pole and fell on the ground - Held - Stand taken by the appellant does not find mention in the written statement and witness states that he made statement on the basis of his experience - Parties cannot deviate from the pleadings - Maintenance of the lines were also done 5 months prior to incident - Appellants did not adduce any satisfactory evidence that safety measures were taken. [Chairman, M.P.S.E.B., Jabalpur v. Mulu @ Moolchandra] ... 1415

Limitation Act (36 of 1963), Section 3 - Bar of limitation - Sale deed executed on 05.06.1972 - Suit challenging sale deed filed on 15.12.1986 i.e., after more than 14 years - Held - Case is barred by limitation. [Bipta Bai (Smt.) v. Smt. Shipra Bai] ... 1402

Lok Parisar (Bedakhali) Adhiniyam, M.P. (46 of 1974), Sections 3 & 17 - Delegation of powers by the State Government to Collectors u/s 17 of the Act - Notification issued on 05.02.1975 and published in Official Gazette on 16.04.1976 - Collector issued the order dated 26.08.1975 appointing S.D.O. as competent authority and it was published in Official Gazette on 19.09.1975 - Validity of appointment of competent authority challenged - Held - Actions taken by the Collector were in anticipation of the order of delegation - Order of Collector appointing competent authority become operative from 16.04.1976 - Therefore order passed by competent authority on 10.02.2000 is a valid order. [Karan Singh v. State of M.P.] ... 1235

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2008, Rule 1.8(4) - Horizontal reservation - Horizontal reservation of seats in favour of disabled persons is not ultra vires. [Rakhi Mangal (Dr.) v. State of M.P.] ... 1260

श्रमिक विधियाँ (संशोधन) और विविध उपबंध अधिनियम, म.प्र. 2002 (2003 का 26), संविधान, अनुच्छेद 14 व 21 — श्रमिक विधियों के अन्तर्गत अपराधों का विचारण करने की शक्ति — संशोधन द्वारा श्रमिक विधियों के अन्तर्गत अपराधों का विचारण करने की शक्ति श्रम न्यायालयों से ले ली गई और नियमित न्यायालयों को प्रदत्त कर दी गई — अभिनिर्धारित — अधिनियम 2002 के उपबंध अधिकारातीत होने से अभिखण्डित किये गये क्योंकि ये प्रयोजन पूरा करने में असफल रहे — वे मंनमाने हैं और मौजूदा अधिनियमिती के उपबंधों को विफल करते हैं — याचिका मंजूर। (लेबर बार एसोशियेशन, सतना वि. म.प्र. राज्य) ...1207

अपकृत्य विधि — प्रतिकर — अवधारण — अभिनिर्धारित — अपकृत्य के अधीन अधिनियम सिद्धांत का उपबंध नहीं करते हैं जिस पर क्षतिपूर्ति निर्धारित की जानी है — अंग्रेजी अधिनियम केवल यह कहता है कि "क्षतिपूर्ति क्रमशः आश्रितों को मृत्यु के परिणामस्वरूप हुई क्षति के अनुपात में अधिनिर्णीत की जा सकती है" — इसी प्रकार भारतीय अधिनियम कहता है कि "न्यायालय ऐसी क्षतिपूर्ति दे सकेगा जितनी वह ऐसी मृत्यु से क्रमशः पक्षकारों को हुई हानि के अनुपाती समझे। (चेयरमेन, एम. पी.एस.ई.बी., जबलपुर वि. मुलु उर्फ मूलचंद्र) ...1415

अपकृत्य विधि — उपेक्षा से मृत्यु — मृतक की मृत्यु विद्युत करंट से हुई — अपीलार्थी ने कथन किया कि एक गिलहरी तार के सम्पर्क में आयी जिसके परिणामस्वरूप शॉर्ट सर्किट हुआ जिसके कारण तार खम्बे से टूटकर जमीन पर गिर गया — अभिनिर्धारित — अपीलार्थी द्वारा लिया गया आधार लिखित कथन में उल्लिखित होना नहीं पाया गया और साक्षी ने कथन किया कि उसने अपने अनुभव के आधार पर कथन किया — पक्षकार अभिवचनों से विचलित नहीं हो सकते हैं — विद्युत लाईन का सुधार भी घटना के 5 माह पूर्व किया गया — अपीलार्थियों ने कोई समाधानप्रद साक्ष्य पेश नहीं की कि सुरक्षा उपाय किये गये थे। (चेयरमेन, एम.पी.एस. ई.बी., जबलपुर वि. मुलु उर्फ मूलचंद्र) ...1415

परिसीमा अधिनियम (1963 का 36), धारा 3 — परिसीमा का वर्जन — विक्रयपत्र दिनांक 05.06.1972 को सम्पादित — विक्रयपत्र को चुनौती देते हुए वाद 15.12.1986 को अर्थात् 14 वर्ष से अधिक समय बाद पेश — अभिनिर्धारित — मामला परिसीमा से वर्जित है। (बिप्ता बाई (श्रीमति) वि. श्रीमति शिप्रा बाई) ...1402

लोक परिसर (बेदखली) अधिनियम, म.प्र. (1974 का 46), धाराएँ 3 व 17 — राज्य सरकार द्वारा कलेक्टरों को अधिनियम की धारा 17 के अधीन शक्तियों का प्रत्यायोजन — अधिसूचना तारीख 05.02.1975 को जारी की गई एवं तारीख 16.04.1976 को शासकीय राजपत्र में प्रकाशित की गई — कलेक्टर ने एस.डी.ओ. को सक्षम प्राधिकारी के रूप में नियुक्त करते हुए आदेश तारीख 26.08.1975 जारी किया और इसे तारीख 19.09.1975 को शासकीय राजपत्र में प्रकाशित किया गया — सक्षम प्राधिकारी की नियुक्ति को चुनौती दी गई — अभिनिर्धारित — कलेक्टर द्वारा किये गये कार्य प्रत्यायोजन के आदेश की प्रत्याशा में थे — कलेक्टर का सक्षम प्राधिकारी की नियुक्ती का आदेश 16.04.1976 से प्रवृत्त हुआ — इसलिए सक्षम प्राधिकारी द्वारा तारीख 10.02.2000 को पारित आदेश विधिमान्य आदेश है। (करन सिंह वि. म.प्र. राज्य) ...1235

चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2008, नियम 1.8(4) — क्षैतिज आरक्षण — निःशक्त व्यक्तियों के पक्ष में सीटों का क्षैतिज आरक्षण अधिकारातीत नहीं है। (राखी मंगल (डॉ.) वि. म.प्र. राज्य) ...1260

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2008, Rule 1.20(11), Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Section 39 - *Ultra vires* - Rules of 2008 are ultra vires the Act of 1995 in as much as they do not earmark seats in Post Graduate Diploma and Degree Courses in the table annexed to the Rules. [Rakhi Mangal (Dr.) v. State of M.P.] ...1260

Medical & Dental Post Graduate Entrance (Conduct of Examination and Admission) Rules, 2008, Rule 1.20(8) - *Counselling, unavoidable circumstances* - Petitioner working as doctor appeared in PG Entrance Examination - Petitioner declared eligible but did not appear in counselling as he was not aware of his result - Held - Petitioner was either careless or callous to find out his result - Carelessness, callousness or negligence cannot be equated with unavoidable circumstances - Petition dismissed. [Somnath (Dr.) v. State of M.P.] ...1306

Medical and Dental Post-Graduate Entrance Test Rules, 2005, Rule 17(5) - *Validity - Discrimination* - Seat reserved for Assistant Professor, Govt. Dental College, Indore - Seat liable to be allotted to eligible non-service (open) candidate if eligible candidate is not available - Held - Classification has been made between a Government College and other Colleges - Private College cannot be equated with Government College - Reservation is not in absolute terms - It is, in a way, preference - As said Rule has been withdrawn on subsequent year, it means it was meant to meet out a particular special circumstance - Rule does not offend Article 14. [Kaluram Khande (Dr.) v. State of M.P.] ...1296

Motor Vehicles Act (59 of 1988), Section 166, Rules of the Road Regulations, 1989, Rules 8 & 9 - *Compensation - Contributory negligence - Burden of proof* - Precaution so as to avoid accident at the intersection of roads - Deceased was going on a motorcycle dashed by a truck at intersection of roads - Tribunal found 50% contributory negligence of deceased - Held - Respondents failed to examine any witness to disprove version of eye witness - Respondents failed to discharge burden to prove that deceased was himself negligent - No presumption of negligence of deceased can be drawn merely because accident occurred at the intersection of roads - Finding of tribunal that deceased was contributory negligent erroneous - Appeal allowed. [Usha (Smt.) v. Rajesh] ...1390

Narcotics Drugs and Psychotropic Substances Rules, 1985, Rule 2(c) - *Application for re-examination of drugs sample at different laboratory - Rejection - Revision* - Held - Rule 2(c) defines Chemical Examiner - Authorized Government Laboratory of Opium & Alkaloid Works has given report - Adequate provisions have been made under the Act - General

चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2008; नियम 1.20(11), निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995, धारा 39 - अधिकारातीत - 2008 के नियम 1995 के अधिनियम के उस सीमा तक अधिकारातीत हैं जिस तक वे नियमों के साथ संलग्न सारणी में स्नातकोत्तर डिप्लोमा या डिग्री पाठ्यक्रमों में सीटों को निश्चित नहीं करते हैं। (राखी मंगल (डॉ.) वि. म.प्र. राज्य) ...1260

चिकित्सा और दंत स्नातकोत्तर प्रवेश (परीक्षा का संचालन एवं प्रवेश) नियम, म.प्र. 2008, नियम 1.20(8) - काउंसिलिंग, अपरिहार्य परिस्थितियाँ - चिकित्सक के रूप में कार्यरत याची स्नातकोत्तर प्रवेश परीक्षा में बैठा - याची को अर्ह घोषित किया गया किन्तु काउंसिलिंग में इसलिए उपस्थित नहीं हुआ क्योंकि वह अपने परीक्षा परिणाम से अवगत नहीं था - अभिनिर्धारित - याची अपने परीक्षा परिणाम का पता लगाने में या तो लापरवाह या निश्चित था - लापरवाही, निश्चितता या उपेक्षा अपरिहार्य परिस्थितियों के तुल्य नहीं मानी जा सकती - याचिका खारिज। (सोमनाथ (डॉ.) वि. म.प्र. राज्य) ...1306

चिकित्सा और दंत स्नातकोत्तर प्रवेश परीक्षा नियम, 2005, नियम 17(5) - विधिमाम्यता - विभेद - सहायक प्राध्यापक, शासकीय दंत महाविद्यालय, इन्दौर के लिए सीट आरक्षित - सीट पात्र सेवातिरिक्त (मुक्त) अभ्यर्थी को आबंटित किये जाने योग्य, यदि पात्र अभ्यर्थी उपलब्ध नहीं है - अभिनिर्धारित - वर्गीकरण शासकीय महाविद्यालय एवं अन्य महाविद्यालयों के मध्य किया गया है - प्रायवेट महाविद्यालय को शासकीय महाविद्यालय के बराबर नहीं माना जा सकता - आरक्षण आत्यंतिक निबंधनों में नहीं है - यह एक तरीके से अधिमान है - चूंकि उक्त नियम पश्चात्पूर्व वर्ष में वापस ले लिया गया, इसका अर्थ यह है कि यह विशिष्ट विशेष परिस्थिति का सामना करने के लिए अभिप्रेत था - नियम अनुच्छेद 14 का उल्लंघन नहीं करता है। (कालूराम खांडे (डॉ.) वि. म.प्र. राज्य) ...1296

मोटर यान अधिनियम (1988 का 59), धारा 166, सड़क विनियमन के नियम, 1989, नियम 8 व 9 - प्रतिकर - योगदायी उपेक्षा - सबूत का भार - पूर्ववधानियाँ ताकि सड़कों के चौराहे पर दुर्घटनाओं से बचा जा सके - मृतक जो एक मोटरसाइकल पर जा रहा था, को सड़कों के चौराहे पर ट्रक द्वारा टक्कर मारी गई - अधिकरण ने मृतक की 50 प्रतिशत योगदायी उपेक्षा पायी - अभिनिर्धारित - प्रत्यर्थी प्रत्यक्षदर्शी साक्षियों के बयानों को नासाबित करने के लिए किसी साक्षी की परीक्षा कराने में विफल रहे - प्रत्यर्थी यह साबित करने का भार उन्मोचित करने में विफल रहे कि मृतक स्वयं उपेक्षावान था - केवल इस कारण कि दुर्घटना सड़कों के चौराहे पर घटित हुई, मृतक की उपेक्षा की कोई उपधारणा नहीं की जा सकती - अधिकरण का निष्कर्ष कि मृतक योगदायी उपेक्षावान था, त्रुटिपूर्ण - अपील मंजूर। (उषा (श्रीमति) वि. राजेश) ...1390

स्वापक औषधि और मनःप्रभावी पदार्थ नियम, 1985, नियम 2(सी) - औषधि के नमूने की भिन्न प्रयोगशाला में पुनः जाँच कराने के लिए आवेदन - नामंजूर - पुनरीक्षण - अभिनिर्धारित - नियम 2(सी) रासायनिक परीक्षक को परिभाषित करता है - प्राधिकृत शासकीय अपीम और एल्केलॉयड वर्क्स प्रयोगशाला ने रिपोर्ट दी - अधिनियम के अधीन पर्याप्त उपबंध किये गये हैं - पुनः जाँच के लिए द.प्र.सं. के सामान्य उपबंधों की सहायता लेना आवश्यक नहीं होगा

provisions of Cr.P.C. for re-examination would not be necessary to call in aid - Application not maintainable - Application filed after five years of incident when sample may not be in proper condition - More so, allowing the application would lead to spate in litigation by similarly situated accused - Rejection of application proper - Revision dismissed. [Muzafar Ali v. Central Narcotic Bureau, Neemuch] ... 1502

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 38 - Filling up of vacancies - Petitioner officiating as Sarpanch as a no confidence was passed against the Sarpanch - Election programme for filling of the post of Sarpanch declared - Action challenged on ground that once a Sarpanch is nominated to officiate in such casual vacancy, the same cannot be construed as vacancy as would call for fresh election - Held - Section 38(1)(a) provides for filling up of such casual vacancy as soon as may be vacant in accordance with the provisions of the Act and the Rules made there under - Temporary filling up of the post of a Sarpanch u/s 38(1)(b) does not create a right in favour of such Officiating Sarpanch to claim that no election can be held u/s 38(1)(a) till the entire term expires. [Phoolabai v. State of M.P.] ... 1293

Panchayat Service (Recruitment and General Conditions of Services) Rules, M.P. 1999, Rule 20 - See - Service Law [Bharar Bhushan Sharma v. State of M.P.] ... 1204

Penal Code (45 of 1860), Section 34 - Common intention - Section is only a rule of evidence and does not create a substantive offence - The distinctive feature is element of participation in action. [Daya Shankar v. State of M.P.] SC... 1197

Penal Code (45 of 1860), Sections 34, 302 - Murder and common intention - No overt act attributed to appellant - Mere fact that he was in company of accused who were armed would not sufficient to attract Section 34 - Appellant neither armed nor having any animosity with deceased - Appellant acquitted - Appeal allowed. [Daya Shankar v. State of M.P.] SC... 1197

Penal Code (45 of 1860), Sections 68 & 69 - See - Criminal Procedure Code, 1973, Sections 362 & 482 [Prahlad Singh v. State of M.P.] ... 1537

Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 32 - Dying declaration - Dying declaration can form the sole basis for conviction, if it is found to be true and voluntary. [Dayaram v. State of M.P.] ... 1422

Penal Code (45 of 1860), Sections 302/34, 342 - Murder or Wrongful confinement - Appellant No.2 caught hold of deceased and appellant No.1 caused knife injuries - Appellant No.1 did not utter a single word before dealing knife blows - He also did not exhorted to appellant No.2 to catch hold the deceased - Held - It can be held that appellant No.2 was not having

— आवेदन पोषणीय नहीं — आवेदन घटना के पाँच वर्ष बाद पेश किया गया जब नमूना उचित अवस्था में नहीं हो सकता है — इसके अतिरिक्त आवेदन मंजूर करना समान परिस्थितियों वाले अभियुक्त द्वारा वादों में वृद्धि करेगा — आवेदन की खारिजी उचित — पुनरीक्षण खारिज। (मुजफर अली वि. सेंट्रल नारकोटिक ब्यूरो, नीमच) ...1502

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 38 — पदों को भरा जाना — याची सरपंच के रूप में स्थानापन्न रूप से कार्यरत क्योंकि सरपंच के विरुद्ध अविश्वास प्रस्ताव पारित किया गया — सरपंच का पद भरने के लिए निर्वाचन कार्यक्रम घोषित किया गया — कृत्य को इस आधार पर चुनौती दी गई कि जब एक बार ऐसी आकस्मिक रिक्ति में सरपंच को स्थानापन्न रूप से कार्य करने के लिए नामित कर दिया जाता है तो इसे पद की रिक्ति के रूप में नहीं माना जाएगा और उसकी पूर्ति के लिए नये चुनाव कराने की आवश्यकता नहीं रहेगी — अभिनिर्धारित — धारा 38(1)(ए) ऐसी आकस्मिक रिक्तियों की पूर्ति के लिए उपबंध करती है कि जैसे ही रिक्तियाँ हों अधिनियम और उसके अधीन बनाये गये नियमों के अनुसार उनकी पूर्ति की जाए — धारा 38(1)(बी) के अधीन अस्थायी रूप से सरपंच का पद भरा जाना यह दावा करने के लिए कि पूरी अवधि व्यतीत हो जाने तक धारा 38(1)(ए) के अधीन कोई चुनाव नहीं हो सकता, ऐसे स्थानापन्न सरपंच के हित में कोई अधिकार सृष्ट नहीं करता है। (फूलाबाई वि. म.प्र. राज्य) ...1293

पंचायत सेवा (भर्ती तथा सेवा की सामान्य शर्तें) नियम, म.प्र. 1999, नियम 20 — देखें — सेवा विधि (भारत भूषण शर्मा वि. म.प्र. राज्य) ...1204

दण्ड संहिता (1860 का 45), धारा 34 — सामान्य आशय — धारा केवल साक्ष्य का नियम है और कोई वास्तविक अपराध सृष्ट नहीं करती — विशिष्ट लक्षण कार्य में हिस्सेदारी का तत्व है। (दया शंकर वि. म.प्र. राज्य) SC... 1197

दण्ड संहिता (1860 का 45), धाराएँ 34, 302 — हत्या और सामान्य आशय — अपीलार्थी पर कोई प्रत्यक्ष कार्य उपरोपित नहीं — केवल तथ्य कि वह अभियुक्त के साथ था जो सशस्त्र थे, धारा 34 को आकृष्ट करने के लिए पर्याप्त नहीं होगा — अपीलार्थी न तो सशस्त्र था और न मृतक से कोई शत्रुता रखता था — अपीलार्थी दोषमुक्त — अपील मंजूर। (दया शंकर वि. म.प्र. राज्य) SC... 1197

दण्ड संहिता (1860 का 45), धाराएँ 68 व 69 — देखें — दण्ड प्रक्रिया संहिता, 1973, धाराएँ 362 व 482 (प्रहलाद सिंह वि. म.प्र. राज्य) ...1537

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धारा 32 — मृत्युकालिक कथन — मृत्युकालिक कथन दोषसिद्धि का एकमात्र आधार बन सकता है यदि यह सत्य और स्वेच्छया होना पाया जाए। (दयाराम वि. म.प्र. राज्य) ...1422

दण्ड संहिता (1860 का 45), धाराएँ 302/34, 342 — हत्या या सदोष परिरोध — अपीलार्थी क्रमांक 2 ने मृतक को पकड़ा और अपीलार्थी क्रमांक 1 ने चाकू से क्षतियाँ कारित कीं — अपीलार्थी क्रमांक 1 ने चाकू के प्रहार करने के पूर्व एक भी शब्द नहीं कहा — उसने मृतक को पकड़ने के लिए अपीलार्थी क्रमांक 2 को प्रेरित भी नहीं किया — अभिनिर्धारित — यह अभिनिर्धारित किया जा सकता है कि अपीलार्थी क्रमांक 2 को यह ज्ञान नहीं था कि अपीलार्थी क्रमांक 1 अमानक

knowledge that suddenly appellant No.1 would cause knife blows - No circumstance to hold that appellant No.2 was sharing common intention - He is guilty of wrongfully confining the deceased - Acquitted u/s 302/34 and convicted u/s 342 of IPC. [Basantlal v. State of M.P.] ...1431

Penal Code (45 of 1860), Sections 304-B & 498-A - Husband or relative of husband of a woman subjecting her to cruelty - No charge u/s 498-A was framed - Appellant acquitted of charge u/s 304-B and convicted u/s 498-A - Held - No impediment in convicting appellant u/s 498-A, who was charged with and acquitted of the offence u/s 304-B. [Bharat Singh v. State of M.P.] ...1427

Penal Code (45 of 1860), Section 325 - Sentence - Incident took on a sudden quarrel over collection of Mahua flowers - Nothing on record that applicant is a habitual offender - Applicant already undergone imprisonment of 4 months - Held - Applicant sentenced to period already undergone and sentence of fine affirmed - Revision partly allowed. [Amar Singh v. State of M.P.] ...1476

Penal Code (45 of 1860), Sections 366 & 376 - Rape - Appreciation of evidence - Conviction based on sole testimony of prosecutrix - Reliability - Prosecutrix making major omission and contradictions in her statements before the Court - She went to the Court for getting affidavit notarised and signing marriage papers - She nowhere disclosing her acts to be under threat to her life - Doctor opined she was habitual to sexual intercourse - Held - It is not justifiable to convict the appellant on the basis of sole evidence of the prosecutrix - Evidence of prosecutrix is not of that quality on which the conviction could be sustained solely on the basis of her testimony. [Karu @ Samar Singh v. State of M.P.] ...1435

Penal Code (45 of 1860), Sections 420, 120-B, 467, 468 & 471 - Civil or Criminal Dispute - Criminal prosecution should not be used as an instrument of harassment - Tendency is growing to convert purely civil disputes into criminal cases - Charges quashed. [Gyanendra Tripathi v. State of M.P.] ...1515

Police Regulations, M.P., Regulation 241 - See - Service Law [H.R. Kaurav v. State of M.P.] ...1233

Precedent - Conflict between two decisions of the Apex Court - Judgment of 2 Judges Bench in National Insurance Co. Ltd. Vs. Mubasir Ahmed & anr. [2007 LIC 1452] not noticing the earlier judgment of 4 Judge Bench of Pratap Narain Singh Deo Vs. Shrinivas Sabata & anr [AIR 1976 SC 222] - Judgment of the Larger Bench will have to be followed. [Suraj Prasad v. Executive Engineer (Supply/Maintenance) M.P. State Electricity Board, Shajapur] ...1385

Protection of Women from Domestic Violence Act (43 of 2005),

चाकू के प्रहार कारित करेगा - यह अभिनिर्धारित करने के लिए कोई परिस्थिति नहीं कि अपीलार्थी क्रमांक 2 सामान्य आशय में भागीदार था - वह मृतक का सदोष परिरोध करने का दोषी है - धारा 302/34 के अधीन दोषमुक्त और भा.द.सं. की धारा 342 के अधीन दोषसिद्ध। (बसंतलाल वि. म.प्र. राज्य) ...1431

दण्ड संहिता (1860 का 45), धाराएँ 304-बी व 498-ए - किसी स्त्री के पति या पति के नातेदार ने उसके साथ क्रूरता की - धारा 498-ए के अधीन कोई आरोप विरचित नहीं किया गया - अपीलार्थी को धारा 304-बी के आरोप से दोषमुक्त किया और धारा 498-ए के अधीन दोषसिद्ध किया - अभिनिर्धारित - अपीलार्थी को धारा 498-ए के अधीन दोषसिद्ध करने में कोई बाधा नहीं, जिस पर धारा 304-बी के अपराध का आरोप लगाया गया और दोषमुक्त किया गया। (भारत सिंह वि. म.प्र. राज्य) ...1427

दण्ड संहिता (1860 का 45), धारा 325 - दण्डादेश - घटना महुआ के फूलों के संग्रहण पर हुए आकस्मिक झगड़े पर हुई - अभिलेख पर ऐसा कुछ नहीं कि आवेदक आदतन अपराध गी है - आवेदक ने 4 माह का कारावास पूर्व में ही भोग लिया - अभिनिर्धारित - आवेदक को पूर्व में भोगे गये कारावास का दण्डादेश दिया गया और जुर्माने के दण्डादेश की पुष्टि की गई - पुनरीक्षण अंशतः मंजूर। (अमर सिंह वि. म.प्र. राज्य) ...1476

दण्ड संहिता (1860 का 45), धाराएँ 366 व 376 - बलात्संग - साक्ष्य का अधिमूल्यन - दोषसिद्धि एकमात्र अभियोक्त्री के परिसाक्ष्य पर आधारित - विश्वसनीयता - अभियोक्त्री ने न्यायालय के समक्ष अपने बयानों में मुख्य लोप और खण्डन किये - वह न्यायालय में शपथ पत्र को नोटरीत करवाने गयी और विवाह के कागजातों पर हस्ताक्षर किये - उसने यह कहीं भी प्रकट नहीं किया कि उसका कार्य उसके जीवन की धमकी देकर कराया गया - चिकित्सक ने राय दी कि वह मैथुन की अभ्यस्थ थी - अभिनिर्धारित - यह न्यायसंगत नहीं है कि अपीलार्थी को अभियोक्त्री के एकमात्र साक्ष्य के आधार पर दोषसिद्ध किया जाए - अभियोक्त्री की साक्ष्य इस कोटि की नहीं है जिस पर एकमात्र रूप से उसके परिसाक्ष्य के आधार पर दोषसिद्धि कायम रखी जा सके। (कारु उर्फ समर सिंह वि. म.प्र. राज्य) ...1435

दण्ड संहिता (1860 का 45), धाराएँ 420, 120-बी, 467, 468 व 471 - सिविल या दाण्डिक विवाद - दाण्डिक अभियोजन को तंग करने के साधन के रूप में प्रयुक्त नहीं किया जाना चाहिए - शुद्ध रूप से सिविल विवादों को दाण्डिक मामलों में परिवर्तित करने की प्रवृत्ति बढ़ रही है - आरोप अभिखण्डित। (ज्ञानेंद्र त्रिपाठी वि. म.प्र. राज्य) ...1515

पुलिस विनियम, म.प्र., विनियम 241 - देखें - सेवा विधि (एच.आर. कौरव वि. म.प्र. राज्य) ...1233

पूर्वनिर्णय - शीर्ष न्यायालय के दो निर्णयों में अन्तर्विरोध - दो न्यायाधीशों की न्यायपीठ द्वारा नेशनल इश्योरेंस कं. लि. विरुद्ध मुबासिर अहमद व अन्य [2007 LIC 1452] में दिये गये निर्णय में 4 न्यायाधीशों की न्यायपीठ के प्रताप नारायण सिंह देव विरुद्ध श्रीनिवास सबाता व अन्य [AIR 1976 SC 222] के पूर्ववर्ती निर्णय को ध्यान में नहीं रखा - वृहत्तर न्यायपीठ के निर्णय का अनुसरण करना होगा। (सूरज प्रसाद वि. एग्जीक्यूटिव इंजीनियर (सप्लाय/मेन्टेनेन्स) एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड, शाजापुर) ...1385

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 12 व 28,

Sections 12 & 28, Protection of Women from Domestic Violence Rules 2006, Rule 6(5), Criminal Procedure Code, 1973, Section 125 - Application to Magistrate - Procedure - As provided by Section 28(1) of the Act r/w Rule 6(5), the application u/s 12 of the Act shall be dealt with and the order enforced in the same manner as laid down u/s 125 of Cr.P.C., for which providing opportunity of leading their evidence to the parties is required. [Madhusudan Bhardwaj v. Mamta Bhardwaj] ...1506

Protection of Women from Domestic Violence Rules 2006, Rule 6(5) - See - Protection of Women from Domestic Violence Act, 2005, Sections 12 & 28 [Madhusudan Bhardwaj v. Mamta Bhardwaj] ...1506

Registration Act (16 of 1908), Section 17 - Instrument is an unregistered agreement of sale which, as per stipulations contained u/s 17 of the Act requires a compulsory registration and unless the document is compulsory registered the same cannot be taken on evidence in any manner. [Narbada Prasad Agrawal v. Tarun Bhawasar] ...1255

Rules of the Road Regulations, 1989, Rules 8 & 9 - See - Motor Vehicles Act, 1988, Section 166 [Usha (Smt.) v. Rajesh] ...1390

Service Law - Panchayat Service (Recruitment and General Conditions of Services) Rules, M.P. 1999, Rule 20 - Promotion - Seniority-cum-fitness - Criterion explained - Held - While promoting an employee on the basis of seniority-cum-fitness, there is no requirement of assessment of comparative merit and an employee is to be promoted if he fulfills the minimum merit of satisfying a benchmark fixed by the DPC. [Bharat Bhusan Sharma v. State of M.P.] ...1204

Service Law - Police Regulations, M.P., Regulation 241 - Petitioner acquitted in criminal case - Petitioner prayed for quashing the charge-sheet and not to proceed further in D.E. initiated against him - Held - Petitioner has been acquitted by the criminal Court on the same charges on which the D.E. was instituted - Petitioner is entitled to reinstatement in accordance with the provisions of Regulation 241 of Police Regulations - Charge-sheet quashed - Petition allowed. [H.R. Kaurav v. State of M.P.] ...1233

Service Law - Transfer - Competence to transfer - Appellant working as compounder in Autonomous Government Ayurved College, Ujjain - He made an application to the Government for being transferred to Autonomous Government Ayurved College, Rewa - Appellant was transferred to Rewa - After joining at Rewa, he was again transferred to Ujjain for the reason that the Government has no power to transfer an employee of autonomous college from one college to another - Held - Government cannot control the service conditions of employees of autonomous college as autonomous colleges are governed by specific rules framed/adopted by such colleges and cannot transfer such employees from one college to another. [Pramod Kumar Shukla v. State of M.P.] ...1200

घरेलू हिंसा से महिलाओं का संरक्षण नियम, 2006, नियम 6(5), दण्ड प्रक्रिया संहिता, 1973, धारा 125 - मजिस्ट्रेट को आवेदन - प्रक्रिया - जैसा कि अधिनियम की धारा 28(1) सहपठित नियम 6(5) द्वारा उपबंधित किया गया है, अधिनियम की धारा 12 के अधीन आवेदन उसी तरह निपटाया जायेगा और आदेश उसी तरीके से प्रवर्तित किया जाएगा जैसा कि द.प्र.सं. की धारा 125 के अधीन अधिकथित किया गया है, जिसके लिए पक्षकारों को उनकी साक्ष्य पेश करने का अवसर दिया जाना अपेक्षित है। (मधुसूदन भारद्वाज वि. ममता भारद्वाज) ...1506

घरेलू हिंसा से महिलाओं का संरक्षण नियम, 2006, नियम 6(5), दण्ड प्रक्रिया संहिता, 1973, धारा 125 - देखें - घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005, धाराएँ 12 व 28 (मधुसूदन भारद्वाज वि. ममता भारद्वाज) ...1506

रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 17 - लिखित विक्रय का अरजिस्ट्रीकृत अनुबंध है जो अधिनियम की धारा 17 के अन्तर्गत अन्तर्विष्ट शर्तों के अनुसार अनिवार्य रजिस्ट्रेशन अपेक्षित करता है और जब तक अनिवार्य रूप से रजिस्ट्रीकृत न हो वह किसी भी ढंग से साक्ष्य में नहीं लिया जा सकता। (नरबदा प्रसाद अग्रवाल वि. तरुण भावसार) ...1255

सड़क विनियमन के नियम, 1989, नियम 8 व 9 - देखें - मोटर यान अधिनियम, 1988, धारा 166 (उषा (श्रीमति) वि. राजेश) ...1390

सेवा विधि - पंचायत सेवा (भर्ती तथा सेवा की सामान्य शर्तें) नियम, म.प्र. 1999, नियम 20 - पदोन्नति - वरिष्ठता सह योग्यता - मानदण्ड स्पष्ट किये गये - अभिनिर्धारित - जब किसी कर्मचारी को वरिष्ठता सह योग्यता के आधार पर पदोन्नत किया जा रहा हो तो तुलनात्मक योग्यता के निर्धारण की कोई आवश्यकता नहीं है और एक कर्मचारी को पदोन्नत करना होगा यदि वह विभागीय पदोन्नति समिति द्वारा नियत मानक पूरा करने की न्यूनतम योग्यता पूरी करता है। (भारत भूषण शर्मा वि. म.प्र. राज्य) ...1204

सेवा विधि - पुलिस विनियम, म.प्र., विनियम 241 - याची दाण्डिक मामले में दोषमुक्त - याची ने उसके विरुद्ध प्रारम्भ की गई विभागीय जाँच में आरोप पत्र अभिखण्डित करने और आगे कार्यवाही न करने की प्रार्थना की - अभिनिर्धारित - दाण्डिक न्यायालय द्वारा याची को उन्ही आरोपों पर दोषमुक्त किया गया जिन पर विभागीय जाँच संस्थित की गई थी - याची पुलिस विनियम के विनियम 241 के उपबंधानुसार पुनर्नियुक्ति का हकदार - आरोप पत्र अभिखण्डित - याचिका मंजूर। (एच.आर.कौरव वि. म.प्र. राज्य) ...1233

सेवा विधि - स्थानांतरण - स्थानांतरण की सक्षमता - अपीलार्थी स्वशासी शासकीय आयुर्वेद महाविद्यालय, उज्जैन में कम्पाउण्डर के रूप में कार्यरत - उसने स्वशासी शासकीय आयुर्वेद महाविद्यालय, रीवा में स्थानांतरित किये जाने के लिए सरकार को आवेदन किया - अपीलार्थी को रीवा स्थानांतरित किया गया - रीवा में कार्यभार ग्रहण करने के बाद उसे इस कारण पुनः उज्जैन स्थानांतरित किया गया कि सरकार को स्वशासी महाविद्यालय के किसी कर्मचारी को एक महाविद्यालय से दूसरे में स्थानांतरित करने की शक्ति नहीं है - अभिनिर्धारित - सरकार स्वशासी महाविद्यालय के कर्मचारियों की सेवा शर्तों को नियंत्रित नहीं कर सकती क्योंकि स्वशासी महाविद्यालय ऐसे महाविद्यालयों द्वारा विरचित/अपनाये गये विनिर्दिष्ट नियमों से शासित होते हैं और ऐसे कर्मचारियों का एक महाविद्यालय से दूसरे में स्थानांतरण नहीं कर सकती। (प्रमोद कुमार, शुक्ला वि. म.प्र. राज्य) ...1200

Service Law - Transfer - Petitioner an employee of Municipal Council - Transferred to District Urban Development Agency (DUDA) - Order of transfer quashed by High Court holding that transfer was not a transfer from one Municipal Council to another - Petitioner was again transferred to DUDA - Writ petition challenging the order was disposed of with direction to Transfer Grievance Cell for reconsideration - Consequently, petitioner was posted in Municipal Council but was again transferred to DUDA - Petition against - Held - In other case Division Bench of High Court held that DUDA is a body fully controlled by State Government and, therefore, the State employee can be transferred to DUDA - Record pertaining to the proceedings leading to the subject transfer also do not reveal any factor having effect of vitiating transfer - Transfer can not be said to be illegal - Petition dismissed. [S.B. Singh v. State of M.P.] ...1266

Service Law - Transfer - Petitioner, a Reserve Inspector (R.I.) of Police Department posted as Inspector (Traffic) - Send back as R.I. on account of administrative exigency - Held - Clause 2 of the circular dated 14.02.2007 providing the minimum period of 2 years at one place in respect of various officers including S.H.O. is not applicable to the Inspector (Traffic) - Clause 3(2) of the circular empower the Board for transfer and posting of D.S.P. and officers subordinate - It further provides that decision of transfer taken by the Board shall be sent to State Government before execution - After taking the decision to transfer the petitioner, a copy of transfer order was sent by the Board to the State Government - Petitioner's transfer order not violative of the any clause of the circular - Order of transfer was passed taking into consideration the vacant post of R.I., past experience of petitioner and forthcoming election - No mala fide in issuance of impugned transfer order - Petition dismissed. [Arvind Tiwari v. State of M.P.] ...1331

Service Law - Whether employees of autonomous college are Government Servants - Held - No, the Government has no role to play at the time of their appointment, the salary/wages are not paid by the Government and it is not the disciplinary authority - Such persons cannot be held to be Government Servant. [Pramod Kumar Shukla v. State of M.P.] ...1200

Stamp Act (2 of 1899), Section 35 - Agreement to sell suit property on a plain paper - Unless a duty is paid on an instrument it shall not be admitted in evidence for any purpose, which will include a collateral purpose. [Narbada Prasad Agrawal v. Tarun Bhawasar] ...1255

Succession Act (39 of 1925), Sections 276 & 263 - Ex parte probate of will - Application to set-aside u/O. 9 R. 13 CPC filed - Alleged that deceased testator of will was suffering from blood cancer and admitted in hospital one day before the alleged date of execution and died on the next day - Application for amendment so as to treat it as application for revocation

सेवा विधि - स्थानांतरण - याची नगर पालिका परिषद का कर्मचारी - जिला नगरीय विकास अभिकरण (डीयूडीए) में स्थानांतरित किया गया - स्थानांतरण का आदेश उच्च न्यायालय द्वारा यह अभिनिर्धारित करते हुए अभिखण्डित किया गया कि स्थानांतरण एक नगर पालिका परिषद से दूसरी में स्थानांतरण नहीं था - याची को पुनः डीयूडीए में स्थानांतरित किया गया - आदेश को चुनौती देने वाली रिट याचिका स्थानांतरण शिकायत प्रकोष्ठ को पुनर्विचार के निदेश के साथ निपटाई गयी - परिणामस्वरूप, याची को नगर पालिका परिषद में पदस्थ किया गया किन्तु पुनः डीयूडीए में स्थानांतरित कर दिया गया - उसके विरुद्ध याचिका - अभिनिर्धारित - अन्य मामले में उच्च न्यायालय की खण्ड न्यायपीठ ने यह अभिनिर्धारित किया कि डीयूडीए राज्य सरकार द्वारा पूर्णतः नियंत्रित एक निकाय है इसलिए राज्य सरकार का कर्मचारी डीयूडीए में स्थानांतरित किया जा सकता है - विषयांकित स्थानांतरण की कार्यवाहियों से सम्बन्धित अभिलेख भी स्थानांतरण को दूषित करने का प्रभाव रखने वाला कोई कारक प्रकट नहीं करता - स्थानांतरण अवैध नहीं कहा जा सकता - याचिका खारिज। (एस.बी. सिंह वि. म.प्र. राज्य) ...1266

सेवा विधि - स्थानांतरण - याची, पुलिस विभाग का आरक्षित निरीक्षक, की नियुक्ति निरीक्षक (यातायात) के पद पर की गई - प्रशासनिक अत्यावश्यकता के कारण आरक्षित निरीक्षक के रूप में वापस भेजा गया - अभिनिर्धारित - परिपत्र तारीख 14.02.2007 का खण्ड 2 थाना प्रभारी सहित विभिन्न अधिकारियों के सम्बन्ध में एक स्थान पर 2 वर्ष की न्यूनतम कालावधि का उपबंध करता है, निरीक्षक (यातायात) को लागू नहीं होता - परिपत्र का खण्ड 3(2) डी.एस.पी. और उसके अधीनस्थ अधिकारियों के स्थानांतरण और पदस्थापना के लिए बोर्ड को सशक्त करता है - यह भी उपबंधित करता है कि बोर्ड द्वारा स्थानांतरण का निर्णय लेने के बाद उसे निष्पादन के पूर्व राज्य सरकार को भेजा जायेगा - याची को स्थानांतरित करने का निर्णय लेने के बाद स्थानांतरण आदेश की प्रतिलिपि बोर्ड द्वारा राज्य सरकार को भेजी गई थी - याची का स्थानांतरण आदेश परिपत्र के किसी खण्ड का उल्लंघन नहीं करता - स्थानांतरण का आदेश आरक्षित निरीक्षक के रिक्त पद, याची के पूर्व अनुभव एवं आसन्न चुनाव को विचार में लेते हुए पारित किया गया - विवादित स्थानांतरण आदेश जारी करने में कोई असदभाव नहीं - याचिका खारिज। (अरविंद तिवारी वि. म.प्र. राज्य) ...1331

सेवा विधि - क्या स्वशासी महाविद्यालय के कर्मचारी शासकीय कर्मचारी हैं - अभिनिर्धारित - नहीं, सरकार उनकी नियुक्ति के समय कोई भूमिका नहीं निभाती, तनखाह/वेतन का सरकार द्वारा भुगतान नहीं किया जाता और यह अनुशासनिक प्राधिकारी नहीं है - ऐसे व्यक्ति शासकीय कर्मचारी होना अभिनिर्धारित नहीं किये जा सकते। (प्रमोद कुमार शुक्ला वि. म.प्र. राज्य) ...1200

स्टाम्प अधिनियम (1899 का 2), धारा 35 - वादग्रस्त सम्पत्ति विक्रय करने का अनुबन्ध सादा कागज पर - जब तक किसी लिखत पर कोई शुल्क अदा नहीं किया जाता, वह किसी भी प्रयोजन के लिए साक्ष्य में ग्राह्य नहीं होगा, जिसमें आनुषंगिक प्रयोजन भी शामिल है। (नरबदा प्रसाद अग्रवाल वि. तरूण भावसार) ...1255

उत्तराधिकार अधिनियम (1925 का 39), धाराएँ 276 व 263 - वसीयत का एकपक्षीय प्रोबेट - अपास्त कराने के लिए सि.प्र.सं. के आदेश 9 नियम 13 के अधीन आवेदन पेश - यह अभिकथित किया गया कि वसीयत का मृत वसीयतकर्ता ब्लड कैंसर से पीड़ित था और निष्पादन की कथित तारीख के एक दिन पूर्व अस्पताल में मर्ति किया गया और अगले दिन मृत्यु हो गयी - संशोधन के लिए आवेदन भी पेश किया गया ताकि इसे प्रोबेट के प्रतिसंहरण के लिए आवेदन माना जाए -

of probate also filed - Rejection holding that no case for setting-aside ex-parte order is made - Appeal - Held - Aspect of admitting deceased testator in hospital and death on the very next day of execution of will was not disclosed by respondent - Non-disclosure of these facts would amount to concealment from Court something material to the case so as to invoke jurisdiction of revocation of grant of probate for just cause - Powers of the court u/s 263 are wide enough to revoke or annul the grant of probate for just cause - Case remanded for fresh decision - Appeal allowed. [Leelawati (Smt.) v. Emanuele] ...1394

Transfer of Property Act (4 of 1882), Section 52 - Doctrine of lis pendence - Decree for specific performance of contract passed against defendant No.4 in the year 1961 and decree was executed in 1967 - Defendant No.4 took loan in the year 1966 and mortgaged the land - Land auctioned in recovery proceedings and was purchased by defendant No.10 - Held - No right or title is acquired by defendant No.10 - Doctrine of lis pendence would apply - Section 52 places complete embargo on transfer of immovable property, right to which is directly and specifically in question in a pending litigation - Appeal allowed. [Shakuntaladevi v. Shivpuri Sahkari Bhumi Vikas Bank Maryadit, Shivpuri] ...1356

Transfer of property Act (4 of 1882), Section 52 - See - Civil Procedure Code, 1908, Order 21 Rule 29 [Dilip Kumar v. Vijay Bhadur Singh] ...1408

Transfer of property Act (4 of 1882), Section 52 - See - Civil Procedure Code, 1908, Order 21 Rules 98, 100, 101 & 102 [Dilip Kumar v. Vijay Bhadur Singh] ...1408

University Act, M.P. (22 of 1973), Sections 6(12) & 24 - Power to withdraw degree - Section 6(12) of Act empowers University to withdraw degree of Ph.D. - It is not a legal proposition that if a manner for performing an act is not provided, the same cannot be performed despite empowerment for the same under the substantive provision - Authorities are well within their powers to exercise said powers in a reasonable and rational manner which is not prohibited by law. [K.S. Gaharwar v. Barkatullah Vishwavidyalaya] ...1241

University Act, M.P. (22 of 1973), Section 24(xxx) - Natural Justice - Certain portion of thesis found to be copied - Executive Council directed petitioner to resubmit thesis after removal of copied portion - Held - No show cause notice issued to petitioner with regard to allegation about copying - Order quashed - However, University and Executive Council shall have liberty to take up the matter afresh in accordance with law. [K.S. Gaharwar v. Barkatullah Vishwavidyalaya] ...1241

University Act, M.P. (22 of 1973), Section 24(xxx) - Powers and Duties of Executive Council - Withdrawal of degree - Power to withdraw degree is exercisable by Executive Council. [K.S. Gaharwar v. Barkatullah Vishwavidyalaya] ...1241

यह अभिनिर्धारित करते हुए खारिज किया गया कि एकपक्षीय आदेश अपास्त करने के लिए कोई मामला नहीं बनता - अपील - अभिनिर्धारित - मृतक वसीयतकर्ता को अस्पताल में भर्ती करने और वसीयत के निष्पादन के अगले ही दिन मृत्यु होने का तथ्य प्रत्यर्थी द्वारा प्रकट नहीं किया गया - इन तथ्यों का अप्रकटीकरण मामले की तात्त्विक जानकारी को न्यायालय से छुपाने की कोटि में आयेगा ताकि प्रोबेट के प्रतिसंहरण की अधिकारिता का न्यायसंगत कारण के लिए अवलंब लिया जाए - धारा 263 के अधीन न्यायालय को न्यायसंगत कारण के लिए प्रोबेट प्रदान करने को प्रतिसंहत या रद्द करने की व्यापक शक्तियाँ हैं - मामला पुनः विनिश्चय के लिए प्रतिप्रेषित - अपील मंजूर। (लीलावती (श्रीमति) वि. इमेनुअल)...1394

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 52 - लम्बित वाद का सिद्धांत - प्रतिवादी क्रमांक 4 के विरुद्ध वर्ष 1961 में संविदा के विनिर्दिष्ट पालन की डिग्री पारित की गई और डिग्री 1967 में निष्पादित की गई - प्रतिवादी क्रमांक 4 ने वर्ष 1966 में ऋण लिया और भूमि बंधक की - वसूली कार्यवाहियों में भूमि की नीलामी की गई और प्रतिवादी क्रमांक 10 द्वारा क्रय की गई - अभिनिर्धारित - प्रतिवादी क्रमांक 10 द्वारा कोई अधिकार और स्वत्व अर्जित नहीं - लम्बित वाद का सिद्धांत लागू होगा - धारा 52 स्थावर सम्पत्ति के अंतरण पर पूर्ण रोक लगाती है, जिसका अधिकार प्रत्यक्षतः और विनिर्दिष्टतः किसी लम्बित वाद में प्रश्नगत हो - अपील मंजूर। (शकुन्तलादेवी वि. शिवपुरी सहकारी भूमि विकास बैंक मर्यादित, शिवपुरी) ...1356

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 52 - देखें - सिविल प्रक्रिया संहिता, 1908, आदेश 21 नियम 29 (दिलीप कुमार वि. विजय बहादुर सिंह) ...1408

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 52 - देखें - सिविल प्रक्रिया संहिता, 1908, आदेश 21 नियम 98, 100, 101 व 102, (दिलीप कुमार वि. विजय बहादुर सिंह) ...1408

विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धाराएँ 6(12) व 24 - डिग्री वापस लेने की शक्ति - अधिनियम की धारा 6(12) विश्वविद्यालय को पीएच.डी. की डिग्री वापस लेने के लिए सशक्त करती है - यह विधिक प्रतिपादना नहीं है कि यदि किसी कार्य को करने का कोई ढंग उपबंधित नहीं है तो वह मूल उपबंध के अधीन उसके लिए सशक्त होते हुए भी नहीं किया जा सकता - प्राधिकारी युक्तियुक्त और युक्तिसंगत ढंग, जो विधि द्वारा प्रतिषिद्ध नहीं है, से उक्त शक्तियों का प्रयोग करने के लिए उनकी शक्तियों के भीतर हैं। (के.एस.गहरवार वि. बरकतउल्ला विश्वविद्यालय) ...1241

विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धारा 24(गगग) - प्राकृतिक न्याय - थीसिस का कुछ भाग नकल किया हुआ पाया गया - कार्यकारी परिषद् ने याची को निदेशित किया कि नकल किया हुआ भाग हटाने के बाद थीसिस पुनः प्रस्तुत करे - अभिनिर्धारित - नकल के आरोप के संबंध में याची को कोई कारण बताओ सूचना पत्र जारी नहीं किया गया - आदेश अभिखण्डित - तथापि, विश्वविद्यालय और कार्यकारी परिषद् को स्वतंत्रता दी गई कि विधि अनुसार मामले की पुनः सुनवाई करे। (के.एस.गहरवार वि. बरकतउल्ला विश्वविद्यालय) ...1241

विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धारा 24(xxx) - कार्यकारी परिषद् की शक्तियाँ और कर्तव्य - डिग्री का वापस लिया जाना - डिग्री वापस लेने की शक्ति कार्यकारी परिषद् द्वारा प्रयोग की जा सकती है। (के.एस.गहरवार वि. बरकतउल्ला विश्वविद्यालय) 1241

Wakf Act (43 of 1995), Sections 6-A (As amended by M.P. Amendment) & 54, Wakf Rules, M.P. 2000, Rule 15, Civil Procedure Code, 1908, Order 14 Rule 1 - *Manner of Inquiry to be held by Chief Executive Officer - Non-framing of issues - Summary procedure has been provided before C.E.O. whereas full-fledged enquiry has been provided before Tribunal - Scope of enquiry before C.E.O. is limited one and has to determine only encroachment on Wakf property - No fault can be found if C.E.O. has not framed issues - Petition dismissed.* [Asif Ansari v. Waqf Mahal Umrao Jehan] ...1319

Wakf Rules, M.P. 2000, Rule 15 - See - *Wakf Act, 1995, Sections 6-A (As amended by M.P. Amendment) & 54* [Asif Ansari v. Waqf Mahal Umrao Jehan] ...1319

Words and Phrases - *Reside* - *Includes not only permanent residence but also temporary residence but does not include flying visit.* [Manu Bhai Tripathi v. Union of India] 1225

Workmen's Compensation Act (8 of 1923), Section 4A - *Workman suffered grievous injuries by an accident which arises out of act in the course of employment - Commissioner awarded compensation and directed that in case employer failed to deposit compensation within 30 days, workman shall be entitled for interest @ 12% p.a. - Held - Under the provisions of Act, compensation shall be paid as soon as it falls due - Amount of compensation fell due on the date of accident itself - Employer failed to deposit compensation after the accident - Workman entitled for interest @ 12% p.a. from the date of accident till payment - Appeal allowed.* [Suraj Prasad v. Executive Engineer (Supply/Maintenance) M.P. State Electricity Board, Shajapur] ...1385

वक्फ अधिनियम (1995 का 43), धाराएँ 6-ए (म.प्र. संशोधन द्वारा यथा संशोधित) व 54, वक्फ नियम, म.प्र. 2000, नियम 15, सिविल प्रक्रिया संहिता, 1908, आदेश 14 नियम 1 - मुख्य कार्यपालक अधिकारी द्वारा की जाने वाली जाँच का ढंग - विवाद्यकों की विरचना न करना - मुख्य कार्यपालक अधिकारी के समक्ष संक्षिप्त प्रक्रिया का उपबंध किया गया है जबकि अधिकरण के समक्ष पूर्ण विकसित जाँच का उपबंध किया गया है - मुख्य कार्यपालक अधिकारी के समक्ष जाँच का विषयक्षेत्र सीमित है और केवल वक्फ सम्पत्ति पर अतिक्रमण का अवधारण करता है - कोई त्रुटि नहीं पायी जा सकती यदि मुख्य कार्यपालक अधिकारी ने विवाद्यकों की विरचना नहीं की - याचिका खारिज। (असिफ अंसारी वि. वक्फ महल उमराव जेहान) ...1319

वक्फ नियम, म.प्र. 2000, नियम 15 - देखें - वक्फ अधिनियम, 1995, धाराएँ 6-ए (म.प्र. संशोधन द्वारा यथा संशोधित) व 54 (असिफ अंसारी वि. वक्फ महल उमराव जेहान) ...1319

शब्द और वाक्यांश - निवास करना - में न केवल स्थायी निवास बल्कि अस्थायी निवास भी सम्मिलित है किन्तु त्वरित मुलाकात सम्मिलित नहीं है। (मनू भाई त्रिपाठी वि. यूनियन ऑफ इंडिया) ...1225

कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 4ए - कर्मकार नियोजन के अनुक्रम में कार्य से हुई दुर्घटना से गंभीर क्षतियों से पीड़ित हुआ - कमिश्नर ने प्रतिकर अधिनिर्णीत किया और निदेशित किया कि यदि नियोक्ता 30 दिनों के भीतर प्रतिकर जमा करने में विफल रहता है तो कर्मकार 12 प्रतिशत प्रतिवर्ष की दर से ब्याज का हकदार होगा - अभिनिर्धारित - अधिनियम के उपबंधों के अधीन प्रतिकर अदा करना होगा जैसे ही वह देय हो जाता है - प्रतिकर की राशि दुर्घटना दिनांक को ही देय हो गयी - नियोक्ता दुर्घटना के बाद प्रतिकर जमा करने में विफल रहा - कर्मकार दुर्घटना दिनांक से अदायगी तक 12 प्रतिशत प्रतिवर्ष की दर से ब्याज का हकदार - अपील मंजूर। (सूरज प्रसाद वि. एग्जीक्यूटिव इंजीनियर (सप्लाई/मेन्टेनेन्स) एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड, शाजापुर) ...1385

AMENDMENT

In the High Court of M. P. Rules 2008

Jabalpur, dated the 15th May 2009

Notification No. 1

No.39-O.S.D. In exercise of the powers conferred by articles 225 of the Constitution of India, Section 54 of the States Reorganisation Act, 1956, clauses 27 & 28 of the Letters Patent, the High Court of Madhya Pradesh makes following amendments in the High Court of Madhya Pradesh Rules, 2008, namely :-

In the said Rules,-

(1) In Chapter I, sub-rule 12 of rule 4 of shall be substituted by the following :

“(12) “Part-heard Case” means a case in which bipartite final hearing of a main case has commenced but not concluded and is marked “part-heard” by the Court :

Provided that an interlocutory application, heard in part, shall not be treated as part heard :

Provided further that no case heard in part, in motion hearing stage, shall be treated as part heard.”

(2) In chapter II, after clause (f) the following shall be inserted :

“(g) Other Tax Appeals (OTA)”

(3) In chapter II, after rule 28 the following shall be inserted :

“28A. An appeal under any enactment relating to taxation, other than those mentioned hereinbefore in this chapter shall be registered as Other Tax Appeals.”

(4) In chapter IV, clauses (c) & (d) of sub-rule (7) of rule 2 shall be substituted by the following:

“(c) challenging interlocutory or final orders passed by a Tribunal constituted under articles 323A or 323B of the Constitution of India:

(d) challenging interlocutory or final orders passed by following Courts and Tribunals-

(1) A Civil Court constituted under Section 3 of the Madhya Pradesh Civil Courts Act, 1958 and a Family Court under the Family Courts Act, 1984:

(2) Labour Courts, Industrial Courts and Industrial Tribunals constituted under the Madhya Pradesh Industrial Relations Act, 1960 and the Industrial Disputes Act, 1947;

(3) Arbitration Tribunal constituted under the Madhya Pradesh Madhyastham Adhikaran Adhiniyam 1983;

(4) Co-operative Tribunals constituted under the Madhya Pradesh Co-operative Societies Act, 1960:

(5) Debts Recovery Tribunal and Appellate Tribunals constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

(6) Deputy Commissioner, Additional Commissioner and Commissioner appointed under the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985;

(7) State Transport Appellate Tribunal constituted under the Motor Vehicles Act, 1988;

(8) Tribunals constituted under the Sick Industrial Companies (Special Provisions) Act, 1985;

(9) District Forum, State Commission and National Commission constituted under the Consumer Protection Act, 1986;

(10) Any other Court, or Tribunal comprising a judicial member, as may be specified by the Chief Justice by special or general order."

(5) In chapter IV, clause (g) of sub-rule (7) of rule 2 shall be substituted by the following :

"(g) Relating to Income Tax, Wealth Tax, Gift Tax, Estate Duty, Central Sales Tax, Central Excise, Service Tax, Customs Duty, M. P. General Sales Tax, Commercial Tax, Value Added Tax, Entry Tax, Purchase Tax and any other tax, cess or duty as may be specified by the Chief Justice, by a general or special order."

(6) In chapter IV, after clause (i) of sub-rule (7) of rule 2, the following shall be inserted :

"(j) Challenging orders passed in a case under Prevention of Corruption Act, 1988,"

(7) In chapter IV, sub-rule (12) of rule 4 shall be substituted by the following :

"(12) Matters arising from Corruption Cases—

All matters, except applications under Sections 438 & 439 of the Code of Criminal Procedure, 1973, arising from cases under the Prevention of Corruption Act, 1988,"

(8) In clause (a) of sub-rule (1) of rule 13 of Chapter IV, "(ii)" shall be substituted by "(2)",

(9) In Chapter IV, clause (b) of sub-rule (1) of rule 13, shall be substituted by the following :

(b) An application for review, clarification or modification of a judgment, decree or final order, passed by a Judge or Judges who or one or more of whom is or are—

(i) temporarily unavailable and in the opinion of the Chief Justice, the application, looking to the urgency of the matter, cannot wait for such Judge or Judges to resume work or,

(ii) permanently unavailable, shall be heard—

(1) if the decree or order, review of which is applied for, was passed by a Judge sitting alone, by the regular division bench,

(2) If the said decree or order was passed by two or more Judges by a bench of coordinate strength, to be constituted by the Chief Justice. Such bench shall, however, include the Judge or Judges who was/were part of the bench whose decree or order is under review, if available:

Provided that where both Judges of a division bench are permanently unavailable, the matter shall be listed before the regular division bench."

(10) In chapter V, rule 2 shall be substituted by the following:

"2. The Taxing Officer shall decide all questions relating to Court fees falling under S. 5 of the Court Fees Act, 1870.

(11) In chapter V, rule 3 shall be substituted by the following :

"3. (1) (a) Where the scrutiny assistant considers that any document filed in the presentation centre is insufficiently stamped, he shall record his opinion with reasons therefor. This report shall be brought to the notice of the advocate representing the party

concerned who will not thereon whether he accepts or disputes the accuracy thereof. If he raises a dispute, the matter shall be placed before the Taxing Officer, notice of the date being given to the advocate concerned.

(b) The Taxing Officer shall, after hearing the advocate, decide the dispute; where the dispute relates to the necessity of applying a fee or the amount thereof as envisaged under S. 5 of the Court Fees Act, 1870; such decision shall be final, except where the question, in the opinion of the Taxing Officer, is one of general importance, in which case, he shall refer it for final decision to the Taxing Judge.

(2) Where the dispute relates to valuation for the purpose of determining the amount of any court fee paid on a plaint or memorandum of appeal, as envisaged under S. 12 of the Court Fees Act, 1870, the Taxing Officer shall, with his opinion, place the matter before the Court."

(12) In chapter V, rule 6 (1), words "supported by affidavit of the affiant", between the words "application" and "Such" shall be deleted.

(13) In Chapter VII, rule 10 shall be substituted by the following:

"10. A case, wherein the vacation Judge has passed an order under this chapter, shall be listed before the appropriate bench immediately after the vacation.

(14) In Chapter VIII, rule 5(1) sign and word "/durable" shall be inserted between the words "ledger" and "paper".

(15) In Chapter IX, rule 7 sign

and word "/deponent" shall be inserted between the words "affiant" and "in".

(16) In Chapter X, rule 16 (3), "(1)" shall be inserted between "30" and "(a)".

(17) In Chapter X, rule 50 shall be substituted by the following:

"50. Nothing hereinbefore contained in this chapter shall apply to criminal appeals and revisions preferred by a person confined in prison and sent through the officer-in-charge of the jail."

(18) In Chapter XI, rule 1 shall be substituted by the following:

"1. Every-

(1) main case,

(2) interlocutory application, or

(3) any other document in a main case,

-shall be presented in the presentation centre of the High Court during working hours by any party or his recognized agent or counsel, in person."

(19) In rule 12 of chapter XIII, between the words "events" and "to", following words shall be deleted:

"and brief written submission on the substantial question of law stated in the memorandum of appeal, so as."

(20) At the end of rule 19 of chapter XIV following paragraphs shall be inserted :

"The Dealing Assistant making proposal for listing of a case for hearing on an interlocutory application shall flag-mark with an alphabet, the

application and reply thereof, if any, in the record of the case, mentioning the serial number of the application. He shall also ensure that all the flags posted on earlier occasions and irrelevant for the purpose of hearing are removed.

The flag-marked alphabet shall be published in the daily cause list."

(21) In chapter XVIII, sub-rule 5 of rule 1 shall be deleted.

(22) In chapter XVIII, rule 3 shall be substituted by the following :

"3. The applications for certified copies shall be received from 10.30 a. m. to 4.30 p. m. and certified copies to be delivered from 11.00 a. m. to 5.00 p.m. on all working days of the Registry:

Provided that the aforesaid timings shall not be applicable, where the Court makes an order for delivery of the certified copy, the same day."

(23) In Form No. 1 of the appendix, figure "7", between words "rule" and "chapter" shall be substituted by the figure "8".

(24) In Format No. 13, in paragraph 2, figure "439" shall be substituted by the figure "438".

Notification No. 2

"In exercise of the power conferred by rule 2 of Chapter II of the High Court of Madhya Pradesh Rules, 2008, Hon'ble the Chief Justice appoints 15th of June, 2009, as the date on which notified amendments to the High Court of Madhya Pradesh Rules, 2008, shall come into force."

C. V. SIRPURKAR,
Secretary,
High Court Rule Committee
15-5-2009.

Short Note

(28).

A.K. Shrivastava, J

ANNAPURNA DUBEY (SMT.)

Vs.

CHAMPALAL @ CHAUA

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

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

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

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

Vishal Dhagat, for the appellant.

None, for the respondent No.1.

L.D.S. Baghel, Dy.G.A., for the respondent No.2.

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

DAYASHANKAR Vs. STATE OF M.P.

I.L.R. [2009] M. P., 1197

SUPREME COURT OF INDIA

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

20 January, 2009*

DAYA SHANKAR

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Section 34 - Common intention -
Section is only a rule of evidence and does not create a substantive offence - The distinctive feature is element of participation in action. (Para 7)

क. दण्ड संहिता (1860 का 45), धारा 34 - सामान्य आशय - धारा केवल साक्ष्य का नियम है और कोई वास्तविक अपराध सृष्ट नहीं करती - विशिष्ट लक्षण कार्य में हिस्सेदारी का तत्व है।

B. Penal Code (45 of 1860), Sections 34, 302 - Murder and common intention - No overt act attributed to appellant - Mere fact that he was in company of accused who were armed would not sufficient to attract Section 34 - Appellant neither armed nor having any animosity with deceased - Appellant acquitted - Appeal allowed. (Para 9)

ख. दण्ड संहिता (1860 का 45), धाराएँ 34, 302 - हत्या और सामान्य आशय - अपीलार्थी पर कोई प्रत्यक्ष कार्य उपरोपित नहीं - केवल तथ्य कि वह अभियुक्त के साथ था जो सशस्त्र थे, धारा 34 को आकृष्ट करने के लिए पर्याप्त नहीं होगा - अपीलार्थी न तो सशस्त्र था और न मृतक से कोई शत्रुता रखता था - अपीलार्थी दोषमुक्त - अपील मंजूर।

Cases referred :

AIR 1977 SC 109, AIR 1993 SC 1899.

J U D G M E N T

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

2. Challenge in this appeal is to the judgment of a Division Bench of the Madhya Pradesh High Court upholding the conviction of the appellant for offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') as was awarded by learned Additional Sessions Judge, Panna in Sessions Trial No. 15/1992.

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

On 30th November, 1991 at about 5.00 p.m. Ram Kishore (hereinafter referred to as the 'deceased') was murdered in an agricultural field. First Information Report was lodged by Manik Lal at Police Station, Pawal in the evening at about 7.00 p.m. Offence was registered as Crime No. 124/91 under Section

DAYASHANKAR Vs. STATE OF M.P.

302/34 IPC. Deceased had eloped with Lalli, sister of Ramcharan (A-2) and both of them had performed court marriage. The court marriage was registered and Lalli was living with Ramkishore. The appellant was having enmity with deceased on account of aforesaid incident. Deceased after eloping with Lalli was living in some other village and returned to his village a month before the incident. Ramkishore had gone to answer the call of nature in the evening on 30.11.1991 at about 4.30 p.m. towards the agricultural field of Gadka. Around 5 p.m. Phulla (A-3) armed with axe, Ramcharan (A-2) armed with sword alongwith Dayashankar (A-1) and Munni Lal (A-4) went to the field of Gadka. Munni Lal and Dayashankar were barehanded. Phulla gave axe blow on the head of deceased. Thereafter, Dayashankar and Munnial, the co-accused pulled the legs of deceased and threw him on the ground. Ram Kishore fell on the crops in the field. Ramcharan assaulted the deceased by sword on the chest. Then he placed his sword on the chest of the deceased. On account of beating he died. Police after receiving information of the commission of crime carried out the investigation, arrested the accused persons and filed the challan on 3.1.1992 before the Court of Judicial Magistrate. Case was committed to the Court of Sessions Judge. Trial Court framed charges under Section 302/34 IPC against the accused persons. After recording the evidence the trial Court convicted the accused persons for offence under Sections 302 read with Section 34 IPC and sentenced them as afore-noted. Before the High Court the basic stand was that the prosecution failed to prove common intention on the part of the appellants and, therefore, Section 34 had no application. The individual act of the appellant should have been considered. Merely because the appellant had accompanied other accused persons, that cannot be sufficient to warrant presumption of common intention.

4. Learned counsel for the State submitted that the eye witnesses PWs 2 and 3 had described the act of each of the appellants and the role ascribed to the appellant was that he pulled the leg of the deceased as a result of which deceased fell in the field of Masur crop and thereafter he was assaulted by other accused persons. The appeal was dismissed accepting the stand of the State

5. Learned counsel for the appellant re-iterated the stand taken before the High Court and submitted that Section 34 IPC has no application.

6. Learned counsel for the State on the other hand supported the judgment.

7. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The-liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the

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circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar v. State of Punjab* (AIR 1977 SC 109), the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

8. The Section does not say "the common intention of all"; nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch. Pulla Reddy and Ors. v State of Andhra Pradesh* (AIR 1993 SC 1899), Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.

9. The evidence of PWs 2 and 3 did not attribute any overt act to the appellant. The mere fact that he was in the company of the accused who were armed would not be sufficient to attract Section 34 IPC. It is undisputed that appellant was not armed and he had no animosity with the deceased. This position is also accepted by the prosecution. Additionally, the stand that he pulled the leg of the deceased has not been established.

10. In the peculiar facts of the case therefore it would be appropriate that the appellant cannot be held guilty by application of Section 34 IPC. His conviction is accordingly set aside. He be set at liberty forthwith unless required to be in custody in connection with any case.

11. The appeal is allowed.

Appeal allowed.

PRAMOD KUMAR SHUKLA Vs. STATE OF M.P.

I.L.R. [2009] M. P., 1200

WRIT APPEAL*Before Mr. Justice R.S. Garg & Mr. Justice U.C. Maheshwari*

5 January, 2009*

PRAMOD KUMAR SHUKLA

... Appellant

Vs.

STATE OF M.P. & anr.

... Respondents

A. Service Law - Transfer - Competence to transfer - Appellant working as compounder in Autonomous Government Ayurved College, Ujjain - He made an application to the Government for being transferred to Autonomous Government Ayurved College, Rewa - Appellant was transferred to Rewa - After joining at Rewa, he was again transferred to Ujjain for the reason that the Government has no power to transfer an employee of autonomous college from one college to another - Held - Government cannot control the service conditions of employees of autonomous college as autonomous colleges are governed by specific rules framed/adopted by such colleges and cannot transfer such employees from one college to another. (Paras 16 & 17)

क. सेवा विधि - स्थानांतरण - स्थानांतरण की सक्षमता - अपीलार्थी स्वशासी शासकीय आयुर्वेद महाविद्यालय, उज्जैन में कम्पाउण्डर के रूप में कार्यरत - उसने स्वशासी शासकीय आयुर्वेद महाविद्यालय, रीवा में स्थानांतरित किये जाने के लिए सरकार को आवेदन किया - अपीलार्थी को रीवा स्थानांतरित किया गया - रीवा में कार्यभार ग्रहण करने के बाद उसे इस कारण पुनः उज्जैन स्थानांतरित किया गया कि सरकार को स्वशासी महाविद्यालय के किसी कर्मचारी को एक महाविद्यालय से दूसरे में स्थानांतरित करने की शक्ति नहीं है - अभिनिर्धारित - सरकार स्वशासी महाविद्यालय के कर्मचारियों की सेवा शर्तों को नियंत्रित नहीं कर सकती क्योंकि स्वशासी महाविद्यालय ऐसे महाविद्यालयों द्वारा विरचित/अपनाये गये विनिर्दिष्ट नियमों से शासित होते हैं और ऐसे कर्मचारियों का एक महाविद्यालय से दूसरे में स्थानांतरण नहीं कर सकती।

B. Service Law - Whether employees of autonomous college are Government Servants - Held - No, the Government has no role to play at the time of their appointment, the salary/wages are not paid by the Government and it is not the disciplinary authority - Such persons cannot be held to be Government Servant. (Para 9)

ख. सेवा विधि - क्या स्वशासी महाविद्यालय के कर्मचारी शासकीय कर्मचारी हैं - अभिनिर्धारित - नहीं, सरकार उनकी नियुक्ति के समय कोई भूमिका नहीं निभाती, तनखाह/वेतन का सरकार द्वारा भुगतान नहीं किया जाता और यह अनुशासनिक प्राधिकारी नहीं है - ऐसे व्यक्ति शासकीय कर्मचारी होना अभिनिर्धारित नहीं किये जा सकते।

K.C. Ghildiyal, for the appellant.

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

PRAMOD KUMARSHUKLA Vs. STATE OF M.P.**O R D E R**

The Order of the Court was delivered by R.S. GARG, J. :-The appellant being aggrieved by order dated 25.9.2008 passed by the learned Single Judge in Writ Petition No. 11750/2008 {S} has filed this writ appeal submitting interalia that cancellation of order dated 5.7.2008 {Annexure A/6} vide another order dated 9.9.2008 {Annexure A/9} is patently illegal.

2. Short facts necessary for disposal of the writ appeal are that the appellant is working as a Compounder in Autonomous Government Ayurved College, Ujjain. He made an application to the Government that for the reasons stated in the application, he be transferred from Ayurved College, Ujjain to Ayurved College, Rewa. The application was allowed vide order dated 5.7.2008 and the appellant was transferred from Autonomous Ayurved College, Ujjain to another Autonomous Ayurved College, Rewa.

3. It appears that the appellant thereafter joined at Rewa but immediately thereafter, vide Annexure A/9 dated 9.9.2008, the appellant was transferred back from Rewa to Ujjain with a direction interalia that the Government does not have the power to transfer an employee of the Autonomous College from one College to another College. The appellant being aggrieved by the order of re-transfer from Rewa to Ujjain had filed Writ Petition No. 11750/2008 {S}. As observed above, the said writ petition came to be dismissed, therefore, the petitioner/appellant is before this Court.

4. Learned counsel for the appellant submitted that as the Government has absolute and effective control over the management and working of an Autonomous College, therefore, the said control would include a power to transfer an employee from one College to another College. It is submitted by him that on earlier occasions, the persons were transferred from one College to another College but in the case of the present appellant, such an exception has been raised, that too detrimental to the interest of the appellant. It is also submitted by him that from Annexure R/ 2 filed alongwith the affidavit dated 6.11.2008, it does not appear that the Government is stating in the said letter dated 14.5.2001 that it does not have the control over the Autonomous College or it does not have the power to transfer one employee from one Autonomous College to another Autonomous College.

5. Shri Vivekanand Awasthy, learned Government Advocate for respondent No. 1/State, on the other hand, submitted that the Autonomous Colleges, undisputedly, have their own control over the employees and they have the authority and right to engage their own employees. It is also submitted by him that prior to 2001, the Government had taken certain action in transferring the employee from one College to another College and had also directed for fresh appointment of employee of one College to another College but with effect from 14.5.2001, such policy has been abandoned.

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6. It is also submitted by Shri Vivekanand Awasthy, learned Government Advocate for respondent No. 1/State that in the affidavit dated 6.11.2008, it is clearly observed and stated on oath that the State had no power to transfer the employee from Ujjain to Rewa. He also submitted that the Autonomous Colleges/Institutions are governed by the specific rules framed/adopted by such Colleges/Institutions, therefore, their employees are not the members of the Government cadre.
7. The sum and substance of the argument is that the employees of the Autonomous Colleges/Institutions not being the Government servants, cannot be transferred under the orders of the State Government.
8. It is not in dispute before us that the appellant was appointed as a Compounder by the Autonomous Government Ayurved College, Ujjain. The State Government had no role to play in the appointment of the appellant. The salary/wages are being paid to the appellant through the coffers of the Autonomous College/Institution. The State does not pay anything.
9. It is also not in dispute before us that the Autonomous Colleges/Institutions are governed by the specific rules framed/adopted by such Colleges/Institutions. Undisputedly, at the time of the appointment of such employees, the Government has no role to play. If the Government has no role to play at the time of the appointment, the salary/wages of such employees is not being paid by the Government and the Government is not the Disciplinary Authority for such employees then undisputedly, such persons cannot be held to be Government employees.
10. If the employees are not the Government employees then unless some rules are framed or certain policies are adopted or there are other directives in the rules framed by such Autonomous Colleges/Institutions authorizing the Government to transfer an employee from one College to another College, the Government cannot step into the shoes of the employer and transfer one employee from one place to another place. In our opinion, the Government was not wrong in recalling the order dated 5th July, 2008 whereunder the appellant was transferred from Ujjain to Rewa.
11. It was contended by Shri K.C. Ghildiyal, learned counsel for the appellant that on one side, the Government is saying that there would be a ban on the transfer policy and at the same time on oath, it is submitting that it has no power to transfer, therefore, the Court should rely upon the Circulars issued by the State Government and not on the affidavit filed by some Medical Officer.
12. Shri Vivekanand Awasthy, learned Government Advocate for respondent No. 1/State, on the other hand, is submitting that if the Government has come out with a clear stand that the employees of the Autonomous Colleges/Institutions are not the employees of the Government or are not Government employees or

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public servants then whether there is a 'ban' imposed or 'no ban', the Government would not transfer such employees from one College/Institution to another College/Institution.

13. In our opinion, when the State Government has come out with a clear stand that too on oath that the employees of the Autonomous Colleges/Institutions are not members of the Government cadre or Government employees then the Government would have no authority or power to transfer the employee of an Autonomous College/Institution from one College/Institution to another College/Institution.

14. Shri K.C.Ghildiyal, learned counsel for the appellant apprehends that the Government in future might take up the exercise of transferring the employees from one College to another College and thereafter, may come and say before the Court that vide letter dated 14.5.2001, they had simply suspended the action of transfer but did not give up their authority or power to transfer the employees from one Autonomous College/Institution to another Autonomous College/Institution.

15. In our opinion, the apprehension expressed by Shri K.C.Ghildiyal, learned counsel for the appellant is baseless and is misconceived. When a Government Officer under the authority of the Government, files an affidavit in the High Court then irrespective of the status, stature or authority, he is a spokesperson of the Government. If a Peon of the Government files an affidavit on behalf of the Government then the statement made by that Peon on oath would be taken to be the stand of the Government.

16. In the present matter, if the Government had said that it has no authority to transfer an employee then in absence of the rules/some decisions at the Government level, the State would not be entitled to transfer any employee from one Autonomous College/Institution to another Autonomous College/Institution.

17. It is also to be noted that if the Government cannot control the service condition of the employees of an Autonomous College/Institution then it cannot direct appointment of some person in such Autonomous Body/College/Institution because the stand of the Government is that the Autonomous Colleges/Institutions are governed by the specific rules framed/adopted by such Autonomous Colleges/Institutions.

18. To avoid any future complication, while dismissing the writ appeal, we hereby direct that the State Government henceforth shall not transfer any employee of any Autonomous College/Institution to another Autonomous College/Institution nor would issue any order of appointment/absorption of some person from one College into another College or a fresh appointment because the Autonomous Colleges/Institutions are governed by the specific rules framed/adopted by such Colleges/Institutions.

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19. On the merits, we dismiss the writ appeal but, however, with a specific direction to the State Government to adhere to the observations made by this Court with a further caution that if they commit any breach of any observation then they would be exposing themselves to a serious risk. We however permit the appellant to make an application to the College at Rewa for his fresh appointment. It is however made clear that this liberty extended in favour of the appellant would not amount to a direction of this Court to the College. The interim relief granted on earlier occasion is vacated.

20. Let a copy of this order be sent to the Principal Secretary Medical Education, Principal Secretary Health Department so also to the Chief Secretary for its due observance and compliance.

Order accordingly.

I.L.R. [2009] M. P., 1204

WRIT APPEAL

Before Mr. Justice S. Samvatsar & Mrs. Justice Indrani Datta

15 April, 2009*

BHARAT BHUSAN SHARMA

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

Service Law - Panchayat Service (Recruitment and General Conditions of Services) Rules, M.P. 1999, Rule 20 - Promotion - Seniority-cum-fitness - Criterion explained - Held - While promoting an employee on the basis of seniority-cum-fitness, there is no requirement of assessment of comparative merit and an employee is to be promoted if he fulfills the minimum merit of satisfying a benchmark fixed by the DPC. (Para 8)

सेवा विधि - पंचायत सेवा (भर्ती तथा सेवा की सामान्य शर्तें) नियम, म.प्र. 1999, नियम 20 - पदोन्नति - वरिष्ठता सह योग्यता - मानदण्ड स्पष्ट किये गये - अभिनिर्धारित - जब किसी कर्मचारी को वरिष्ठता सह योग्यता के आधार पर पदोन्नत किया जा रहा हो तो तुलनात्मक योग्यता के निर्धारण की कोई आवश्यकता नहीं है और एक कर्मचारी को पदोन्नत करना होगा यदि वह विभागीय पदोन्नति समिति द्वारा नियत मानक पूरा करने की न्यूनतम योग्यता पूरी करता है।

Cases referred :

(1998) 6 SCC 720, (2000) 6 SCC 698:

D.K. Katare, for the appellant.

Vivek Khedkar, G.A., for the respondent No.1/State.

Saurav Verman, for the respondent No.3.

BHARAT BHUSAN SHARMA Vs. STATE OF M.P.**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 appellant challenging order dated 17/03/2009 passed in W.P. (s) No. 13/2009 passed by Single Judge of this Court whereby the petition filed by the present appellant was dismissed.

2. The brief facts of the case are that the appellant is a government employee working on the post of Assistant Grade-III at Janpad Panchayat, Vidisha. He filed a writ petition challenging the order dated 15/12/2008 whereby the respondent No. 3 has been promoted to the post of UDC in the pay-scale of Rs. 4,000-100-6,000/-.

3. The contention of the appellant is that he was found more meritorious than respondent No. 3 by the DPC as he has secured 20 marks in the DPC while the respondent No. 3 has secured only 13 marks, and therefore, he should be promoted. Respondents No. 1 and 2 have committed error in promoting the respondent No. 3. The order of promotion of respondent No. 3 (Annexure P/1) was challenged by the present appellant by way of filing a writ petition i.e. W.P. (s) No. 13/2009 which was dismissed by the impugned order. The learned writ Court upheld the order of promotion of respondent No.3 dated 15/12/2008, hence this appeal.

4. Shri D.K.Katare, learned counsel for the appellant could not dispute that respondent No. 3 is senior to the petitioner, his only contention is that as the appellant is more meritorious than respondent No. 3, therefore, he should be promoted.

5. From perusal of the service rules namely M.P. Panchayat-(Service Recruitment and General Conditions) Service Rules, 1999 which governs the service conditions of appellant as well as respondent No. 3, it is clear that criteria for promotion is seniority-cum-fitness. In the present case, the DPC has considered the cases of the petitioner as well as respondent No. 3. As per the record of the DPC, the DPC has considered the confidential report of both the petitioner as well as respondent No. 3 for the years 2002-03, 2003-04, 2004-05, 2005-06, 2006-07 and 2007-08. The appellant in all these years has been awarded grade "A+" (excellent) while respondent No. 3 has been awarded "A" (good) in the year 2003-04 to 2004-05 and 2006-07 to 2007-08 and has been awarded grade "average" in the year 2005-06. After perusal of the confidential report, the DPC has awarded 13 marks to the respondent No. 3 and 20 marks to the present appellant and ultimately promoted respondent No. 3 being senior.

6. The counsel for the appellant submitted that even though as per the Rules, promotion is to be made on the basis of seniority -cum-fitness and the petitioner being better in merit, should be promoted. For this purpose he referred to the proviso to Rule 23, which provide that if any person is found guilty of committing some mistake, his name can be deleted from the seniority list and his junior can be

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included in the said list. This proviso will not be applicable in the present case because there are no allegations against respondent No. 3 to that effect. So far as principle of seniority-cum-merit is concerned, the Apex Court has considered the principle of seniority-cum-merit in number of cases and held that seniority-cum-merit implies fulfillment of minimum prescribed standard of merit by candidates eligible for consideration and then making promotion out of them on the basis of their inter se seniority irrespective of their comparative merit. This principle is laid down by the Apex Court in the case of *B.V.Sivaiah and others vs. K. Addanki Babu and others*, (1998) 6 SCC 720.

7. The Apex Court in the case of *Union of India vs. Lt. Gen. Rajendra Singh Kadyan and another*, (2000) 6 SCC 698 has considered the criteria of seniority-cum-fitness and held that wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects, "seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of seniority-cum-fitness and seniority-cum-merit. Merit-cum-suitability with due regard to seniority as prescribed in the case of promotion for all-India services necessarily involves assessment of comparative merit of all eligible candidates and selecting the best out of them.

8. Thus, while promoting an employee on the basis of seniority-cum-fitness, there is no requirement of assessment of comparative merit and an employee is to be promoted if he fulfills the minimum merit of satisfying a benchmark fixed by the DPC.

9. In the present case, we find that respondent No. 3 fulfills the said requirement and assessment of comparative merit is not called for in the case for promotion on the basis of seniority subject to fitness. Hence, the writ Court has rightly dismissed the writ petition and upheld the order of promotion.

10. No jurisdictional error is found in the impugned order which calls for any interference. Appeal is therefore, dismissed.

Appeal dismissed.

LABOUR BAR ASSOCIATION, SATNA Vs. STATE OF M.P.

I.L.R. [2009] M. P., 1207

WRIT PETITION

Before Mr. Justice Arun Mishra & Mr. Justice Prakash Shrivastava

1 August, 2008*

LABOUR BAR ASSOCIATION, SATNA

... Petitioner

Vs.

STATE OF M.P. & anr.

... Respondents

Labour Laws (Amendment) and Miscellaneous Provisions Act, M.P. 2002 (26 of 2003), Constitution, Articles 14 & 21 - Power to try offences under Labour Laws - By amendment, power to try offences under labour laws was taken away from Labour Court and conferred on regular Courts - Held - Provisions of Act 2002 struck down being ultra-vires as it failed to achieve purpose - They are arbitrary and rather defeats the provisions of existing enactment - Petition allowed. (Para 21)

श्रमिक विधियाँ (संशोधन) और विविध उपबंध अधिनियम, म.प्र. 2002 (2003 का 26), संविधान, अनुच्छेद 14 व 21 - श्रमिक विधियों के अन्तर्गत अपराधों का विचारण करने की शक्ति - संशोधन द्वारा श्रमिक विधियों के अन्तर्गत अपराधों का विचारण करने की शक्ति श्रम न्यायालयों से ले ली गई और नियमित न्यायालयों को प्रदत्त कर दी गई - अमिनिर्धारित - अधिनियम 2002 के उपबंध अधिकारातीत होने से अभिखण्डित किये गये क्योंकि ये प्रयोजन पूरा करने में असफल रहे - वे मनमाने हैं और मौजूदा अधिनियमिती के उपबंधों को विफल करते हैं - याचिका मंजूर।

Cases referred :

(1997) 4 SCC 287, 2006(2) MPLJ 289, 2003(4) MPHT 199, AIR 1954 SC 424, AIR 1957 SC 503, AIR 1960 SC 457, AIR 1967 SC 212, AIR 1968 SC 353, (1974) 1 SCC 596, (1983) 3 SCC 529, (1983) 4 SCC 166, AIR 1990 SC 2114, AIR 1997 SC 128, AIR 2003 SC 1266, AIR 1973 SC 689, (2006) 3 SCC 434, AIR 1978 SC 597, AIR 1970 SC 564, AIR 1979 SC 1360, 1995 Supp (2) SCC 549, AIR 1993 SC 2178, (1992) 1 SCC 225, (2005) 7 SCC 387, AIR 1983 SC 361, (2005) 3 SCC 551, (2002) 2 SCC 210, (2006) 10 SCC 560, (1987) 1 SCC 124, 1997(1) MPLJ 621, (2003) 2 SCC 412.

Sanjay Verma & Siddharth Gulati, for the petitioner.

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

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :- The writ petitions have been preferred to declare the provisions of M.P. Labour Laws (Amendment) & Misc. Provisions Act, 2002 enforced as per notification dated 5.8.2005 as ultra vires being violative of Article 14 of Constitution of India.

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2. The facts are being narrated from WL No.27941/03 filed by Labour Bar Association, Satna. It is averred in the petition, that by M.P. Labour Laws (Amendment) & Misc.Provisions Act, 2003. (hereinafter referred to as "the Amendment Act"), the provisions of Industrial Disputes Act, 1947 (hereinafter referred to as "the ID Act") and the provisions of M.P.Industrial Relations Act, 1960 (hereinafter referred to as "the MPIR Act") have been amended so far as applicable to the State of M.P., the power to try the offences under the labour laws which was conferred on the Labour Courts vide MP Amendment Act No.43 of 1981 has been taken away and conferred on the regular Courts. It is submitted by the petitioner association of Advocates that the Amendment Act has no reasonable nexus with the objects sought to be achieved of speedier justice. The Act has been promulgated on the basis that Labour Courts are over burdened, hence, the Labour Courts were not having time to adjudicate the disputes arising out of the provisions of the ID Act and MPIR Act; the backdrop of the facts in which the Act was enacted indicates to the contrary.

3. It is further submitted by petitioner-Association that ID Act has been enacted for promoting the industrial harmony with regard to speedy disposal of the cases of Labour class. Section 7 of the ID Act deals with the Constitution of Labour Courts. The appropriate Government is authorized to assign such offences as it deems fit. The MPIR Act is an Act to regulate relations of employer and employee. It provides for settlement of disputes and to provide other incidental matters thereto. The MPIR Act applies to such industries which are covered by notification issued under sub-section (3) of Section 1 of the Act. Section 61(1)(D) of the MPIR Act deals with the power of labour Courts to try the offences punishable under the Act specified in IIInd schedule prior to its amendment and where payment of compensation or conviction for offence is provided, to determine the compensation and order its payment. Section 63 deals with cognizance of offence by the labour courts. Section 64 provides powers of the Labour Courts and Industrial Courts in respect of criminal cases. Schedule II-A has been omitted from the MPIR Act by the Act No.26 of 2003.

4. It is submitted by petitioner's Association that considering the pendency of large number of cases in the criminal Courts, State of MP enacted Amendment Act of 1981. It came into force with effect from 26.1.1982 by which the provisions of the ID Act and the MPIR Act in relation to its application in State of M.P. were amended.

Under the ID Act the power was given to try the offences punishable under the Acts specified in Part B of IIInd Schedule. The Labour Courts were conferred with the power of Judicial Magistrate Ist Class. Section 11-C provided for an appeal to the Industrial Court. The Labour Courts were conferred with the power of Judicial Magistrate Ist Class by virtue of Section 11-B. Section 11-D deals with the powers of Industrial Court hearing an appeal under Section 11-C.

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5. Similarly the provisions of the MPIR Act were also amended in the year 1982 and clause (D), sub-section (1) of Section 61 was amended centering the power to the Labour Courts to try the offences punishable under this Act as well as the Acts specified in Schedule II-A. Section 63 and 64 were substituted by the aforesaid amending Act of 1981.

6. The petitioner-Association further submitted that after 1992 arrears of cases in regular criminal Courts have increased instead of decreasing and the regular Courts are not able to decide the criminal cases. The criminal-administration justice is on the verge of collapse due to delay in trial. The Apex Court in *Kadra Pahadiya and others vs. State of Bihar* (1997) 4 SCC 287 has issued directions to appoint Special Magistrates to deal with petty cases as regular criminal Courts are reeling under the arrears of cases. It is not fair and just to keep the criminal cases pending. It is violative of mandate of Article 39-A. Right of speedy justice is enshrined under Article 21 of Constitution of India read with Article 14.

7. Petitioner-Association submits that industries run by the State Government have already been taken out of MPIR Act as such the work of Labour Court has substantially reduced. The Labour Courts are in much better condition of disposing off the cases quickly due to substantial reduction of work. The amendment made is patently arbitrary and has no reasonable nexus with the object sought to be achieved of speedy disposal of the cases. In case the criminal cases which are pending before the Labour Courts are transferred to regular Labour Courts, their adjudication would be delayed and affected, workmen would not be able to get justice, steps have been taken by the State legislature, consequently, the writ petition has been preferred.

8. In the reply filed by the State of MP, it is submitted that the Amendment Act does not suffer from any legal or constitutional infirmity, Association has no right to file the petition, none of their rights have been affected. Citizen has no right to select the forum for trial of offences committed by him, legislature in its wisdom has thought it apposite to confer such powers upon Judicial Magistrate in place of Labour Courts. State legislature is competent to enact the provisions, its competence has not been assailed, thus, the challenge to the Amendment Act is misconceived.

9. It is further submitted by State of MP in its reply that provisions of ID Act and MPIR Act are penal in nature, if offence is proved, offender may have to suffer jail sentence also, provisions of the Act affects the life and liberty of the citizens, Judicial Magistrates are well acquainted and well versed, with the implementation of such penal laws the Amendment Act has, thus, nexus with the object sought to be achieved. It is further submitted by State of MP that the statement of object and reasons for enacting the impugned Amendment Act is not decisive for adjudication of legality and constitutional validity of the provisions contained in the Amendment Act. There is clear nexus with the object sought to

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be achieved. The offences would be tried by competent criminal Courts presided by qualified and trained judicial officers. The experience indicates that Labour Courts were not able to effectively deal with such cases after the amendment was made in the year 1981. The delay in disposal of the cases involving the offences of provisions of the ID Act and the MPIR Act was not only affecting the labours, but was also causing delay in disposal of other cases which are necessarily to be tried by the Labour Courts. It was noticed that gap between filing and disposal of the cases was widening. Chart (R-1) has been relied upon by State of MP. Thus, no fault can be found in the Amendment Act. Speed of disposal of criminal cases by Judicial Magistrates is much faster than that of Labour Courts. Apprehension of petitioner-Association of delay in disposal is baseless, petitioner-Association cannot come up in case of violation of fundamental right of some other persons who have not come forward to challenge the legality and validity of the Amendment Act.

10. A rejoinder has been filed by petitioner-Association contending that Association has right to maintain the petition.

11. We also note in brief the facts mentioned in WP No. 12937/07 filed by M.P. Transport Workers Federation. The Association is formed by the workers and is a registered trade Union. Reliance has been placed upon the statement of object and reasons mentioned in the Bill of Amendment Act of 1981 which provided that State of MP has a well organized labour judiciary functioning under MPIR Act and ID Act, Labour Courts handle the cases only under various labour laws with the objects and provisions of which the Presiding Officers are very familiar. The Labour Courts used to decide criminal cases under labour laws also before the Code of Criminal Procedure, 1973 became effective. Thus, it was considered desirable to entrust all criminal work arising under the various labour laws to the Labour Courts. The statement and object of Amendment Act, 2002 runs contrary to the object sought to be achieved rather it is going to frustrate it. The State of MP deleted 8 industries from the Schedule with effect from 10.10.05. In the Labour Courts pendency is not more than 2000 cases which is less than total cases before any CJM, pendency of the criminal cases before Judicial Magistrate 1st class is much more than any Labour Court. The object and reason for which the criminal cases arising out of various Labour laws were entrusted to Labour Courts would be frustrated, statement (P/6) of the pendency of cases before various Labour Courts has been placed on record.

12. Shri Sanjay Verma and Shri Siddharth Gulati, learned counsel appearing for petitioners have submitted that the Amendment Act is ultra vires. There is no nexus with the object sought to be achieved by the Act, the provisions are violative of Article 14, 21 read with Article 39-A of Constitution of India. The purpose of enacting the Amendment Act, 1981 has been lost sight of while enacting Amendment Act, 2002, the Labour Courts are well equipped to deal with the

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offences committed under various labour laws as Labour Courts are dealing with aforesaid labour laws and are better equipped and considering the pendency of cases before Labour Courts, it could not be said that they were over burdened, infact regular Courts are over burdened as observed by the Apex Court in several decisions relied upon by them. They have submitted that by deleting certain industries in the year 2005 from the purview of MPIR Act, work of Labour Courts has been substantially reduced, thus, Labour Courts were in better position to deal with the cases pertaining to offences arising out of various labour laws in the relevant schedule of the ID Act and the MPIR Act. Chart (R/1) indicates that 80 cases per month were decided by Labour Courts at the relevant time whereas total institution of civil and criminal cases was 41, thus, disposal was more than the institution. Coming to criminal cases, only 10 criminal cases per month on an average were being instituted whereas 30 cases were being decided by Labour Courts whereas in regular Courts institution is more as compared to disposal. Thus, the provision of Amendment Act, 2002 deserves to be struck down.

13. Shri R.S.Patel, learned Addl. AG and Shri Deepak Awashty, learned GA appearing for State of MP have supported the provisions of the Amendment Act, 2002, they have submitted that there is no vested right in the forum where the cases should be tried. Labour Courts were over burdened with other cases as such it was thought appropriate to confer the powers upon the regular Courts by virtue of Amendment Act, 2002 by deleting certain provisions, regular Courts are better equipped to deal with the offences arising out of various labour laws. They have also submitted that deletion of certain industries was made, the decision of this Court in *Heavy Electricals Mazdoor Trade Union vs. State of M.P. and others* 2006 (2) MPLJ 289 has been stayed by the Apex Court by which notification excluding certain industries from the MPIR Act was declared as ultra vires. Order (R.1) has been passed by the Apex Court. The decision in *M.P. Dainik Vetan Bhogi Karmachari Sangh, Jabalpur and another vs. State of M.P.* 2003 (4) MPHT 199 is applicable in the case in which the notification has been held to be intra vires, it was held that power to exclude certain industries from the application of the MPIR Act is with the Government.

14. Before dilating upon various submissions raised at Bar, we deem it appropriate to reproduce the amended provision by virtue of Amendment Act, 1981 amending provisions of ID Act and the MPIR Act. Sub-section (1-A) of Section 7 of ID Act was incorporated in the year 1982 to the following effect :-

"7(1-A) : In addition to the functions specified in sub-section (1), the Labour Court shall try offences punishable under this Act and the Acts specified in Part B of the Second Schedule".

Section 11-B, 11-C and 11-D were also incorporated under the ID Act which reads thus :-

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"11-B Power of Labour Courts in respect of criminal cases :- In respect of offences punishable under this Act and the Acts specified in Part B of the Second Schedule a Labour Court shall have all the powers under the Code of Criminal Procedure, 1973 (No.2 of 1974) of a Judicial Magistrate of the first class and in the trial of every such offence shall follow the procedure laid down in Chapter XXI of the said Code for summary trial and the rest of the provisions of the Code, shall, so far as may be, apply to such trial.

11-C. Appeal - (1) An appeal shall lie to the Industrial Court constituted under Section 9 of the M.P. Adhyogik Sambandh Adhiniyam, 1960 (XXVII of 1960) -

(a) against a conviction by Labour Court, by the person convicted;

(b) against an acquittal by Labour Court, by the State Government;

(c) for enhancement of sentence awarded by a Labour Court by the State Government.

11-D. Powers of Industrial Courts hearing appeal under Section 11-C - In respect of offence punishable under this Act and the Acts specified in Part B of the Second Schedule, Industrial Court hearing appeal under Section 11-C shall have all the powers of the High Court under the Code of Criminal Procedure, 1973 (2 of 1974) and shall follow such procedure as it may think fit in disposing of the appeal."

Section 61(1)(D), 63 and 64 as amended in the year 1982 of the MPIR Act reads thus :-

"61. Power of Labour Court (1) In addition to powers conferred under other provisions of this Act, a Labour Court shall have power to -

D. try offences punishable under this Act and where the payment of compensation or conviction for an offence is provided for, determine the compensation and order its payment.

63. Cognizance of offence - No Court shall take cognizance of any offence :-

(a) punishable under this Act, except on complaint in writing made by the person affected thereby or the representative of employee or the employer or on a report in writing of the Labour Officer;

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(b) punishable under any of the Acts specified in Schedule II-A, except in accordance with the provisions of the respective Acts.

64. Power of Labour Court and Industrial Court in respect of criminal cases :- (1) In respect of offences punishable under this Act a Labour Court shall have all the powers under the Code of Criminal Procedure, 1973 (No.2 of 1974) of a Judicial Magistrate of the First Class and in the trial of every such offence shall follow the procedure laid down in Chapter XXI of the said Code for summary trial and the rest of such provisions of the Code shall, so far as may be, apply the trial.

(2) In respect of offences punishable under this Act or any of the Acts specified in Schedule II-A, the Industrial Court shall have all the powers of the High Court under the Code of Criminal Procedure, 1973 (No.2 of 1974)."

15. MP Bill No.32 of 1981 provided the statement of object and reasons thus :-

" STATEMENT OF OBJECT AND REASONS

The statement has a well-organised Labour Judiciary functioning both under the Madhya Pradesh Industrial Relations Act, 1960 and the Industrial Disputes Act, 1947. The Labour Courts handle cases only under the various Labour Laws with the objects and provisions of which the Presiding Officers are very familiar. The Labour Courts decided criminal cases under labour laws also before the Code of Criminal Procedure Code, 1973, became effective."

The objects of the Amendment Act, 2002 as mentioned in the Act is as follows :-

"Statement of objects and reasons:- The Labour Courts have been constituted under the Industrial Disputes Act, 1947 and the Madhya Pradesh Industrial Relations Act, 1960 to dispose of the cases relating to termination, workmen compensation, industrial disputes, less payment claim of the workmen. After the enactment of M.P. Labour Laws (Amendment and Miscellaneous Provisions) Act, 1981 (No.43 of 1981) powers to try offences punishable under the various labour laws are vested in the Presiding Officers of the Labour Courts in the State.

2. Consequent to the aforesaid amendment Act the basic functioning of the Labour Courts got over burdened by the additional work and as a result, the disposal of aforesaid cases of workmen are being adversely affected.

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3. In the light of above the State Government has decided to empower again the Judicial Magistrate to try offences arising out of various labour laws.

4. It is, therefore, proposed to amend the Industrial Disputes Act, 1947 in its application to the State of Madhya Pradesh and the Madhya Pradesh Industrial Relations Act, 1960 suitably.

5. Hence this Bill."

Prior to enactment of Cr.P.C., 1973, power to try with the criminal cases arising out under the labour laws was with the Labour Courts. It was felt necessary by the State of MP to enact Amendment Act, 1981. The object and reasons behind the enactment were that the State has a well-organized labour judiciary functioning under the ID Act and the MPIR Act. The labour Courts were having the expertise in the labour laws and they were familiar with the object and provisions of various labour laws. Amendment Act of 1981 was enacted in due recognition of the fact that Labour Courts decided the criminal cases under labour laws also before the Cr.P.C., 1973 became effective, it was considered desirable to entrust all the criminal work arising under the various labour laws to the labour Courts. The statement of object and reasons mentioned in Bill behind enactment of Amendment Act of 2002 provides that after enactment of MP Labour Laws Amendment Act, 1981, power to try offences punishable under various labour laws are vested in the Presiding Officers of the Labour Courts of the State, consequent thereto the basic function of Labour Courts got over burdened by the additional work and as a result disposal of aforesaid cases of workmen are being adversely affected. In the light of above, State Government has decided to empower the Judicial Magistrates to try offences arising out of under various labour laws. Labour Courts have to deal with the cases relating to termination, workmen compensation, industrial disputes, less payment claim of the workmen. By Amendment Act, 2002 In the ID Act wherever the words and letters "in Part-A of the Second Schedule" occur, the Second Schedule has been substituted. Sub-section (1-A) of Section 7, Section 11-B, 11-C and 11-D of ID Act have been omitted. Sub-section (2) of Section 4 of ID Act has been amended to provide "no Court inferior to that of Metropolitan Magistrate or a judicial Magistrate of the first class shall try any offence punishable under this Act." In Second Schedule Part-A and Part-B have been omitted. In the MPIR Act, the Acts specified in Schedule II-A have been omitted. The words "and the Acts specified in Schedule II-A" have been omitted. Section 63 has also been substituted. Amendment Act of 2002 was published in MP Gazette (Extra Ordinary), dated 5.8.03. Relevant portion of the M.P. Labour Laws (Amendment) & Misc. Provisions Act, 2002 is quoted thus :-

"1. Short title and commencement :- (1) This Act may be called the Madhya Pradesh Labour Laws (Amendment) and Miscellaneous Provisions Act, 2002.

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(2) It shall come into force on such date as the State Government may, by notification, appoint.

PART I**Amendment of the Industrial Disputes Act, 1947**

2. Amendment of Central Act No. 14 of 1947 in its application to the State of Madhya Pradesh :- The Industrial Disputes Act, 1947 (No. 14 of 1947) (hereinafter in this Part referred to as the Principal Act) shall in its application to the State of Madhya Pradesh, be amended in the manner hereinafter in this Part provided :-

3. Amendment of Central Act No. 14 of 1947 - In the Principal Act- (i) throughout the Act, for the words and letters "in Part-A of the Second Schedule" Wherever they occur, the words and letters "in the Second Schedule" shall be substituted.

(ii) in Section 7, sub-section (1-A) shall be omitted.

(iii) Section 11-B, 11-C and 11-D shall be omitted.

(iv) in Section 34, for sub-section (2) as substituted by the Madhya Pradesh Labour Laws (Amendment) and Miscellaneous Provisions Act, 1981 (No. 43 of 1981), the following sub-section shall be substituted, namely :-

"(2) No Court inferior to that of Metropolitan Magistrate or a judicial Magistrate of the first class shall try any offence punishable under this Act."

(v) in the Second Schedule

(a) the words and letters "Part-A" shall be omitted.

(b) "Part-B" shall be omitted.

PART II**Amendment of the Madhya Pradesh Audhyogik Sambandh Adhiniyam, 1960**

(No. 27 of 1960)

4. Amendment of Madhya Pradesh Act No. 27 of 1960 :- In the Madhya Pradesh Audhyogik Sambandh Adhiniyam, 1960 (No. 27 of 1960) :-

(i) in section 61-

(a) in paragraph D of sub-section (1), the words and letters "and the Acts specified in Schedule II-A" shall be omitted.

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(b) in sub-section (3), the words and letters "and the Acts specified in Schedule II-A" shall be omitted.

(ii) For Section 63, the following Section shall be substituted, namely -

"63. Cognizance of Offence -No Court shall take cognizance of any offence punishable under this Act, except on a complaint in writing made by the person affected thereby or the representative of employees or the employer or on a report in writing of the Labour Officer."

(iii) in Section 64-

(a) in sub-section (1), the words and letters "or any of the Acts specified in Schedule II-A" shall be omitted.

(b) in sub-section (2), the words and letters "or any of the Acts specified in Schedule II-A" shall be omitted.

(iv) Schedule II-A shall be omitted."

16. Before dilating upon the issues involved in the case, we deem it appropriate to consider principles laid down in various decisions. In *Dhirendra Kumar vs. Superintendent and Remembrancer of Legal Affairs to the Government of West Bengal* AIR 1954 SC 424, it has been laid down that classification must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved and cannot be made arbitrarily and without any substantial basis. In *Asgarali Nazarali Singaporewalla vs. State of Bombay* AIR 1957 SC 503 the Criminal Law Amendment Act providing for Special Courts and special procedure was upheld, it did not violate Article 14 of the Constitution of India, the provisions had the necessary effect of bringing about a speedier trial of these offences and this intelligible differentia had rational relation to the object sought to be achieved by the Act. In *Kangshari Halder and another vs. The State of West Bengal* AIR 1960 SC 457, the Apex Court has observed that having ascertained the policy and the object of the Act the Court should apply the dual test in examining its validity. Is the classification rational and based on intelligible differentia, and, has the basis of differentiation any rational nexus with its avowed policy and object? If both these tests are satisfied, the statute must be held to be valid; and in such a case the consideration as to whether the same result could not have been better achieved by adopting a different classification would be foreign to the scope of the judicial enquiry. If either of the two tests is not satisfied, the statute must be struck down as violative of Art. 14. Final decision about the vires of any impugned provision must depend upon the decision which the Court reaches having regard to the facts and circumstances of each case, the general scheme of the impugned Act and the nature and effect of the provisions the vires of which

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are under examination. In *State of Nagaland vs. Ratan Singh* AIR 1967 SC 212, sections 6 and 7 of Scheduled Districts Act were held to be valid as different treatment was contemplated under Article 372A of the Constitution of these tracts and the differences are justified by the vast differences between the needs of social conditions in Nagaland and the various stages of development of different parts. In *Jagdish Pandey vs. The Chancellor, University of Bihar and others* AIR 1968 SC 353, section 4 of Bihar State Universities Amendment Act was held not to be violative of Article 14 of Constitution as it could not be said that there was no nexus with the object to be achieved. In *M/s Gammon India Ltd. and others vs. Union of India and others* (1974) 1 SCC 596, the Apex Court emphasized the test of rational relation between the Act and its object. In *Shiv Dutt Rai Fateh Chand and others vs. Union of India and others* (1983) 3 SCC 529, the Apex Court held that Section 48 of the Haryana General Sales Tax Act, 1973 cannot be said to confer an uncanalised, unguided and arbitrary power on the authority levying penalty and was not violative of Article 14 of Constitution of India. In *Delhi Cloth & General Mills Co.Ltd. vs. Union of India and others* (1983) 4 SCC 166, the Apex Court while examining the conditions imposed by sub-ordinate legislature held that it must be necessary to effectuate the purpose and relatable to the object of the statute to remain intra vires. The conditions which can be prescribed to effectuate the purpose must a fortiori, be valid. It is the constitutional obligation of the State to protect socially and economically weaker segments of the society against exploitation.

In *Shashikant Laxman Kale and another vs. Union of India and another* AIR 1990 SC 2114, the classification made under Income Tax Act Section 10(10C) between the public sector employees and private sector employees was held not to be discriminatory or arbitrary as it achieved object of streamlining public sector by curing it of one of its ailments of overstaffing.

In *Krishnan Kakkanth vs. Government of Kerala and others* AIR 1997 SC 128, in the context of policy decision of the Government, the Apex Court observed that to ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial if a better or more comprehensive policy decision could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. In *Welfare Assocn.A.R.P., Maharashtra and another vs. Ranjit P.Gohil and others* AIR 2003 SC 1266, the Apex Court held that legislation intended for benefit of "well defined class" is not open to challenge under Article 14 of

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Constitution of India. The Court can interfere only on being convinced that the classification would result in pronounced inequality or palpable arbitrariness on the touchstone of Article 14.

In *Kadra Pahadiya and others vs. State of Bihar* (1997) 4 SCC 287, the provision for appointment of Special Judicial Magistrates/Special Metropolitan Magistrates under Section 13(1) and 18(1) of Code of Criminal Procedure, 1973 were held not to be violative of Article 14 of Constitution of India. The idea underlying the provision for appointment of Special Judicial Magistrates/Special Metropolitan Magistrates under Section 13(1) and 18(1) respectively is to relieve the regular Courts of the burden of trying those cases which could be disposed of by such Magistrates. The High Court was given the power under the provisions to specify the qualification/experience that would be required for discharge of duties by such Magistrates and the period for which such appointments may be made. The object is to reduce the burden of pendency in regular Courts. The appointees should view the call as a social obligation and not employment, indeed, as a social service to the society. The withdrawal of petty cases with a view to reduce the burden on regular Courts is improper. It was also ordered that High Court will also ensure that regular Magistrates are relieved of petty cases, they would dispose of large number of more serious cases so that the offenders are brought to book at an early date and the innocent are not unnecessarily vexed for long spells. The Apex Court has laid down thus :-

"23. There can be little doubt that when the calendars of criminal courts (magistracy) in most of the States, barring a few geographically small States, are clogged and as a result, trial of cases is delayed, there is no justification for not setting a part of the machinery envisioned by the Code into motion. The basic idea in providing for the appointment of Judicial Magistrates, second class, is to ensure that petty cases do not occupy the time of the regular magisterial courts. So also the idea underlying the provisions for the appointment of Special Judicial Magistrates/Special Metropolitan Magistrates under Sections 13(1) and 18(1) respectively, is to relieve the regular courts of the burden of trying those cases which could be disposed of by such Magistrates. Parliament has advisedly left the decision as to the choice of power to be conferred on such Magistrates with the High Court. Once a request is received from the Central/ State Government by the High Court, the ball is entirely in the High Court, and it is the High Court and the High Court alone which has to decide on the number of appointments to be made, the choice of personnel to be entrusted with such power, and the extent of power to be conferred on such persons. It is the High Court which has to specify the qualification

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and/or experience that would be required for the discharging of duties by such Magistrates. As pointed out earlier, the period for which such appointments may be made must not exceed one year at a time, which shows that these are not appointments by way of regular entry into service, and are meant to be short-duration appointments to reduce the burden of pendency in regular Courts. In our view, the appointees should view the call as a social obligation and not employment; indeed as a social service to society. That is the spirit of Sections 13 and 18 and every appointee must take the call in that spirit and not expect payment as if they are in the service of the concerned State/ Union Territory. That is the reason why the said two provisions expect persons who have retired or are about to retire from Government service to be appointed to help clear the pendency. Viewed from this angle it seems fairly clear to us that retired Judicial Officers, officers of the Registry of District Courts and High Courts, as well as other Government servants who have the specified experience and qualification, can be requested to accept appointments as part of social service and they may be paid a fee to meet their out-of-pocket expenses and honorarium. We are sure that the High Courts will find any number of public spirited, retired persons available to extend a helping hand to the Criminal Justice System in the country. The High Court, we must add by way of caution, must be extremely careful in the conferment of power and should do so based on the qualification and experience of each appointee.

26. In the past, in certain States, large numbers of such petty cases were withdrawn with a view towards reducing the burden on the regular courts. We are of the opinion that unless a machinery is set up to ensure that such cases will not pile up once again after the system is put on an even keel by the withdrawal of such cases, such a measure will not serve any purpose but will, instead, send a wrong signal to the offenders that they can commit such infractions with impunity as nothing will happen to them, and ultimately the cases would be withdrawn. That will bring about more indiscipline in society rather create a culture of discipline which is so vital for national growth. But, if an adequate machinery of the type envisioned by Sections 13 and 18 of the Code is placed in position to ensure that cases do not pile up in future and then the cases are withdrawn with a view to placing the system on an even keel, it will achieve the desired objective to bring about discipline in society and eradicate crime. That is because the

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wrong-doer will know that he will be immediately hauled up before a Magistrate and would be punished if found guilty. If the load of such petty crimes is taken out of the regular courts, those courts would have time to deal with more serious crimes rather than have their time consumed by such petty cases. Besides, petty cases would also be disposed of with speed if sufficient number of Second Class Magistrates and Special Judicial/Special Metropolitan Magistrates are appointed. With such a huge pendency, it is difficult to understand the indifference in utilising this machinery envisioned by the Code. The decision to invoke these provisions was taken in 1993 at the Conference of Chief Ministers and Chief Justices which was presided over by the Prime Minister and was attended by the Chief Justice of India and yet there was almost halting progress. Even today the machinery has not been set up in some States, and where it has been set up, it is not in full strength as the status position indicated State-wise earlier would show."

17. It is necessary to consider the pendency of cases and disposal made by the labour Courts. Chart (R.1) filed by respondent/State of MP indicates that in the month of February, 2004, total number of criminal cases filed were 274 in Labour Courts, total number of criminal cases decided were 761, thus, decision of criminal cases by the Labour Courts was approximately two times more than the institution. The labour Courts were reducing the arrears at a rapid pace. Total number of civil cases filed in February, 2004 were 680 whereas total number of civil cases decided were 1079. Total number of cases pending at the end of the month in the various Labour Courts were 51,816, there was reduction in total pendency of the civil and criminal cases before the Labour Courts, at the beginning of the month 52,732 cases were pending. Thus, as per chart on an average 11 criminal cases were filed in every Labour Court whereas more than 32 criminal cases were decided on an average by each of the Labour Court. Figure is also healthy with respect to disposal of civil cases, institution was less, disposal was more.

18. When we consider the pendency before the regular Courts of lower judiciary as per data available in the High Court, in the year 2005 pendency as on 31.12.05 was 7,98,020 as on 31.12.2006 it was 7,91,290 as on 31.12.2007 it was 8,23,962. The arrears in regular Court of lower judiciary i.e. JMFC/CJM/CJ Class-II/CJ Class-I is increasing. Disposal in 2005 was 8,02,448, in the year 2006 it was 7,62,010, in the year 2007 it came down to 6,31,633. The pendency has been increased. Considering the heavy burden on the lower judiciary, Criminal Laws Local MP Amendment called Code of Criminal Procedure (M.P. Amendment) Act, 2007 has been enacted by which power to try offences under Sections 317, 318, 326, 363, 363-A, 365, 377, 392, 393, 394, 409, 435, 466, 467, 468, 471, 472, 473, 474, 475, 476, 477 and 477-A of the IPC were given to Court of Sessions instead

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of Magistrates of the First Class as burden on the lower judiciary is increased which also indicates that regular criminal courts are already over burdened. Considering juxtaposed the pendency before the Labour Courts as per statement (R.1) and also considering the disposal rate of Labour Courts which was quite handsome of both civil as well as criminal cases to be dealt with by them under the ID Act and the MPIR Act and under various other labour laws, it could not be said that the Labour Courts were not having sufficient time to deal with the cases of termination, workmen compensation, industrial disputes, less payment claim of workmen or that they were overburdened by the additional work given under the Amendment Act, 1981. It could not be said that disposal of the cases required to be adjudicated by the Labour Courts was adversely affected due to the Amendment Act of 1981.

19. No doubt about it that there is no right to be tried before a forum. In the instant case the Amendment Act, 2002 fails to achieve the aims and object of its enactment, it rather defeats the very purpose of main enactment and being arbitrary is violative of Article 14 of the Constitution of India. The Apex Court in the matter of "RV", A Judicial Officer (Criminal Appeal No. 1152/2004, decided on October 6, 2004) has observed that it is a judicially noticeable fact that subordinate Courts are over burdened and are called upon to deal with such number of cases as is totally out of proportion with what a Judge can reasonably be supposed to handle. In *Kadra Pahadiya and others vs. State of Bihar* AIR 1997 SC 3750 the Apex Court has also observed that in most of States criminal Courts (Magistracy) are clogged, as a result of which trial of cases is delayed. In *Nagpur Improvement Trust and another vs. Vithal Rao and others* AIR 1973 SC 689, the Apex Court held that the classification made must be founded on intelligible differentia, the object itself cannot be discriminatory, it cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved.

The State could not have overlooked the fact that while it was enacting the provisions of Amendment Act, 2002, what would be the plight of the cases relating to offences under labour laws before the regular criminal Courts. Moreover it could not be said from the data that Labour Courts were overburdened considering the figure of disposal and pendency mentioned in Chart (R/1) filed by the State. The provision appear not only arbitrary but unreasonable also. In *Bombay Dyeing & Mfg. Co. Ltd. vs. Bombay Environmental Action Group and others* (2006) 3 SCC 434, the Apex Court has observed that unreasonableness is certainly a ground of striking down a subordinate legislation. In *Smt. Maneka Gandhi vs. Union of India* AIR 1978 SC 597, the Apex Court has also referred to decision in *Rustom Cavasjee Cooper vs. Union of India* AIR 1970 SC 564 in which it was observed that object of law or executive action is irrelevant when it establishes the petitioner's contention about the fundamental right. There are restrictions

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imposed were held to be violative of right of freedom of speech and expression. In the instant case, right of speedy trial by and large is being defeated by the Amendment Act of 2002.

Speedier trial is fundamental right as held by Apex Court in *Hussainara Khatoon and others vs. Home Secretary, State of Bihar, Patna* AIR 1979 SC 1360, *Muralidhar Dayandeo Kesekar vs. Vishwanath Pandu Barde and another* 1995 Supp (2) SCC 549 and *Unni Krishnan, J.P. and others vs. State of Andhra Pradesh and others* AIR 1993 SC 2178.

In *Abdul Rehman Antulay and others vs. R.S. Nayak and another* (1992) 1 SCC 225 the Apex Court held thus :-

"40. The learned Judge, however, posed a question which he left to be answered at a later stage. The question posed was : What is the consequence of denial of this right ? Does it necessarily entail the consequence of quashing of charges/trial ? That question we shall consider separately but what is of significance is, this decision does establish the following propositions :-

(1) Right to speedy trial is implicit in the broad sweep and content of Article 21.

(2) That unless the procedure prescribed by law ensures a speedy trial it cannot be said to be reasonable, fair or just. Expeditious trial and freedom from detention are part of human rights and basic freedoms and that a judicial system which allow incarceration of men and women for long periods of time without trial must be held to be denying human rights to such undertrials.

48. The Court then examined the facts of the case before it in the light of the said principles and found that the accused himself was responsible for a fair part of the delay and that he has also been unable to establish how he was prejudiced in the conduct of his defence on account of delay. The Court also took into consideration the nature of offence, namely an economic offence which jeopardizes the economy of the country and held that it is not a case which calls for interference. Accordingly, it set aside the judgment of the High Court. In the course of his judgment, Chinnappa Reddy, J., noted that "delay is a known defence tactic" and also that where the prosecution has a weak case, it may resort to same tactic with a view to keep the prosecution pending as long as possible. He observed (SCC p.612, para1)

"Denial of speedy trial may with or without proof of something more lead to an inevitable of prejudice and denial of justice. It is

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prejudice to a man to be detained without trial. It is prejudice to a man to be denied a fair trial."

In *Surinder Singh alias Shingara Singh vs. State of Punjab* (2005) 7 SCC 387 and in *T.V.Vatheeswaran vs. The State of Tamilnadu* AIR 1983 SC 361(2), the Apex Court observed that right to speedy trial is a fundamental right implicit in the broad sweep and content of Article 21. *Hussainara Khatoon and others vs. Home Secretary, State of Bihar, Patna* (supra), it is held that speedy trial is the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. In all criminal prosecutions, the accused have the right of speedy trial, it is implicit in the broad sweep and contents of Article 21. No procedure which does not ensure a reasonably quick trial can be regarded as "reasonable, fair or just" and it will foul of Article 21. It is also observed in *Pratap Singh vs. State of Jharkhand and another* (2005) 3 SCC 551 that right to speedy trial is not a new right, it is embedded in our Constitution in terms of Articles 14 and 21 thereof. It is also emphasized in *Narinderjit Singh Sahni and another vs. Union of India and others* (2002) 2 SCC 210. In *Moti Lal Saraf vs. State of J&K and another* (2006) 10 SCC 560, the Apex Court held thus :-

"52. In order to make the administration of criminal justice effective, vibrant and meaningful, the Union of India, the State Governments and all authorities concerned must take necessary steps immediately so that the important constitutional right of the accused to a speedy trial does not remain only on paper or is a mere formality."

20. It is required to be gone into whether the object of the Act has the nexus with the objective sought to be achieved by the Amendment Act of 2002. Right to speedy trial is a well recognized fundamental right as laid down by the Apex Court by interaction of Articles 14, 21 and 39-A of Constitution of India. The purpose behind the enactment of Amendment Act of 1981 was that State has well organized labour judiciary having expertise to deal with labour cases and only the labour Courts handle the cases under various labour laws. Labour Judges are familiar with the objects and provisions of labour laws, thus, it was considered desirable to entrust all criminal work arising under various labour laws to Labour Courts. The constitution of Administrative Tribunals has been upheld by the Apex Court on the ground of expertise and special skill required in *S.P. Sampath Kumar vs. Union of India and others* (1987) 1 SCC 124 and *L. Chandra Kumar vs. Union of India and others* (1997) 3 SCC 261. The constitution of Consumer Forums was also approved by Apex Court in *State of Karnataka vs. Vishwabharathi House Building Coop. Society and others* (2003) 2 SCC 412 on the ground that such cases require special approach. The Apex Court has emphasized that Special Magistrates should be appointed as regular criminal Courts are reeling with the burden of the cases and it is required to be drastically reduced.

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By the aforesaid Amendment Act of 2002 the purpose of speedy disposal of criminal cases will be totally frustrated when State has enacted Amendment of 1981 considering the expertise. The burden on the regular criminal Courts was already too much. The Labour Courts are empowered to decide offences arising out of various labour laws with which they are dealing and are familiar, it would defeat the very purpose of the enactment and render Amendment Act, 2002 arbitrary couched in the form of speedier disposal of other kind of cases by delaying other category of cases. The situation before labour Courts was not such so as to effect the amendment. The burden on labour Courts has been substantially reduced and presently it is comparatively lesser due to deletion of certain industries from the purview of the MPIR Act also by amendment made in the year 2005, validity of which is under examination before the Apex Court and interim stay has been granted on the decision rendered by this Court in *Heavy Electricals Mazdoor Trade Union vs. State of M.P. and others* (supra). Due to the trial of offences under the various labour laws effective functioning of the Labour Courts was not adversely affected as apparent from Annexure (R/1). Thus, the basic function of the Labour Courts could not be said to be over burdened by the trial of offences punishable under various labour laws which power was vested by way of Amendment Act of 1981. State has completely ignored and over looked the data which indicates that Labour Courts were functioning more effectively as compared to the already over burdened regular criminal Courts where arrears are increasing. It cannot be denied that labour Courts are well equipped also to deal with the cases arising out of various labour laws as the Labour Courts are already dealing with the labour laws out of which offences arise and they are well acquainted in such branch of law which is a specialized branch with the aims and objects of labour laws. On the other hand, The Amendment Act of 2002 also defeats the right of persons involved in the trial of offence to get speedier justice which is basic fundamental right as we have held that Labour Courts were not overburdened, thus, there was no rational nexus to be achieved by excluding criminal cases by the Amendment Act of 2002 from the jurisdiction of Labour Courts and to give the power to try them to the regular Courts. There is nexus between the cases to be tried by the Labour Courts and the offences under the labour laws, object of labour laws, thus, the classification made of excluding cases from the Labour Courts under the guise that the Labour Courts were overburdened whereas they were not, they were rather well equipped to deal with the kind of cases handed over by the impugned Act to the regular Courts.

21. Consequently, we have no hesitation in striking down the **M.P. Labour Laws (Amendment) & Misc. Provisions Act, 2002** as **ultra vires** as it fails to achieve the purpose, it is clearly arbitrary and rather defeats the provisions of existing enactment. The writ petitions are allowed. We direct the trial of the cases to be made before the Labour Courts. The validity of the decisions rendered

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and proceedings taken by regular Courts will not be adversely affected by the decision. No costs.

Petition allowed.

I.L.R. [2009] M. P., 1225

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Sanjay Yadav

11 August, 2008*

MANU BHAI TRIPATHI

... Petitioner

Vs.

UNION OF INDIA & ors.

... Respondents

A. Words and Phrases - Reside - Includes not only permanent residence but also temporary residence but does not include flying visit.

(Para 7)

क. शब्द और वाक्यांश - निवास करना - में न केवल स्थायी निवास बल्कि अस्थायी निवास भी सम्मिलित है किन्तु त्वरित मुलाकात सम्मिलित नहीं है।

B. Cantonment Electoral Rules, 2007, Rule 28(1) - Qualification of electorals - Resident and Resided - A person is resident of a particular place only if he maintains a house or portion of house - A person can physically reside in a particular place without maintaining a house or a portion of house - Section 28(1) does not use the word resident - Held - Once a person has temporarily resided in cantonment for a period of six months immediately preceding the qualifying date and is not otherwise disqualified is entitled to be enrolled as electoral - Persons making flying visit are not entitled to be included in electoral rolls.

(Para 11)

ख. छावनी निर्वाचन नियम, 2007, नियम 28(1) - निर्वाचकों की अर्हता - निवासी और निवास किया - कोई व्यक्ति केवल तब किसी विशिष्ट स्थान का निवासी है यदि वह कोई गृह या गृह का भाग रखता है - व्यक्ति कोई गृह या गृह का भाग रखे बिना शारीरिक रूप से किसी विशिष्ट स्थान में निवास कर सकता है - धारा 28(1) शब्द निवासी प्रयुक्त नहीं करती है - अभिनिर्धारित - जब किसी व्यक्ति ने छावनी में अर्हकारी तारीख के ठीक पूर्व की छः माह की कालावधि तक अस्थायी रूप से निवास कर लिया हो और अन्यथा अनर्ह नहीं है तो निर्वाचक के रूप में नामांकित किये जाने का हकदार है - त्वरित मुलाकात करने वाले व्यक्ति निर्वाचक नामावली में अन्तर्विष्ट किये जाने के हकदार नहीं हैं।

C. Cantonment Electoral Rules, 2007, Rules 12, 13 & 28, Constitution, Article 226 - Locus standi - Petitioner did not raise any objection to any entry in preliminary electoral roll - Held - He cannot raise contention that even persons making flying visit or casually staying have been included in final electoral rolls.

(Para 13)

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ग. छावनी निर्वाचन नियम, 2007, नियम 12, 13 व 28, संविधान, अनुच्छेद 226 – सुने जाने का अधिकार – याची ने प्राथमिक निर्वाचक नामावली में किसी प्रविष्टि के बारे में कोई आपत्ति नहीं उठाई – अभिनिर्धारित – वह यह प्रतिविरोध नहीं कर सकता कि त्वरित मुलाकात करने वालों या आकस्मिक रूप से उहरने वालों को अंतिम निर्वाचक नामावली में सम्मिलित किया गया है।

Cases referred :

(2000) 2 SCC 20, AIR 1963 SC 1521, (1999) 3 SCC 555, AIR 1990 SC 1747, AIR 2005 SC 294.

Adarsh Muni Trivedi with Uttam Maheshwari, for the petitioner.

Dharmendra Sharma, A.S.G., for the respondent Nos.1 & 2.

Indira Nair with Jasmeet Chana, for the respondent No.3.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE.** :-The petitioner who is a resident of Sagar Cantonment has filed this writ petition as a Public Interest Litigation challenging the preparation of final electoral rolls of the Sagar Cantonment for elections to the Sagar Cantonment Board.

2. The relevant facts briefly are that the Cantonments Act, 1924 was replaced by the new Cantonments Act, 2006 (for short 'the 2006 Act') by Parliament. The 2006 Act was brought into force by notification dated 18.12.2006. Under Section 31 of the 2006 Act, the Central Government made and notified on 21.8.2007 the Cantonment Electoral Rules, 2007 (for short 'the 2007 Rules'). Thereafter the Sagar Cantonment Board undertook the demarcation of wards in Sagar Cantonment in accordance with the 2007 Rules. The petitioner filed his objections to the revision of the wards in the Sagar Cantonment stating that there have been lot of encroachments resulting in increase of number of voters and that the encroachers have no right to be included in the electoral rolls. By order dated 12.9.2007, the Cantonment Board, Sagar disposed of the objections holding inter-alia that the present exercise is only to fix the boundaries of wards and not to make the voter list and the petitioner may submit his objections at the time of preparation of the electoral rolls, which will be considered. Thereafter, the preliminary electoral rolls of the Sagar Cantonment were published by a notice on the office of the Cantonment Board on 20.11.2007 but the petitioner did not file any objection to the inclusion of names of non-eligible persons in the electoral rolls and the final electoral rolls were published. Aggrieved, the petitioner has filed this petition under Article 226 of the Constitution for appropriate reliefs.

3. At the hearing, Mr. Adarsh Muni Trivedi, learned Senior Counsel appearing for the petitioner submitted that under Section 28 of the 2006 Act, only a person who has resided in the Cantonment for a period of not less than six months

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immediately preceding the qualifying date shall be entitled to be enrolled as an elector. He submitted that Section 2 (zt) of the 2006 Act defines a 'resident' in relation to a Cantonment as a person who maintains therein a house or a portion of a house. He further submitted that in *Union of India and others vs. Dudh Nath Prasad*, (2000) 2 SCC 20, the Supreme Court relying on its earlier decision in *Mst. Jagir Kaur and another vs. Jaswant Singh*, AIR 1963 S.C. 1521, has taken a view that a casual stay or a flying visit to a particular place would not be included in the meaning of the word 'reside'. He submitted that persons who do not have any residence in the Sagar Cantonment and have encroached in different places of Sagar Cantonment or who are on training for a short period and are living in tents have been included in the electoral rolls of Sagar Cantonment for elections to the Cantonment Board. He further submitted that under Rule 4 of the Cantonment Land Administration Rules, 1937, land in the Cantonment has been classified into Class 'A' land, Class 'B' land and Class 'C' land. He submitted that the occupants of Cantonment land specified as Class 'C' land and Class 'B-4' land cannot be included in the electoral rolls of the Cantonment and only those residents who were residing in the area demarcated in the GLR of Survey of India are entitled to be included in the electoral rolls. He argued that the final electoral rolls have been prepared disregarding these provisions of Rule 4 of the Cantonment Land Administration Rules, 1937 and persons who are not residents of the Sagar Cantonment and have a nomadic existence in the Sagar Cantonment have been illegally enrolled in the final electoral rolls of the Sagar Cantonment for elections to the Cantonment Board. He cited the decision in *Chief Executive Officer vs. Surendra Kumar Vakil and others*, (1999) 3 SCC 555 in which a discussion of the provisions of the Cantonment Land Administration Rules, 1937 finds place.

4. Mrs. Indira Nair, learned Senior Counsel appearing for the respondent No.3 Sagar Cantonment Board, and Mr. Dharmendra Sharma, learned Assistant Solicitor General appearing for the respondent No. 1 Union of India, on the other hand, relying on the replies filed by the respondents 1 and 3 submitted that Section 28 of the 2006 Act only says that every person who has resided in the Cantonment for a period of not less than six months immediately preceding the qualifying date shall be entitled to be enrolled as an elector if he is not otherwise disqualified. They submitted that Section 28 of the 2006 Act does not make any distinction between persons who are encroachers and persons who are not encroachers, nor does it make a distinction between persons who are residing in Class 'A' land or Class 'C' land or Class 'B-4' land. They further submitted that the word used in Section 28 (1) of the 2006 Act is 'resided' and hence the definition of 'resident' in Section 2 (zt) of the 2006 Act has no relevance for deciding who is and who is not qualified to be enrolled as an elector in the electoral rolls of a Cantonment. They submitted that the word 'resident' finds place in Sections 13 (7), 65 (1) (iv), 348

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(2) and 348 (31) of the 2006 Act and it is for this reason that Section 2 (zt) of the 2006 Act defines the word 'resident'.

5. Mrs. Nair and Mr Sharma further submitted that Rule 9 of the 2007 Rules provides that every person who is eligible for enrolment as an elector under sub-section (1) of Section 28 of the 2006 Act, and is not otherwise disqualified under sub-section (2) of the said section shall be enrolled as an elector. They submitted that according to these provisions of Section 28 of the 2006 Act and Rule 9 of the 2007 Rules, the electoral rolls of the Sagar Cantonment were prepared. They finally submitted that in any case after the preliminary electoral rolls were prepared and published, the petitioner did not file any objection to the inclusion of names of any person in the electoral rolls and hence, at this stage, the petitioner cannot raise an objection that persons who are not eligible to be included as electors in the electoral rolls of the Sagar Cantonment have in fact been included as electors in the final electoral rolls of the Sagar Cantonment.

6. Mrs. Nair submitted that in *Gwalior Rayons Silk Manufacturing (Wrg) Co. Ltd. vs. Custodian of Vested Forests, Balaghat*, AIR 1990 S.C. 1747, the Supreme Court has held that in finding out the legislative intention, Judges not only listen to the voice of the Legislature but also listen attentively to what the Legislature does not say. She submitted that since the Legislature has not said in Section 28 that only persons who maintain houses in the Cantonment will be qualified to be electors, the Court cannot hold that only persons who maintain houses in the Cantonment area will be entitled to be included in the electoral rolls as electors for the elections to the Cantonment Board. She cited *State of Jharkhand and another vs. Govind Singh*, AIR 2005 S.C. 294 for the proposition that when the words of the statutes are clear, plain or unambiguous and they are reasonably susceptible to only one meaning, the Courts are bound to give effect to that meaning irrespective of consequences because the intention of the legislature is primarily to be gathered from the language used by the legislature.

7. In *Mst. Jagir Kaur and another* (supra), the word 'resides' used in Section 488 of the Criminal Procedure Code, 1898 came to be considered and the Supreme Court held:

"In the Oxford Dictionary it is defined as: 'dwell permanently or for a considerable time; to have one's settled or usual abode; to live in or at a particular place.' The said meaning, therefore, takes in both a permanent dwelling as well as a temporary living in a place. It is, therefore, capable of different meanings, including domicile in the strictest and the most technical sense and a temporary residence. Whichever meaning is given to it, one thing is obvious and it is that it does not include a casual stay in, or a flying visit to a particular place. In short, the meaning of

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the word would, in the ultimate analysis, depend upon the context and the purpose of a particular statute."

It is thus clear that the word "reside" includes not only permanent residence but also temporary residence but does not include a flying visit to or a casual stay in a particular place and in the ultimate analysis the meaning of the word "reside" will depend upon the context and the purpose of a particular statute in which the word is used. This decision has been followed by the Supreme Court in *Union of India and others vs. Dudh Nath Prasad* (supra). Thus, the word "resided" in Section 28(1) of the 2006 Act has to be interpreted in the context of the 2006 Act.

8. Section 2 (zt) and Section 28 of the 2006 Act on which reliance has been placed, are quoted herein below:

"2(zt) "resident", in relation to a cantonment, means a person who maintains therein a house or a portion of a house which is at all times available for occupation by himself or his family even though he may himself reside elsewhere, provided that he has not abandoned all intention of again occupying such house either by himself or his family."

"28. Qualification of electors.-(1) Every person who, on such date as may be fixed by the Central Government in this behalf by notification in the Official Gazette hereinafter in this section referred to as "the qualifying date", is not less than eighteen years of age and who has resided in the cantonment for a period of not less than six months immediately preceding the qualifying date shall, if not otherwise disqualified, be entitled to be enrolled as an elector. -

Explanation - When any place is declared a cantonment for the first time, or when any local area is first included in a cantonment, residence in the place or area comprising the cantonment on the aforesaid date shall be deemed to be residence in the cantonment for the purposes of this sub-section.

(2) A person notwithstanding that he is otherwise qualified, shall not be entitled to be enrolled as an elector if he on the qualifying date -

- (i) is not a citizen of India, or
- (ii) has been adjudged by a competent Court to be of unsound mind, or
- (iii) is an undischarged insolvent, or
- (iv) has been sentenced by a Criminal Court to imprisonment for a term exceeding two years for an offence which

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is declared by the Central Government to be such as to unfit him to become an elector or has been sentenced by a Criminal Court for any offence under Chapter IX-A of the Indian Penal Code (45 of 1860): Provided that any disqualification incurred by a person under clause (iv) shall terminate on the lapse of three years from the expiry of the sentence or order.

(3) If any person having been enrolled as an elector in any electoral roll subsequently becomes subject to any of the disqualifications referred to in sub-section (2), his name shall be removed from the electoral roll unless, in the case referred to in clause (iv), the disqualification is removed by the Central Government.”

9. Section 28(1) of the 2006 Act says that every person who has resided in the Cantonment for a minimum period of six months before the qualifying date is entitled to be enrolled as an elector. Hence, temporary residence in the Cantonment for a period of six months and not a flying visit to or a casual stay in the Cantonment will entitle a person to be included in the electoral roll as an elector. Section 2(zt) of the 2006 Act, however, defines “resident” in relation to a Cantonment to mean a person who maintains therein a house or a portion of a house. The word “resident” has a different meaning than the word “reside”. A person is a resident of a particular place only if he maintains a house or a portion of a house at that particular place and not otherwise, but a person can physically reside in a particular place without maintaining a house or a portion of a house in that particular place. Hence, for interpreting Section 28(1) of the 2006 Act which uses the word “resided” and does not use the word “resident”, the definition of “resident” in Section 2(zt) of the 2006 Act is not relevant. As pointed out by Mrs. Nair, the word “resident” finds place in Sections 12(7), 65(1), 348(2) and 348(31) of the 2006 Act and for this reason Section 2(zt) of the 2006 Act defines the word “resident”.

10. Rule 9 of the 2007 Rules is quoted herein below:

“9 Qualification of elector - Every person who is eligible for enrolment as an elector under sub-section (1) of Section 28 of the Act, and is not otherwise disqualified under sub-section (2) of the said section shall be enrolled as an elector.”

It will be clear from Rule 9 of the 2007 Rules that every person who is eligible for enrolment as an elector under sub-section (1) of Section 28 of the 2006 Act and is not otherwise disqualified under sub-section (2) of the said section has to be enrolled as an elector. Thus, under the 2007 Rules also, once a person has even temporarily resided in the Cantonment for a period of six months immediately preceding the qualifying date and is not otherwise disqualified under sub-section (2) of Section 28 of the 2006 Act is entitled to be enrolled as an elector. There is no provision in sub-section (2) of Section 28 of the 2006 Act

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disqualifying an encroacher or a person occupying Class 'C' or Clause 'B-4' land or residing outside the residential locality demarcated in GLR of the Survey of India to be an elector.

11. Hence on a reading of different provisions and in particular Section 28 of the 2006 Act and on a reading of different provisions and in particular Rule 9 of the 2007 Rules, we have no doubt in our mind that all persons residing even temporarily for a period of six months in the Cantonment, whether in any house maintained by them or in any other place, are entitled to be enrolled as electors in the electoral rolls of the Cantonment and the contention of the petitioner that encroachers or persons residing in tents are not entitled to be enrolled as electors in the electoral rolls of the Cantonment is misconceived. We, however, make it clear that persons making a casual visit to and casually staying and have not been residing in the Cantonment for a period of six months preceding the qualifying date are not entitled to be included in the electoral rolls of a Cantonment.

12. Rules 12 and 13 of the 2007 Rules which deal with notice of publication of electoral rules and claims and objections to the inclusion of a name in the electoral roll, are extracted herein below:

12. Notice of publication of electoral rolls.-

(1) Copies of the electoral roll prepared under rule 10 shall be displayed at the notice board of the office of Cantonment Board, and at the same time notice of their preparation shall be displayed in Form II at the notice board of the said Office and at such places throughout the Cantonment, there being at least one such place in each ward, as the Board, or where a Board is not constituted, the Officer Commanding the Station, may specify.

(2) The notice shall also specify the mode in which claims and objections are to be preferred and disposed of.

13. Claims and objections --

(1) Every claim for the inclusion of a name in the electoral roll and every objection to an entry therein shall be made within a period of twenty days from the date of publication of the notice referred to in rule 12.

(2) Every claim made under sub-rule (1) shall be

(a) in Form III.

(b) Signed by the person desiring his name to be included in the roll.

(c) Countersigned by another person whose name is already included in that part of the roll in which the claimant desires his name to be included.

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(3) Every objection to the inclusion of a name in the roll shall be -

(a) in Form IV.

(b) Preferred only by a person whose name is already included in that roll.

(c) Countersigned by another person whose name is already included in that part of the roll in which the name objected to appears.

(4) Every objection to any particular in an entry in the roll shall be -

(a) in Form IV-A; and

(b) preferred only by the person to whom that entry relates.

(5) Every claim or objection shall be presented to the Chief Executive Officer in person or be sent by registered post to the Chief Executive Officer.

(6) If any objection relates to the inclusion in the electoral roll of the name of a person other than the objector, the objection shall be filed in duplicate.

(7) The Chief Executive Officer shall reject any claim or objection which is not made within the period or in the form and manner specified in this rule.

13. It is clear from Rules 12 and 13 of the 2007 Rules that when the preliminary electoral rolls are prepared and displayed in the notice board of the Cantonment Board, objection to any entry in the electoral roll can be made within a period of twenty days from the date of publication of the notice. The petitioner had filed an objection at the stage of revision of wards that there have been lot of encroachments resulting in inclusion of illegal voters and encroachers have no right to be included in the electoral rolls, but by order dated 12.9.2007 of the Cantonment Board, the objection was rejected saying that the petitioner may submit objections at the time of preparation of voters-list. Thereafter, when the preliminary electoral rolls were published under Rule 12 of the 2007 Rules on 20.11.2007, the petitioner did not raise any objection to the inclusion of any name in the electoral rolls on the ground that he has not been residing in the Cantonment for six months or more preceding the qualifying date and was only an encroacher or a visitor living in the Sagar Cantonment. Since the petitioner did not raise any such objection, he cannot now raise a contention before the Court in the present writ petition that even persons making flying visit to or casually staying in the Sagar Cantonment had been included in the final electoral rolls published by the Sagar Cantonment Board.

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14. In the result, we do not find any merit in the writ petition and we dismiss the same and vacate the interim order dated 13.5.2008. There shall be no orders as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 1233

WRIT PETITION

Before Mr. Justice R.S. Jha

21 August, 2008*

H.R. KAURAV

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Service Law - Police Regulations, M.P., Regulation 241 - Petitioner acquitted in criminal case - Petitioner prayed for quashing the charge-sheet and not to proceed further in D.E. initiated against him - Held - Petitioner has been acquitted by the criminal Court on the same charges on which the D.E. was instituted - Petitioner is entitled to reinstatement in accordance with the provisions of Regulation 241 of Police Regulations - Charge-sheet quashed - Petition allowed. (Para 6)

सेवा विधि - पुलिस विनियम, म.प्र., विनियम 241 - याची दाण्डिक मामले में दोषमुक्त - याची ने उसके विरुद्ध प्रारम्भ की गई विभागीय जाँच में आरोप पत्र अभिखण्डित करने और आगे कार्यवाही न करने की प्रार्थना की - अभिनिर्धारित - दाण्डिक न्यायालय द्वारा याची को उन्ही आरोपों पर दोषमुक्त किया गया जिन पर विभागीय जाँच संस्थित की गई थी - याची पुलिस विनियम के विनियम 241 के उपबंधानुसार पुनर्नियुक्ति का हकदार - आरोप पत्र अभिखण्डित - याचिका मंजूर।

D.K. Dixit, for the petitioner.

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

ORDER

R.S. JHA, J. :-The petitioner, who at the relevant time was working as a Sub Inspector, has filed this petition praying for quashing of the charge-sheet issued to him on 26.11.1990 and for a further direction to the respondents not to proceed further in the departmental enquiry initiated against the petitioner on the ground that the petitioner was already being prosecuted for the same charges before the competent Criminal Court in Sessions Trial No.82/1992 pending before the First Additional District and Sessions Judge and Special Judge, Mandla. It is relevant to state that the petitioner had initially filed this petition before the Madhya Pradesh State Administrative Tribunal and by interim order dated 11.9.1996 further proceedings in the departmental enquiry initiated against the petitioner were stayed. The interim stay, granted by the Tribunal, continues till date.

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2. During the pendency of the petition the petitioner has filed an application for taking documents on record on 10.1.2002 and has placed the judgment of the First Additional District & Sessions Judge and Special Judge, Mandla dated 28.4.2000 passed in Session Trial Nos.82/90 and 72/93 and Special Case No.28/94 on record in which the petitioner has been acquitted.

3. It is submitted by the learned counsel for the petitioner that as the petitioner has been acquitted by the competent Criminal Court in respect of the charges which are similar and identical to the one which have been levelled against him in the departmental proceedings, the petition filed by him deserves to be allowed and the impugned charge-sheet deserves to be quashed. The aforesaid facts are not denied by the respondents.

4. In view of the aforesaid facts and circumstances, without entering into the merits of the case, this Court only proposes to examine as to whether the petitioner's acquittal in the criminal case has rendered the departmental proceedings initiated against him a nullity specifically in view of the provisions of regulation 241 of the M.P. Police Regulations (hereinafter referred to as 'the Police Regulations') which is in the following terms:-

"241. Cases of acquittal- When a police officer has been tried and acquitted by a criminal court, he must as a rule be reinstated. He may not be punished departmentally when the offence for which he was tried constitutes the sole ground of punishment. If, however the acquittal, whether in the court of original jurisdiction or of appeal, was based on technical grounds; or if the facts established at the trial show that his retention in Government service is undesirable, the Superintendent may take departmental cognizance of his conduct, after obtaining the sanction of the Inspector General."

5. Though the learned Govt. Advocate appearing for the respondents has vehemently contended that the charges levelled against the petitioner in the impugned charge-sheet are different and not identical to the charges framed against the petitioner in the criminal case in which he has been acquitted, a perusal of the judgment in the criminal case dated 28.4.2000 indicates that the issue regarding an attempt on the part of the petitioner to convert the case of murder into one of suicide, demanding bribe, beating up the complainant, not properly recording the statements of the complainant or the seizure memo and other conducts not becoming that of a police officer which were levelled against the petitioner in the criminal case were identical to the charges levelled against him in the departmental enquiry though additionally he was also charged with offences punishable under the Prevention of Corruption Act and the Criminal Court, after analyzing and appreciating the oral and documentary evidence on record, has acquitted the

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petitioner by recording a finding that the prosecution had failed to establish the same against the petitioner.

6. In view of the aforesaid facts, I am of the considered opinion that as the charges in both the cases, i.e. the departmental proceedings and the criminal case, were identical and as the petitioner has been acquitted by the Criminal Court of the same charges on which the departmental enquiry was instituted against him, the petitioner is entitled to reinstatement in accordance with the provisions of Regulation 241 of the Police Regulation. It is appropriate to state that normally the proper course in such a case would have been to remit the matter back to the departmental authority to examine the case after his acquittal in the criminal case, in the light of the provision of Regulation 241 of the Police Regulations, however looking to the fact that the incident relates to the year 1989 and that the petition is pending before this Court since 1996, and on a perusal of the record it is patently apparent that the charges in the departmental proceedings and the criminal case were same, no useful purpose would be served by sending the matter back and, therefore, in view of the aforesaid facts and circumstances, the impugned charge sheet dated 26.11.1990 and the departmental proceedings, initiated against the petitioner, are hereby quashed in view of the provisions of Regulation 241 of the Police Regulations and the petitioner is directed to be reinstated.

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

Petition allowed.

I.L.R. [2009] M. P., 1235

WRIT PETITION

Before Mr. Justice Ajit Singh

29 August, 2008*

KARAN SINGH & ors.

... Petitioners

Vs.

STATE OF M.P. & ors.

... Respondents

Lok Parisar (Bedakhali) Adhiniyam, M.P. (46 of 1974), Sections 3 & 17 - Delegation of powers by the State Government to Collectors u/s 17 of the Act - Notification issued on 05.02.1975 and published in Official Gazette on 16.04.1976 - Collector issued the order dated 26.08.1975 appointing S.D.O. as competent authority and it was published in Official Gazette on 19.09.1975 - Validity of appointment of competent authority challenged - Held - Actions taken by the Collector were in anticipation of the order of delegation - Order of Collector appointing competent authority become operative from 16.04.1976 - Therefore order passed by competent authority on 10.02.2000 is a valid order. (Para 10)

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लोक परिसर (बेदखली) अधिनियम, म.प्र. (1974 का 46), धाराएँ 3 व 17 - राज्य सरकार द्वारा कलेक्टरों को अधिनियम की धारा 17 के अधीन शक्तियों का प्रत्यायोजन - अधिसूचना तारीख 05.02.1975 को जारी की गई एवं तारीख 16.04.1976 को शासकीय राजपत्र में प्रकाशित की गई - कलेक्टर ने एस.डी.ओ. को सक्षम प्राधिकारी के रूप में नियुक्त करते हुए आदेश तारीख 26.08.1975 जारी किया और इसे तारीख 19.09.1975 को शासकीय राजपत्र में प्रकाशित किया गया - सक्षम प्राधिकारी की नियुक्ति को चुनौती दी गई - अभिनिर्धारित - कलेक्टर द्वारा किये गये कार्य प्रत्यायोजन के आदेश की प्रत्याशा में थे - कलेक्टर का सक्षम प्राधिकारी की नियुक्ति का आदेश 16.04.1976 से प्रवृत्त हुआ - इसलिए सक्षम प्राधिकारी द्वारा तारीख 10.02.2000 को पारित आदेश विधिमान्य आदेश है।

Cases referred :

AIR 1965 SC 458, AIR 2000 SC 1102, AIR 2003 SC 269.

ORDER

AJIT SINGH, J. :-Original plaintiff/petitioner Kamal Singh died during the pendency of this petition and hence the names of his legal representatives have been substituted as petitioners.

2. This petition, under Article 227 of the Constitution, is directed against the order dated 9.9.2005 passed in Miscellaneous Civil Appeal No. 17/2005 by the District Judge, Chhatarpur, whereby he has dismissed the plaintiff's appeal confirming the order of rejecting the application for grant of temporary injunction as passed by the trial court.

3. The case of plaintiff Kamal Singh in his suit before the trial court is that the premises in question (land, house and well) belonged to the erstwhile Maharaja Bhawani Singh of Chhatarpur who, on being pleased with the services rendered by his parents, gifted the same to him by a gift deed dated 12.7.1946. According to Kamal Singh, on 1.3.1958 he joined the services of the State Forest Department and was posted at Chhatarpur on 24.11.1976 whereupon respondent no. 6, without his request, allotted the premises to him and started deducting its rent from salary. Kamal Singh has also averred that he even filed an appeal on 25.8.1978 against the deduction of rent but to no avail and the respondents continued to deduct the rent upto 1.10.1999 though he retired from service on 30.11.1995. According to Kamal Singh, respondent no. 5, the Sub-Divisional Officer served him with a show cause notice dated 5.12.1995 under the provisions of the Madhya Pradesh Lok Parisar (Bedakhali) Adhiniyam, 1974 (in short, "the Act") in Revenue Case No. 54B/21/99-00 to which he replied and sought documents. Thereafter, respondent no. 5 by order dated 10.2.2000 held that the occupation of the premises by him was unauthorized and directed him to immediately vacate the same. In passing the eviction order respondent no. 5 acted as competent authority under the Act. Aggrieved with the order, Kamal Singh filed the suit from which this petition arises claiming the relief of permanent injunction and declaration that the

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order dated 10.2.2000 is void and without jurisdiction. He also filed an application for grant of temporary injunction.

4. The respondents have averred that the premises belongs to the State Government and is maintained by it. According to the respondents, Kamal Singh, after his posting at Chhatarpur in the year 1976, applied for the allotment of the premises on rent but as it was not vacant the same could not be allotted to him. Kamal Singh thereafter again applied for the allotment of the premises by filing applications dated 7.11.1977 and 29.6.1978 pursuant to which it was allotted to him by order dated 3.8.1978 and after allotment Kamal Singh, on his own, continued to deposit the rent upto September 1999. The respondents also took the plea that the suit of Kamal Singh was not maintainable and the order, having been passed by a competent authority, no injunction can be granted against it in view of the bar under section 10 of the Act.

5. The trial court rejected the application of Kamal Singh for grant of temporary injunction against which he filed an appeal which too was dismissed by the impugned order. The trial court as well as the appellate court agreed with the finding of respondent no. 5 that Kamal Singh was an unauthorized occupant of the premises as the same was allotted to him by the Forest Department on his request after he was posted at Chhatarpur. Both the courts have also found the document of gift deed relied upon by Kamal Singh as unreliable and held that no injunction can be granted against the order dated 10.2.2000 passed by respondent no. 5 who was the competent authority under the Act.

6. The Act provides for the eviction of unauthorized occupants from public premises and section 10 excludes the jurisdiction of civil courts with regard to every order made by a competent authority under the Act. It reads as under:

"10. Finality of orders.- Save as otherwise expressly provided in this act, every order made by a competent authority or appellate authority under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

7. The submission of learned Senior Counsel for the petitioners is that section 10 of the Act is not applicable because respondent no. 5 was not validly appointed as competent authority and hence his order dated 10.2.2000 was a nullity. This is the only point that the learned Senior counsel has argued in support of the petition. A reading of section 10 makes it clear that every order made by competent authority or appellate authority under the Act shall be final and shall not be called in question in any original suit and no injunction shall be granted by any court in respect of any action taken or to be taken in pursuance of powers conferred by or under the

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Act. It is well settled that such an exclusionary provision in the Act which forbids a challenge to "a determination or order made under the Act" in a civil court contemplates cases of a real determination or order and does not protect a determination or order which is a nullity or void. It is trite law that an order passed without jurisdiction is a nullity. Thus, it is desirable to first examine whether the order dated 10.2.2000 is a nullity.

8. The argument that respondent no. 5 was not validly appointed as competent authority requires examination of sections 17 and 3 of the Act which read as under:

"17. Delegation of powers.- The State Government, may by notification in the Official Gazette, direct that any power exercisable by it under this Act shall subject to such conditions, if any, as may be specified in the notification be exercisable also by an officer of the State Government."

"3. Appointment of competent authority.- The State Government may, by notification in the Official Gazette, -

(a) appoint such person being an officer not below the rank of Assistant Collector or Deputy Collector as competent authority for the purposes of this Act; and

(b) define the local limits within which, or the categories of public premises in respect of which, the competent authority shall exercise the powers conferred, and perform the duties imposed on competent authority by or under this Act."

Section 17 of the Act authorizes the State Government to delegate its powers whereby the State Government may, by notification in the Official Gazette, direct that any power exercisable by it under the Act shall, subject to such conditions, if any, as may be specified in the notification, be exercisable also by an officer of the State Government. According to section 3, the State Government, by a notification in the Official Gazette, may appoint certain persons, not below the rank of Assistant Collector or Deputy Collector, as competent authority for the purposes of the Act. Thus, the powers, which vested in the State Government under section 3 if delegated to the Collectors by a notification in the Official Gazette, can also be exercised by the Collectors within their respective jurisdiction.

9. The State Government, in exercise of the powers conferred by section 17 of the Act, issued a notification dated 5.2.1975 which was published in the Official Gazette on 13.2.1976. The notification is as under:

"Home Department

Bhopal, dated 5th February 1975

No. F. 13-1-75-II-A(3). - In exercise of the powers conferred

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by section 17 of the Madhya Pradesh Lok Parisar (Bedakhali) Adhiniyam, 1974 (No. 46 of 1974), the State Government hereby directs that the powers exercisable by it under section 3 of the said Adhiniyam shall also be exercisable by all Collectors within their respective jurisdictions.”

Pursuant to the delegation of powers Collector, Chhatarpur, by a notification dated 26.8.1975 which was published in the Official Gazette on 19.9.1975, appointed all Sub-Divisional Officers, including respondent no. 5, as competent authority of their respective tahsils.

10. It is to be noted that although the notification under section 17 was issued on 5.2.1975 it was published in the Official Gazette on 16.4.1976 whereas the notification dated 26.8.1975 issued by the Collector appointing Sub-Divisional Officers was published in the Official Gazette on 19.9.1975. The learned Senior Counsel for petitioners has, therefore, argued that delegation of powers by the State Government under section 17 of the Act became effective from the date 16.4.1976 when the notification was published in the Official Gazette and the Collector, Chhatarpur, had no authority to appoint Sub-Divisional Officers as competent authority under section 3 before that date. The learned counsel, in support of his argument that when the requirement of the notification is publication in Official Gazette the date of the notification is the date of its publication, has relied upon the decisions of Supreme Court in *Municipal Board, Pushkar Vs. State Transport Authority, Rajasthan and others* AIR 1965 SC 458; *Union of India and others Vs. M/s. Ganesh Das Bhojraj* AIR 2000 SC 1102 and *Subhash Ramkumar Bind @ Vakil and another Vs. State of Maharashtra* AIR 2003 SC 269. From these cases it can be taken as well settled that when an order is to be made by notification in the Official Gazette, the order comes into force and becomes operative from the date of issuance of notification in the Official Gazette. But there was no bar for taking action in anticipation that the order of delegation made by the State Government in favour of Collectors under section 17 of the Act would be published in the Official Gazette and become operative. The Collector, Chhatarpur, issued the order dated 26.8.1975 appointing all Sub-Divisional Officers, including respondent no. 5, as competent authority of their respective tahsils and sent it for publication which was published in the Official Gazette on 19.9.1975. These actions taken by the Collector were in anticipation of the order of delegation issued under section 17 by the State Government becoming operative and were not immediately effective but they became effective when the order of the State Government delegating the powers to Collectors was published in the Official Gazette on 16.4.1976. The order of the Collector, Chhatarpur, appointing all Sub-Divisional Officers, including respondent no. 5, as competent authority, thus, also became operative from 16.4.1976. Respondent no. 5 was, therefore, a competent authority within the meaning of section 3 when he passed the order dated 10.2.2000.

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11. It is also interesting to note that in the case of *Municipal Board, Pushkar* (Supra) the bus operators were aggrieved by the order dated 4.12.1959 of fixation of the new bus stand and discontinuance of old bus stand but even before that order was notified on 28.6.1960 and became operative a revision was filed. The Supreme Court in that case held that revision was made before the date of notification in anticipation of the notification and did not reject the revision on the ground that it was premature and incompetent

12. There is yet another way of looking into the matter. Section 22 of the Madhya Pradesh General Clauses Act, 1957 (in short, "the 1957 Act") permits making of rules or bye-laws and issuing of orders between publication and commencement of a Madhya Pradesh Act but the rules etc. so made before commencement of the Act come into operation from the date the Act comes into force. Section 31(b) of the 1957 Act applies all the provisions of the 1957 Act, including section 22, for the construction of rules, regulations, bye-laws, orders, notifications, schemes or forms made or issued under any Madhya Pradesh Act. Therefore, the principle of anticipatory action behind section 22 of the 1957 Act can also be applied to an order of delegation made by the State Government under section 3 of the Act. Applying this principle, the Collector's order appointing Sub-Divisional Officers including respondent no. 5 as competent authority though made earlier and published earlier to the date when the delegation under section 17 of the Act became operative by publication in the Official Gazette was valid. The order, however, became operative from the date delegation became operative by publication of the notification in the Official Gazette.

13. For these reasons I find that respondent no. 5 was validly appointed as competent authority and the order dated 10.2.2000 passed by him is not a nullity. The order is thus not open to question in any original suit and the Civil Court is clearly forbidden from passing any injunction in respect of any action taken pursuant to or to be taken pursuant to the said order.

14. The learned Government Advocate has argued that even if there was some illegality in the appointment of respondent no. 5 as competent authority, he at least functioned as a de facto authority and his orders cannot be called in question on the ground of illegality in his appointment. As I have already held that respondent no. 5 was validly appointed as competent authority, I do not find it necessary to consider this argument.

15. The petition fails and is dismissed with a cost of Rs.1000/-.

Petition dismissed.

K.S. GAHARWAR Vs BARKATULLAH VISHWAVIDYALAYA

I.L.R. [2009] M. P., 1241

WRIT PETITION*Before Mr. Justice Abhay M. Naik*

8 September, 2008*

K.S. GAHARWAR

... Petitioner

Vs.

BARKATULLAH VISHWAVIDYALAYA

... Respondent

A. University Act, M.P. (22 of 1973), Sections 6(12) & 24 - Power to withdraw degree - Section 6(12) of Act empowers University to withdraw degree of Ph.D. - It is not a legal proposition that if a manner for performing an act is not provided, the same cannot be performed despite empowerment for the same under the substantive provision - Authorities are well within their powers to exercise said powers in a reasonable and rational manner which is not prohibited by law. (Para 11)

क. विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धाराएँ 6(12) व 24 - डिग्री वापस लेने की शक्ति - अधिनियम की धारा 6(12) विश्वविद्यालय को पीएच.डी. की डिग्री वापस लेने के लिए सशक्त करती है - यह विधिक प्रतिपादन नहीं है कि यदि किसी कार्य को करने का कोई ढंग उपबंधित नहीं है तो वह मूल उपबंध के अधीन उसके लिए सशक्त होते हुए भी नहीं किया जा सकता - प्राधिकारी युक्तियुक्त और युक्तिसंगत ढंग, जो विधि द्वारा प्रतिषिद्ध नहीं है, से उक्त शक्तियों का प्रयोग करने के लिए उनकी शक्तियों के भीतर हैं।

B. University Act, M.P. (22 of 1973), Section 24(xxx) - Powers and Duties of Executive Council - Withdrawal of degree - Power to withdraw degree is exercisable by Executive Council. (Para 12)

ख. विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धारा 24(xxx) - कार्यकारी परिषद् की शक्तियाँ और कर्तव्य - डिग्री का वापस लिया जाना - डिग्री वापस लेने की शक्ति कार्यकारी परिषद् द्वारा प्रयोग की जा सकती है।

C. University Act, M.P. (22 of 1973), Section 24(xxx) - Natural Justice - Certain portion of thesis found to be copied - Executive Council directed petitioner to resubmit thesis after removal of copied portion - Held - No show cause notice issued to petitioner with regard to allegation about copying - Order quashed - However, University and Executive Council shall have liberty to take up the matter afresh in accordance with law. (Paras 19 & 22)

ग. विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धारा 24(xxx) - प्राकृतिक न्याय - थीसिस का कुछ भाग नकल किया हुआ पाया गया - कार्यकारी परिषद् ने याची को निदेशित किया कि नकल किया हुआ भाग हटाने के बाद थीसिस पुनः प्रस्तुत करे - अभिनिर्धारित - नकल के आरोप के संबंध में याची को कोई कारण बताओ सूचना पत्र जारी नहीं किया गया - आदेश अभिखण्डित - तथापि, विश्वविद्यालय और कार्यकारी परिषद् को स्वतंत्रता दी गई कि विधि अनुसार मामले की पुनः सुनवाई करे।

K.S. GAHARWAR V. BARKATULLAH VISHWAVIDYALAYA**Cases referred :**

AIR 1962 SC 574, 1978 MPLJ 9, AIR 1991 SC 309, AIR 1990 SC 1402, (1995) 5 SCC 302.

R.N. Singh with A.J. Pawar, for the petitioner.

Mahendra Pateria, for the respondents.

Rajendra Tiwari with P.K. Kaurav, for the intervenor.

O R D E R

ABHAY M. NAIK, J. :—Short facts leading to the petition are that the petitioner submitted his research thesis on 'THE EFFECT OF THE LATEX OF OPUNTIA COECINELIFERA ON THE FERTILITY OF FEMALE ALBINO RAT WITH SPECIAL REFERENCE TO UTERINE MAST CELLS' in the Barkatullah Vishwavidyalaya Bhopal in the year 1987, which was duly accepted and the Degree of Ph.D. (Doctor of Philosophy) was awarded to him in the same year. At the time of awarding such Degree of Ph.D., its matter was governed by the provisions of Ordinance No.14 of the respondent University which is on record as Annx.P/4. As regards petitioner's service career, it may be noted that, he was promoted to the post of Deputy Registrar of respondent University on 28.3.1991. He was, thereafter, sent on deputation to University Grant Commission (hereinafter referred to as 'UGC' for brevity) as Joint Secretary and was made Incharge of State of Madhya Pradesh and Rajasthan. Period of deputation was extended upto 30.6.2000. During this period, he was promoted to the post of Registrar vide Annx.P/7 dated 1.6.2000. In the same year, his name came up for consideration for appointment to the office of Vice Chancellor of respondent University by a Committee headed by retired Hon'ble Chief Justice Shri B.M. Lal and nominee of UGC and Executive Council constituted for this purpose by the Chancellor. His name was allegedly recommended and included in the panel submitted by the Committee to the Vice Chancellor. Petitioner was not appointed on the said post on account of expiry of the period of deputation. He was again posted as Registrar of the respondent University vide Annx.P/8 dated 10.7.2000. Ultimately, the petitioner was transferred on deputation to Higher Education Department vide Annx.P/11 dated 19.3.2001 where he joined as Additional Secretary.

2. There were complaints made to the Hon'ble Governor of the State that the petitioner obtained the Degree of Ph.D. in illegal and fraudulent manner. He had allegedly copied certain pages of his thesis from the thesis of his guide Dr. Norton. Additional Secretary of the Hon'ble Governor requisitioned the report of the Vice Chancellor of respondent University vide Annx.P/10 dated 19.9.2000. Copies of complaints were sent to the petitioner, who sent his reply as contained in Annx.P/12 dated 13.3.2001. Ultimately, the thesis of the petitioner was sent for verification through two experts who gave their opinion that certain pages in the thesis of the petitioner were copied substantially from the thesis of Dr. Norton.

K.S. GAHARWAR Vs BARKATULLAH VISHWAVIDYALAYA

Matter was directed to be placed before the Executive Council of the respondent University to take a decision in the matter. The Executive Council took a decision on 16.4.2003 as revealed in Annx.P/16 that the thesis of the petitioner is to be resubmitted after removal of the copied portion and two chapters (copied chapters) would be rewritten taking into account the literature available till date under a new supervisor. Hence, this petition has been preferred for quashment of the impugned decision taken by the Executive Council against the petitioner vide Annx.P/16.

3. Respondent submitted its return stating therein that the petitioner was found to have copied two chapters in his thesis from the thesis of his guide Dr.Norton. Accordingly, the Executive Council of the University has taken a decision that the thesis may be resubmitted after rewriting the said two chapters in place of the copied portion under his new supervisor. It is stated in the return with elaboration that there were specific complaint as revealed in Annx.R/3 dated 20.7.2002 that the petitioner had copied substantially (98%) from page 5 to page 35 in Chapter 2 & 3 of his guide Dr. Norton. Thesis of the petitioner as well as that of Dr. Norton were sent to two examiners along with the alleged report vide letter dated 25.2.2003. The two examiners, namely, Professor T. Subramoniam and Professor M. Arumagam, both from the Department of Zoology, Madras University, opined that as per Chapter-III the histological description of the female reproductive tract, several portions were copied directly from Dr. Norton's thesis without referring to Dr. Norton's work. In continuation of their report, the said two professors further submitted conclusions on 11.3.2003 recommending thereby that the thesis of the petitioner is to be resubmitted after removal of the copied portion and the said portion would be rewritten taking into account the literature available till date, under a new supervisor. This supplementary report though is undated carries on it the seal of 11.3.2003. Finally, it is submitted that the Executive Council has taken a proper decision since the petitioner is found to have copied from the thesis of his guide Dr. Norton, while submitting his own thesis for Ph.D. This was duly detected and the decision vide Annx.P/16 has been rightly taken by the Executive Council.

4. Heard the arguments of Shri R.N. Singh, learned Senior counsel for the petitioner and Shri Mahendra Pateria, learned Advocate for respondent University, which have been considered in the light of pleadings and material on record and the legal provisions governing the situation.

5. Shri R.N. Singh, learned Senior Advocate contended that the Degree of Ph.D. was conferred in the year 1987 which cannot be disturbed after such a long span of time. Once the thesis of Ph.D. is submitted, examined and accepted, the student (petitioner) cannot be asked to resubmit the thesis after rewriting the allegedly copied two chapters. This according to him is beyond the powers of the

K.S. GAHARWAR Vs. BARKATULLAH VISHWAVIDYALAYA

Executive council. This apart, he contended that the decision of the Executive Council to the impugned extent has been taken without affording an opportunity of hearing to the petitioner. Thus, there being flagrant violation of principles of natural justice, the impugned order is not sustainable in law.

6. Shri Mahendra Pateria, learned counsel for the respondent countered the said submissions by contending that the petitioner is found to have copied two Chapters in his thesis of Ph.D from the thesis of his guide Dr. Norton. This being so, the Executive Council is well justified in taking a decision after duly comparing and verifying the copied portion of the thesis of petitioner.

7. Section 6 of the Madhya Pradesh University Act, 1973 (hereinafter referred to as 'the Adhiniyam' for brevity), lays down the Powers of University. Clause 11 and 12 of Section 6 empower it to confer degrees as well as to withdraw the degrees, which read as under :-

“(11). to confer degrees and other academic distinctions on persons who have carried on research under conditions laid down in the Ordinances;

(12). to withdraw degrees, diplomas, certificates and other academic distinctions for good and sufficient reasons.”

Thus, undoubtedly, the respondent University has a power to confer the degrees of Ph.D. and to withdraw it as well for good and sufficient reasons.

8. Section 24 of the said Adhiniyam lays down the powers and duties of the Executive Council. The Executive Council shall have the relevant following powers and perform the following duties, namely :-

“24(xxx). to confer withdraw degrees, diplomas, certificates and other academic distinctions in the manner prescribed by the Statutes.”

9. Shri R.N. Singh, learned Senior Advocate contended that no manner for withdrawal of the Degree of Ph.D. is prescribed in the Statute, therefore, the Ph.D. awarded to the petitioner in the year 1987 cannot be withdrawn. Moreover, there is no provision empowering the Executive Council or the respondent University to ask a student to rewrite any chapter contained in his thesis of Ph.D. after the acceptance of the thesis and conferral of the Degree of Ph.D. Impugned decision does not amount to withdrawal of the Degree of Ph.D and the same being beyond the powers vested in the Executive Council is not sustainable in law.

10. Shri Mahendra Pateria, learned counsel admitted that the manner for withdrawal is not provided in the Statutes. He further admitted that the manner for withdrawal is also not provided in the Adhiniyam or the Ordinances issued thereunder.

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11. It is a trite law that whenever a manner is prescribed in a Statute, the same is to be strictly adhered to. Any action without following in the prescribed manner will not be sustainable law. However, it is not a legal proposition that, if, a manner for performing an act is not provided at all, the same cannot be performed despite empowerment for the same under the substantive provision. Clause (12) of Section 6 empowers the University to withdraw degree of Ph.D. for good and sufficient reasons. Similarly, clause (xxx) of Section 24 empowers the Executive Council to withdraw the Degree of Ph.D. Thus, undisputably, there is a substantive provision in the Adhiniyam for withdrawal of the Degree of Ph.D. This substantive provision cannot be made redundant, merely, on account of absence of the prescribed manner. The authorities duly empowered under law are well within their powers to exercise the said powers in a reasonable and rational manner which is not prohibited by law. I may profitably refer to the Supreme Court decision in the case of *The Dargah Committee, Ajmer Vs. The State of Rajasthan and another* (AIR 1962 SC 574), wherein it has been observed "if the rules are not prescribed then all that can be said is that there is no form prescribed for issuing a demand notice; that does not mean that the statutory power conferred on the Committee by section 222 (1) to make a demand is unenforceable".

12. Contention of learned Senior Advocate Shri R.N. Singh that power under Clause (xxx) of Section 24 cannot be exercised in the absence of a prescribed manner, is misconceived in view of the full Bench decision of this Court in the case of *Sudhir Kumar Mishra Vs. Municipal Corporation, Jabalpur* (1978 MPLJ 9). I may successfully quote paragraph 7 of the said decision as follows :

"7. Shri Mukherji appearing on behalf of respondent No.1 Municipal Corporation, argued that no rules prescribing the mode of consultation with the State Public Service Commission having been framed, the second and third provisos to sub-section (1) of section 58 have not yet come into operation. It is not possible to accept this contention. The provision for consultation so made in section 58(1) is complete in itself and capable of operation without the aid of any further rules to bridge the gap. For this reason, there is no need or room to take the view that unless rules are framed specifying the details of the mode of consultation till then this provision cannot operate. The words "in the manner prescribed" occurring in the second proviso only mean that if and when rules are framed laying down the details of procedure for consultation, they will be followed. Till then the consultation with the Commission will be made in a reasonable manner thought fit by the Corporation. Nothing more was required to be prescribed by the law when it laid down the need of consultation with the Commission as a necessary requirement of a valid appointment

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under Section 58(1). It is not shown to us as to how the consultation with the State Public Service Commission cannot be made without rules being framed regulating the details of procedure and what is that thing, if any, that remains to be laid down to enable an effective consultation with the Commission”.

In the light of the aforesaid, this Court is of the opinion that the powers under clause (xxx) of Section 24 are indeed exercisable by the Executive Council of the respondent University.

13. Shri R.N. Singh, learned Senior Advocate, further contended that the impugned direction for rewriting certain pages after removal of the alleged copied portion does not amount to withdrawal of Ph.D and is beyond the powers conferred by virtue of Clause (xxx) of Section 24. This, too, did not impress this Court because the impugned decision is clearly a step towards withdrawal of Degree of Ph.D. If a student does not resubmit the thesis after rewriting the copied chapters, the Executive Council of respondent University would be well competent to take a further decision regarding withdrawal of the Degree of Ph.D. This being so, a direction/order in the impugned nature is implicitly covered by the power of withdrawal and it cannot be said that the impugned decision is beyond the scope of powers of withdrawal conferred by virtue of Clause (xxx) supra.

14. Next contention of learned counsel for the petitioner is that the Executive Council has taken up the issue against the petitioner without inclusion of the item pertaining to it in the agenda. His submission will not detain this Court any more for the reason that it has been clearly mentioned in Annx.P/16 that the relevant item was taken up for consideration after seeking the permission from Chairman of the Executive Council. It has been further contended that the examiners were not appointed for verification of petitioner's thesis in accordance with Section 24 of the Adhiniyam. This is equally misconceived because a provision has been made for appointment of examiners for the purposes of Ph.D. in Ordinance No.14 which is not shown to have been violated.

15. Ordinance No.14 deals with the Degree of Doctor of Philosophy. It clearly provides that on detection of any irregularity, the University shall take suitable steps to withdraw the degree as per provisions of Section 6(12) of the Adhiniyam. Although, the Degree of Ph.D. was awarded in the year 1987 to the petitioner, complaint was made in the year 2000 that certain chapters of the thesis of the petitioner were copied from the thesis of his own guide, namely, Dr. Norton. This was found to be correct. Surprisingly, the petitioner has nowhere averred in the writ petition that he had not copied the said two chapters from the thesis of Dr. Norton. There is no specific averment in the writ petition or on record in any manner that alleged two chapters were not copied from the thesis of Dr. Norton or they did not tally substantially with the contents of Dr. Norton's thesis. The

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averments are only to the extent of mere denial of allegations. Even before this Court, it was not specifically contended that the said two chapters do not tally with the thesis work of Dr. Norton.

16. Last contention of Shri R.N. Singh, learned Senior Advocate has definitely substance that the impugned decision has been taken in violation of principles of natural justice. It may be seen that the Degree of Ph.D. was awarded long back in the year 1987 in due manner. After conferral of such degree, definitely, a right did accrue in favour of the petitioner who acquired the status of Ph.D. holder. Neither the respondent University nor the Executive Council did issue any show cause notice to the petitioner to explain about the allegations with regard to copying from the thesis of Dr. Norton.

17. Shri Mahendra Pateria, learned counsel for the respondents drew attention of this Court to Annx.P/12 which is a reply by the petitioner with regard to complaints. It may be seen that Annx.P/12 was sent by the petitioner in response to a letter received by him from Hon'ble Governor of the State of Madhya Pradesh. Respondent University or the Executive Council did not serve the petitioner with any notice inviting thereby his explanation about the allegation or for the proposed impugned action. Impugned action may, obviously, have an ill-consequence of withdrawing the Degree of Ph.D. Petitioner who acquired the Degree of Ph.D. in the year 1987 cannot be legally deprived of the same without granting opportunity of hearing.

18. Apex Court in the case of *Shrawan Kumar Jha Vs. State of Bihar and others* (AIR 1991 SC 309) has clearly observed that it is well settled that no order to the detriment of a person can be passed without complying with the rules of natural justice. Requirement of fairness in administrative action was considered by the Apex Court in the case of *Ku. Neelima Misra Vs. Dr. Harinder Kaur Paintal and others* (AIR 1990 SC 1402) wherein observation to the following effect has been made :-

“An administrative function is called quasi-judicial when there is an obligation to adopt the judicial approach and to comply with the basic requirements of justice.”

In paragraph 22, it has been further observed :-

“An administrative order which involves civil consequences must be made consistently with the rule expressed in the Latin Maxim *audi alteram partem*. It means that the decision maker should afford to any party to a dispute an opportunity to present his case. What is now not in dispute is that the person concerned must be informed of the case against him and the evidence in support thereof and must be given a fair opportunity to meet the case before an adverse decision is taken.”

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Discussion on the point is summed up by the Apex Court as under :-

“The duty to act judicially or to act fairly may arise in widely different circumstances. It may arise expressly or impliedly depending upon the context and considerations. All these types of non-adjudicative administrative decision making are now covered under the general rubric of fairness in the administration. But when even such an administrative decision unless it affects one's personal rights or one's property rights, or the loss of or prejudicially affects something which would juridically be called at least a privilege does not involve the duty to act fairly consistent with the rules of natural justice. We cannot discover any principle contrary to this concept.”

19. On the aforesaid parameters, it is concluded that the impugned order contained in Annx.P/16 is bad in law and, accordingly, unsustainable in the absence of a notice to show cause having been served by the respondent University or its Executive Council with regard to the allegation about copying by the petitioner in his Ph.D. thesis.

20. Apart from the aforesaid, it may be seen that the Executive Council does not seem to have taken a decision vide Annx.P/16 by applying its own mind. The two examiners who were asked to make verification of the complaint about copying from the thesis of Dr. Norton have recommended the punishment vide letter dated 11.3.2003 in the following language :

(1) Thesis of Mr. K.S. Gaharwar is to be resubmitted after removal of the copied portions and these two matters should be rewritten taking into account the literature available till date, under a new supervisor.

(2) The guide Dr. Norton shall be banned from taking new student of Ph.D. guidance for next three years.

These two recommendations are reproduced verbatim in Annx.P/16 which reflects non-application of mind by the Executive Council. Duty of the two examiners was to give their findings about the similarity/identity of the alleged copied portion in the subject thesis with that of Dr. Norton's thesis. It was none of their business to recommend/suggest the punishment/action against the petitioner. Executive Council which is invested with a power to take decision is obliged to take it in an independent manner according to its own wisdom without getting guided by any outside authority about nature or quantum of punishment. In the present case, the Executive Council has virtually reproduced in verbatim the action proposed by the two examiners of Madras University and is thus found to have not exercised its discretion/wisdom at all. It is again a trite law that when an authority is invested with a power to take decision, such decision shall not be affected by any outside agency.

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21. I may successfully refer to the Supreme Court decision in the case of *Anirudhsinhji Karansinhji Jadeja and another Vs. State of Gujrat* [(1995) 5 SCC 302], wherein it has been observed that if a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with instructions of another authority, then it will be a case of failure to exercise discretion altogether. In view of the aforesaid, the exercise of power against the petitioner vide Annx. P/16 is found to be on the basis of external dictation made by two examiners of Madras University which amounts to failure to exercise the discretion altogether by the respondent University or its Executive Council. Therefore, also the same is not sustainable in law.

22. In the result, the writ petition succeeds and is, hereby, allowed merely to the extent of setting aside the decision about the petitioner contained in Annx. P/16 for the reasons stated hereinabove. However, since certain pages of thesis of the petitioner are found to have substantially been copied from the thesis of Dr. Norton and certain pages are further found to have been fully copied by the independent examiners, this Court is of the opinion that the respondent University and Executive Council shall have liberty to take up the matter afresh in accordance with law. They would be empowered to take appropriate action in the matter after following the principles of natural justice and granting reasonable opportunity of hearing to the petitioner.

No order as to costs.

Petition allowed.

I.L.R. [2009] M. P., 1249

WRIT PETITION

Before Mr. Justice Sanjay Yadav

23 October, 2008*

STATE OF M.P.

... Petitioner

Vs.

BHANU PRATAP SINGH

... Respondent

A. Forest Act (16 of 1927), Sections 52, 52-A & 52-B - *In exercise of power u/s 52-A(6), appellate authority remanding the matter by reversing the order of confiscation with a direction to the authorized officer to pass a fresh order - Held - Order would tantamount to attaching finality to the proceedings before appellate authority - Therefore, against the order revision u/s 52-B is maintainable.* (Para 9)

क. वन अधिनियम (1927 का 16), धाराएँ 52, 52-ए व 52-बी - धारा 52-ए(6) के अधीन शक्तियों के प्रयोग में अपीलीय प्राधिकारी ने अधिहरण का आदेश उलटते हुए प्राधिकृत अधिकारी को नवीन आदेश पारित करने के निदेश के साथ मामला प्रतिप्रेषित किया -

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अभिनिर्धारित – आदेश अपीलीय प्राधिकारी के समक्ष कार्यवाहियों से अंतिमता संलग्न करने के तुल्य होगा – इसलिए आदेश के विरुद्ध धारा 52-बी के अधीन पुनरीक्षण पोषणीय है।

B. Forest Act (16 of 1927), Section 52-B - Appellate authority remanding the matter by reversing the order of confiscation of vehicle with a direction to pass a fresh order - Order challenged in revision - Revisional Court ordered to release the vehicle on furnishing bank guarantee - Order challenged - Held - After passing the order by the appellate authority, no order of confiscation was in existence - In the facts & circumstances, order of release of the vehicle was proper and revisional Court did not exceed its jurisdiction. (Para 10)

ख. वन अधिनियम (1927 का 16), धारा 52-बी – अपीलीय प्राधिकारी ने वाहन के अधिहरण का आदेश उलटते हुए नवीन आदेश पारित करने के निदेश के साथ मामला प्रतिप्रेषित किया – आदेश को पुनरीक्षण में चुनौती दी गई – पुनरीक्षण न्यायालय ने बैंक गारंटी प्रस्तुत किये जाने पर वाहन निर्मुक्त करने का आदेश दिया – आदेश को चुनौती – अभिनिर्धारित – अपीलीय प्राधिकारी द्वारा आदेश पारित किये जाने के बाद अधिहरण का कोई आदेश अस्तित्व में नहीं था – तथ्यों और परिस्थितियों में वाहन निर्मुक्त करने का आदेश उचित था और पुनरीक्षण न्यायालय ने अपनी अधिकारिता का अतिक्रमण नहीं किया।

Cases referred :

AIR 1961 SC 794, AIR 2000 SC 2729, AIR 2004 SC 1251.

Samdarshi Tiwari, for the petitioner.

Deelip Pandey, for the respondent.

ORDER

SANJAY YADAV. J. :-Challenge in this writ petition is to an order dated 16.6.2006 passed by First Additional Sessions Judge, Rewa in Criminal Revision No.157/2008; whereby, the revisional court while affirming the order passed by the appellate authority under Section 52-A of the Forest Act 1927, has directed the release of the truck which seized being involved in the forest offence.

2. The facts in nutshell are that the vehicle (truck) bearing no.UP42/T 2007 on 27.10.2006 was seized at Haddi Hill at Ghatcha Beat when the same was found loading metallic stone (gitti) in Compartment No.P-275 of Forest Compartment Barha Koodi, 40 Meter inside State of UP Border. Forest offence under POR No.10784/15 was registered and the said vehicle was seized along with implements like jhoomar, spades, hammer etc. used for breaking stones. The authorised officer/sub-divisional officer, Rewa, after following the procedure under Section 52 of the Act of 1927 i.e., sending intimation to the Chief Judicial Magistrate, Rewa/Teothar and show cause notice to the owner and driver of the truck and after recording evidence passed an order of confiscation on 30.11.2007 having the vehicle involved in violating the Sections 30(c), 32,33(b), 52(1)(2) of Forest Act, 1927. The said order of confiscation was challenged before the

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appellate authority/Conservator of Forest, Rewa under Section 52-A of the Act of 1927. The appellate authority vide order dated 17.3.2008 set aside the order of confiscation and remitted the matter to the authorised officer for a fresh decision on merit. This order was subjected to challenge by the respondent invoking Section 52B of the Act of 1927 by filing Criminal Revision before the First Additional Sessions Judge, Rewa. The revisional Court while affirming the order of remand passed by the appellate authority, directed the petitioner herein to release the vehicle in question on furnishing of bank guarantee of Rs.50,000/- by the respondent. This order was passed on the ground that the vehicle was wearing away and that the offence was compoundable.

3. The petitioner assails the order on two counts.

4. Firstly, it is urged, that the order passed by the Conservator of Forest being a remand order and not a final order, it was beyond the competence of the revisional court to have entertained the revision which is maintainable only when a final order is passed by the appellate Court. Learned counsel places reliance on the provisions contained under Section 52 B (1) of the Act of 1927 and *M/s Jethanand Versus State of M.P.*: AIR 1961 SC 794 to bring home the submissions that the order is final only when the finality is attached to the proceedings. In the case at hand, the remand order does not decide the dispute finally as would cast Jurisdiction upon the Revisional Court. It is accordingly urged that since the revision was not maintainable, the order passed by the revisional Court is nonest in the eyes of law, which it is urged, is liable to be set aside.

Secondly, it is contended that the release of vehicle involved in a forest offence should be in the rarest case and not as a matter of course as adopted by the revisional court. Reliance is placed on the judgment rendered by the Supreme Court in the case of *State of Karnataka V/s Krishnan*: AIR 2000 SC 2729 and *Section Forester and another V/s Mansur Ali Khan*: AIR 2004 SC 1251.

5. The learned counsel for the respondent on his turn has supported the order passed by the revisional court, contending, inter alia that, the revision was maintainable and it was within the powers of the revisional court to pass an order releasing the vehicle even while upholding the order of remand passed by the appellate authority. It is accordingly urged that the petition deserves dismissal.

6. Heard the learned counsel for the parties at length.

7. To appreciate the rival contention worth it will be to note the relevant provisions of the Act of 1927. It is pertinent to note that Sections 52, 52 A, 52 B, 52 C of the Act of 1927 were substituted by Section 3 M.P. Act 25 of 1983.

Section 52 provides for seizure of property when there is a reason to believe that a forest offence has been committed in respect of any forest produce and a forest produce, as per Section 2(4) &(b)(iv), includes all products of mines or

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queries. This Section further provides for the procedure to be adhered to before confiscating such property. Section 52 A makes a provision for appeal against the order of confiscation before the Conservator of Forest/appellate authority. Sub Section (6) of Section 52 A stipulates.

"52-A(6) On the date fixed for hearing of the appeal or "suomotu" action, or on such date to which the hearing may be adjourned, the Appellate Authority shall peruse the record and hear the parties to the appeal if present in person, or through any agent duly authorised in writing or through a legal practitioner, and shall thereafter proceed to pass an order of confirmation, reversal or modification of order of confiscation:

Provided that before passing any final order the Appellate Authority may, if it is considered necessary for proper decision of appeal or for proper disposal of "suomotu" action, make further inquiry itself or cause it to be made by the authorised officer, and may also allow parties to file affidavits for asserting or refuting any fact that may arise for consideration and may allow proof of facts by affidavits."

8. This provision thus empowers the appellate authority to pass an order of confirmation, reversal or modification of order of confiscation, thus a finality is attained in respect of the controversy regarding confiscation and in order to achieve this finality the proviso empowers the appellate authority to make further enquiry.

Sub-Section (7) of Section 52 A stipulates:-

"52-A.(7) The Appellate Authority may also pass such orders of consequential nature, as it may deem necessary.

9. This provisions empowers the appellate authority to also pass such orders of consequential nature, as it may deem necessary. By way of illustration the provisions can be understood to mean that while modifying the order of confiscation the appellate authority may by taking aid of sub-section (4) of Section 52 A to pass an order of interim nature for custody preservation or disposal (if necessary) of the subject matter of confiscation, as may appear to be just and proper in the circumstances of the case. Or, in case, the appellate authority does not propose to exercise the discretion vested in him under proviso to sub-section(6) to make further enquiry and finds that there is an improper appreciation of evidence on record, may remand the matter by reversing the order of confiscation with a further discretion to the authorised officer to pass a fresh order, in accordance with the observation, as in the case at hand, would tantamount to attaching finality to the proceedings before it. The contentions raised by the learned counsel for the

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petitioner is that the expression 'order of consequential nature' has to carry its shade from the expression 'final order' and the order of remand being not a final order, is misconceived. The basic fallacy in the submissions of learned counsel for the petitioner creeps in is because of the relevant aspect lost sight of i.e., while remanding the matter there is a reversal of the order of confiscation, meaning thereby that, the order of confiscation passed by the authorised authority is no more in existence, as in the present case. Therefore, in the considered opinion of this Court, there is no force in the contentions raised by learned counsel for the petitioner that the revision was not maintainable under Section 52-B of the Act of 1927 which stipulates:-

"52-B Revision before Court of Sessions against order of Appellate Authority:-(1) Any party to the appeal, aggrieved by final order or by order of consequential nature passed by the Appellate Authority, may within thirty days of the order sought to be impugned, submit a petition for revision to the Court of Sessions within the Sessions division whereof the headquarters of the Appellate Authority are situate.

Explanation- In computing the period of thirty days under the sub-section, the time requisite for obtaining certified copy of order of Appellate Authority shall be excluded.

(2) The Court of Sessions may confirm, reverse or modify any final order or an order of consequential nature passed by the Appellate Authority.

(3) Copies of the order passed in revision shall be sent to the Appellate Authority and to the Authorised officer for compliance or for passing such further order or for taking such further action as may be directed by such Court.

(4) For entertaining, hearing and deciding a revision under the Section, the Court of Sessions shall, as far as may be, exercise the same powers and follow the same procedure as it exercises and follows while entertaining, hearing and deciding a revision under the Code of Criminal Procedure, 1973 (No.2 of 1974).

(5) Notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973 (No.2 of 1974), the order of the Court of Sessions passed under this section shall be final and shall not be called in question before any Court.

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10. This takes us to the next argument of the petitioner that the order of releasing the vehicle can be only in rarest of the case and that it was beyond the powers of the revisional court to have ordered the release of vehicle. Before examining this issue one aspect has to be kept in mind; In the case at hand, after passing of order by the appellate authority, no order of confiscation is in existence and it is only the order of seizure which survives. The revisional court records the following findings in respect of exercise its power under Section 52 B(4) which empowers the Court of session to exercise the same powers and follow the same procedure as it exercises and follows while entertaining, hearing and deciding a revision under the Code of Criminal Procedure 1973. The reasons recorded by the Court of session are:

"9. इस प्रकरण के अवलोकन से स्पष्ट है कि वाहन करीब डेढ़ वर्ष अधिक समय से पूर्व दि.27.10.06 को जप्त किया गया है एवं जप्त शुदा 600 घनमीटर गिट्टी जब्त की गई है एवं कार्यवाही करने वाले अधिकारी शुभकरण प्रसाद मिश्रा वन परिक्षेत्राधिकारी डभौरा द्वारा 700 रु. कीमत न्यायालय में व्यक्त की गई है, जिसके संबंध में साक्ष्य अभिलेख पर है। यद्यपि अभिलेख पर प्राधिकृत अधिकारी एवं उपवनमण्डलाधिकारी द्वारा वाहन राजसात किए जाने के संबंध में धारा-52म.प्र. वन अधि. के अन्तर्गत साक्षी भीमसेन कोल, सतेन्द्र प्रसाद वन रक्षक, रमेश कुमार गौतम, श्री राजेन्द्र प्रसाद द्विवेदी वन रक्षक, बाबूलाल त्रिपाठी उप वनपाल, जनार्दन प्रसाद प्रयासी वन पाल, शुभकरण प्रसाद मिश्रा वन परिक्षेत्राधिकारी डभौरा, वाहन चालक राजेश यादव और बचाव साक्ष्य के रूप में लक्ष्मण प्रसाद यादव, पप्पू कोल, पंकज सिंह, मनुप्रतापसिंह, वाहन मालिक, का साक्ष्य लिया गया है और दस हजार रु. के संबंध में लिखित तर्क भी किया गया था। समस्त साक्ष्य के बाद विवेचना में वर्तमान बाज़ार मूल्य के आधार पर एक हजार रु. से अधिक कीमत होने के कारण प्रशमननही किया गया है। प्राधिकृत अधिकारी का यद्यपि निर्णय विचारणीय प्रश्न के रूप में नहीं था, लेकिन इसके बावजूद विद्वान अपीलीय अधिकारी के समक्ष सम्पूर्ण साक्ष्य उपलब्ध थी, वह गुणदोष के आधार पर निष्कर्ष दे सकते थे तथा जिस प्रकार आदेश दिया गया है, वह अंतिम आदेश नहीं है। इसलिए अपीलीय अधिकारी के आदेश, निष्कर्ष उपलब्ध न होने के कारण, उसे सही या गलत इस स्तर पर नहीं कहा जा सकता है, लेकिन जो अपीलार्थी द्वारा प्रशमनयोग्य अपराध होने के प्रथम दृष्टया आधार होने तथा लंबे समय से अनावश्यक रूप से वाहन खड़े होने और जिस प्रकार विद्वान अपीलीय अधिकारी द्वारा न्यायालय से सत्यप्रति प्राप्त किए जाने के संबंध में आदेश दिया गया है, अभी भी निकट भविष्य में समय लगने की सम्भावना है। अतः जबकि अविवादित रूप से वाहन दि. 27.1-0.06 से ट्रक क्रं. यू.पी.42टी2007 थाना जेनह में खड़ा कराया गया है, उसके टायर एवं ट्यूब स्वभावित रूप से खड़े होने से पौने दो वर्ष में खराब होने की स्थिति में होंगे और अन्ततः वाहन के लोहे एवं अन्य धातु के होने के कारण व अन्य चीजें जंग लगने से उसका पूरी तरह से तात्विक रूप से नष्ट होने की सम्भावना है और राजसात किया भी जाता है तो उसका वह मूल्य नहीं रहेगा।

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इसलिए उपर्युक्त माननीय उच्चतम न्यायालय के सुन्दरभाई अम्बालाल देसाई बनाम गुजरात स्टेट एवं इन्द्राणी श्रीवास्तव, में दिए गये निष्कर्ष के अनुसार प्रकरण में जप्तशुदा मिट्टू का मूल्य एवं राजीनामा योग्य अपराध होने के कारण निगरानीकर्ता द्वारा 50,000/- रु. का बिना शर्त बैंक गारण्टी किसी राष्ट्रीयकृत बैंक की, प्रदान किए जाने पर और इस शर्त के साथ राजसात होने पर प्रश्नगत वाहन को प्राधिकारी के समक्ष पेश करेगा और अगर पेश नहीं करेगा तो उसकी बैंक गारण्टी वन विभाग शासन के पक्ष में राजसात हो जावेगी एवं प्रश्नगत ट्रक को भी दण्डात्मक कार्यवाही कर राजसात किया जा सकता है, उक्त शर्तों के अधीन प्राधिकृत अधिकारी एवं वन मण्डलाधिकारी रीवा के समक्ष बैंक गारण्टी एवं सुपुर्दनामा पेश दिए जाने पर निगरानीकर्ता को वाहन सुपुर्दगी पर दिया जाय एवं अन्य कार्यवाही विधि अनुसार अपीलीय अधिकारी के अनुसार दिए गये निर्देश के अनुसार आदेश पारित किया जावेगा "।

11. In the considered opinion of this Court, the revisionsal Court did not exceed its jurisdiction while passing an order of releasing the vehicle. Thus the second limb of the arguments of the petitioner also fails. The judgments relied upon by the petitioner in the context turns on their own fact and the principle of law laid down therein are not attracted in the case at hand.

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

Petition dismissed.

I.L.R. [2009] M. P., 1255

WRIT PETITION

Before Mr. Justice Sanjay Yadav

4 November, 2008*

NARBADA PRASAD AGRAWAL

... Petitioner

Vs.

TARUN BHAWASAR

... Respondent

A. Stamp Act (2 of 1899), Section 35 - Agreement to sell suit property on a plain paper - Unless a duty is paid on an instrument it shall not be admitted in evidence for any purpose, which will include a collateral purpose. (Para 6)

क. स्टाम्प अधिनियम (1899 का 2), धारा 35 - वादग्रस्त सम्पत्ति विक्रय करने का अनुबन्ध सादा कागज पर - जब तक किसी लिखत पर कोई शुल्क अदा नहीं किया जाता, वह किसी भी प्रयोजन के लिए साक्ष्य में ग्राह्य नहीं होगा, जिसमें आनुषंगिक प्रयोजन भी शामिल है।

B. Registration Act (16 of 1908), Section 17 - Instrument is an unregistered agreement of sale which, as per stipulations contained u/s 17 of the Act requires a compulsory registration and unless the document is compulsory registered the same cannot be taken on evidence in any manner. (Para 7)

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ख. रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 17 – लिखत विक्रय का अरजिस्ट्रीकृत अनुबंध है जो अधिनियम की धारा 17 के अन्तर्गत अन्तर्विष्ट शर्तों के अनुसार अनिवार्य रजिस्ट्रेशन अपेक्षित करता है और जब तक अनिवार्य रूप से रजिस्ट्रीकृत न हो वह किसी भी ढंग से साक्ष्य में नहीं लिया जा सकता।

Manikant Sharma, for the petitioner.

Ashok Lalwani, for the respondent.

ORDER

SANJAY YADAV, J. :-The order passed in this writ petition shall govern the disposal of Writ Petitions No.5047/2008, 5048/2008 & 3714/2008. As the issue involved in these writ petitions are similar and for the sake of record the facts of W.P.No.5051/2008 are taken into consideration:

2. The challenge put forth by the petitioner in this petition under Article 227 of the Constitution of India is to order dated 7.5.2007, 31.1.2008 and 24.3.2008 respectively. By order dated 7.5.2007 an application under Section 35 Stamp Act, 1899 filed by the respondent/plaintiff was allowed. Where as the application under Section 33 of the Act of 1899 has been rejected. And by order dated 24.3.2008 the right of petitioner/defendant to lead evidence has been closed.

3. The facts noted from the petition briefly are that the respondent/plaintiff instituted a civil suit for eviction of the petitioner/defendant on the ground that the petitioner, a tenant, has defaulted in payment in rent. The petitioner challenging the ownership opposed the relief on the ground that he is in possession of suit property not as a tenant but by virtue of an agreement of sale executed in favour of the petitioner by the erstwhile owners. The petitioner sought to prove the agreement dated 24.12.1993. An objection was raised by the respondent by filing an application under Section 35 of the Act of 1899. Whereof an application under Section 33 of the Act of 1899 was filed by the petitioner seeking rectification of the defect.

4. The trial Court vide order dated 7.5.2007 declined to permit the petitioner to prove unregistered instrument in the following terms:

प्रतिवादी साम्याशिक्षा प्रयोजन अर्थात् अपना वादग्रस्त स्थान पर अपना अधिपत्य दर्शाने के लिये उक्त दस्तावेज पर प्रदर्श अंकित कर उसे प्रमाणित कराना चाहता है किन्तु स्वयं प्रतिवादी के कथनानुसार उसके द्वारा वादग्रस्त स्थान झलकन सिंह को किराया अदा करता था। अनुबंध पत्र के अनुसार यह वादग्रस्त मकान के अधिपत्य में यहाँ ऐसा उसका कथन नहीं है।

प्रतिवादी का ऐसा भी कथन नहीं है कि वह कथित विक्रय अनुबंध पत्र का संभव स्टाम्प एवं उसकी पेनाल्टी अदा करने के लिए तैयार है।

अतः प्रस्तुत दस्तावेज जो कि एक सादे कागज पर है धारा-17 रजिस्ट्रेशन एक्ट के तहत रजिस्टर्ड नहीं है, समुचित रूप से स्थापित नहीं है, इसलिए

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धारा-35 स्टाम्प एक्ट के तहत साक्ष्य में ग्राह्य योग्य नहीं है। अतः प्रतिवादी की ओर से प्रस्तुत दस्तावेज पर प्रदर्श कंडिका अमि करने की अनुमति नहीं दी जाती है।

प्रतिवादी की ओर से प्रस्तुत न्याय दृष्टांत के तथ्य इस प्रकरण के तथ्यों से भिन्न है। यहां तो प्रतिवादी के कथन अनुसार उसके द्वारा झलकन सिंह को वादग्रस्त स्थान का किराया अदा किया गया।

प्रस्तुत न्यायदृष्टांत से प्रतिवादी को कोई लाभ नहीं मिलता है।

तदनुसार वादी की आपत्ति एवं आवेदन धारा-35 स्टाम्प एक्ट के अनुसार किया जाता है।

Similarly, the trial Court while dealing with the application under Section 33 records the following finding vide its order dated 31.1.2008.

वादी ने यह वाद प्रतिवादी के विरुद्ध निष्कासन एवं किराया वसूला बाबत प्रस्तुत किया है। जिसमें वादग्रस्त स्थान का रजिस्टर्ड विक्रयपत्र दिनांक 07/12/94 प्र.पा. 1 के द्वारा महेंद्रसिंह से क्रय करना बताया गया है। प्रतिवादी द्वारा कहा गया है, कि उसने वादग्रस्त स्थान अनुबंध विलेख दिनांक 24/12/93 के द्वारा क्रय करने का अनुबंध किया था, किंतु प्रतिवादी द्वारा प्रस्तुत उक्त कथित अनुबंध विलेख समुचित स्टाम्प पर न होकर सादे कागज पर होने और रजिस्ट्रेशन एक्ट की धारा 17 के तहत रजिस्टर्ड न होने से उसे साक्ष्य में ग्राह्य करने बाबत प्रतिवादी द्वारा प्रस्तुत आवेदन धारा-35 स्टाम्प एक्ट का दिनांक 07/05/07 को निरस्त किया गया है।

जो प्रतिवादी द्वारा 33 स्टाम्प एक्ट के तहत उक्त का था। अनुबंध विलेख को वादग्रस्त स्थान पर अपना आधिपत्य स्पष्ट करने, संपाशविक प्रयोजन के लिए परिरुद्ध (इंमाण्ड) कराने के लिए प्रस्तुत किया है, किंतु उक्त विलेख किसी स्टाम्प पर नहीं है और एक सादे कागज पर है। ऐसी स्थिति में प्रस्तुत आवेदन स्वीकार योग्य नहीं है। अतः अमान्य कर निरस्त किया जाता है।

Assailing the orders, it is urged, that the trial Court committed an error in rejecting the plea of the petitioner/defendant to admit the document for collateral purpose. It is further contended that the petitioner is even willing and ready to pay the duty. The respondent/plaintiff on its turn has supported the impugned orders.

5. Heard the learned counsel for the parties at length.

6. Section 17 of the Registration Act, 1908 stipulates:

"17. Documents of which registration is compulsory.(1)

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

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(a) instruments of gift of immovable property;

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

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

1[(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:]

Provided that the [State Government] may, by order published in the [Official Gazette], exempt from the operation of this subsection any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees."

Section 33 of the Stamp Act, 1899 stipulates:

"33. Examination and impounding of instruments.- (1)

Every person having by law or consent of parties, authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in [India] when such instrument was executed or first executed:

Provided that-

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if

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he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purpose of this section, in case of doubt,-

(a) 1[the 2[State Government]] may determine what offices shall be deemed to be public offices; and

(b) 1[the 2[State Government]] may determine who shall be deemed to be persons in charge of public offices.

"Section 35(a) of Stamp Act, 1899 stipulates:

35. Instruments not duly stamped inadmissible in evidence, etc- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

(Emphasis supplied)

Provided that-

(a) any such instrument 4[shall], be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees; or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

Thus unless a duty is paid on an instrument it shall not be admitted in evidence for any purpose, which will include a collateral purpose.

7. In the case at hand, petitioner intended first to get the instrument admitted under Section 33 for the examination for collateral purpose. The concerned instrument is an unregistered agreement of sale which, as per stipulations contained under Section 17 of the Registration Act, requires a compulsory registration and unless the document is compulsory registered the same cannot be taken on evidence in any manner. Therefore in the considered opinion of this court, the trial court did not commit any error by rejecting the claim put forth by the petitioner. Furthermore, the trial Court duly exercised the jurisdiction by passing order

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dated 24.3.2008 whereby, the application put forth by the petitioner under Section 17(3) was rejected.

8. Thus no case is made out on merit and the petition is dismissed. However, no costs.

Petition dismissed.

I.L.R. [2009] M. P., 1260

WRIT PETITION

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

6 November, 2008*

RAKHI MANGAL (DR.)

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2008, Rule 1.8(4) - *Horizontal reservation - Horizontal reservation of seats in favour of disabled persons is not ultra vires.* (Para 9)

क. चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2008, नियम 1.8(4) - क्षैतिज आरक्षण - निःशक्त व्यक्तियों के पक्ष में सीटों का क्षैतिज आरक्षण अधिकारातीत नहीं है।

B. Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2008, Rule 1.20(11), Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Section 39 - *Ultra vires - Rules of 2008 are ultra vires the Act of 1995 in as much as they do not earmark seats in Post Graduate Diploma and Degree Courses in the table annexed to the Rules.* (Paras 12 & 13)

ख. चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2008, नियम 1.20(11), निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995, धारा 39 - अधिकारातीत - 2008 के नियम 1995 के अधिनियम के उस सीमा तक अधिकारातीत हैं जिस तक वे नियमों के साथ संलग्न सारणी में स्नातकोत्तर डिप्लोमा या डिग्री पाठ्यक्रमों में सीटों को निश्चित नहीं करते हैं।

Cases referred :

AIR 2007 SC 3136, (1992) 3 SCC 212, AIR 1952 SC 369, (2004) 6 SCC 708.

Rajendra Shrivastava, for the petitioner.

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

Indira Nair with Shishir Dixit, for the respondent No.3.

RAKHI MANGAL (DR.) Vs. STATE OF M.P.**O R D E R**

The Order of the Court was delivered by **A.K. PATNAIK, C. J.**:-The petitioner is a person with disability and has filed this writ petition under Article 226 of the Constitution challenging the provisions of Rule 1.8(4) and Rule 1.20(11) of the Madhya Pradesh Medical Dental Post Graduate Course Entrance Examination Rules, 2008 (for short 'the Rules 2008') made under Section 10 of the Madhya Pradesh Chikitsa Shiksha Sanstha Niyantaran Adhiniyam, 1973.

2. The facts relevant for disposal of the petition briefly are that the State Government made the Rules, 2008 for admissions to the Post Graduate Medical (M.D. & M.S.) course, Post Graduate Diploma and Dental (MDS) course in Medical & Dental Colleges in the State of Madhya Pradesh. Rule 1.8 of the Rules, 2008 provides for reservation and sub-rule (4) of Rule 1.8 provides that 3% seats are reserved for admissions to Post Graduate courses for physically handicapped persons who are bonafide residents of Madhya Pradesh and belong to ST, SC, OBC and Unreserved categories and that such reservation will be horizontal. Rule 1.19 of the Rules, 2008 is titled as "Merit List" and sub-rule (1) of Rule 1.19 provides that the merit list will consist of the number of candidates equal to the number of seats available for allotment in State quota and separate merit list will be prepared for in-service and non-service (open) candidates. Rule 1.20 of the Rules, 2008 provides for counselling and sub-rule (11) of Rule 1.20 provides for counselling for non-service candidates in the following sequence:

- (A) ST Category
- (B) SC Category
- (C) OBC Category
- (D) Unreserved Category

The petitioner appeared in the Pre P.G. Examination as a physically handicapped candidate in non-service category (open) and secured 124.25 marks out of 200 and was placed in the second position in merit list of non-service (open) category for physically handicapped candidates. The physically handicapped candidate who was placed in the first position in the merit list of non-service (open) category did not appear for counselling but the petitioner appeared for counselling, but she was not offered any degree seat but was offered a seat in Diploma in Ophthalmology and two seats in Diploma in E.N.T. and she was compelled to give her option in Diploma in Ophthalmology and she was allotted a seat accordingly.

3. The petitioner has filed this writ petition praying that Rule 1.8(4) of the Rules, 2008 in so far it provides that reservation for physically handicapped persons will be horizontal be declared ultra vires and Rule 1.20(11) of the Rules, 2008 which provides for sequence of counselling be declared illegal. The petitioner has also prayed that the tables annexed to the Rules, 2008 in so far as they do not ear-

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mark degree and diploma seats for Physically Handicapped candidates be declared ultra vires and that the respondents be directed to give admission to the petitioner in M.D. Course in Radiology, Pathology or Paediatrics.

4. Mr. Rajendra Shrivastava, learned counsel appearing for the petitioner, submitted that Section 39 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short 'the Act of 1995') provides that all Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less than three percent seats for persons with disabilities. He submitted that reservation for physically handicapped persons therefore will have to be vertical and not horizontal and the provision in Rule 1.8(4) of the Rules, 2008 that such reservation for physically handicapped persons will be horizontal is ultra vires. In support of his contention, he cited the decision of Supreme Court in *Mahesh Gupta and others vs. Yashwant Kumar Ahirwar and others*, AIR 2007 SC 3136. He further submitted that by not indicating in the tables 1, 3 and 5 annexed to the Rules, 2008 the seats in Post Graduate Degree and Post Graduate Diploma courses reserved for physically handicapped persons, the rule making authority has violated Section 39 of the Act of 1995 as well as Article 14 of the Constitution because the residual seats which are not opted for by the SC, ST, OBC and UR candidates will be left for physically handicapped SC, ST, OBC and UR candidates and the physically handicapped candidates will be forced to take seats in courses which no other candidates opt for.

5. Mr. Vijay Shukla, learned Deputy Advocate General, appearing for the respondent No.1 and 2, submitted relying on the return filed on behalf of the respondents No.1 and 2 that the petitioner has been allotted a diploma seat and as per Rule 20(7) and 20(15) of the Rules, 2008 she is not entitled to allotment of any other seat. He further submitted that after having accepted the diploma seat allotted to her she cannot now raise a grievance that a degree seat should have been allotted to her. He further submitted that as per the 2008 Rules 3% reservation has been provided for physically handicapped persons in all four categories i.e. UR, ST, SC and OBC and according to the rules any physically handicapped candidate has to make his claim in his own category and this is because 3% reservation in favour of the physically handicapped candidates is a horizontal reservation. He submitted that 3% of the total seats works out to 9 seats, 7 for non-service Physically Handicapped candidates and 2 for in-service Physically Handicapped candidates. He finally submitted that for the academic session 2008-09 the last date of counselling was extended upto 10th June, 2008 pursuant to directions of the Supreme Court and hence no admission can be given to the petitioner after 10th June, 2008 in any seat.

6. Mrs. Indira Nair, learned senior counsel appearing for respondent No.3, submitted that under Regulation 10 of the Postgraduate Medical Education

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Regulations, 2000 made by the Medical Council of India, migration/transfer of students undergoing any postgraduate course, degree/diploma, cannot be permitted by any university or any authority. She however submitted that this provision in the Regulation does not bar a student from taking fresh admission in a subsequent academic session in a different postgraduate course, degree or diploma.

7. The first question which we have to decide in this case is whether the provision in Rule 1.8(4) of the Rules, 2008 that reservation in favour of physically handicapped persons will be horizontal is ultra vires. There is no provision in the Constitution enabling the State to provide for reservation of seats in educational institutions for disabled persons. There is however a mandate in Section 39 of the Act of 1995 to make such reservation, which reads as follows:

“39. All educational institutions to reserve seats for persons with disabilities.- All Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less than three percent seats for persons with disabilities.”

Thus, Section 39 of the Act of 1995 provides that all Government educational institutions and other educational institutions receiving aid from Government shall reserve not less than three percent seats for persons with disabilities but it does not indicate whether such reservation will be horizontal or vertical. Hence it will be for the appropriate Government to decide whether such reservation of seats for persons with disabilities in Government educational institutions and other educational institutions receiving aid from the Government would be horizontal or vertical.

8. In *Mahesh Gupta and others vs. Yashwant Kumar Ahirwar and others* (supra) cited by Mr. Shrivastava, the Supreme Court has not held that reservation in favour of physically handicapped persons cannot be horizontal. The Supreme Court has only held that reservation for women or handicapped persons would not come within the ceiling of 50% reservation fixed by the Supreme Court in *Indra Sawhney vs. Union of India*, (1992) 3 SCC 212 : AIR 1993 SC 477 for the reserved categories of candidates (SC, ST and OBC). In the present case, we find that in Rule 1.8 of the Rules 2008, 20% seats are reserved for candidates belonging to ST, 16% seats are reserved for candidates belonging to SC and 14% seats are reserved for candidates belonging to Other Backward Classes and in Rule 1.8(4) of the Rules 2008 a separate 3% reservation has been provided for physically handicapped persons. Hence the reservation of 3% of the seats in favour of the physically handicapped persons is over and above the 50% reservation in favour of ST, SC and OBC. The provision in the Rules 2008 is thus in accordance with the decision of the Supreme Court in *Mahesh Gupta and others vs. Yashwant Kumar Ahirwar and others* (supra).

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9 We are thus of the view that under Section 39 of the Act of 1995 the State can as a policy decision provide for horizontal reservation of seats in favour of disabled persons in Government educational institutions and educational institutions receiving aid. Hence the provision in Rule 1.8(4) of the Rules, 2008 made by the State Government that reservation in favour of physically handicapped persons will be horizontal reservation is not ultra vires the Constitution or the Act of 1995.

10. The second question which we have to decide in this case is whether the Rules, 2008 are ultra vires inasmuch as they do not ear-mark in the tables annexed to the Rules the seats in Post Graduate Degree/Diploma Courses reserved for physically handicapped persons. Section 39 of the Act of 1995 has to be read alongwith the short and long titles of the Act of 1995 for understanding the purpose of the reservation of 3% seats for persons disabilities in all Government educational institutions and other educational institutions receiving aid from the Government. As observed by S.R. Das, J in *Ashwini Kumar Ghosh and another vs. Arvinda Bose and another*, AIR 1952 SC 369:

“It is now settled law that the title of a statute is an important part of the Act and may be referred to for the purpose of ascertaining its general scope and of throwing light on its construction, although it cannot override the clear meaning of the enactment.”

The short title of the Act of 1995 reads: “The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995”. The long title of the Act states that it is an Act to give effect to the proclamation on the full participation and equality of the people with disabilities in the Asian Pacific Region.

11. In *Union of India vs. Sanjay Kumar Jain*, (2204) 6 SCC 708, in para 8 at page 712 of the SCC the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region adopted at Beijing in December, 1992 has been referred to and it is stated therein that to give full effect to the Proclamation it was felt necessary to enact a legislation to provide for the following matters:

(i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities;

(ii) to create barrier free environment for persons with disabilities;

(iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-a-vis non-disabled persons;

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(iv) to counteract any situation of the abuse and the exploitation of persons with disabilities;

(v) to lay down a strategy for comprehensive development of programmes and services and equalization of opportunities for persons with disabilities; and

(vi) to make special provision of the integration of persons with disabilities into the social mainstream."

(emphasis supplied)

12. We may now examine the Rules, 2008 to find out whether the reservation of 3% of the seats provided therein in favour of physically handicapped persons achieves the purposes set out in the Short and Long Titles of the Act of 1995 and the Proclamation adopted at Beijing in December, 1992. Table No.5 states that 7 seats would be reserved for physically handicapped persons (non-service) and two seats would be reserved for physically handicapped persons (in-service) which total to 9 seats and this works out to 3% of the total of 308 seats. In the Tables 1, 2, 3 and 4 in which the seats in the Post Graduate Degree/Diploma courses have been distributed amongst UR, SC, ST and OBC categories in the different Government educational institutions or educational institutions receiving aid from the Government at Bhopal, Gwalior, Indore, Jabalpur and Rewa, no specific seats have been ear-marked for physically handicapped persons. The result is that physically handicapped persons who have been selected for admission and have got less marks than other candidates belonging to ST, SC, OBC and UR categories are compelled to accept seats either in the degree or in the diploma course which are not opted for by candidates belonging to SC, ST, OBC and UR categories other than the physically handicapped candidates by operation of Rule 1.20(9) and Rule 1.20(11) of the Rules, 2008 which provide for sequence of counselling amongst in-service and non-service candidates respectively. Disabled persons or physically handicapped candidates thus will not get equal opportunity for studying PG Course, Diploma or Degree, or will not get employment in jobs which they can perform and will be denied the right to fully participate in the medical/health programmes of the country and as a result, they cannot get integrated into the social mainstream. In short, the entire purpose of reservation of 3% of seats in the Government Educational Institutions and Institutions receiving aid from the Government as provided in Section 39 of the Act of 1995 will be frustrated.

13. The 2008, Rules are thus ultra vires the Act of 1995 inasmuch as they do not earmark seats in Post Graduate Diploma and Degree Courses in the tables annexed to the Rules, 2008. We, however, make it clear that it is for the rule making authority to decide which are the courses in the Post Graduate Degree or Diploma in which seats should be reserved for persons with disabilities keeping in mind the physical requirements of students for different courses of study but it

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must ear-mark some seats in the Post Graduate Degree and some seats in the Post Graduate Diploma, as otherwise the object of 3% reservation provided for in Section 39 of the Act of 1995 will not be attained.

14. Since the petitioner has already taken admission in diploma course in academic year 2008-2009 and the last date for admission was 10th June, 2008, we cannot direct the authorities to give admission to the petitioner in the PG Course during the academic year 2008-2009. We, however, direct the State Government to make fresh rules for admission to PG Medical & Dental Courses for the academic year 2009-10 in accordance with the observations made in this judgment ear-marking specific seats for persons with disability in Post Graduate Degree and Post Graduate Diploma Courses and to give admission to the petitioner in accordance with such fresh rules to a specific seat in the Post Graduate Degree or Diploma Course during the academic session 2009-10.

Order accordingly.

I.L.R. [2009] M. P., 1266

WRIT PETITION

Before Mr. Justice Abhay M. Naik

19 December, 2008*

S.B. SINGH

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Service Law - Transfer - Petitioner an employee of Municipal Council - Transferred to District Urban Development Agency (DUDA) - Order of transfer quashed by High Court holding that transfer was not a transfer from one Municipal Council to another - Petitioner was again transferred to DUDA - Writ petition challenging the order was disposed of with direction to Transfer Grievance Cell for reconsideration - Consequently, petitioner was posted in Municipal Council but was again transferred to DUDA - Petition against - Held - In other case Division Bench of High Court held that DUDA is a body fully controlled by State Government and, therefore, the State employee can be transferred to DUDA - Record pertaining to the proceedings leading to the subject transfer also do not reveal any factor having effect of vitiating transfer - Transfer can not be said to be illegal - Petition dismissed.
(Paras 16 & 17)

क. सेवा विधि - स्थानांतरण - याची नगर पालिका परिषद का कर्मचारी - जिला नगरीय विकास अभिकरण (डीयूडीए) में स्थानांतरित किया गया - स्थानांतरण का आदेश उच्च न्यायालय द्वारा यह अभिनिर्धारित करते हुए अभिखण्डित किया गया कि स्थानांतरण एक नगर पालिका परिषद से दूसरी में स्थानांतरण नहीं था - याची को पुनः डीयूडीए में स्थानांतरित किया गया -

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आदेश को चुनौती देने वाली रिट याचिका स्थानांतरण शिकायत प्रकोष्ठ को पुनर्विचार के निदेश के साथ निपटाई गयी – परिणामस्वरूप, याची को नगर पालिका परिषद में पदस्थ किया गया किन्तु पुनः डीयूडीए में स्थानांतरित कर दिया गया – उसके विरुद्ध याचिका – अभिनिर्धारित – अन्य मामले में उच्च न्यायालय की खण्ड न्यायपीठ ने यह अभिनिर्धारित किया कि डीयूडीए राज्य सरकार द्वारा पूर्णतः नियंत्रित एक निकाय है इसलिए राज्य सरकार का कर्मचारी डीयूडीए में स्थानांतरित किया जा सकता है – विषयांकित स्थानांतरण की कार्यवाहियों से सम्बन्धित अभिलेख भी स्थानांतरण को दूषित करने का प्रभाव रखने वाला कोई कारक प्रकट नहीं करता – स्थानांतरण अवैध नहीं कहा जा सकता – याचिका खारिज।

B. Civil Procedure Code (5 of 1908), Section 11 - Res judicata - First order of transfer from Municipal Council to DUDA quashed by High Court - In subsequent writ petition challenging the order of transfer from Municipal Council to DUDA it was directed that Transfer Grievances Cell shall reconsider the case of petitioner. - Held - Petitioner ought to have insisted for quashment of the subsequent transfer order - Instead petitioner subjected himself to the decision of State Government - Petitioner deemed to have waived the plea of res judicata. (Paras 14 & 15)

खा. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – नगर पालिका परिषद से डीयूडीए में स्थानांतरण का प्रथम आदेश उच्च न्यायालय द्वारा अभिखण्डित – नगर पालिका परिषद से डीयूडीए में स्थानांतरण के आदेश को चुनौती देने वाली पश्चात्तर्वर्ती रिट याचिका में यह निदेशित किया गया कि स्थानांतरण शिकायत प्रकोष्ठ याची के मामले पर पुनर्विचार करे – अभिनिर्धारित – याची को पश्चात्तर्वर्ती स्थानांतरण आदेश को अभिखण्डित करने के लिए आग्रह करना चाहिए था – इसके स्थान पर याची ने स्वयं को राज्य सरकार के निर्णय के अधीन रखा – याची द्वारा पूर्व न्याय के अभिवचन को अधित्यक्त कर दिया समझा गया।

Cases referred :

1973 MPLJ 832, (2005) 7 SCC 190, (1999) 5 SCC 590, AIR 1979 SC 551, AIR 1965 SC 1150, AIR 1990 Kerala 88, AIR 1981 J&K 21, AIR 1968 SC 933, (1998) 7 SCC 484, (1994) 4 SCC 145, (2007) 8 SCC 150, (2004) 7 SCC 405, AIR 2004 SC 2165, AIR 1979 SC 1136.

Ravish Agrawal with Arpan J. Pawar, for the petitioner.

Samdarshi Tiwari, G.A., for the respondent No.1.

Siddharth Gulati, for the respondent No.2.

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

R.P. Agrawal with Praveen Dave, for the intervenor.

ORDER

ABHAY M. NAIK, J. :-Case of the petitioner is that he was appointed as Chief Executive Officer in Special Area Development Authority, Sidhi (hereinafter referred to as SADA) vide order dated 1.7.1991 and was subsequently transferred from time to time to various other SADAs in the State. Lastly, while the petitioner was posted as Chief Executive Officer, SADA, Bhilai (Durg) in 1998, the SADA

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was dissolved by the State Government in exercise of powers conferred under Section 76(1) of the M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973. The petitioner was, further, posted as Commissioner in Municipal Corporation, Bhilai vide order dated 15.6.1998. Petitioner was, thereafter, transferred and posted as Project Officer, District Urban Development Agency, Gwalior (hereinafter referred to as DUDA) vide order dated 30.3.2000 passed by the State Government. This order was challenged by the petitioner in W.P. No.2155/2000 inter alia on the ground that DUDA is only a society registered under the M.P. Societies Registrikaran Adhiniyam, 1973 and was not a part of any Municipality or Municipal Corporation. This Court vide order dated 12.5.2000 allowed the writ petition in part holding that the transfer of the petitioner as Project Officer, DUDA, Gwalior was not a transfer from one Municipal Council to another and as such the transfer could not be sustained. A copy of this order is on record as Annexure/P-1. Petitioner was again posted as Chief Municipal Officer in Municipal Council, Panna w.e.f. 19.5.2000. Subsequently, vide order dated 22.8.2000 he was transferred to the post of Commissioner, Municipal Corporation, Singrauli, District Sidhi and thereafter he was transferred vide order dated 4.7.2002 to the post of Commissioner, Municipal Corporation, Katni. Copy of the order dated 4.7.2002 is on record as Annexure/P-2. Ignoring Annexure/P-1, the petitioner was again transferred to the post of Project Officer, DUDA, Jabalpur vide order dated 12.10.2004. It was again challenged in W.P. NO.10770/2004. This petition was disposed of by this Court on 19.10.2004 vide Annexure/P-4 with a direction to the Transfer Grievance Cell of the State Government to consider and take a decision in the matter of the petitioner. Till such a decision, status quo was directed to be maintained. During pendency of the representation of the petitioner made pursuant to Annexure/P-4 one Shri L.K. Dwivedi was posted as Commissioner, Municipal Corporation, Katni which was challenged by the petitioner in W.P. No.12462/04. This petition was disposed of vide order dated 2.12.2004 contained in Annexure/P-6 holding that adequate directions had already been given vide Annexure/P-4 and the grievance in the matter may be raised by the petitioner before the Transfer Grievance Cell. Ultimately, the petitioner was posted as Additional Commissioner, Municipal Corporation, Gwalior.

2. It is further stated in the writ petition that the respondent No.3 who was posted as Commissioner, Municipal Corporation, Singrauli was suspended vide order dated 13.3.2006 and subsequently, the petitioner who was serving as Additional Commissioner, Gwalior was transferred to the post of Commissioner, Municipal Corporation, Singrauli vide order dated 14.3.2006. Pursuant thereto petitioner gave his joining as Commissioner, Municipal Corporation, Singrauli on 17.3.2006. Respondent No.3 challenged the order of his suspension in W.P. No.4042/06(S). This Court in the said writ petition, directed on 20th March, 2006 the Chief Secretary of the State of Madhya Pradesh to scrutinise the case of the

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respondent No.3 and keep the order of suspension in abeyance until the outcome of such scrutiny. Consequently, the respondent No.3 again joined as Commissioner, Municipal Corporation, Singrauli. Copy of the order dated 20.3.2006 is on record as Annexure/P-9. State Government submitted an application for review/recall of the said order which was allowed by this Court in M.C.C. No.794/2006 vide order Annexure/P-10 dated 27.4.2006. Petitioner was, thereafter, again posted vide order dated 3.5.2006 as Commissioner, Municipal Corporation, Singrauli in exercise of the power under Section 54 of the Municipal Corporation Act, 1956. Copy of this order is on record as Annexure/P-11. Petitioner gave his joining pursuant to the said order on 5.5.2006 and has been continuing on the said post. However, pursuant to Annexure/P-9 dated 20.3.2006, an enquiry was conducted and the report was submitted by the Principal Secretary holding that the complaint made by respondent No.3 was not correct. A resolution was also passed by the Municipal Corporation, Singrauli on 24.12.2007 vide Annexure/P-15 that the State Government be requested not to post the respondent No.3 as Commissioner, Municipal Corporation, Singrauli against its interest.

3. Despite the aforesaid, the petitioner has been posted by impugned order dated 24.3.2008 (Annexure/P-16) on the post of Project Officer, DUDA, Khandwa and the respondent No.3 has been again posted on the post of Municipal Commissioner, Singrauli. Petitioner has challenged in this petition his posting vide Annexure/P-16 to DUDA. He has prayed for the following reliefs :-

a) set aside the order dated 24.3.2008 (Annexure P16).

b) direct the respondent No.1 to permit the petitioner to continue as Commissioner, Municipal Corporation, Singrauli.

4. Respondents submitted their returns stating therein mainly that the learned Single Bench of this Court vide Annexure/P-1 had held that the petitioner after dissolution of SADA had become an employee of State Municipal Services and cannot be transferred to DUDA which is a society registered under the provisions of M.P. Societies Registrkaran Adhiniyam, 1973. Thereafter, Division Bench of this Court while considering the identical point has held vide order Annexure/R-1 dated 12.1.2005 passed in LPA No.845/04 that DUDA is the body fully controlled by the State and therefore the State employee can be transferred to DUDA. It is further stated in the return that the petitioner was working as Chief Executive Officer, SADA and became employee of State Municipal Services against the resolution of SADA but only because he was appointed as Commissioner, Municipal Corporation he cannot claim any right for the reason that there is no permanent post of Commissioner of Municipal Corporation and appointments of Commissioner, Municipal Corporations are being made under Section 54 of the M.P. Municipal Corporation Act as per the decision taken by the State Government. It is further

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stated that the respondent No.3 is quite qualified for the post of Commissioner of the Municipal Corporation and there is nothing on record to show that respondent No.3 is ineligible for the said post. He has been posted as Commissioner of the Municipal Corporation as per the decision of the Government which does not suffer from any illegality and/or infirmity.

5. Respondent No.3 submitted its return containing inter alia that the petitioner is not a regular Chief Municipal Officer holding a Civil post of the State Government sanctioned in the State Municipal Services (Executive), under the control of the Urban Administration and Development Department. Initially the petitioner was appointed as Chief Executive Officer in Town Improvement Trust and, subsequently, was transferred and posted as Chief Executive Officer in various development authorities. The said authorities were under the control of the State of Madhya Pradesh in Housing and Environment Department. Since, the State Government took the decision to abolish SADA and Town Improvement Trust and a policy was made to transfer all the assets, liabilities and responsibilities of those abolished authorities to the respective Municipal Councils and Municipal Corporations. Accordingly, the petitioner came in services of the Urban Administration and Development Department. The dispute with respect to the final absorption of persons like petitioners who have come from the erstwhile Town Improvement Trust or SADA has not been finally resolved as a result, till date there is no final absorption order issued in respect of petitioner absorbing him on any of the post in the State Municipal Services (Executive). Though, it is being said that such persons are being absorbed or have been absorbed on the post of Chief Municipal Officer, but the fact remains that their names have not been included in the gradation seniority list of the Chief Municipal Officer of any category. In support of this plea, copies of gradation seniority list of Chief Municipal Officers are placed on record as Document No.R3/1 and R3/2. Name of the answering respondent is mentioned at Serial No.24 in Document No.R3/1 whereas the name of the petitioner does not find place in Document No.R3/2. In this view of the matter, the petitioner has no better claim than the answering respondent who has already been appointed in the services of the State Government in the State Municipal Services (Executive) and is a holder of the Civil post of the State. Commissioner of the Municipal Corporation cannot be removed from the office in a meeting of the Corporation with less than 3/4th of the total number of elected councilors. No such resolution was ever passed. On the contrary, a resolution in the year 2002 was passed against the petitioner with respect to his working as revealed in Document No.R3/3. It is further averred in the return that many of the Chief Municipal Officers have been posted as Project Officer in various DUDAs in the State after amalgamation of the department. Therefore, it cannot be said that under the changed circumstances only because once it is said by this Hon'ble Court that the posting of Project Officer is not permissible in

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any other department, he cannot be posted as Project Officer in DUDAs. This being the position, it cannot be said that any violation is committed by the State in transferring and posting the petitioner as Project Officer in DUDA, Khandwa. This apart, it has been averred that respondent No.3 has not only taken over charge of the post but he is exercising all the powers of the Commissioner of the Municipal Corporation, Singrauli and is taking active part in all the proceedings. Financial transactions have also been started by him as revealed in Document No.R3/13 and R3/14. In view of the aforesaid, prayer for dismissal of the writ petition has been made.

6. Petitioner submitted his rejoinder stating therein that the decision of the Division Bench contained in Annexure/R-1 has no applicability to the petitioner's case. On the contrary, Annexure/P-1 continues to hold field as far as the petitioner is concerned. Additionally, it is contended that pursuant to the order dated 3.5.2006 respondent No.3 has joined as Project Officer, DUDA, Khandwa. Accordingly, the order dated 3.5.2006 (Annexure/P-11) stood executed and it could not have been revoked after execution. This being so, order dated 24.3.2008 (Annexure/P-16) is void ab initio because an order once executed cannot be revoked.

7. Respondent No.3 submitted additional return refuting the various factual and legal averments raised in the rejoinder. Application for intervention has also been filed by the intervenors vide I.A. No.4590/08.

8. Learned counsel for the parties are heard at length which have been considered in the light of the material on record. It is worth mentioning that respondent No.1 has made available the record of the department leading to the impugned order regarding transfer of the petitioner which, too, has been perused.

9. Main contention of Shri Ravish Agrawal, learned senior counsel is that the petitioner was earlier posted as Commissioner in Municipal Corporation, Bhilai. He was transferred from there to the post of Project Officer, DUDA vide order dated 30.3.2000 passed by the State Government. It was challenged by the petitioner in W.P. No.2155/00 on the ground that DUDA is only a society registered under M.P. Societies Registrickaran Adhiniyam, 1973 and was not a part of any Municipal Council or Municipal Corporation. This Court vide Annexure/P-1 dated 12.5.2004 allowed the writ petition in part holding that the transfer of the petitioner as Project Officer, DUDA, Gwalior was not a transfer from one Municipal Council to another and as such the transfer could not be sustained. Contention of the learned senior counsel is that this order operates as res-judicata against the State Government and the impugned order dated 24.3.2008 contained in Annexure/P-16 transferring thereby the petitioner on the post of Project Officer, DUDA, Khandwa is therefore not sustainable despite having been held by the Division Bench of this court vide Annexure/R-1 dated 12.1.2005 in L.P.A. No.854/04 that the District Urban Development Agency (DUDA) is a body wholly controlled by

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the State Government and having regard to the proviso to F.R. 110, transfer to DUDA cannot be said to be illegal. Reliance has been placed to buttress this submission on the Single Bench decision of this Court in the case of *State of Madhya Pradesh Vs. Mulamchand* (1973 MPLJ 832) wherein following conclusions have been drawn :-

“(1) The bar of res-judicata operates also as between two stages in the same litigation.

(2) A decision in a writ proceeding operates as res-judicata in a subsequent suit based on the same cause of action between the same parties.

(3) The principle of res-judicata is based on the need of giving finality to a judicial decision. Once a res judicata, it shall not be adjudged again. The underlying principle is that the parties should not be vexed twice over.

(4) Even where section 11, Civil Procedure Code, does not apply, the principle of res judicata may apply for the purposes of achieving finality in litigation.

(5) A question of law is as much in issue as a question of fact. The expression “matter in issue” is not confined to issues of fact; it includes issues of law as well.

(6) But, for the purposes of the rule of res judicata, the issue of law must not be an abstract question of law, it must be one relating to its applicability or non-applicability to the facts and circumstances of the particular case.

(7) Even an erroneous decision on an issue of law operates as res judicata. Exceptions to this rule are (i) where by a subsequent legislation, the law, as applied in the earlier decision, is altered. However, a different interpretation of the law as given in a subsequent binding precedent is not the same thing as altering the law. (ii) Where the question of law is one purely relating to the jurisdiction of the Court. (iii) Where the decision of the Court sanctions something which is illegal. ‘Illegality’ in this context refers to an act prohibited by law.

(8) As between a decision which operates as res judicata and another which is a binding precedent, though not res judicata, the former prevails.

(9) A decision of the Supreme Court is binding on all Courts by virtue of Article 141 of the Constitution, but it is not the same thing as to say that a decision of the Supreme court alters the law.

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Article 141 does not confer on the Supreme Court any legislative function. The Supreme Court declares the law ; it does not alter the existing law, or make a new law."

10. Strength has also been derived from the decision of Chancery Division in the case of *Waring Westminster Bank Vs. Burton Butler and Opinions of the Lords of Appeal (House of Lords) for Judgment In the Cause : Watt (formerly Carter) (sued on his own on behalf of the other members of the Labout party) (Respondent) V. Ahsan (Appellant)* to contend that even by virtue of the later decision of the learned Division Bench vide Annexure/R-1, the effect of *res judicata* does not get vanished because even an erroneous decision on an issue of law operates as *res judicata*.

11. Referring to another Supreme Court decision in the case of *Ishwar Dutt Vs. Land Acquisition Collector and another* (2005) 7 SCC 190 it is submitted that the principles of *res judicata* is applicable to writ proceedings and the respondent State is prohibited from issuing the impugned order of transfer of the petitioner in contravention of Annexure/P-1. Reliance has been further placed on the decision of the Supreme Court in the case of *Hope Plantations Ltd. Vs. Taluk Land Board; Peermade and another* (1999) 5 SCC 590 to contend that the principles of *res judicata* and estoppel would apply even to proceedings of administrative authorities. He contended, taking support from *Ishwardas Vs. The State of Madhya Pradesh and others* AIR 1979 SC 551, that the plea of *res judicata* may be sustained, without anything more, if the questions at issue and the parties are the same, subject of course to the other conditions prescribed by S. 11. Once the questions at issue in the two suits are found to be the same, the fact that the material which led to the decision in the earlier suit was not again placed before the Court in the second suit cannot make the slightest difference. Applicability of principles of *res judicata* to writ petitions was already recognised by the five Judges Bench of the Supreme Court in the case of *Devilal Modi Vs. Sales Tax Officer, Ratlam and others* AIR 1965 SC 1150.

12. It is strenuously argued that although the Division Bench of this Court vide Annexure/R-1 has held that a transfer could be made to DUDA, this point having been concluded between the petitioner and the State Government vide Annexure P-1, it cannot be reopened by the impugned order on account of having been hit by the principle of *res judicata*. Reliance has also been placed for this purpose on the following passage from the decision of the Kerala High Court in the case of *Bharti Amma and others Vs. Kumaran Peethambaran and another* AIR 1990 KERALA 88. It is observed that :-

"A finding or decision inter partes based on a certain view of the law connected with the facts relating to right of parties is binding on them even though the abstract proposition of law

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dissociated from the facts may not be so. Subsequent change of law, statutory or interpretative, cannot take away the binding force of the previous decision inter partes. That does not mean that in spite of the change of law the earlier decision will bind the parties in future dispute. When the cause of action and reliefs are different, the new law alone will govern. That is because the matter in issue in the subsequent proceeding is different since the law to be interpreted is different. A statutory change of law with retrospective effect, depending upon statutory provisions, may be capable of re-opening concluded decisions. But a different interpretation of law overruling an earlier decision not inter partes on the question of interpretation of law cannot have the effect of re-opening the earlier decision which has become final between parties. Otherwise, whenever there is an interpretative change in law, fresh litigations ignoring earlier concluded decisions could be had. *Velayudhan's case* 1975 Ker LT 1 (FB), which overruled *Rev. Fr. Victor Fernandez's case* 1971 Ker LT 216 : (AIR 1973 Ker 55) (FB) on the interpretation of the amplitude of tenancy, cannot have the effect of taking away the bar of res judicata on account of previous concluded decisions inter partes and allowing the plaintiff to file the present suit ignoring the earlier decisions. If such an interpretation is allowed, there cannot be any finality of decisions."

Full Bench decision of Jammu & Kashmir High Court in the Case of *Abdul Salam Vs. State of Jammu and Kashmir and others* AIR 1981 JAMMU AND KASHMIR 21 has also been harnessed into operation wherein it is observed :-

"From a review of the aforesaid judgment it stands established that in any case in which it is found that the matter directly and substantially in issue had been directly and substantially in issue in a former suit or writ petition and has been heard and finally decided by a competent Court principles of res judicata cannot be ignored. Even an erroneous judgment is nonetheless a binding judgment inter partes, so long as it is not reviewed or reversed by a higher court. Once a final judgment has been obtained, the same matter cannot be canvassed anew in another action. This is the core of the rule, the court is not concerned with the correctness or otherwise of the earlier judgment.

The matter in issue, if it is purely one of fact decided in the earlier proceedings by a competent court must in a subsequent litigation between the same be regarded as finally decided and be reopened. A mixed question of law and fact, for the same reasons,

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cannot be considered anew in any subsequent proceedings. There would be no difference where the decision is on a question of law either, if the conditions for the application of Section 11 C.P.C. are satisfied, except in cases where the question decided in the previous cause is a question of law and relates to the jurisdiction of the court or the lack of it or the law has been subsequently changed by the legislature. Doctrine of *res judicata* and general principle emanating therefrom must be resorted to secure and freeze the issue once debated and finally decided and the principle of *res judicata* cannot be ignored merely on the plea that the earlier judgment was wrong or erroneous.

Undoubtedly Article 141 of the Constitution of India enacts that the law declared by the Supreme Court shall be binding on all courts within the territory of India. But the plain implication of the article is that when the Supreme Court expresses its view on a particular point of law, that view would be binding on all courts in India, irrespective of any contrary view expressed by any other court earlier and after the declaration by the Supreme Court, the view expressed to the contrary would no longer be treated as good law. It, however, does not mean that the effect of the decision, which had taken a contrary view and had become final between them stands automatically wiped off. The effect of a judgment, *inter partes*, can only be wiped off by getting that particular judgment reversed in an appeal or review. To hold otherwise would offend against the principle of finality of judgments. Moreover, Mr. Thakur is not correct in assuming that the declaration of law by the Supreme Court amounts to an 'alteration' in law so as to exclude the application of the rule of *res judicata*.

Article 141 of the Constitution has a limited purpose and does not confer any legislative functions on the Supreme Court. The Supreme Court only interprets law and neither enacts nor amends the law as laid down by the legislature. Thus, the exception to application of the rule of *res judicata* that if there is 'alteration' of the law since the earlier judgment the rule would not apply, would not be attracted because the interpretation given by the Supreme Court cannot be equated with enactment of new or altered law by the legislature. It is, therefore, immaterial for the application of the principles of *res judicata* as to whether the Supreme Court subsequently in a different case expresses a view contrary to a decision *inter partes* in an earlier suit or writ petition. Indeed, the declaration by the Supreme Court would imply that the law has

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always what the Supreme Court interprets it to mean but this cannot be extended to take away the rights which have become final between the parties in an earlier decision which took the contrary view. The rights which have become final as a result of a judgment delivered by a competent court cannot be washed away by a Subsequent interpretation in a different cause. The correctness or otherwise of the earlier decision is wholly irrelevant where the conditions for the application of the rule of res judicata are satisfied in the latter case.”

12. I have considered the position of law with regard to section 11 as projected by the learned counsel for the petitioner. There can be dispute about it. However, it may be seen that a plea of res judicata does not involve a pure question of fact but it involves a mixed question of law and fact. A plea of res judicata is not a plea touching the jurisdiction of a Court in total or absolute sense. Thus, it is a plea which a party may waive. Apex Court in the case of *Associated Hotels of India Ltd. Vs. S.B. Sardar Ranjit Singh* AIR 1968 SC 933 has held that a waiver is an intentional relinquishment of a known right. If a party chooses not to take shelter of this plea knowing fully well about his right flowing from earlier inter partes decision on merits, he may be deemed to have waived the plea of res judicata.

13. Apex Court in the case of *Ram Harakh (Dead) By LRs. Vs. Hamid Ahmed Khan (Dead) By LRs. and others* (1998) 7 SCC 484 has held that if a plea of res judicata was not raised before the consolidation authorities in the first instance or before the appellate authorities, the same will be deemed to have been waived. Similarly, it has been held by the Apex Court in the case of *Sangappa Gurulingappa Sajjan Vs. State of Karnataka and others* (1994) 4 SCC 145 that a plea despite being available, if not raised, will not be available in the SLP.

14. There is a peculiar feature in this case. In the instant case, although, the transfer of the petitioner to DUDA was quashed by this Court in W.P. No.2155/2000 vide Annexure/P-1 dated 12.5.2004, he was again transferred to the post of Project Officer, DUDA, Jabapur vide order dated 12.10.2004. The order was challenged before this Court in W.P. No.10770/04. This petition was disposed of by this Court on 19.10.2004 vide Annexure/P-4 with a direction to the Transfer Grievance Cell of the State Government to consider the case of the petitioner and take a decision therein. Since, the principle of res judicata is equally applicable to administrative authorities, the petitioner ought to have insisted for quashment of the order of his transfer to DUDA, Jabalpur. On the contrary, the petitioner is not found to have challenged the order in W.P. No.10770/04 in LPA and instead subjected himself to the decision of the State Government in the matter. Had he been particular for taking advantage of the plea of res judicata on the strength of Annexure/P-1, he would have insisted this Court in W.P. No.10770/04 for quashment of the order transferring him thereby to DUDA, Jabalpur vide dated 12.10.2004 in the light of Annexure/P-1 or would have challenged the order dated

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19.10.2004 vide Annexure/P-4 passed in W.P. No.10770/04 directing thereby the Transfer Grievance Cell to take a decision in the matter of transfer in L.P.A. Thus, the petitioner despite being fully aware of his right flowing from Annexure/P-1 having not insisted for quashment of Annexure/P-4 on the strength of Annexure/P-1 is deemed to have waived the plea of *res judicata* on account of non-sticking to it in W.P. No.10770/04 and further permitting the Transfer Grievance Cell of the State Government to take a decision pursuant to the order of this Court made vide Annexure/P-4. If a party without raising a plea of *res judicata* despite full awareness allows the Court to decide the question afresh or to issue a direction afresh, it is not open to such party to challenge the subsequent administrative decision on the plea of *res judicata* because he himself despite of making challenge at the earlier occasion in W.P. No.10770/04 did not insist for a decision on the basis of *res judicata*. This apart, it may be seen from the relief clause that the petitioner has merely prayed for quashment of his transfer order contained in Annexure/P-16 and has not challenged the other Govt. decisions leading to his transfer. Moreover, every transfer order gives rise to a fresh cause of action if an employee wishes to challenge it. I may successfully quote the passage from House of Lords decision approved by the Supreme Court of India in *Ishwar Dutt's case* (supra) :-

“Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue.”

15. In view of the aforesaid discussion, I am of the considered opinion that the petitioner having not insisted before this Court in W.P. No.10770/04 for applicability of plea of *res judicata* on the strength of Annexure/P-1, and having further subjected himself to the decision of the State Government pursuant to Annexure/P-4 is deemed to have waived it and this Single Bench would be bound by the law laid down by the Division Bench (headed by the then Chief Justice Hon'ble Shri R.V. Raveendran, presently Judge, Supreme Court of India) decision in L.P.A. No.854/04 vide Annexure/R-1 that transfer from State Municipal Service (Executive) to DUDA cannot be said to be illegal having regard to the proviso to F.R. 110 because DUDA is a body wholly controlled by the State Government.

16. Now this Court is required to examine the sustainability of the impugned order of transfer (Annexure/P-16) on the parameters applicable to such matters. Scope of interfering in the matter of transfer has been laid down by the Apex Court time and again. Following are few such decisions :-

(i) In the case of *Mohd. Masood Ahmad Vs. State of U.P. and others* (2007) 8 SCC 150 it is observed that transfer is an exigency of service. It should not be interfered with ordinarily by a court of law in exercise of its

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discretionary jurisdiction under Article 226 unless the court finds that either the order is malafide or that the service rules prohibit such transfer, or that the authorities who issued the orders, were not competent to pass the orders.

(ii) In the case of *State of U.P. And another Vs. Siya Ram and another* (2004) 7 SCC 405 it has been held :-

“The High Court while exercising jurisdiction under Arts. 226 and 227 of the Constitution of India, 1950 (in short the 'Constitution') had gone into the question as to whether the transfer was in the interest of public service. That would essentially require factual adjudication and invariably depend upon peculiar facts and circumstances of the case concerned. No Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer as shown to be an outcome of malafide exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the Courts or the Tribunals normally cannot interfere with such orders as a matter of routine, as though they were the appellate authorities substituting their own decision for that of the employer/management, as against such orders passed in the interest of administrative exigencies of the service concerned.

(iii) In the case of *State of U.P. and others Vs. Gobardhan Lal with D.B. Singh Vs. D.K. Shukla and others* AIR 2004 SC 2165 while deprecating the interference in the matter of transfer, it has been observed :-

“A challenge to an order of transfer should normally be eschewed and should not be countenanced by the Courts or Tribunals as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that Courts or Tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the State and even allegations of malafides when made must be such as to inspire confidence in the Court or are based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer.”

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Thus, the transfer of the petitioner cannot be interfered with unless malafides against the respondents are established or a violation of statutory provision is made out. Merely on the basis of general or political remarks, there cannot be interference as held in the *Gobardhan Lal's case* (supra).

(iv) Transfer has already been held as exigency of service which is based on the opinion of the employer. Supreme Court of India in the case of *K.B. Shukla and others Vs. Union of India and others* AIR 1979 SC 1136 has observed :-

"It is true that formation of opinion by the Central Government as to the existence of 'exigencies of the service' requiring appointment by such method, is a pre-requisite for the exercise of the power. But the formation of such opinion is a matter which, in view of the peculiar nature of the function and the language of the provision, has primarily been left to the subjective satisfaction of the Government. Indeed, it is as it ought to be. The responsibility for good administration is that of the Government. The maintenance of an efficient, honest and experienced administrative service is a must for the due discharge of that responsibility. Therefore, the Government alone is best suited to judge as to the existence of exigencies of such a service, requiring appointments by transfer. The term 'exigency' being understood in its widest and pragmatic sense as a rule, the court would not judge the propriety or sufficiency of such opinion by objective standards, save where the subjective process of forming it, is vitiated by malafides, dishonesty, extraneous purpose, or transgression of the limits circumscribed by the legislation."

17. Record pertaining to the proceedings leading to the subject transfer is made available which do not reveal any factor having effect of vitiating the transfer. In view of the aforesaid discussion, the petitioner is not found to have established any ground for impugning the transfer successfully.

18. As regards objection that executed order cannot be revoked, reliance has been placed on the order dated 29.1.1988 of this Court passed in M.P. No.32/1988. On perusal it is found that it is an order passed at the stage of motion hearing having no value as a precedence. Moreover, the impugned order having not been found invalid, cannot be interfered with on the basis of the aforesaid contention.

19. Consequently, the writ petition being devoid of substance is hereby dismissed.

No order as to costs.

Petition dismissed.

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I.L.R. [2009] M. P., 1280

WRIT PETITION

Before Mr. Justice Sanjay Yadav

6 January, 2009*

GANNON DUNKERLEY & CO. LTD.(M/s.)

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Building and Other Construction Workers' Welfare Cess Act (28 of 1996), Sections 3, 4 & 5, Building and Other Construction Workers' Welfare Cess Rules, 1998, Rule 6, Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996, Sections 2(1)(d) & 2(1)(i)(iii) – Levy and collection of cess - Whether contractor is an employer who would be required to pay cess - Held - Contractors who carries out the work of building or other construction work is an employer for the purpose of the Construction Workers Act, 1996 and the Cess Act, 1996. (Para 19)

क. भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर अधिनियम (1996 का 28), धाराएँ 3, 4 व 5, भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर नियम, 1998, नियम 6, भवन एवं अन्य संनिर्माण कर्मकार (नियोजन विनियमन एवं सेवा शर्तें) अधिनियम, 1996, धाराएँ 2(1)(डी) व 2(1)(i)(iii) – उपकर का उद्ग्रहण एवं संग्रहण – क्या ठेकेदार एक नियोक्ता है जिसे उपकर अदा करना आवश्यक होगा – अभिनिर्धारित – ठेकेदार जो भवन या अन्य संनिर्माण कार्य का निष्पादन करता है संनिर्माण कर्मकार अधिनियम, 1996 एवं उपकर अधिनियम, 1996 के प्रयोजनों के लिए एक नियोक्ता है।

B. Building and Other Construction Workers' Welfare Cess Act (28 of 1996), Section 2(d), Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996, Section 2(1)(d) - Whether applicability of Factories Act would exclude the contractors from applicability of Construction Workers' Act, 1996 and Cess Act, 1996 - Held - Merely because the provisions of Factories Act has been made applicable besides other labour laws would not exclude the applicability of Construction Workers Act, 1996 & Cess Act, 1996. (Para 21)

ख. भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर अधिनियम (1996 का 28), धारा 2(डी), भवन एवं अन्य संनिर्माण कर्मकार (नियोजन विनियमन एवं सेवा शर्तें) अधिनियम, 1996, धारा 2(1)(डी) – क्या कारखाना अधिनियम की प्रयोज्यता ठेकेदारों को संनिर्माण कर्मकार अधिनियम, 1996 एवं उपकर अधिनियम, 1996 की प्रयोज्यता से अपवर्जित करेगी – अभिनिर्धारित – केवल इस कारण कि अन्य श्रमिक विधियों के अतिरिक्त कारखाना अधिनियम के उपबंध लागू किये गये हैं, संनिर्माण कर्मकार अधिनियम, 1996 एवं उपकर अधिनियम, 1996 की प्रयोज्यता अवर्जित नहीं होगी।

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C. Building and Other Construction Workers' Welfare Cess Act (28 of 1996), Section 5 - Determination of cess to access tax - Held - Rate at which cess is levied is 1% of the cost of construction incurred by an employer and thus there exist no ambiguity in the determination of cess. (Para 22)

ग. भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर अधिनियम (1996 का 28), धारा 5 - प्रवेश कर के उपकर का अवधारण - अभिनिर्धारित - दर जिस पर उपकर उद्ग्रहीत किया जाता है नियोक्ता द्वारा उपगत संनिर्माण की लागत का 1 प्रतिशत है और इस प्रकार उपकर अवधारण में कोई संदिग्धता विद्यमान नहीं है।

D. Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act (27 of 1996), Section 2(1)(i), Building and Other Construction Workers' Welfare Cess Rules, 1998, Rule 4(3) - Whether company liable to pay cess - Held - Government or public sector undertaking are bound to deduct or cause to be deducted the cess payable at the notified rates from the bills paid for such works and in the context of rule 4(3), the Company is liable to realize the cess from the bills of the contractors and account for the same. (Para 23)

घ. भवन एवं अन्य संनिर्माण कर्मकार (नियोजन विनियमन एवं सेवा शर्त) अधिनियम, 1996, धारा 2(1)(i), भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर नियम, 1998, नियम 4(3) - क्या कम्पनी उपकर अदा करने के लिए दायी है - अभिनिर्धारित - सरकार या सार्वजनिक उपक्रम ऐसे कार्यों के लिए संदत्त बिलों से अधिसूचित दरों से देय उपकर की कटौती करने या कटौती करवाने के लिए बाध्य है और नियम 4(3) के संदर्भ में कम्पनी ठेकेदारों के बिलों से उपकर वसूल करने और उसका लेखा देने के लिए दायी है।

Cases referred :

AIR 1970 SC 488, AIR 1981 SC 422, AIR 1957 SC 657, AIR 2007 SC 2320, AIR 1985 SC 1041.

Sanjay Mishra, for the petitioners.

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

H.K. Solankey, for the respondent No.3.

ORDER

SANJAY YADAV, J. :-The order passed in the present writ petition shall govern the disposal of Writ Petitions bearing number W.P. No. 3657/2008 - *M/s BOC India Ltd. vs. State of M.P. and others*, W.P. No. 3846/2008 - *Neo Structo Construction Ltd. v. State of M.P. and others*, W.P. No. 4271/2008 - *M/s Naftogaz India Pvt. Ltd. v. State of M.P. and others*, W.P. No. 4274/2008 - *M/s Naftogaz India Pvt. Ltd. v. State of M.P. and others*, W.P. No. 1802/2008 - *Patron Engineering Construction Ltd. v. State of M.P. and others*, W.P. No. 4562/2008 - *M/s. MSK Projects (India) Ltd. v. State of M.P. and others*, W.P. No. 4564/2008 - *M/s. MSK Projects (India) Ltd. v. State of M.P. and others*, W.P. No. 4567/2008 - *M/s. MSK Projects (India) Ltd. v. State of M.P. and others*,

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W.P. No. 6968/2008 – *M/s. S.K.B. Builders & fabricators v. State of M.P. & ors.*, W.P. No. 5420/2008 – *Bridge and Roof Co. (India) Ltd. v. State of M.P. and others*, W.P. No. 5421/2008 – *M/s. Bridge and Roof Co. (India) Ltd. v. State of M.P. and others*, W.P. 5422/2008 – *M/s. MSK Projects (India) Ltd. v. State of M.P. and others*, W.P. No. 6361/2008 – *M/s. Thermax Limited v. State of M.P. and others* and W.P. No. 9353/2008 – *M/s. Pace Process Controls Pvt. Ltd. v. State of M.P. and others*; wherein, challenge put-forth is to an order passed by the Assessing Officer under the Building and Other Construction Workers Welfare Cess Act, 1996 (hereafter referred to as Cess Act of 1996) and the Rules made thereunder, viz., the Building and Other Construction Workers' Welfare Cess Rules, 1998 (hereafter referred to as Rules of 1998); whereby, the petitioner contractors and the Bharat Oman Refineries Ltd. been subjected to the levy of cess.

2. Facts briefly are that, Bharat Oman Refineries Limited is a joint venture company brought into existence vide joint venture agreement entered into between the Bharat Petroleum Corporation Limited and Oman Oil Company Limited, and incorporated under the Companies Act, 1956 (hereafter referred to as Company). The Company is constructing an oil refinery in village Agasod, tehsil Bina district Sagar, M.P. with an estimated cost of more than rupees ten thousand crores. To facilitate commissioning thereof within the stipulated time the company has engaged 37 contractors who are issued work orders between 18.4.2006 to 4.9.2007 for various building or other construction works. As a result whereof the petitioners are subjected to levy of cess under the Cess Act of 1996 and the Rules of 1998 by the impugned order @ 1 % of the cost of construction incurred.

3. The contractors questions the levy on the grounds that they are not the employer but are employed by the company and, therefore, they cannot be held liable for cess which is levied and collected from the employer. Furthermore, it is urged that even if for the sake of argument the contractors are termed as employer, then the nature of work which they are engaged in is governed by the Factories Act, 1948 and, therefore, are excluded from applicability of the Cess Act of 1996 and the Rules, 1998 made thereunder. In the alternate it is contended that the assessment of cess is not in accordance with the provisions contained in Rules of 1998.

4. To substantiate the contentions the learned counsel appearing for the petitioner contractors has led this Court through various provisions not only of the Act of 1996 and Rules 1998 made thereunder, but also of the provisions contained in the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (referred to as Construction Workers Act, 1996) and the Factories Act, 1948. Placing reliance on Section 2 (d) of the Construction Workers' Act, 1996 it is contended that, the "building and other Construction Work" does not include any building or other construction work to which provisions of the Factories Act, 1948, apply. It is urged that since the company is governed by

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the Factories Act, 1948, the provisions contained in the Act of 1996 are not applicable. It is further contended that the contractors like the petitioners being employed by the Company cannot be construed as an employer for the purpose of levy of cess which is to be collected from every employer. Moreover, it is urged that, for the sake of argument if it is construed that the contractor can be an employee then the levy can be on the cost of construction incurred by the employer, whereas in the case at hand, the learned counsel for the petitioners contends that, the assessment is on the basis of work done, the methodology adhered to by the respondent has thus led to uncertainty regarding collection of cess. Based on these submissions, the contractors seek quashment of assessment order dated 23.1.2008.

5. The company on its turn questions the order of assessment that they have wrongly been joined with the Contractors for the liability to deposit the Cess. It is urged by the learned counsel for the company that since the buildings and other construction work is being carried out through contractors, it is the Contractors who are liable to pay the cess and not the company. Accordingly, it is urged that the joint liability imposed by the impugned order is bad and liable to be set aside.

6. The respondent State of Madhya Pradesh on its turn justifies the action of levying the cess on the Contractors and also making the company liable for its recovery at source. The action, it is urged, is in consonance with the provisions contained under the Cess Act of 1996, rules of 1998, and the Construction Workers' Act, 1996. It is contended that, the reference to Factories Act 1948 is a misconception because the nature of construction being undertaken are not those undertaken for achieving the object delineated under Chapter III and IV under the heading Health and Safety. Commenting upon the provisions contained in the Rules of 1998 which provides for the procedure adhered to for assessing the cess, the learned counsel for the respondent State submits that it is the taxable event which has been made the basis for the assessment of cess and even if such event are fictional there exist provision for its adjustment, therefore, the contention raised by the petitioner that there is no procedure provided under the Cess Act of 1996 and the rules made thereunder is being denied by the State of Madhya Pradesh.

7. Having considered the rival submissions, the issue which crops up for consideration is whether the Contractors who have undertaken the work of construction of Buildings and other Construction works for the company can be said to be employer as would make them liable for the payment of cess and whether the procedure adhered to for levy of cess and its recovery is just and proper.

8. The decision on the issue turns on the construction of the provisions of Construction Workers Act, 1996, Cess Act 1996.

9. The Building And Other construction Workers (Regulation of Employment And Condition of Service) Act, 1996 was enacted on 19.8.1996. The long

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introduction appended to the statute reveals that the enactment was to provide safety, health and Welfare measures for more than eight million workers engaged throughout the country in building and other construction work. It was observed that, these members were one of the most vulnerable segments of the unorganized labour in India and their work were temporary in nature, their relationship with employer was temporary, working hours were uncertain, basic amenities and welfare facilities were inadequate, there was absence of machinery to get requisite information regarding number and nature of accidents. It was to bridge over these major discrepancies, the Construction Workers' Act 1996 was brought into existence with an object to regulate the employment and condition of service of building and other construction workers and to provide for their safety, health and welfare measures and for other matters connected therewith and incidental thereto and for ensuring sufficient funds to undertake the social security schemes and welfare measures.

10. Section 2 (d) of Construction Workers Act, 1996 defines the building and other construction work to mean:

“(d) ‘building or other construction work’ means the construction, alteration, repairs, maintenance or demolition, of or, in relation to, buildings, streets, roads, railways, tramways, airfields, irrigation, drainage, embankment and navigation works, flood control works (including storm water drainage works), generation, transmission and distribution of power, water works (including channels for distribution of water), oil and gas installations, electric lines, wireless, radio, television, telephone, telegraph and overseas communications, dams, canals, reservoirs, watercourses, tunnels, bridges, viaducts, aquaducts, pipelines, towers, cooling towers, transmission towers and such other work as may be specified in this behalf by the appropriate Government, by notification but does not include any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952) apply;”

The expression “Contractor” is defined under Section 2 (g) to mean

“(g) ‘contractor’ means a person who undertakes to produce a given result for any establishment, other than a mere supply of goods or articles of manufacture, by the employment of building workers or who supplies building workers for any work of the establishment; and includes a sub-contractor;

Whereas, an “employer” is defined under Section 2 (i) in the following terms:

“(i) “employer”, in relation to an establishment, means the owner thereof, and includes,-

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(i) in relation to a building or other construction work carried on by or under the authority of any department of the Government, directly without any contractor, the authority specified in this behalf, or where no authority is specified, the head of the department;

(ii) in relation to a building or other construction work carried on by or on behalf of a local authority or other establishment, directly without any contractor, the chief executive officer of that authority or establishment;

(iii) in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor;

The "establishment" means:

"2 (j) 'establishment' means any establishment belonging to, or under the control of, Government, any body corporate or firm, an individual or association or other body of individuals which or who employs building workers in any building or other construction work; and includes an establishment belonging to a contractor, but does not include an individual who employs such workers in any building or construction work in relation to his own residence the total cost of such construction not being more than rupees ten lakhs;"

Chapter V deals with Building and Other Construction Workers' Welfare Boards. Section 24 provides for the Constitution of a fund called:

"24. Building and Other Construction Workers' Welfare fund and its application.- (1) There shall be constituted by a Board a fund to be called the Building and Other Construction Workers' Welfare Fund and there shall be credited to-

(a) any grants and loans made to the Board by the Central Government under section 23;

(b) all contributions made by the beneficiaries;

(c) all sums received by the Board from such other sources as may be decided by the Central government.

(2) The fund shall be applied for meeting-

(a) expenses of the Board in the discharge of its functions under section 22; and

(b) salaries, allowances and other remuneration of the members, officers and other employees for the Board;

(c) expenses on objects and for purposes authorized by this Act.

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(3) No Board shall, in any financial year, incur expenses towards salaries, allowances and other remuneration to its members, officers and other employees and for meeting the other administrative expenses exceeding five per cent. of its total expenses during that financial year.

Chapter IX makes special provisions regarding responsibility of employers (Sec. 44); responsibility for payment of wages and compensation (Sec. 45); and the notice of commencement of building or other construction work (Sec. 46), which obligates the employer to sent written notice to Inspector having jurisdiction in the area where proposed building or other construction work is to be executed at least thirty days before the commencement of any building or other construction work information of particulars which find mention under Section 46.

11. To provide for the levy and collection of cess on the cost of construction incurred by employees with a view to augmenting the resources of the Building and Other Construction Workers' Welfare Board constituted under the Construction Workers Act 1996, the Parliament enacted the Building And other Construction Workers' Welfare Cess Act 1996; wherein Section 3, stipulated:

"3. Levy and collection of cess – (1) There shall be levied and collected a cess for the purposes of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, at such rate not exceeding two per cent. But not less than one per cent. Of the cost of construction incurred by an employer, as the Central Government may, by notification in the Official Gazette, from time to time specify.

(2) The cess levied under sub-section (1) shall be collected from every employer in such manner and at such time, including deduction at source in relation to a building or other construction work of a Government or of a public sector undertaking or advance collection through a local authority where an approval of such building or other construction work by such local authority is required, as may be prescribed.

(3) The proceeds of the cess collected under sub-section (2) shall be paid by the local authority or the State Government collecting the cess to the Board after deducting the cost of collection of such cess not exceeding one per cent. Of the amount collected.

(4) Notwithstanding anything contained in sub-section (1) or sub-section (2), the cess leviable under this Act including payment of such cess in advance may, subject to final assessment to be made, be collected at a uniform rate or rates as may be

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prescribed on the basis of the quantum of the building or other construction work involved.”

12. Section 4 provides for furnishing of returns whereas Section 5 provided for assessment of Cess. Section 9 stipulates penalty for non-payment of cess within the specified time. Section 11 makes a provision for Appeals. Section 14 empowers the Central Government to frame rules to carryout the provisions of the Cess Act, 1996. In exercise whereof, the Central Government has framed Rules, viz., the Building and other Construction Workers' Welfare Cess Rules, 1998; whereunder Rule 3 stipulates that, cost of construction shall include all expenditure incurred by an employer in connection with the Building or other Construction Work, excluding, the cost of land and any compensation paid or payable to a worker or his kin under the Workmen's Compensation Act, 1923. Rule 4 provides for time and manner of collection, indicating therein that :

“(1) The cess levied under sub-section (1) of Section 3 of the Act shall be paid by an employer, within thirty days of completion of the construction project or within thirty days of the date on which assessment of cess payable is finalized, whichever is earlier, to the cess collector.

(2) Notwithstanding the provisions of sub-rule (1), where the duration of the project or construction work exceeds one year, cess shall be paid within thirty days of completion of one year from the date of commencement of work and every year thereafter at the notified rates on the cost of construction incurred during the relevant period.

(3) Notwithstanding the provisions of sub-rule (1) and sub-rule (2), where the levy of cess pertains to building and other construction work of a Government or of a Public Sector Undertaking, such Government or the Public Sector Undertaking shall deduct or cause to be deducted the cess payable at the notified rates from the bills paid for such works.

(4) Notwithstanding the provisions of sub-rule (1) and sub-rule (2), where the approval of a construction work by a local authority is required, every application for such approval shall be accompanied by a crossed demand draft in favour of the Board and payable at the station at which the Board is located for an amount of cess payable at the notified rates on the estimated cost of construction:

Provided that if the duration of the project is likely to exceed one year, the demand draft may be for the amount of cess payable on cost of construction estimated to be incurred during

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one year from the date of commencement and further payments of cess due shall be made as per the provisions of sub-rule (2).

5. An employer may pay in advance an amount of cess calculated on the basis of the estimated cost of construction along with the notice of commencement of work under Section 46 of the Main Act by a crossed demand draft in favour of the Board and payable at the station at which the Board is located.

Provided that if the duration of the project is likely to exceed one year, the demand draft may be for the amount of cess payable on cost of construction estimated to be incurred during one year from the date of such commencement and further payment of cess due shall be made as per the provisions of sub rule (2).

6. Advance cess paid under sub-rules (3), (4) and (5), shall be adjusted in the final assessment made by the Assessing Officer."

13. Rule 6 requires that every employer, within thirty days of commencement of his work of payment of cess, as the case may be, furnish to the Assessing Officer, information in Form 1 and the assessing officer thereafter shall proceed to scrutinize the same and take action in accordance with the provisions contained under Rule 7. Rule 8 provides for return of overpaid cess in the event where the employer decides to withdraw from or foreclose the works or modifies the plan of construction thereby reducing the cost of construction undertaken or has been forced by circumstances to call off the completion of the work undertaken. Appeal is provided under Rule 14.

14. Brief resume of various provisions thus reveals that, the Construction Workers Act, 1996 is a piece of beneficial legislation whereas the Cess Act of 1996 is in the nature of taxing statute, i.e., an Act making compulsory imposition of cess.

15. About the beneficial legislation it has been observed by their Lordships of the Supreme Court in *Works Manager, Central Railway Workshop, Jhansi v. Vishwanath and others* (AIR 1970 SC 488) paragraph 11:

"It is probably true that all legislation in a welfare State is enacted with the object of promoting general welfare, but certain types of enactments are more responsive to some urgent social demands and also have more immediate and visible impact on social vices by operating more directly to achieve social reforms."

16. The long introduction and the statement of objects and reasons of the statutes under consideration reveals the special type of enactment to eradicate menaces faced by more than eight million workers engaged in Building and other Construction

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work, which, besides being a beneficial in nature also carries with it the fiscal and the penal provisions. Thus, while interpreting the beneficial aspect the provision is to be construed in such a manner as to give an optimum applicability so that the object is achieved as per the goal set by the makers. As was observed by their Lordships in *Surendra Kumar Verma v. The Central Government Industrial Tribunal-cum-Labour Court, New Delhi and another* (AIR 1981 SC 422) (paragraph 6):

“Semantic Luxuries are misplaced in the interpretation of ‘bread and butter’ statutes. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the court is not to make in roads by making etymological excursion.”

17. In respect of fiscal statute, the law is trite that “the subject is not to be taxed unless the words taxing statute unambiguously impose the tax on him”. It has been observed by their Lordships in *A.V. Fernandez v. State of Kerala* (AIR 1957 SC 657 P. 661) in the following terms:

“..... in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter.”

Similarly, it was observed by their Lordships in *Mathuram Agrawal v. State of Madhya Pradesh* (AIR 2000 SC 109) in paragraph 11:

“..... In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law, i.e., the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity

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regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter.”

18. The first submission put-forth by the learned counsel for the petitioner contractors is that they are not the employer because the principal employer is the Company and the contractors are engaged by the company. This contention of the petitioner contractor loses its substance in view of clause (i) (iii) of sub-section (1) of Section 2 of the Construction Workers Act, 1996 which defines ‘employer’ in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor. The word “means” and the expression “and includes” are of great significance in this sub-clause; which has been noted recently by the Apex Court in the case of *Bharat Co-operative Bank (Mumbai) Ltd. v. Co-operative Bank Employees Union* (AIR 2007 SC 2320) wherein their Lordships were pleased to observe:

“22. Section 2 (bb) of the ID Act as initially introduced by Act 54 of 1949 used the word “means..... and includes” and was confined to a “Banking Company” as defined in Section 5 of the Banking Companies Act, 1949, having branches or other establishments in more than one province and includes Imperial Bank of India. Similarly, Section 2 (kk), which was also introduced by Act 54 of 1949, defines Insurance Company as “an Insurance Company defined in Section 2 of the Insurance Act, 1938 (IV of 1938), having branches or other establishments in more than one province”. It is trite to say that when in the definition clause given in any statute the word “means” is used, what follows is intended to speak exhaustively. When the phrase “means” is used in the definition, to borrow the words of Lord Esher M.R. in *Gough*, it is a “hard and fast” definition and no meaning other than that which is put in the definition can be assigned to the same. (Also see : *P. Kasilingam and Ors. Vs. P.S.G. College of Technology and others* (AIR 1995 SC 1395). On the other hand, when the word “includes” is used in the definition, the legislature does not intend to restrict the definition; makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Therefore, the use of the word “means” followed by the word “includes” in Section 2 (bb) of the ID Act is clearly indicative of the legislative intent to make the definition exhaustive and would cover only those banking companies which fall within the purview of the definition and no other.”

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19. The intention of the legislature is therefore not only to include the owner of the establishment in the present case the Company but also the Contractors who carries out the work of building or other construction work and is an employer for the purpose of the Construction Workers Act, 1996 and the Cess Act, 1996. Thus, there is no escape for the Contractors who have undertaken the building and other Construction work in the establishment belonging to the Company. Thus, in the considered opinion of this Court the Contractors who undertake the work of building and other construction works in an establishment belonging to or under the control of Government any body Corporate or firm, an individual or association or other body of individuals which or who employs building workers in any building or other construction work; and includes an establishment belonging to a Contractor, are governed by the provisions of Cess Act 1996 and the Rules of 1998 made thereunder.

20. The next submission of the learned counsel for the petitioner contractor is based on the exclusion clause contained in the definition under Section 2 (1) (d) of "Building or other Construction Work", which stipulates that any building or other construction work to which the provisions of the Factories Act, 1948 will not be included in the definition as contained in this clause. It is the contention of the learned Counsel for the petitioner that the Company is governed by the Factories Act, 1948 and as such the Construction which are carried out are governed by the said Act, the necessary corollary whereof would be the exclusion of the contractors engaged therein from the applicability of the Construction Workers Act, 1996 and the Cess Act, 1996 and the Rules made thereunder.

21. The Factories Act, 1948 was enacted to consolidate and amend the law regulating labour in factories. The statement of objects of reasons reveals that at the time of enactment, the Factories Act, 1934 was in existence but number of defects and weaknesses were experienced and the provisions pertaining to safety, health and welfare of workers engaged in factories were found to be inadequate and unsatisfactory which harbingered the need for minimum requirements regarding health (cleanliness, ventilation and temperature, dangerous dusts and fumes, lighting and control of glare etc.), safety (eye protection, control of explosive and inflammable dusts, etc.), and general welfare of workers (washing facilities, first-aid, canteens, shelter rooms creches, etc.) amplified where necessary, by rules and regulations to be prescribed by Governments. Thus, the factories Act, 1948, as the statement of objects and reasons and various provisions contained therein reveals, operates in a different field with different scope and object than the construction workers Act, 1996, Cess Act, 1996. The nature of construction activities undertaken to commission a refinery cannot by any stretch of imagination be construed as an activity under the Act of 1948. Merely because the provision of the Act of 1948 has been made applicable besides other labour laws to the contractors, will not, in the considered opinion of this Court, exclude the applicability of the Construction Workers Act, 1996 and Cess Act, 1996 to the petitioner

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contractors. The second submission, therefore, put-forth by the petitioner regarding exclusion of the petitioner Contractors from the applicability of the Construction Workers Act, 1996 and Cess Act 1996 therefore also fails.

22. The last contention of the petitioner contractors that there is no proper provision or machinery to assess and compute the cess as a result whereof the petitioners are being arbitrarily dealt with. Every taxing statute, in the present context Cess Act 1996 making compulsory imposition of cess, has a charging section and provisions laying down the procedure to assess the tax and penalties and method of their collection. The resume of Cess Act, 1996 reveals the three elements viz., the subject on which the Cess is levied, i.e., the "employer" as defined under Section 2 (1) (i) of the Construction Workers Act, 1996; the persons liable to pay, i.e., it could be an owner of the establishment, or the head of the department in relation to building or other construction work carried on by or under the authority of any department of the government, directly without any contractor, or the Chief Executive Officer in relation to a building or other construction work carried on by or on behalf of a local authority or other establishment directly without contractor and contractor in relation to a building or other Construction work carried on by or through a contractor, or by the employment of building workers supplied by a Contractor; and the rate at which the cess is levied which in present case is 1 % of the cost of construction incurred by an employer. There thus exist no ambiguity as complained by the petitioner contractors. In *Govind Saran Ganga Saran v. CST* (AIR 1985 SC 1041) it was held by the Supreme Court that the first component in the concept of a tax is the character of imposition, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed and the fourth is, the value to which the rate is applied for computing the tax liability. The last submission put-forth on behalf of petitioner contractors also fails.

23. Now coming to the contentions raised by the learned counsel for the petitioner company that they cannot be made liable for payment of cess. The answer to the contention lies in the definition of the employer u/S. 2 (1) (i) of the Construction Workers Act, 1996 which leaves open the option of collection of the cess from the class of person who owes the liability whether it would be the Head of Department, the Chief Executive Officer or the Contractor as the case may be. However, sub-rule 3 of Rule 4 of the Rules of 1998 stipulates that :

"Notwithstanding the provisions of sub-rule (1) and sub-rule (2), where the levy of cess pertains to building and other construction work of a Government or of a Public Sector Undertaking, such Government or the Public Sector Undertaking shall deduct or cause to be deducted the cess payable at the notified rates from the bills paid for such works."

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Thus, the above provision bind the Government or the public sector undertaking to deduct or cause to be deducted the cess payable at the notified rates from the bills paid for such works and in the context of said provision, the action of the respondent State of Madhya Pradesh cannot be found fault with in making the Company liable to realize the cess from the bills of the Contractors and account for the same.

24. Having thus considered, this Court does not find any substance in the challenge. In the result the petition fails and is hereby dismissed. However, no costs.

Petition dismissed.

I.L.R. [2009] M. P., 1293

WRIT PETITION

Before Mr. Justice Sanjay Yadav

6 January, 2009*

PHOOLA BAI

... Petitioner

Vs.

STATE OF M.P.

... Respondent

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 38 - Filling up of vacancies - Petitioner officiating as Sarpanch as a no confidence was passed against the Sarpanch - Election programme for filling of the post of Sarpanch declared - Action challenged on ground that once a Sarpanch is nominated to officiate in such casual vacancy, the same cannot be construed as vacancy as would call for fresh election - Held - Section 38(1)(a) provides for filling up of such casual vacancy as soon as may be vacant in accordance with the provisions of the Act and the Rules made there under - Temporary filling up of the post of a Sarpanch u/s 38(1)(b) does not create a right in favour of such Officiating Sarpanch to claim that no election can be held u/s 38(1)(a) till the entire term expires. (Para 5)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 38 - पदों को भरा जाना - याची सरपंच के रूप में स्थानापन्न रूप से कार्यरत क्योंकि सरपंच के विरुद्ध अविश्वास प्रस्ताव पारित किया गया - सरपंच का पद भरने के लिए निर्वाचन कार्यक्रम घोषित किया गया - कृत्य को इस आधार पर चुनौती दी गई कि जब एक बार ऐसी आकस्मिक रिक्ति में सरपंच को स्थानापन्न रूप से कार्य करने के लिए नामित कर दिया जाता है तो इसे पद की रिक्ति के रूप में नहीं माना जाएगा और उसकी पूर्ति के लिए नये चुनाव कराने की आवश्यकता नहीं रहेगी - अभिनिर्धारित - धारा 38(1)(ए) ऐसी आकस्मिक रिक्तियों की पूर्ति के लिए उपबंध करती है कि जैसे ही रिक्तियाँ हों अधिनियम और उसके अधीन बनाये गये नियमों के अनुसार उनकी पूर्ति की जाए - धारा 38(1)(बी) के अधीन अस्थायी रूप से सरपंच का पद भरा जाना यह दावा करने के लिए कि

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पूरी अवधि व्यतीत हो जाने तक धारा 38(1)(ए) के अधीन कोई चुनाव नहीं हो सकता, ऐसे स्थानापन्न सरपंच के हित में कोई अधिकार सृष्ट नहीं करता है।

Adil Usmani, for the petitioner.

ORDER

SANJAY YADAV, J. :—Head on admission

The petitioner, an officiating Sarpanch, Gram Panchayat, Guda, Block Palera, district Tikamgarh calls in question the notification dated 21.11.2008, Annexure P/5, whereby the election programme for election of Sarpanch has been notified.

2. The challenge is on the ground that one Smt. Bhoori Devi was elected as Sarpanch of Gram Panchayat, Guda, Tahsil, Palera district Tikamgarh. A no confidence motion was moved against her under Section 21 (1) of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam 1993 culminating into passing of no confidence against her. The said motion was questioned in Revision before Additional Collector who set aside the same by order dated 16.10.2006. This order was affirmed in W.P. No. 15417/2006; however, in Writ Appeal No. 498/2007 the said order was set aside and the no confidence was restored vide order dated 26.4.2007. Against the said order the petitioner contends that an SLP in Supreme Court is pending.

3. The claim of the petitioner is that after the passing of no confidence against said Bhoori Devi, the petitioner was nominated as officiating Sarpanch in accordance with the provisions contained under Section 38 of the Act of 1993 and till she continues to officiate as Sarpanch, the post cannot be construed to have fallen vacant as would call for holding an election.

4. Section 38 of the Act of 1993 stipulates:

"38. Filling up of vacancies.- (1) (a) In the event of death, resignation, no confidence motion, or removal of an office bearer of a Panchayat or on his becoming a member of State Legislative Assembly or a member of either House of Parliament before the expiry of his term, a casual vacancy shall be deemed to have occurred in his office and such vacancy shall be filled as soon as may be by election in accordance with the provisions of the Act and the rules made thereunder;

(b) in the event of occurrence of a casual vacancy in the office of the Sarpanch of a Gram Panchayat, the Secretary of the Gram Panchayat, as the case may be, shall cause to be called a special meeting of the Panchayat immediately, but not later than fifteen days from the date of receipt of information from the prescribed authority regarding the vacancy and the members shall elect from amongst themselves a person to hold the office

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temporarily till a new Sarpanch, as the case may be, is elected in accordance with the provisions of this Act and the rules made thereunder and such officiating Sarpanch, as the case may be, shall perform all the duties and exercise all the powers of Sarpanch, during the pendency of election.

Provided that if the office of the Sarpanch is reserved for the member of Scheduled Caste or Scheduled Tribes or other Backward Classes or for a woman, the officiating Sarpanch shall be elected from amongst the members belonging to the same category;

Provided further that where the office of Sarpanch is reserved for a woman belonging to Scheduled Castes or Scheduled Tribes or other Backward classes, and there is no other woman belonging to that category who can be elected to officiate as Sarpanch, any other woman belonging to the other reserved categories may be elected to officiate as Sarpanch during the casual vacancy.

(c) If the out-going office bearer fails to hand over any record, article, money or property of the Panchayat forthwith to his successor the prescribed authority may by order in writing direct him to do so and on his failure to comply with such direction the prescribed authority may proceed against him in accordance with Section 92 and take necessary steps to prosecute him under Section 98."

5. Thus, the vacancy does accrue in the event of no confidence motion though it may be casual in nature. The contention of the learned counsel for the petitioner that once a Sarpanch is nominated to officiate in such casual vacancy the same cannot be construed as a vacancy as would call for fresh election, is misconceived. Clause (a) of sub-section 1 of Section 38 of the Act of 1993 provides for filling up of such casual vacancy as soon as may be vacant in accordance with the provisions of the Act of 1993 and the Rules made thereunder. The temporary filling up of the post of a Sarpanch under clause (b) of sub-section (1) of Section 38 does not create a right in favour of such officiating Sarpanch to claim that no election can be held under clause (a) of sub-section (1) of Section 38 till the entire term expires.

6. Having thus considered, this Court does not find any substance in the claim put-forth by the petitioner and the petition being devoid of substance is dismissed in limine.

Petition dismissed.

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I.L.R. [2009] M. P., 1296

WRIT PETITION*Before Mr. Justice Dipak Misra & Mr. Justice K.S. Chauhan*

12 January, 2009*

KALURAM KHANDE (DR.)

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Medical and Dental Post-Graduate Entrance Test Rules, 2005, Rule 17(5) - Validity - Discrimination - Seat reserved for Assistant Professor, Govt. Dental College, Indore - Seat liable to be allotted to eligible non-service (open) candidate if eligible candidate is not available - Held - Classification has been made between a Government College and other Colleges - Private College cannot be equated with Government College - Reservation is not in absolute terms - It is, in a way, preference - As said Rule has been withdrawn on subsequent year, it means it was meant to meet out a particular special circumstance - Rule does not offend Article 14. (Para 22)

चिकित्सा और दंत स्नातकोत्तर प्रवेश परीक्षा नियम, 2005, नियम 17(5) - विधिमन्यता - विभेद - सहायक प्राध्यापक, शासकीय दंत महाविद्यालय, इन्दौर के लिए सीट आरक्षित - सीट पात्र सेवातिरिक्त (मुक्त) अभ्यर्थी को आवंटित किये जाने योग्य, यदि पात्र अभ्यर्थी उपलब्ध नहीं है - अभिनिर्धारित - वर्गीकरण शासकीय महाविद्यालय एवं अन्य महाविद्यालयों के मध्य किया गया है - प्रायवेत महाविद्यालय को शासकीय महाविद्यालय के बराबर नहीं माना जा सकता - आरक्षण आत्यंतिक निबंधनों में नहीं है - यह एक तरीके से अधिमान है - चूंकि उक्त नियम पश्चात्तवर्ती वर्ष में वापस ले लिया गया, इसका अर्थ यह है कि यह विशिष्ट विशेष परिस्थिति का सामना करने के लिए अभिप्रेत था - नियम अनुच्छेद 14 का उल्लंघन नहीं करता है।

Cases referred :

AIR 1983 SC 1, AIR 2001 SC 168, AIR 2004 SC 1295, AIR 1990 SC 2114, (2005) 2 SCC 227, (2007) 11 SCC 5289, AIR 2007 SC 2844.

Rajendra Tiwari with T.K. Khadka, for the petitioner.

Kumaresh Pathak, Dy.A.G., for the respondent/State.

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 declaring Rule 17 (5) of the Medical and Dental Post-Graduate Entrance Test Rules, 2005 (hereinafter referred to as 'the Rules') as ultra vires Article 14 of the Constitution of India and to command the respondents to grant him admission as a student of M.D.S in Government College, Indore for the academic session 2005-06.

2. The facts which are imperative to be stated are that the petitioner, is an

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Assistant Professor in the Department of Dentistry in Gajara Raja Medical College (Autonomous Society), Gwalior. The Government College of Dentistry at Indore runs bachelor course in dental surgery and master degree in dental surgery. In the year 2005 there were three seats in dental surgery. Three seats for master degree in dental surgery were allocated to Orthodontics (unreserved), Prosthodontics (All India Quota) and Prosthodontics (reserved for ST candidate). It is contended that the seat reserved for orthodontics was meant for-unreserved category and it was intended for Assistant Professor, Government College, Indore though it should have been made available to every person in Government service in the State of M.P. who is working as Assistant Professor in Dental Surgery. As there was no Assistant Professor available in Government Dental College, Indore for admission the seat was given away to non-service open candidates on the basis of merit. It is put forth that the petitioner should have been considered for admission to the said seat in preference to non-service (Open) candidates for whom there was several seats. It is urged that Rule 17(5) of the Rules which provides to the effect that the seat is reserved for Assistant Professor, Government Dental College, Indore, with the stipulation that if the eligible candidate is not available the seat will be allotted to eligible non-service (open) candidate strictly on merit-cum- option basis is discriminatory and arbitrary. It is contended that there cannot be reservation for a singular college and should have been open for all the Assistant Professor working in the Medical Colleges in State of M.P. It is also urged that if a candidate of the said medical college is not available then other Assistant Professors of the Colleges should be considered irrespective of their category does not save it from the vice of Article 14 of the Constitution. In this backdrop prayer has been made as has been indicated hereinabove.

3. A counter affidavit has been filed by the answering respondents contending, inter alia, that the College of Dentistry at Indore is the only college which imparts education for Post Graduate degree in Dentistry and rest of the colleges which impart education in Dentistry are private colleges. It is the stand in the return that the rule has carved out reservation for Assistant Professor of Government College, Indore only because it has got some rational nexus and a purpose to achieve inasmuch as it is the only dental college that imparts education in Post Graduation course and it is necessary to see that maximum Professors imparting education are Post Graduates so that the students studying there in BDS course can get the advantage of teaching by the Postgraduate teachers. It is averred that the candidates who desire to pursue their study are required to fill a bond to the effect that after completing the course they will serve the Government Dental College, Indore for a minimum period of two years. It is set forth that the Rule gives that if in-service candidates are not available then the seat will be filled up by the general category candidate and this is the only seat available for general category candidate and the selection would be made on merit-cum-option basis. It is

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highlighted that the Dental Council of India has required the Government Dental College, Indore to fulfill the deficiencies and one of the deficiencies is that deficiency of five readers in the department of Prosthodontics, Conservative Dentistry, Oral and Maxillofacial Surgery, Periodontics and Orthodontics and to fulfill the said deficiency the respondents have been made restricted to Assistant Professor in Government Dental College, Indore. The same has been done to save the college from being de-recognized by the Dental Council of India. The further stand in the return is that in the concerned college there are nine Lecturers working who have only done B.D.S. and are serving as Assistant professor and hence, the Department has no option but to take service of these teachers because the Postgraduate teachers are not available and it is incumbent on the part of the Government to equip the College with the Postgraduate teachers. It is urged that the said provision has been made so that the education in Postgraduate courses can be imparted properly and students get benefitted.

4. A rejoinder has been filed stating, inter alia, that the inspection report while pointing out the deficiencies had shown that all nine lecturers are on contract basis. It is put forth that once they are on contract basis, they are not entitled to be given the benefit of admission in the post graduate subject as an In-service candidate as per rule 15(4) and in this background reservation for such a college is totally uncalled for. It is urged that no distinction can be made between the petitioner who is also an In-service candidate in the State of M.P. and an Assistant Professor serving in Government College of Dentistry, Indore. A reference has been made to Rules of 2002 to show that there was no such reservation. Various other aspects have been highlighted in the rejoinder affidavit indicating that no financial burden would be incurred on the State if the petitioner is admitted in the MDS course.

5. An application for taking subsequent events and documents on record has been filed by the respondents. In the said application it is averred that in the year 2006 a new set of Rules, namely, Medical and Dental Post Graduate Entrance Test Rules, 2006 has come into existence and sub-rule (5) of Rule 17 which provided for reservation for Assistant Professor for Government College of Dentistry, Indore has been done away with.

6. We have heard Mr. Rajendra Tiwari, learned senior counsel along with Mr. T.K. Khadka for the petitioner and Mr. Kumares Pathak, learned Deputy Advocate General for the State.

7. It is submitted by Mr. Tiwari, learned senior counsel appearing for the petitioner that the rule in question offends the basic tenet of Article 14 of the Constitution as a discrimination has been created without any base or foundation. The restriction of consideration limiting to the Government College of Dentistry at Indore fall foul of equality clause. It is his further submission that the justification

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given in the counter affidavit that there is no other Government College in the State and the said reservation has been made to meet out the deficiencies pointed out by the Dental Council of India, does not meet the concept of reasonable classification which is consonant with the guarantee of equal protection as inherent under Article 14 of the Constitution. Learned senior counsel has propounded that edifice of intelligible differentia as projected by the respondents has no rational relationship to the object sought to be achieved by the Rule in question and in the absence of any nexus between the classification and the object sought to be achieved, the Rule is violative of Article 14.

8. Mr. Kumaresh Pathak, learned Deputy Advocate General for the State justifying the Rule has submitted that the State Government has framed the Rule with the object of fulfilling the deficiency pointed out by the Dental Council of India in Government College of Dentistry, Indore as it is the sacrosanct duty of the State Government to meet the deficiency to avoid the catastrophe like de-recognition. Learned Deputy Advocate General for the State has further urged that the policy underlying the Rule has an object to achieve and if the said policy is kept in view the duel test which is required to be examined the validity of the Rule is met with. It is canvassed by him that classification meets the test of reasonableness if the existing circumstances at the relevant point of time are appreciated with studied scrutiny. The base of classification, submits Mr. Pathak, is manifestly perceptible as Assistant Professor serving in a Government College stands on a different footing and belongs to a particular class than the Assistant Professor serving in a private college. It is further propounded by him that the provision under attack also protects the interest of all the candidates as in case of non-availability of Assistant Professor in Government College thus, the preference does not suffer from incurable rigidity. It is highlighted by him that the classification cannot be said to be wholly irrelevant to the object sought to be achieved and but the other hand it is relevant and justified, and in a way necessary.

9. To appreciate the rivalised submissions raised at the Bar it is relevant to refer to certain rules which have been emphasised upon. Rule 8 deals with reservation and sub-rule (4) of the said Rule which deals with reservation for In-service candidates reads as under:

"8. (4) In PG Degree and Diploma Courses 20% of seats are reserved for In-service Medical officers (In-service candidate - Table No.3 & 4) For these In-service candidates, selection process and conditions for degree and diploma courses will be as under:

Selection Criteria:-

(a) Only those candidates, who have completed 5 years of service on 1st January of year of examination as Medical

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Officer under the Government of Madhya Pradesh and who are not serving on contractual basis will be eligible for selection as In-service candidates. If a candidate was working on contractual basis in Public Health and Family Welfare Department of the State Government and has come in regular services while working on contractual basis, then experience of contract service will also be considered.

(b) Women candidates, who have served for three consecutive year in rural areas and who are not serving on contractual basis will also be eligible, even if they have not completed a total of five years of service. Relaxation for such woman candidate with less than 5 years of service will, however be subject to condition that they will be entitled for selection to post graduate courses in Obstetrics and Gynecology and Anesthesia only. If a woman candidate was working on contractual basis in Public Health and Family Welfare Department of the State Government and has come in regular services while working on contractual basis, then experience of contract service will also be considered."

10. Rule 12 which deals with fee, bond etc is as follows:

"12. Fee, Bond etc.:-

Each candidate will have to obey the entrance examination rules of the Professional Examination Board, and will have to deposit prescribed examination fees. Selected candidates have to execute a bond for serving under the State Government for at least 5 years after completing PG degree/ Diploma course."

11. Rule 15 deals with eligibility. Rule 17 deals with admission to PG Dental Degree Courses. Sub-rule (5) of the said Rule relates with the seats available. It reads as under:

17. ADMISSION TO PG DENTAL DEGREE COURSES:-

(5) Seats Available At autonomous Dental College for MDS course, following seats are available:-

Orthodontics – Un-Reserved category – One – This seat is reserved for Assistant Professor, Government Dental College, Indore, however if eligible candidate is not available, the seat will be allotted to eligible non service (open) candidate strictly on merit cum option basis.

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Prosthodontics – One. All India quota

Prosthodontics – Reserved category – One – This seat is reserved for scheduled tribe category candidate, in case eligible candidate is not available then the seat will be filled up as described in sub-rule (11) of rule 20."

12. Rule 20 deals with counselling and Rule 21 deals with admission.

13. The centroidal issue that requires to be dwelled upon is whether the reservation as engrafted under Rule 17 (5) pertaining to the stream, namely, Orthodontics, invites the frown of the equality clause. The said seat, as is evincible, is reserved for Assistant Professor, Government College of Dentistry, Indore. It is categorically asseverated in the return that there is singular Government Dental College in the entire State of M.P. It is highlighted that the college had certain deficiencies with regard to teaching faculty and hence, the said provision was incorporated to fill up the posts from the Assistant Professors in MDS (Orthodontics). It is not in dispute the petitioner is an Assistant Professor in G.R. Medical College, Gwalior which is not a Government College. Submission of Mr. Tiwari, in essentiality, is that by the classification a discrimination has been created between the Government Dental College and other colleges. It is also urged by him that in the matter of public employment all citizens must be given equal opportunity and it cannot be monopolized by a particular class.

14. In this context, we may refer with profit to the decision rendered in *S.P. Mittal v. Union of India and Others*, AIR 1983 SC 1. In the said case the Apex Court has held as under:

"165. The argument cannot be accepted for two reasons. Firstly, because it has not been pointed out which were the other institutions where similar situations were prevailing. Besides, there is a uniqueness with this institution inasmuch as the Government is also involved. Even a single institution may be taken as a class. The situation prevailing in the Auroville had converted the dream of the Mother into a nightmare. There had arisen acute law and order situation in the Auroville, numerous cases were pending against various foreigners, the funds meant for the Auroville had been diverted towards other purposes and the atmosphere was getting out of hand. In the circumstances the Government intervened and promulgated the Ordinance and later on substituted it by the impugned enactment. It cannot be said that it is violative of Art. 14 on that account. We get support for our view from the following decisions:

166. In Budhan Chowdhury v. State of Bihar, (1955) 1

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SCR 1045 : (AIR 1955 SC 191) a Constitution Bench of seven Judges of this Court explained the true meaning and scope of Article 14 as follows (at p. 193 of AIR):

"It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differential must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupation or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure."

These observations were quoted with approval by this Court in *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar*, 1959 SCR 279: (AIR 1958 SC 538). In this case the Court further laid down,

"(a) 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;

(b) That there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

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(e) *that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and*

(f) *that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individual or corporations to hostile or discriminating legislation."*

15. In this regard we may fruitfully refer to the decision in *J.C. Yadav v. State of Haryana*, AIR 1990 SC 857 wherein the Apex Court was considering the power of relaxation clause in service law. In that context their Lordships opined that the power of relaxation even if generally included in the service rules could either be for the purpose of mitigating hardships or to meet special and deserving situations. We have referred to the said decision only to show that special circumstances can be thought of to meet out a situation and in that event the concept of arbitrariness or non-consideration inviting the wrath of Article 14 of the Constitution would not be attracted.

16. In *Kshetriya Kisan Gramin Bank v. D.B. Sharma and Others*, AIR 2001 SC 168 it has been held as follows:

"...It is too well settled that even a single institution can form a class by itself and while deciding the question of violation of Article 14 what is required to be found out is whether there are any reasonable basis on which a simple person or group of persons are left out of the group and whether there is any rational relation for such differentiation with the object sought to be achieved. In other words, what is necessary is that there must be nexus between the basis of classification and the object of such classification...."

17. In this regard, we may usefully to a two Judge Bench decision in *Dharam Dutt and Others v. Union of India and Others*, AIR 2004 SC 1295 wherein it has been held as follows:

"....A single institution is capable of being treated as a class by itself for the purpose of legislation if there are special circumstances or reasons which are applicable to that

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institution and such legislation would not incur the wrath of Art. 14. In S.P. Mittal (supra), the impugned legislation brought with the object and purpose of taking away the management of Auroville from the Aurobindo Society and to bring it under the management of the Central Government under the provisions of the impugned Act was held to be valid. The exercise of legislative power by Parliament was sought to be justified as falling within the field of Entry 63 of List I. Their Lordships referred to several decisions wherein the constitutional validity of similar legislation was upheld. In Ram Krishna Dalmia v. Justice S.R. Tendolkar, 1959 SCR 279, legislation relating to a single 'Individual' in Raja Birakishore v. State of Orissa (1964) 7 SCR 32, legislation in respect of a single 'temple' and in Chiranjit Lal Chowdhuri v. Union of India 1950 SCR 869, a separate law enacted for one company were held not to offend Art. 14 of the Constitution on the ground that there were special reasons for passing such legislation."

18. In *Shashikant Laxman Kale and another v. Union of India and another*, AIR 1990 SC 2114, the Apex Court has upheld the classification between the public sector employees and private sector employees.

19. In *Pallavi Refractories and others v. Singareni Collieries Co. Ltd. and others*, (2005) 2 SCC 227, the Apex Court upheld the dual fixation of price based on reasonable classification different types of customers to be valid. Be it noted, in the said case, the Government of India had identified seven core/priority sector industries and challenge was made by the non-core/unlinked sector industries.

20. In *Government of Andhra Pradesh and another v. G. Jaya Prasad Rao and Others*, (2007) II SCC 528 while dealing with the scheme of accelerated promotion for the persons in extremist operation, their Lordships held that the classification withstands Article 14 of the Constitution and the said classification is valid in law.

21. In this context, we may refer to the decision in *Municipal Committee, Patiala v. Model Town Residents Assocn. and Others*, AIR 2007 SC 2844 wherein it has been held as under:

"The central test for permissible classification has to satisfy two conditions. It must be founded on an intelligible differentia which distinguishes persons or premises that are grouped together from others left out of the groups and the differential must have a rational relation to the object sought to be achieved by the Act in question. A law based on a permissible classification fulfills the

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guarantee of the equal protection of the laws and is valid whereas a law based on an impermissible classification violates the guarantee and is void. Equality is violated by treating persons similarly situated differently. If a law deals equally with members of a well defined class, it is not open to challenge such a law on the ground of denial of equal protection. In order to sustain the presumption of constitutionality, the Court can take into consideration matters of common knowledge and, at the same time, the Court must presume that the Legislature understands and correctly appreciates the need of its own people."

22. In the instant case, as is patent, a classification has been made between a Government college and other colleges. Such a classification is indubitably permissible. A private college cannot be equated with the Government college. The seat in Orthodontics was meant for unreserved category, as is manifest, is reserved for an Assistant Professor serving in Government College. An explanation has been given that the college was facing a problem of de-recognition by the Dental Council of India. As put forth, keeping in view the same, the said Rule was introduced. It is also worth noting that the said Rule is not in absolute terms. It postulates that if eligible candidate is not available the said seat would be allotted to non-service (open) candidate strictly on merit-cum-option basis. Rule 2(d) which defines 'in-service medical officer' to mean such doctor who is serving under the Government of Madhya Pradesh and not serving on contract basis. Thus, if the dictionary clause is properly understood, the petitioner cannot be treated as in-service candidate to claim parity with an in-service medical officer. However, when the seat is thrown open he is not debarred to appear. He cannot claim a better privilege than a non-service (open) candidate. That apart the rule can also be constructed from another angle. Though term reserved has been used, as has been stated earlier, it is not in absolute term. It is in a way preference. Additionally it is worth noting that the said Rule has been withdrawn as the documents brought on record would show, on subsequent year. Thus, it was meant to meet out a particular special circumstance.

23. Judged from all these angles, we are of the considered opinion that the Rule does not offend Article 14 of the Constitution of India. The inevitable result of such analysis is dismissal of the writ petition which we direct. There shall be no order as to costs.

Petition dismissed.

SOMNATH (DR.) Vs. STATE OF M.P.

I.L.R. [2009] M. P., 1306

WRIT PETITION*Before Mr. Justice Dipak Misra & Mr. Justice Sanjay Yadav*

12 January, 2009*

SOMNATH (DR.)

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Constitution, Article 226 - Disputed questions of fact - Mere existence of disputed questions of fact ipso facto does not prevent a writ court from determining disputed question of fact. (Para 11)

क. संविधान, अनुच्छेद 226 - तथ्य के विवादित प्रश्न - केवल तथ्य के विवादित प्रश्नों का अस्तित्व स्वयमेव ही रिट न्यायालय को तथ्य के विवादित प्रश्न का अवधारण करने से निवारित नहीं करता।

B. Medical & Dental Post Graduate Entrance (Conduct of Examination and Admission) Rules, 2008, Rule 1.20(8) - Counselling, unavoidable circumstances - Petitioner working as doctor appeared in PG Entrance Examination - Petitioner declared eligible but did not appear in counselling as he was not aware of his result - Held - Petitioner was either careless or callous to find out his result - Carelessness, callousness or negligence cannot be equated with unavoidable circumstances - Petition dismissed. (Para 15)

ख. चिकित्सा और दंत स्नातकोत्तर प्रवेश (परीक्षा का संचालन एवं प्रवेश) नियम, म.प्र. 2008, नियम 1.20(8) - काउंसिलिंग, अपरिहार्य परिस्थितियाँ - चिकित्सक के रूप में कार्यरत याची स्नातकोत्तर प्रवेश परीक्षा में बैठा - याची को अर्ह घोषित किया गया किन्तु काउंसिलिंग में इसलिए उपस्थित नहीं हुआ क्योंकि वह अपने परीक्षा परिणाम से अवगत नहीं था - अभिनिर्धारित - याची अपने परीक्षा परिणाम का पता लगाने में या तो लापरवाह या निश्चित था - लापरवाही, निश्चितता या उपेक्षा अपरिहार्य परिस्थितियों के तुल्य नहीं मानी जा सकती - याचिका खारिज।

Cases referred :

(1969) 3 SCC 769, (2004) 3 SCC 553.

Aditya Sanghi, for the petitioner.

Deepak Awasthy, G.A., for the respondents.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** :- The petitioner, an in-service candidate, who belongs to OBC category appeared in Pre.P.G. Test, 2008 and had secured 117.95 marks out of 200 marks. He has been working for last five years in Primary Health Centre at

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village Pagarkhurd in the district of Satna and the said village, as pleaded, is approximately 50 Kms. away from the district headquarters of Satna. It is averred that said village does not have newspaper circulation or internet/mobile/telephone connection. When the result of Pre.P.G., 2008 was declared, the petitioner though was declared qualified, could not know his result till 28.5.2008. The result of the examination was declared on 22.5.2008 and the first counseling was scheduled from 27.5.2008.

2. The petitioner, as setforth, came to know about his result only on 28.5.2008 when he came to Satna to a Cyber Cafe. On downloading his result, he found that he was declared as qualified but in the said result marks were not shown in the internet site. He had not received any information of the result nor was he aware of the date of first counseling. After getting information on 28.5.2008 he rushed to Bhopal where he got the information that he had secured 117.95 marks and his merit position was 42 amongst the in-service candidates of OBC category. Had he been aware of the publication of the result and holding of counselling on 27.5.2008 to 01.6.2008, he would have got allocation in a very good subject, but as he was not aware of such information, he could not reach on or before the date of first counselling. Accordingly, he met the Director, Medical Education, the respondent No.2 herein, and was informed that he would get the seat as per his merit in the second counselling scheduled to be held on 8.6.2006. He also requested the authorities to give him sponsorship letter which is a pre-requisite for in-service candidates to appear in the counselling, but the authorities refused to give him sponsorship letter on some pretext or the other. Despite this the petitioner reposed faith in the respondent No.2 and waited for the second counselling.

3. As averred, he appeared in the second counselling on 08.6.2008 and requested the respondents to allot a seat as per Rule 1.20(8) of the Medical & Dental Post Graduate Entrance (Conduct of Examination and Admission) Rules, 2008 (hereinafter referred to as the Rules) but, to his utter surprise, the respondent No.2 refused to allot a seat to him on the ground that in the notification dated 07.6.2008 published in the newspaper on 08.6.2008 it was made clear that the students who had remained absent in the first counselling, would not be allowed to get the seat in the second counselling. The petitioner putforth his stand that due to unavoidable circumstances he could not attend the first counselling and, therefore, he was entitled to participate in the counselling but the respondents declined to accept the explanation as a result of which he has been denied a seat in Post Graduation course despite his merit position in the second counselling. It is averred that as per rule 1.20(8) he was eligible to appear in the second counselling and also eligible to get Post Graduate M.D/MS seat but the said benefit has been denied to him.

4. It is contended that the petitioner is from a rural background and is serving for last 5 years in a village which is totally cut off from the modern equipments. As he did not have any information of publication of result and date of counselling,

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he could not appear and said non-appearance has to be treated as non-appearance due to unavoidable circumstances. In this backdrop a prayer has been made to issue a writ of mandamus to command the respondents to allot a Post Graduate (MD/MS) seat to the petitioner as per his merit position and to allot him the seat in the next academic year of 2009-10. A prayer has also been made to issue a command for payment of compensation as the respondents No.1 and 2 have acted in violation of the rules and caused hardship to the petitioner.

5. A counter affidavit has been filed by the respondents No.1 to 3 contending, inter alia, that the non-appearance of the petitioner in the counselling which commenced on 27.5.2008 cannot be said to be due to unavoidable circumstance. The petitioner had appeared in the Pre.P.G. Entrance Examination in the month of April, 2008 and it was expected of him to be careful and alert about the declaration of the result. It is further put forth that he is posted only 15 Kms. away from district headquarters and hence, that cannot be a ground to advance a stance that he was not in a position to know about the result. Due to carelessness on the part of the petitioner, he could not know the result of the Entrance Examination and, therefore, he cannot be allowed to take advantage of Rule 1.20(8) of the Rules. The plea of the respondents is that the petitioner was having number of friends and relatives in Satna and, therefore, he could have been informed about the result of the examination. It is asserted that it is beyond acceptance that on the date of declaration of the result he did not have the information.

6. A rejoinder affidavit has been filed by the petitioner stating, inter alia, that the result of Pre.P.G. Test was declared on inter-net in which the only information was "qualified" or "disqualified" and no marks whatsoever were mentioned in the result which means that the petitioner did not have any knowledge with regard to the marks received in the Pre.P.G. Test, 2008. It is contended that the counselling was delayed indefinitely as first counselling was done 27.5.2008 to 30.6.2008. As the petitioner was expecting the counselling in the month of April, 2008, where he is working, He enquired in the month of April, 2008 for counselling but no positive reply was received by him. It is reiterated that village is without any communication and hence, it was difficult to know about the publication of the result. It is urged that the petitioner is covered under the ambit and sweep of Rule 1.20(8) of the Rules which deals with "unavoidable circumstance". as the petitioner's non-appearance in the first counselling is absolutely due to unavoidable circumstance.

7. An additional reply has been filed by the respondents No.1 & 2 wherein it has been stated that by letter dated 08.8.2008 the Block Medical Officer, Community Health Centre, Majhgawan, District Satna informed the Chief Medical and Health Officer, Satna that the petitioner is residing at Birsinghpur as no land was available at Pagarkhurd for construction of residential house and Rs.300/- is being deducted towards its rent. Copy of such letter has been brought on record as Annexure-R/1. It is put forth that the petitioner has made erroneous assertion that he is

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residing in village Pagarkhurd which is 50 Kms. away from Satna. It is highlighted that the petitioner has tried to mislead the Court about his place of residence to claim the benefit of unavoidable circumstance, though actually it is the carelessness and callousness of the petitioner. It is asseverated that in village Pagarkhurd landline as well as mobile phone facility is available and is in working condition and the statement made by the petitioner is false.

8. An additional affidavit has been filed by the petitioner in reply to the affidavit filed by the respondent by way of additional reply wherein it has been set forth that the petitioner has to look after the Government Hospital on 24 hour basis and in most of the days he has to remain present at Government Hospital, Pagarkhurd, though his official residence is at Birsinghpur and his family is only living there but due to pressure of work he is staying at Pagarkhurd. Various assertions have been made to highlight that he did not have the communication about the result. It is reiterated that there is no landline facility at Birsinghpur and emphasis has been made on the marks obtained by him. It is contended that on 16.6.2008 he had been given the additional duty at Birsinghpur and prior to that he was working exclusively at Pagarkhurd. He has also been directed to combat the natural calamities at village Pagarkhurd and, therefore, it is clear that he was working full time as a Medical Officer in village Pagarkhurd.

9. We have heard Mr. Aditya Sanghi learned counsel for the petitioner and Mr. Deepak Awasthy, learned Government Advocate for the respondents.

10. The singular and seminal question that arises for consideration is whether the petitioner can be given the benefit as enshrined under Rule 1.20(8) of the Rules. Rule 1.20 deals with counselling. Sub-rule (2) of the said Rule stipulates that programme for counselling will be published in the leading newspapers of the State. Separate call letters will not be sent to the candidates. Various provisions have been engrafted to meet out certain contingencies. Rule 1.20(8) which is relevant for the present purpose reads as under:-

"(8) If the candidates or his/her representatives due to any unavoidable circumstances does not remain present on the date and time fixed for them for scrutiny of the documents and counselling, then such candidates, if they come afterwards, will be considered only at the stage, where the counselling is progressing irrespective of their merit. They will be considered only if the counselling of their category is going on and allotment done earlier to other candidates on the basis of their merit will remain unchanged. This rule will be applicable to candidates of all categories."

Submission of Mr. Sanghi, learned counsel for the petitioner is that due to unavoidable circumstance, neither the petitioner nor his representatives could

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remain present on the date and time fixed for scrutiny of documents and counselling. The ground has been pyramided, as has been indicated hereinbefore, on the foundation that there was no possibility to know about the result.

11. The controversy, as we perceive, rests on a factual dispute. We are absolutely conscious that merely because some disputed question of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule. It has been held in *Gunwant Kaur v. Municipal Committee, Bhatinda*, AIR (1969) 3 SCC 769 that mere existence of disputed questions of fact ipso facto does not prevent a writ Court from determining the disputed question of fact. The aforesaid principle has been reiterated in *ABL International Ltd. and Another v. Export Credit Guarantee Corporation of India Ltd. and Others*, (2004) 3 SCC 553. It would be depend upon the facts of each case to make it a case exclusively in the domain of disputed facts.

12. In the case at hand, as the narration of factual assertions would show, the petitioner has been given official accommodation at Birsinghpur and the rent is being deducted. A tall stand has been putforth that he has been working for 24 hours in the hospital and his family has been staying at Birsinghpur. The allotment of quarter at Birsinghpur is not controverted. It is difficult to lend credence to the asseveration that the petitioner was working on 24 hours basis at Pagarkhud and not going to meet his family. It is well nigh impossible to accept that he could not have been made aware of the marks.

13. Mr. Sanghi, learned counsel has laid immense emphasis on the terms "unavoidable circumstances". In this context, we may refer with profit to the meaning ascribed to the term "unavoidable" in P. Ramanatha Aiyar's Law Lexicon which is as under:-

"If no human agency concerned with the process could, by the exercise of a high standard of reasonable care have avoided the contamination, the consequence, if a consequence of the process, is unavoidable."

In the said Law Lexicon the terms "unavoidable cause" has been described as follows:-

"A cause which will not be avoided by ordinary prudent person."

14. In Black's Law Dictionary 6th Edition the term 'unavoidable' has been described as follows:

"Unavoidable. Not avoidable, incapable of being shunned or prevented, inevitable, and necessary."

In the said dictionary 'unavoidable causality' has been described to mean an event or accident which human prudence, foresight, and sagacity cannot prevent happening against will and without negligence.

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15. From the conduct of the petitioner, we are of the considered opinion, that he was either careless or callous to find out his result. Carelessness, callousness or negligence cannot be equated with unavoidable circumstances. Hence, the benefit of said Rule cannot be made available to the petitioner.

16. In the result, we perceive no merit in the writ petition and accordingly, the same has to pave the path of dismissal which we direct. However, in the peculiar facts and circumstances of the case there shall be no order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 1311

WRIT PETITION

Before Mr. Justice Viney Mittal

15 January, 2009*

AZMATULLAH

... Petitioner

Vs.

UNION OF INDIA & ors.

... Respondents

A. Cantonments Act (41 of 2006), Section 15, Cantonment Electoral Rules, 2007, Rule 20 - Notification for election of Cantonment Board - On recommendations of Presidents of Cantonment Board, Central Government twice changed date of election of Board on the ground of assembly election - Held - Central Government while issuing the notification for change of date of election of Board had valid and justifiable reasons for postponing date of election. (Para 29)

क. छावनी अधिनियम (2006 का 41), धारा 15, छावनी निर्वाचन नियम, 2007, नियम 20 - छावनी बोर्ड के चुनाव की अधिसूचना - छावनी बोर्डों के अध्यक्षों की अनुशंसाओं पर केन्द्र सरकार ने विधानसभा चुनाव के आधार पर बोर्ड के चुनाव की तारीख दो बार परिवर्तित की - अभिनिर्धारित - केन्द्र सरकार के पास बोर्ड के चुनाव की तारीख परिवर्तित करने के लिए अधिसूचना जारी करते समय चुनाव की तारीख मुलतवी करने के लिए वैध और न्यायसंगत कारण थे।

B. General Clauses Act (10 of 1897), Section 14 - Power conferred to be exercisable from time to time - Once the Central Government has power to postpone the elections for a period of 40 days under the proviso to Rule and there is no prohibition decipherable from the Rule, therefore, the power may be exercised by Central Government on repeated occasions, from time to time, if condition enumerated in the proviso exists. (Para 19)

ख. साधारण खण्ड अधिनियम (1897 का 10), धारा 14 - समय-समय पर प्रयोग किये जाने के लिए प्रदत्त शक्ति - एक बार जब केन्द्र सरकार के पास नियम के परन्तुक के अधीन चुनावों को 40 दिन की कालावधि के लिए मुलतवी करने की शक्ति है और नियम से

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सांकेतिक अर्थ निकालने योग्य कोई प्रतिषेध नहीं है, इसलिए केन्द्र सरकार द्वारा समय-समय पर पुनरावृत्त अवसरों पर शक्ति का प्रयोग किया जा सकता है यदि परन्तुक में बतायी गई शर्त अस्तित्व में है।

Cases referred :

1985 J.L.J. 793, (1982) 3 SCC 519, (1992) 2 SCC 61, (2004) 9 SCC 755, (2006) 10 SCC 736.

A.S. Garg with Anshuman Shrivastava, for the petitioner.

V.K. Zelawat, A.S.G., for the respondent No.1.

B.L. Pavecha with Ashutosh Nimgaonkar, for the respondent No.2 to 6.

ORDER

VINEY MITTAL, J. :- The petitioner-Azmatullah, a resident of Mhow, District Indore, has filed the present petition under Article 226 of the Constitution of India, raising a grievance against the Union of India, the President, Returning Officer and Chief Executive Officer etc. of the Cantonment Board, Mhow, in not, allegedly, conducting the elections to Mhow Cantonment Board (hereinafter referred to as the Board), in accordance with law.

The relevant facts.

2. Mhow town is a Cantonment as per Section 3 of Cantonments Act, 2006 (hereinafter referred to as Act). Under Section 10 of the Act, governance of Mhow Cantonment is done by a Cantonment Board. The Elections of the Cantonment Board are held as per the various provisions of the Act and the Cantonment Electoral Rules, 2007 (hereinafter called as Rules).
3. The petitioner pleads that he is a resident of Mhow Cant, living in ward No. 4 thereof. He has pleaded that he is qualified to become a Member of Cantonment Board, as per Section 29 of the Act.
4. In exercise of powers under Section 15(1) of the Act, the Central Government, issued a notification dated September 10, 2008, notifying that the elections to the Cantonment Board, Mhow, would be held on November 9, 2008. A copy of the said notification dated September 10, 2008 has been appended as Annexure P-1 with the present petition. It may be noticed that through the said notification, elections to the Cantonment Board of Jabalpur and Saugor were also notified. In pursuance to the said notification, the President of the Cantonment Board, as per requirement of rule 20 of the Rules, published a public notice of the aforesaid election. A copy of the aforesaid public notice has been appended as Annexure P-2 with the petition.
5. Subsequently, on October 3, 2008, the Central Government issued another notification, in exercise of its powers under Section 15(1) of the Act read with rule 20 of the Rules, changing the date of elections of the Cantonment Board, from November 9, 2008 to December 14, 2008. It was recited in the said notification

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that the said change was necessitated, on having been brought to the notice of the Central Government by the Presidents of the Cantonment Boards of Jabalpur, Mhow and Saugor, that the Assembly Elections for Madhya Pradesh State were expected to be held shortly and therefore, with a view to avoid administrative problems, in view of the close proximity of the Assembly Elections, the Board elections were deferred, to be held on December 14, 2008. A copy of the aforesaid notification dated October 3, 2008 has been appended as Annexure P-3 with the petition.

6. Still further, another notification dated November 17, 2008 was issued by the Central Government, wherein again, it was noticed that on recommendations of the Presidents of Cantonment Boards in question, that the State Assembly elections in the State of M.P. had been notified to be held on November 27, 2008, and therefore, again, with a view to avoid administrative problems and in view of the close proximity of the Assembly Elections, the date for Cantonment Boards Elections was notified to be held on January 18, 2009, instead of December 14, 2008. The aforesaid notification dated November 17, 2008 has been appended as Annexure P-5 with the present petition.

7. It is in these circumstances that the petitioner has approached this Court through the present petition, claiming that as per proviso to rule 20 of the Rules, although the Central Government, on the recommendation of the President of the Cantonment Board, could postpone the date of elections in three situations, as provided under the proviso, but the said postponement could not be for a period of more than forty days. According to the petitioner, since the notification Annexure P-1 issued on September 10, 2008 had notified the elections of Cantonment Board, Mhow to be held on November 9, 2008, therefore, as per proviso to rule 20 of the Rules, the Central Government did not possess any power to postpone the elections beyond a period of forty days from the said date, and because of the fact that the notification Annexure P-5 had notified the elections to be held on January 18, 2009, the postponed date of elections, being beyond a period of forty days from the original notified date of November 9, 2008, the entire exercise of holding the elections through notification Annexure P-5, was vitiated. The petitioner has also maintained that since the elections were not held within the period of forty days of November 9, 2008, therefore, the entire fresh procedure for holding the elections to the Cantonment Board was required to be followed, and even fresh electoral rolls were required to be published.

8. On a show cause notice issued by this Court, the respondents have contested the petition. Separate replies have been filed. A reply has been filed on behalf of the Union of India-respondent No. 1 and an independent reply has been filed by respondents No. 2,3 and 5, i.e. the Cantonment Board and its officers. The respondents have justified postponement of the elections and fixing January 18, 2009 as the date for holding the same. It has been maintained that on account of

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the fact that the State Assembly Elections had been notified by the Election Commission of India, and as per the notification dated October 3, 2008, Annexure P-3, were expected to be held in the proximity of November 9, 2008, therefore, the said date was postponed to December 14, 2008, and later on, when the State Assembly Elections were notified to be held on November 27, 2008, then keeping the aforesaid fact, the Board elections were postponed to be held on January 18, 2009. The respondents have specifically maintained that on such postponement, there was no requirement of law to have followed, de-novo, the entire procedure and frame fresh electoral rolls.

9. I have heard Shri A.S. Garg, learned senior counsel for the petitioner, Shri V.K. Zelawat, learned Assistant Solicitor General for respondent No.1 and Shri B.L. Pavecha, learned senior counsel for respondents 2 to 6 and with their assistance, have also gone through the various provisions of law and record.

10. Shri A.S. Garg, learned senior counsel for the petitioner, during the course of arguments, has reiterated all pleas which have been raised by the petitioner in the petition. Shri Garg has referred to rule 20 of the Rules and has placed specific reliance upon the first proviso therein. According to the learned senior counsel, whenever a public notice of election of a Cantonment Board was issued under Rule 20, then the same was required to contain the date, time and place of polling; the number of persons to be elected and details of wards reserved for Scheduled Castes etc; the time and place for receipt of nominations; the time and place for scrutiny of nominations; the symbols that were to be allotted to the candidates etc; and any other matter which was required to be informed to the voters and candidates. It has been maintained by Shri Garg that the first proviso to the said Rule, enabled the Central Government, to postpone the date of elections in three situations enumerated therein, i.e. the date of election coinciding with or being in close proximity of the date of election for the Lok Sabha, State Assembly etc.; a riot or open violence breaking out or existence of tension in the area; or some natural calamity affecting the Cantonment, on recommendation of the President of the Cantonment Board. However, such a postponement, as per the proviso, could not be beyond a period of forty days. On facts of the case, it has been pointed out by learned senior counsel that originally, through notification Annexure P-1, the elections to the Cantonment Board, Mhow, were notified to be held on November 9, 2008, and even if it were to be taken that on account of the close proximity of the said date to the State Assembly Election, the Central Government had the power to postpone the same, the same had been validly postponed to December 14, 2008, through notification Annexure P-3, but through the subsequent notification Annexure P-5, the Elections having been postponed beyond a period of forty days from November 9, 2008, the said postponement was beyond the power of Central Government.

11. On the other hand, Shri B.L. Pavecha, learned senior counsel for respondents

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No. 2 to 6, has vehemently refuted the aforesaid contention raised by Shri Garg. Shri Pavecha has maintained that the facts, which have not been even disputed by the petitioner, disclosed that after the notification Annexure P-1 had been issued by the Central Government on September 10, 2008, notifying the date of Cantonment Board elections to be held on November 9, 2008, the Election Commission of India had taken a decision to hold the State Assembly Elections in the month of November 2008. On that basis, the said fact, having been brought to the notice of the Central Government by the President of the Board, the date of elections was postponed to December 14, 2008 through notification Annexure P-3. Later on, when the Election Commission of India notified the date of holding the State Assembly Elections as November 27, 2008, then a decision was taken by the Central Government, on the recommendation of the President of the Board, to postpone the elections of the Cantonment Board to January 18, 2009. According to Shri Pavecha, the postponement of the elections of the Cantonment Board, and fixing the date of January 18, 2009, for holding the same was absolutely in-conformity with rule 20 of the Rules, and the postponement itself specifically was visualized by Clause (i) of the first proviso.

12. With regard to the objection raised on behalf of the petitioner that postponement of elections of the Board, under proviso to rule 20 of the Rules could not be for a period of more than forty days, the learned senior counsel for the respondents has maintained that the powers conferred by any statutory provision can be exercised repeatedly, if and when occasion arises, unless such repetitive exercise is forbidden, either by express language or by necessary implication. In this regard, reliance has been placed by the learned senior counsel on Section 14 of the General Clauses Act, 1897.

13. To support the aforesaid argument, strength is sought from the provisions of Section 23-F of the Madhya Pradesh Accommodation Control Act, 1961, wherein a power has been given to stay the operation of the order of eviction for a total period of not more than six months. The law laid down by a Division Bench of this Court in the case of *B. Johnson Vs. C.S. Naidu*, 1985 J LJ 793 has been cited. Specific reliance has been placed on para 31 of the judgment.

14. Similar contentions have been raised by Shri V.K. Zelawat, learned Assistant Solicitor General, appearing for respondent No. 1.

15. I have given my thoughtful consideration to the rival contentions raised by learned senior counsel for the parties.

16. At the outset, it would be appropriate to extract the relevant portion of rule 20 of Rules as under.

“Rule 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

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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
- (iii) some natural calamity affects the Cantonment."

17. It would also be beneficial to extract the provisions of Section 14 of the General Clauses act, 1897 as under.

"14. Powers conferred to be exercisable from time to time.-

(1) Where, by any (Central Act) or Regulation made after the commencement of this Act, any power is conferred, then [unless a different intention appears] that power may be exercised from time to time as occasion requires.

(2) This section applies also to all [Central Acts] and Regulations made on or after the fourteenth day of January, 1887."

18. Under the provisions of the Act and the Rules, the Central Government has competence to notify the elections of a Cantonment Board. Rule 20 of the Rules, requires that after notification by the Central Government, a public notice of election shall be issued, indicating the details, as enumerated in the Rule. The first proviso to rule 20 of the Rules enables the Central Government, that in three situations enumerated therein, on receipt of a recommendation to that effect from the President of the Board, it may postpone the date of elections of a Board, which had been earlier notified. A limit of forty days has been provided by which the

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elections may be postponed from the earlier date fixed for such elections. Thus, there can be no dispute, nor has one been raised on behalf of the petitioner, that the Central Government does possess the powers to postpone the date of elections of a Cantonment Board, once they are so notified. However, whereas, the petitioner maintains that postponement, in any situation, could not have been for a period beyond forty days, the respondents have maintained that the power of the Central Government, conferred under proviso, could be exercised from time to time, as the situation may demand, but the aforesaid postponement, in exercise of the said powers, could not be for a period of forty days, while issuing a particular notification.

19. Section 14 of the General Clauses Act, reproduced above, provides that where, through a Central Act or Regulation, any power is conferred, then unless a different intention appears that power may be exercised from time to time as occasion arises. Thus, once, the Central Government has the power to postpone the elections for a period of forty days under the proviso to Rule 20, it is apparent that since there is no such prohibition decipherable from the Rule, in any manner, therefore, the said power may be exercised by the Central Government, on repeated occasions, from time to time, under the proviso, if the conditions enumerated in anyone of the three situations in the said proviso exist.

20. Under the provisions of Section 23-F of Madhya Pradesh Accommodation Control Act, 1961, a power has been given to stay the operation of the order of eviction for a total period of not more than six months. Relying upon the Division Bench judgment in *B Johnson's case* (supra), it has been maintained by learned senior counsel for the respondents that a fresh stay order, on the expiry of six months of the earlier stay order, could be passed in a suitable case, which would operate for same time limit.

21. It would be relevant to notice the provision of Section 23 of M.P. Accommodation Control Act, 1961, at this stage.

“23-F Duration of stay – The stay of the operation of the order of eviction passed by as Rent Controlling Authority or by the High Court shall not ensure for a total period of more than six months.”

22. It would also be relevant to notice the observations of the Division Bench in para 31 of the judgment in *B Johnson's case* (supra) as follows.

“31. We are, therefore, of the opinion that Section 23-F prescribed the time limit of six months for operation of the stay order and the same stands automatically vacated by efflux of time on expiry of six months from the date of the stay order. However, a fresh stay order can be passed in suitable case, which would operate for the same time limit, as there is no prohibition against a

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fresh stay order being made on the expiry of the earlier stay order by efflux of time. There is thus no basis to challenge the validity of this provision.”

23. Thus, the postponement of the elections through notification Annexure P-5 of the Act, appears to be absolutely justified, legal, and even warranted by the facts and circumstances of the case.

24. It would also be beneficial to notice the legal position, as laid down by the Apex Court in various judgments.

25. In the case of *State of Maharashtra Vs. Narayan Shamrao Puranik and others*, (1982) 3 SCC 519, it was held by the Supreme Court that a power under subsections (2) and (3) of Section 51 of the States Re-organization Act, 1956, was intended and meant to be exercised from time to time, as occasion arises, as there is no intention to the contrary manifested in the Act, within the meaning of Section 14 of the General Clauses Act, 1897.

26. Again, in the case of *B.N. Shankarappa Vs. Uthapur Srinivas and others*, (1992) 2 SCC 61, the Apex Court, while relying upon Section 14 of Karnataka General Clauses Act (which is in para-materia to the provisions of General Clauses Act, 1897), held that if the situation so demanded, and there was justification, the enabling power could be exercised from time to time.

27. Again, in the case of *Madhya Pradesh Vidyut Karamchhari Sangh Vs. Madhya Pradesh Electricity Board*, (2004) 9 SCC 755, it was held by the Apex Court that since the M.P. Electricity Board has the power to make regulations to lay-down the conditions of service of its employees, therefore, having regard to the provisions of General Clauses Act, 1897, it has the power to make regulations from time to time.

28. Even in the case of *Madhya Pradesh State Electricity Board Vs. Union of India* (2006) 10 SCC 736, relying upon the provisions of Section 14 of the General Clauses Act, 1897, it was held by the Apex Court that a statutory authority may exercise his statutory power from time to time.

29. As already noticed, no provision under the Rules or the Act, has been brought to the notice of the Court, reflecting that enabling power conferred upon the Central Government under the proviso to rule 20 of the Rules, could not be exercised from time to time, therefore, on the basis of the provisions of Section 14 of the General Clauses Act, 1897, and in view of the settled position of law, and also keeping in view the factual position with regard to the dates notified for the State Assembly Elections, it has to be held that the Central Government, while issuing the notification Annexure P-5, had validly and for justifiable reasons, postponed the elections now to be held on January 18, 2009.

30. No other point has been urged.

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31. Consequently, I do not find any merit in the present petition. The same is hereby dismissed.

32. C.c. as per rules.

Petition dismissed.

I.L.R. [2009] M. P., 1319

WRIT PETITION

Before Mr. Justice K.K. Lahoti & Mrs. Justice Sushma Shrivastava

22 January, 2009*

ASIF ANSARI

... Petitioner

Vs.

WAQF MAHAL UMRAO JEHAN & anr.

... Respondents

Wakf Act (43 of 1995), Sections 6-A (As amended by M.P. Amendment) & 54, Wakf Rules, M.P. 2000, Rule 15, Civil Procedure Code, 1908, Order 14 Rule 1 - *Manner of Inquiry to be held by Chief Executive Officer - Non-framing of issues - Summary procedure has been provided before C.E.O. whereas full-fledged enquiry has been provided before Tribunal - Scope of enquiry before C.E.O. is limited one and has to determine only encroachment on Wakf property - No fault can be found if C.E.O. has not framed issues - Petition dismissed.* (Para 7)

वक्फ अधिनियम (1995 का 43), धाराएँ 6-ए (म.प्र. संशोधन द्वारा यथा संशोधित) व 54, वक्फ नियम, म.प्र. 2000, नियम 15, सिविल प्रक्रिया संहिता, 1908, आदेश 14 नियम 1 - मुख्य कार्यपालक अधिकारी द्वारा की जाने वाली जाँच का ढंग - विवादकों की विरचना न करना - मुख्य कार्यपालक अधिकारी के समक्ष संक्षिप्त प्रक्रिया का उपबंध किया गया है जबकि अधिकरण के समक्ष पूर्ण विकसित जाँच का उपबंध किया गया है - मुख्य कार्यपालक अधिकारी के समक्ष जाँच का विषयक्षेत्र सीमित है और केवल वक्फ सम्पत्ति पर अतिक्रमण का अवधारण करता है - कोई त्रुटि नहीं पायी जा सकती यदि मुख्य कार्यपालक अधिकारी ने विवादकों की विरचना नहीं की - याचिका खारिज।

Cases referred :

AIR 1956 SC 231, AIR 1977 P&H 158.

Ashok Lalwani, for the petitioner.

S.D. Khan, for the respondent No.1.

S.A. Wakil, for the respondent No.2.

ORDER

The Order of the Court was delivered by K.K. LAHOTI, J. :-All the aforesaid petitions are filed, challenging the order of Chief Executive Officer, M.P.Waqf Board, Bhopal dated 26.4.2008 by which an application filed by petitioner (non-applicant before the Chief Executive Officer)

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under Order 14 Rule 1 read with section 151 of the Code of Civil Procedure, 1908 dated 9.1.2008 was rejected.

2. The authority found that under section 54 of the Wakf Act, 1995, (hereinafter referred to as 'Act' for short) it was not necessary for him to frame the issues to decide the disputes between the parties. Section 54 does not made applicable the procedure envisaged in the Code of Civil Procedure, 1908 (hereinafter referred to as 'C.P.C.' for short). The Chief Executive Officer is also not a civil Court and the proceedings under section 54 of the Act are not under the C.P.C. Section 54(3) provides a limited enquiry in respect of encroachment on Waqf property and after issuing a notice to the encroacher, the Chief Executive Officer is empowered to remove the encroachment, recording aforesaid findings the application filed by the petitioner was rejected.

3. As in all the aforesaid cases, same applications with similar allegations were decided, so all these petitions are being decided by this common order and for the convenience facts are taken from W.P.No.5939/2008 (*Asif Ansari Vs. Waqf Mahal Umrao Jehan & others*).

4. Learned counsel for petitioner challenged the aforesaid order on following grounds :-

(1) That to decide the dispute between the parties it was necessary to the Chief Executive Officer to frame the issues in the case. On framing issues, parties would know the real controversy and substantial points of dispute and would be able to produce evidence in this regard. So it was necessary for respondent no.2 to frame the issues in the case.

(2) Reliance was placed to the Apex Court judgment in *J.K.Iron and Steel Co., Ltd. Vs. The Iron and Steel Mazdoor Union, Kanpur* (AIR 1956 SC 231) and *Banke Ram Vs. Smt. Sarasti Devi* (AIR 1977 Punjab & Haryana 158) and submitted that this petition be allowed and the impugned order be quashed.

5. Learned counsel for respondents opposed the aforesaid contention and submitted that the proceedings were of administrative nature and not judicial proceedings and it was not at all required by the Chief Executive Officer to frame issues, to decide the factum of encroachment. The Chief Executive Officer has rightly rejected the application in which no interference is needed.

6. To appreciate the rival contention of the parties factual position may be stated.

The Chief Executive Officer, M.P.Waqf Board, Bhopal issued a show cause notice to the petitioner under section 54 of the Act in respect of an encroachment of petitioner on Wakf property of which details were given in notice Annexure P-1 and petitioner was asked to appear in the office of Chief Executive Officer. The

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petitioner filed reply of show cause notice in which the petitioner denied that he was an encroacher. Thereafter the Chief Executive Officer respondent no.2 proceeded to enquire into the matter. In the said enquiry petitioner moved an application under order 14 Rule 1 C.P.C., for framing of issues which has been decided by the impugned order.

The Act provides removal of encroachment from wakf property. For ready reference section 54 reads thus :-

“54. Removal of encroachment from wakf property –

(1) Whenever the Chief Executive Officer considers whether on receiving any complaint or on his own motion that there has been an encroachment on any land, building, space or other property which is wakf property and, which has been registered as such under this Act, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling upon him to show cause before a date to be specified in such notice, as to why an order requiring him to remove the encroachment before the date so specified should not be made and shall also send a copy of such notice to the concerned mutawalli.

(2) The notice referred to in sub-section (1) shall be served in such manner as may be prescribed.

(3) If, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the Chief Executive Officer is satisfied that the property in question is wakf property and that there has been an encroachment on any such wakf property, he may, by an order, require the encroacher to remove such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the wakf.

(4) Nothing contained in sub-section (3) shall prevent any person aggrieved by the order made by the Chief Executive Officer under that sub-section from instituting a suit in a Tribunal to establish that he has right, title or interest in the land, building, space or other property :

Provided that no such suit shall be instituted by a person who has been let into possession of the land, building, space or other property as a lessee, licensee or mortgagee by the mutawalli of the wakf or by any other person authorised by him in this behalf.”

The aforesaid provision specifically provides that the Chief Executive Officer on receiving a complaint or on his own motion in respect of encroachment of any

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property of wakf registered under the Act, shall initiate the proceedings after serving notice on the encroacher as mentioned in section 54 and after extending an opportunity of hearing to the encroacher, require him to remove the encroachment before the specified date. The aforesaid procedure is purely executive in nature because sub-section (4) provides a remedy to the aggrieved party for filing a suit before the M.P.Wakf Tribunal to establish his right title or interest in the property. Section 55 of the Act makes a provision for enforcement of order under section 54. The legislation has also framed M.P.Wakf Rules, 2000 (hereinafter referred as 'Rules of 2000' for short) providing procedure for the proceedings under section 54 of the Act. Rule 15 of the Rules of 2000 provides procedure for initiating proceedings under section 54 of the Act, which reads as under:-

"15. Manner of Inquiry to be held by Chief Executive Officer
- The inquiry under sub-section (3) of Section 54 shall held by the Chief Executive Officer in the following manner :-

(a) The Chief Executive Officer after serving the show cause notice to the person concerned shall call for written statement duly supported by any documentary proof. If necessary the Chief Executive Officer shall record the oral evidence tendered by the contending parties. The Chief Executive Officer shall also receive such documentary evidence as may be produced in the course of Inquiry;

(b) The Chief Executive Officer shall prepare a case file containing following particulars -

- (i) minute of proceedings ;
- (ii) report or information on which the proceeding has been started;
- (iii) show cause notice and its reply ;
- (iv) evidence (oral and documentary) received at the enquiry ;
- (v) order."

The aforesaid provision provides a complete procedure for enquiry to be held by the Chief Executive Officer under sub-section (3) of section 54 of the Act. The aforesaid rule does not provide for framing of any issue or for conducting any full-fledged enquiry, though he is under an obligation to receive documentary and oral evidence in the enquiry.

6. The order passed by the Chief Executive Officer under section 54 can be challenged by an aggrieved party by filing a suit in a tribunal to establish about his right title or interest in the property.

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Section 6-A as amended by the Wakf (Madhya Pradesh Amendment) Act, 1994 empowers Tribunal to determine dispute regarding wakfs. For ready reference Section 6-A may be quoted which reads as under :-

“6-A. Power of tribunal to determine dispute regarding Wakfs – (1) If after the commencement of the Wakf (Madhya Pradesh Amendment) Act, 1994 any question arises whether a particular property specified as Wakf property in a list of Wakfs published under sub-section (2) of Section 5 is Wakf property or not, or whether a Wakf specified in such list is a Shia Wakf or a Sunni Wakf, the Board or the mutawalli of the Wakf, or any person interested therein may apply to the Tribunal having jurisdiction in relation to such property for the decision of the question and the decision of the Tribunal in respect of such matter shall be final :

Provided that -

(a) In the case of the list of Wakfs relating to any area of the State and published or purporting to have been published after the commencement of the Wakf (Madhya Pradesh Amendment) Act, 1994, no such application shall be entertained after the expiry of one year from the date of publication of the list of Wakfs under sub-section (2) of Section 5; and

(b) In the case of the list of Wakfs relating to any part of the State and published or purporting to have been published at any time within a period of one year immediately preceding the commencement of Wakf (Madhya Pradesh Amendment) Act, 1994 such an application may be entertained by the Tribunal within the period of one year from such commencement:

Provided further that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not reopen such question.

(2) The Wakf Commissioner shall not be made a party to any application under sub-section (1).

(3) The list of Wakfs published under sub-section (2) of Section 5 and where any such list is modified in pursuance of a decision of the Tribunal under sub-section (1) the list as so modified, shall be final.”

Rule 35 of the Rules of 2000 provides procedure and power of the tribunal and rule 36 provides framing and determination of issues. For ready reference Rules 35 and 36 may be referred, which reads thus:-

“35. Procedure and power of the Tribunal – The Tribunal

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shall have the same power for the purpose of discharging its functions, under the Act as are vested to Civil Court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely :-

- (a) Summoning and enforcing the attendance of any person and examining him on oath ;
- (b) Requiring the discovery and production of documents;
- (c) Taking evidence ;
- (d) Subject to the provisions of Section 123 and 124 of the Indian Evidence Act, 1872, requisitioning of public record or documents or copy of such record or document from any office;
- (e) Issuing Commission for the examination of witnesses or documents ;
- (f) Dismissing an application for default or ex-parte;
- (g) Setting aside any order of dismissal of any application for default or any ex-parte order ;
- (h) Disposing of application for restraining any party for breach of contract or doing any alleged or unauthorised act;
- (i) Exercising inherent power in order to prevent the abuse of process of Court.

36. Framing and determination of issues – (1) After considering the reply, the Tribunal shall ascertain upon what material proposition of fact or of law the parties are at variance and shall thereupon proceed to form and record the issue on which the decision of the case depends.

(2) In recording the issue, the Tribunal shall distinguish between the issue of facts and law.

(3) After framing the issues, the Tribunal shall proceed to record oral evidence of the parties.”

Rule 36 specifically provides that after considering the reply the Tribunal shall ascertain all the material proposition of fact or of law, the parties are at variance and shall thereupon proceed to form and record the issue on which the decision of the case depends. Rule 36(2) and (3) further provides that in recording issue the Tribunal shall distinguish between the issue of facts and law and after framing the issues the Tribunal shall proceed to record oral evidence of the parties.

7. The legislation in its wisdom has provided a summary procedure before the Chief Executive Officer under Rule 15 of the Rules of 2000, while a full-fledged enquiry has been provided before the Tribunal to decide the dispute between the

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parties. The proceedings before the Tribunal are akin to civil suit and while considering the controversy in the suit, the Tribunal is under an obligation under Rule 36 to frame and determine all the issues. Section 83 of the Act provides constitution of Tribunals for determination of any disputed question or other matter relating to a wakf or wakf property under the Wakf Act, so for all the purposes Wakf Tribunal is civil Court and has been vested with the power of civil Court under sub-section (5) of section 83 of the Act. In view of specific procedure provided under the Rules, the Chief Executive Officer while holding an enquiry under section 54 of the Act was not under an obligation to frame the issue. Apart from this the scope of enquiry under section 54 of the Act is limited one and Chief Executive Officer was to determine only encroachment on Wakf property. He was not required to decide the right, title and interest in the property, but the scope of enquiry was limited as envisaged under section 54 of the Act to remove the encroachment on the wakf property. In view of specific provision under the Act and Rules, if the Chief Executive Officer had not framed the issues to decide the dispute before him, no fault is found.

8. In *J.K. Iron & Steel Co.* (supra) the Apex Court was considering an adjudication by the Tribunal constituted under the Industrial Disputes Act, while in this case the matter was before the Chief Executive Officer and not before the Tribunal, so the judgment in *J.K. Iron & Steel Co.* (supra) is not applicable in the present case.

In *Banke Ram* (supra) the Full Bench of Punjab and Haryana High Court was considering the procedure applicable for eviction before the Tribunal constituted under the East Punjab Urban Rent Restriction Act, 1949, while the factual position in the present case is entirely different. The matter was not before the Tribunal, but before the Chief Executive Officer under section 54 of the Act.

9. In view of aforesaid legal position, if the Chief Executive Officer had not framed the issues at the request of petitioner, no fault is found. All the petitions are found without merit and accordingly dismissed with no order as to costs.

Petition dismissed.

TEJULAL YADAV Vs. STATE OF M.P.

I.L.R. [2009] M. P., 1326

WRIT PETITION*Before Mr. Justice Rajendra Menon*

23 January, 2009*

TEJU LAL YADAV

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Constitution, Articles 14, 16 & 309 - Contingency Paid Employees - Time Bound Promotion - Contingency paid and work charged employees are considered to be forming a common class - The benefit of time bound promotion which is extended to work charged employees is also to be extended to contingency paid employee - Petition allowed. (Paras 8 & 11)

संविधान, अनुच्छेद 14, 16 व 309 - आकस्मिकता निधि से वेतन पाने वाले कर्मचारी - समयबद्ध पदोन्नति - आकस्मिकता निधि से वेतन पाने वाले और कार्यभारित कर्मचारियों को समान वर्ग निर्मित करने के लिए विचार में लिया गया - समयबद्ध पदोन्नति का लाभ, जो कार्यभारित कर्मचारियों तक विस्तारित है, आकस्मिकता निधि से वेतन पाने वाले कर्मचारी तक भी विस्तारित किया गया है - याचिका मंजूर।

Cases referred :

K.L. Asre Vs. State W.P. No.1070/2003(S) decided on 07.11.2005.

Shiv Kumar Dubey, for the petitioner.

Alok Pathak, for the respondents.

ORDER

RAJENDRA MENON, J. :-The petitioner claims to be working in the Government Mahila Polytechnic College, Ghamapur as Hostel Peon. It is claimed that the petitioner was initially appointed on the post of Work Shop Labour in the year 1983 against the vacant and sanctioned post and thereafter, continued to work in the said post. Vide order dated 20th March, 1989 he was regularized in the regular work charged and contingency paid establishment on the post of Hostel Peon. Claiming grant of time bound promotion under the scheme formulated by the State Government vide Annexure P/3 dated 17.03.1999 and modified vide Annexure P/4 dated 27.02.2001, the petitioner sought grant of benefit after completing 12 years of service. However, when representations were made and the same were not considered, the petitioner has filed this petition.

2. On notice being issued, the respondents have filed a reply and the only objection of the respondents is to the effect that the petitioner is a contingency paid employee, therefore, the scheme contemplated for granting the time bound promotion as contained in Annexures P/3 and P/4 is not applicable.

3. It is the case of the respondents that the scheme for time bound promotion

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is only applicable to employees who are working in the regular establishment and not to employees of the work charged or contingency paid establishment.

4. Learned counsel for the petitioner placing reliance on the judgment rendered by the Bench of this Court in Writ Petition (S) No.1070/2003 (*K.L.Asre vs. State*) decided on 07.11.2005, submits that when the work charged establishment Drivers and the Time Keepers in the Public Works Department are held entitled for promotion under the aforesaid scheme, the petitioner, who is a contingency paid employee, is also entitled to the same benefits.

5. In case of *K.L.Asre* (supra), the benefit of time bound promotion is extended to the employees of Work Charge Establishment in the Public Works Department and it is so held by the learned Judge in paragraph No.5 of the aforesaid judgment, which reads as under :-

“On bare perusal of Annexure P/7 it is gathered that the respondents are giving promotion under the Time Bound Promotion Scheme to the Drivers serving under Work-charge Establishment. When the promotion under the Time Bound Promotion Scheme is being given to the Drivers of the Work Charge Establishment, then why the petitioner should not be benefited in the same manner. The Supreme Court in the case of *Raghunath Prasad Singh vs. Secretary, Home (Police) Department, Government of Bihar and others*, AIR 1988 SC 1033 in para 4 has held as under:-

“4. Before we part with the appeal, we would like to take notice of another aspect. In course of hearing of the appeal, to a query made by us, learned counsel for the appellant indicated the reason as to why the appellant was anxious to switch over the general cadre. He relied upon two or three communications which are a part of the record where it has been indicated that there is no promotional opportunity available in the wireless organization. Reasonable promotional opportunities should be available in every wing of public service. That generates efficiency in service and fosters the appropriate attitude to grow for achieving excellence in service. In the absence of promotional prospects, the service is bound to degenerate and stagnation kills the desire to serve properly. We would, therefore, direct the State of Bihar to provide at least two promotional opportunities to the officers of the State Police in the wireless organization within six months from today by appropriate amendments of Rules. In case the State of Bihar fails to comply, with this direction, it should within two months thereafter, give a fresh opportunity to personnel in the Police wireless organization to exercise option to report to the general cadre and

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that benefit should be extended to everyone in the wireless organization.”

The same principle has been reiterated in the case of *Dr.Ms.O.Z.Hussain vs. Union of India and others*, AIR 1990 SC 311. This Court in the case of *Smt.Kamla Devi Tiwari vs. The State of M.P. and another* (W.P. No.9368/2003) decided on 05.01.2005 has held that according to the decision of *Raghunath Prasad Singh* (supra) the employees are entitled for promotion and the respondents were directed to extend the said benefit in terms of the decision of Supreme Court in *Raghunath Prasad Singh* (supra).

6. Since the Time Bound Promotion scheme is applicable to the Drivers serving under the Work Charge Establishment, the view of this Court is that the same is also applicable to the petitioner who was serving on the post of Time Keeper and was retired from the said post.” (Emphasis supplied)

6. Apart from the above, it is seen that the petitioner is working in the Polytechnic College and is said to be a contingency paid employee. Under the M.P. Education Department (Technical Branch) Contingency Paid Employees Recruitment and Conditions of Service Rules, 1978, a contingency paid employee is defined under Rule 2(b) to mean a person employed for full time in an office or establishment and who is paid on monthly basis and whose pay is charged to “Office Contingencies” but it excludes such of the employees who are employed for certain periods only in the year. In the aforesaid Rules of 1978, the categorization of employees is done under Rule-6 and the employees are classified into two categories i.e. permanent and temporary. Under Sub-rule 2 of Rule-6, it is provided that on completion of 15 years of continuous service the contingency paid employees shall be eligible for attaining the status of permanent work charged or contingency paid employee. The similar provisions are made in the M.P. (Work Charged and Contingency Paid Employees) Pension Rules, 1979 wherein the permanent employee is defined under Rule 2(c) to mean a contingency paid employee or a work charged employee who has completed 15 years of service or more on or after 1st January, 1974.

7. The complete reading of these Rules indicates that a contingency paid employee attaining the permanent status and a work charged employee attaining the permanent status are treated to be similar in all respects for the purpose of granting them pension and revision of pay scales under the M.P. Work Charged and Contingency Paid Employees Revision of Pay Rules, 1990 and under the M.P. (Work Charged and Contingency Paid Employees) Pension Rules, 1979.

8. Considering the fact that under the statutory rules also the contingency paid

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and the work charged employees are considered to be forming a common class. There is no reason why the benefit of time bound promotion which is extended to the work charged employees and why the judgment rendered in case of *K.L.Asre* (supra) be not made applicable in the case of the present employee also who has attained the status of a permanent work charged or contingency paid employees and entitled to various benefits in the matter of revision of pay and pension in identical manner.

9. A perusal of the Policy as contained in Annexure P/3 further indicates that even though the policy speaks about granting Krammanoti under the scheme to employees in the regular establishment, but by Clause (13) and (14) of the Scheme, the Government has extended the benefit of Krammanoti to vehicle drivers working in the work charged and contingency paid establishment. A perusal of Clauses (13) and (14) clearly indicates that the benefit of Krammanoti after completing 12 years and 24 years of service is made applicable to employees in the work charged and contingency paid establishment.

10. As far as work charged and contingency paid employees are concerned, their service conditions are governed by the same rules namely the Work Charged and Contingency Paid Employees Recruitment Rules, applicable to various Departments and the Work Charged and Contingency Paid Employees Pension Rules 1979 and the Work Charged and Contingency Paid Employees Revision of Pay Rules 1990. For the purpose of recruitment, appointment, pay revision and grant of pensionary benefits, the work charged and contingency paid employees constitute a common class and their terms and conditions of employment are governed by identical set of rules. It is, therefore, clear that for the purpose of recruitment, appointment, grant of pension and revision of pay scales, work charged and contingency paid employees are treated similarly and a separate set of rules, different from the one applicable in the regular establishment, govern their terms and conditions of employment. The work charged and contingency paid employees constitute a common class and, therefore, this class of employees are entitled to similar treatment in all respects, deviation being permissible on justifiable grounds and reasons. In the present case, the benefit of time bound promotion under the scheme – Annexure P/3 and P/4, is extended to vehicle drivers working in the work charged and contingency paid establishment, as per the policy itself.

11. The principles laid down in the case of *Shri K.L. Asre* (supra) has been made applicable to time keepers, working in the work charged and contingency paid establishment. If time keepers and drivers in the work charged establishment are entitled to promotion under the time bound scheme, there is no reason as to why the said benefit be not extended to other employees constituting the same class in the work charged and contingency paid establishment. The policy is made applicable to drivers of this establishment and the reason for not making the said

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policy applicable to other categories of the work charged and contingency paid establishment is not indicated in the return. No reason is given as to why a different policy is being adopted in the case of other employees in the work charged and contingency paid establishment and the benefit granted to drivers in the said establishment is not extended to other employees like the petitioner. Respondents being a "State" has to give similar benefit to employees similarly situated and forming a common class. They may be justified in granting some additional benefit to some of the employees in comparison to others, but the justification and reasons for such a classification has to meet the test of Article 14 of the Constitution and the decision has to be reasonable, fair and justified by cogent reasons and relevant considerations. Except for contending that the Policy is not applicable to employees working in the work charged and contingency paid establishment, no justification is forthcoming from the respondents with regard to further classification amongst the employees working in the work charged and contingency paid establishment with regard to implementation of the Policy – Annexure P/3 and P/4. When the employees working in the work charged and contingency paid establishment constitute a common class, all benefits which are extended to one set of employees namely drivers as per the policy and the time keepers in the light of the judgment in the case of *K.L. Asre* (supra), has to be granted by the respondents to the present petitioners also. In the absence of proper justification for adopting a different policy and cogent reason given justifying the reasonableness in the classification and differentiation done fulfilling the requirement of Article 14 of the Constitution, discrimination cannot be permitted. Parity in employment is required to be maintained and, therefore, keeping in view the circumstances and the action of the respondents in adopting a pick and choose method violative of Article 14 of the Constitution in the case of employees who form a homogenous class, the action discriminatory in nature cannot be upheld by this Court.

12. Keeping in view the aforesaid, the respondents are directed to extend the benefit of promotion in accordance with the aforesaid scheme to the petitioner and after evaluating his case in accordance with the requirements of the said scheme, grant benefit to the petitioner. In case the petitioner is found entitled then necessary orders in this regard be passed within a period of 03 months.

13. The petition is, accordingly, allowed and disposed of.

Petition allowed.

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I.L.R. [2009] M. P., 1331

WRIT PETITION*Before Mr. Justice Shantanu Kemkar*

13 February, 2009*

ARVIND TIWARI.

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Service Law - Transfer - Petitioner, a Reserve Inspector (R.I.) of Police Department posted as Inspector (Traffic) - Send back as R.I. on account of administrative exigency - Held - Clause 2 of the circular dated 14.02.2007 providing the minimum period of 2 years at one place in respect of various officers including S.H.O. is not applicable to the Inspector (Traffic) - Clause 3(2) of the circular empower the Board for transfer and posting of D.S.P. and officers subordinate - It further provides that decision of transfer taken by the Board shall be sent to State Government before execution - After taking the decision to transfer the petitioner, a copy of transfer order was sent by the Board to the State Government - Petitioner's transfer order not violative of the any clause of the circular - Order of transfer was passed taking into consideration the vacant post of R.I., past experience of petitioner and forthcoming election - No mala fide in issuance of impugned transfer order - Petition dismissed. (Paras 7, 8, 11 & 12)

सेवा विधि - स्थानांतरण - याची, पुलिस विभाग का आरक्षित निरीक्षक, की नियुक्ति निरीक्षक (यातायात) के पद पर की गई - प्रशासनिक अत्यावश्यकता के कारण आरक्षित निरीक्षक के रूप में वापस भेजा गया - अभिनिर्धारित - परिपत्र तारीख 14.02.2007 का खण्ड 2 थाना प्रभारी सहित विभिन्न अधिकारियों के सम्बन्ध में एक स्थान पर 2 वर्ष की न्यूनतम कालावधि का उपबंध करता है, निरीक्षक (यातायात) को लागू नहीं होता - परिपत्र का खण्ड 3(2) डी.एस.पी. और उसके अधीनस्थ अधिकारियों के स्थानांतरण और पदस्थापना के लिए बोर्ड को सशक्त करता है - यह भी उपबंधित करता है कि बोर्ड द्वारा स्थानांतरण का निर्णय लेने के बाद उसे निष्पादन के पूर्व राज्य सरकार को भेजा जायेगा - याची को स्थानांतरित करने का निर्णय लेने के बाद स्थानांतरण आदेश की प्रतिलिपि बोर्ड द्वारा राज्य सरकार को भेजी गई थी - याची का स्थानांतरण आदेश परिपत्र के किसी खण्ड का उल्लंघन नहीं करता - स्थानांतरण का आदेश आरक्षित निरीक्षक के रिक्त पद, याची के पूर्व अनुभव एवं आसन्न चुनाव को विचार में लेते हुए पारित किया गया - विवादित स्थानांतरण आदेश जारी करने में कोई असदभाव नहीं - याचिका खारिज।

*Amit Agrawal, for the petitioner.**M.S. Dwivedi, Panel Lawyer, for the respondents.***ORDER**

SHANTANU KEMKAR, J. :- Petitioner a Reserve Inspector of the Home (Police) Department of the State Government posted at Indore in the capacity of Inspector

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(Traffic) has challenged his transfer order dated 22.1.2009 (Annexure P-13) by which he has been transferred as Reserve Inspector District, Sidhi.

2. The case of the petitioner is that the impugned transfer order (Annexure P-13) is violative of the policy decision taken by the State Government vide circular dated 14.2.2007 (Annexure P-14), providing in the Clause 2 for the minimum period of posting of 2 years of various posts including the post held by the petitioner. In the said circular dated 14.2.2007 transfer of such police officers prior to completion of minimum 2 years period is permissible only if any of the conditions enumerated in the said circular dated 14.2.2007 is existing. It has been alleged by the petitioner that the impugned order has been issued by the Police Establishment Board {for short the Board} without ratification/approval of the State Government and as such the same is violative of Clause 3 of the said circular. It is further case of the petitioner that the sanctioned cadre strength of the Reserve Inspector as per M.P. Police Executive (Gazetted) Service Recruitment and Promotion Rules, 2000 is 71. As per the Government Circular dated 7.9.2000 (Annexure P-2) the Reserve Inspectors who have completed 5 years of substantive service as Reserve Inspector shall be available for their posting either as an Inspector (Traffic) or Reserve Inspector. He averred that the State Government issued yet another Circular dated 27.5.2008 (Annexure P-3) providing that out of total Cadre strength of Reserve Inspector not more than 33% shall be posted as Inspector (Traffic). Thus, according to the petitioner 23 incumbents can be posted as Inspector (Traffic) and as such petitioner's posting as Inspector (Traffic) at Indore being in consonance of the circulars of the State Government he could not have been sent back as Reserve Inspector, ignoring the need of control of Traffic situation of city of Indore. It has been also stated that there is no administrative exigency in transferring him at Sidhi at the cost of one administrative exigency and need of Inspector (Traffic) at Indore. According to him, he has been subjected to frequent transfers and the issuance of the impugned transfer order is an arbitrary exercise of powers on the part of the respondents.

3. The respondents filed reply and have stated that the impugned transfer order (Annexure P-13) has been passed on administrative grounds. It has been passed by the Board taking into consideration the administrative exigency that at Sidhi where the petitioner has been transferred, the post of Reserve Inspector was lying vacant. It was noticed by the Board that Sidhi District where the petitioner has been transferred as a Reserve Inspector is a sensitive place, and in the Assembly Election held in 2008 in the absence of posting of the Reserve Inspector the administration had to face great difficulties. In order to overcome such situation during the forthcoming Parliamentary Elections of 2009 the petitioner has been transferred to Sidhi and posted on his substantial post as Reserve Inspector. The respondents have placed on record the minutes of the meeting held by the Board as Annexure R-1. Thus, the case of the respondents is that the petitioner's transfer

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order is based on administrative grounds and the State has the total discretion to pass such transfer order for achieving the administrative convenience.

4. The petitioner has filed rejoinder and has stated that in place of the petitioner no one has been posted at Indore as Inspector (Traffic) and as such the petitioner's posting at Sidhi may not serve the administrative exigencies and the public purpose. According to him, the respondents have completely ignored the traffic hazard of the city like Indore and such an important aspect cannot be thrown to winds at the cost of alleged administrative exigency. In the rejoinder the responsibilities and duties of Reserve Inspector as also of Subedar have been quoted.

5 Heard the learned counsel for the parties and perused the documents.

6. From the averments made by the parties there cannot be a dispute that as per the Government Circulars a Reserve Inspector can be posted as Inspector (Traffic). The total number of Inspector (Traffic) which can be posted out of the total strength of Reserve Inspector may be to the extent of 23. However, the moot question involved in this petition is as to whether the petitioner can claim any right to remain posted as Inspector (Traffic) and whether his transfer is malafide, arbitrary or in breach of any statutory rule or is an outcome of colourable exercise of powers on the part of the Board.

7. In order to appreciate the contentions raised by the learned counsel for the petitioner, I have examined the circular dated 14.2.2007 (Annexure P-14) which provides that the minimum tenure of Police Officer posted in Range as Inspector General, Deputy Inspector General and the Police Officers posted in the District as Superintendent of Police, S.D.O.(P), City Superintendent of Police and Station House-officer (Incharge Police Station) shall be of 2 years unless the competent authority decides to post them elsewhere on account of setting up of departmental enquiry or on conviction for a criminal offence or for conviction for moral turpitude or in the case of dereliction of duty or on failure to control the serious law and order condition or on their promotion or superannuation. Thus, the minimum period of 2 years posting is provided amongst the other officers is in regard to the post of the Station House Officer/Police Station Incharge and not to the Inspector (Traffic).

8. The petitioner on the basis of letters dated 3.10.2008 (Annexure P-10) and 19.8.2008 (Annexure P-11) written to him by Additional S.P. City (East Indore) and Deputy Superintendent of Police (Traffic, Indore) in regard to routine duty work of management of the Traffic in which he has been addressed as Incharge Police Station (Traffic) Eastern Area, Indore cannot claim his status or posting to be of the S.H.O./Police Station Incharge. To my mind, such protection of tenure provided in Clause 2 of the Circular is not available to the petitioner who is posted as Inspector (Traffic). The petitioner's substantive post is Reserve Inspector and he was transferred and posted at Indore as Inspector (Traffic). He being not posted as Station House Officer/Incharge of any police station, Clause 2 of the

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circular dated 14.2.2007 providing the minimum period of 2 years at one place in respect of various officers including Station House Officer is not applicable to the post which the petitioner is holding. In the circumstances, the petitioner's transfer order cannot be said to be violative of the said Clause of the Circular.

9. As regards the petitioner's contention that the State Government has not approved or ratified the decision of the Board as required under Clause 3 of the Circular dated 14.2.2007, and, therefore, his transfer is illegal, also cannot be accepted. Clause-3 (2) of the said Circular empowered the Board to take decision about transfer and posting of Deputy Superintendent of Police and Officers subordinate to the post of Deputy Superintendent of Police. It also provides that in exceptional circumstances the State Government shall have power to interfere into a decision taken by the Board. It further provides that the decision of transfer as may be taken by the Board shall be sent to the State Government before execution of the said decision. Thus the board had full power to take decision about the petitioner's transfer. In the present case after taking the decision to transfer the petitioner, a copy of the transfer order dated 22.1.2009 was sent by the Board to the State Government on 22.1.2009 itself and, therefore, it cannot be said that the transfer order has been passed in violation of the said clause of the circular.

10. The petitioner's claim that he has been subjected to frequent transfers also cannot be accepted. Prior to the impugned transfer order dated 22.1.2009 on 7.11.2007 the petitioner was transferred from Police Headquarters Bhopal to District Chattarpur as Reserve Inspector and thereafter from Chhattarpur he was transferred to Indore vide order dated 10.7.2008 (Annexure P-8). These two earlier transfers cannot make the case of the petitioner as of frequent transfers more particularly having regard to the fact that the petitioner is serving in the police department of the State Government and he has been transferred for administrative exigency.

11. As regards the petitioner's grievance that there is no administrative exigency for passing the impugned transfer I find no merit in it. As is clear from the minutes of the meeting held by the Board, the petitioner has been transferred to District Sidhi on the vacant post of Reserve Inspector. The Board considering that at a sensitive District Sidhi a post of Reserve Inspector was lying vacant and also noticing the fact that in the elections of the Legislative Assembly held in 2008 there was great administrative difficulty in the absence of posting of the Reserve Inspector. Thus, taking into account the past experience and need of posting of Reserve Inspector at Sidhi in the forthcoming Parliamentary Elections of 2009 it was deemed proper by the Board to fill up the vacant post of Reserve Inspector at District Sidhi. Accordingly, the petitioner who was holding the substantive post of Reserve Inspector was ordered to be transferred to fill up the said vacant post. Thus, the decision of Board is based on administrative ground and there is no

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arbitrary or colourable exercise of the powers on the part of the Board in transferring the petitioner. Thus, even if as per the circulars of the State Government the Reserve Inspectors can be posted as Inspector (Traffic) but that will not give any right to the petitioner to remain posted as such. The Board or the State Government have powers to transfer the Reserve Inspector posted as Inspector (Traffic) back as Reserve Inspector in case of administrative exigency.

12. It is now well settled that transfer of an employee is an incident of service and it is the right of the employer to transfer its employee to any place depending upon the exigencies, requirement and need. No employee can legally assert that he has a right to remain at a particular place. No malafide could be established in issuance of the impugned transfer order. The petitioner's contention that no one has been posted at his place and, therefore, there would be dearth of Inspector (Traffic) to regulate the hazardous traffic at Indore is no ground to quash the petitioner's transfer order so long as no infirmity is found in his transfer. It is for the administration to deploy adequate police personnels to control the traffic of Indore City. This Court hopes and trusts that the adequate number of police personnels shall be deployed by the State Government to control the traffic situation at Indore. However, this aspect has to be seen by the administration and the petitioner is not entitled to remain at Indore as Inspector (Traffic) when his transfer is based on sound administrative grounds.

13. Accordingly, no case for interference in the impugned transfer order is made out. The petition deserves to be and is hereby dismissed.

No orders as to the costs.

Petition dismissed.

I.L.R. [2009] M. P., 1335

WRIT PETITION

Before Mr. Justice R.K. Gupta

30 March, 2009*

SHAMBHUNATH MISHRA

Vs.

STATE OF M.P. & ors.

... Petitioner

... Respondents

A. Constitution, Article 311 - Departmental Enquiry and Judicial Review - Merely because certain persons were punished by imposing minor penalty and others have been punished with major penalty then that would not be a ground for judicial review. (Para 18)

क. संविधान, अनुच्छेद 311 - विभागीय जाँच एवं न्यायिक पुनर्विलोकन - केवल इसलिए कि कुछ व्यक्तियों को लघु शास्ति अधिरोपित करते हुए दण्डित किया गया और अन्य

*W.P. No.12349/2003 (O.A. No.547/1998) (Jabalpur)

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व्यक्तियों को गुरुतर शास्ति से दण्डित किया गया तब न्यायिक पुनर्विलोकन के लिए यह कोई आधार नहीं होगा।

B. Constitution, Article 311 - *Departmental Enquiry and Discrimination - Allegations against the petitioner are not similar to the other two employees - No case of discrimination made out.* (Para 19)

ख. संविधान, अनुच्छेद 311 — विभागीय जाँच एवं विभेद — याची के विरुद्ध आरोप अन्य दो कर्मचारियों के समान नहीं हैं — विभेद का कोई मामला नहीं।

Cases referred :

1984 (Supp) SCC 351, (1983) 4 SCC 225, (2003) 4 SCC 364, (1997) 3 SCC 371, (2003) 4 SCC 364, (1997) 10 SCC 779.

A. Adhikari, for the petitioner.

Kumaresh Pathak, Dy.A.G., for the respondents.

O R D E R

R.K. GUPTA, J. :-Heard.

The present petition is filed by the petitioner seeking for the quashment of the order dated 29/04/1997, which is Annexure-A-9, by which the petitioner is refused to join his duties.

2. The facts leading to the present case are that the petitioner at the relevant time was employed on the post of Patwari. Since there had been manipulation in the record, therefore alongwith the petitioner two other persons were also charge sheeted. They were Shri Prajapati, Naib Tehsildar and Shri Indra Kumar Dwivedi, who was employed as LDC. A joint enquiry against all three persons was conducted and a punishment of removal from services by an order dated 16/04/1990 (Annexure-A-3) was imposed.

3. So far as the present petitioner is concerned he filed the original application before the SAT which was registered as O.A. No. 1016/1990. He challenged the legality and validity of the departmental enquiry including the order of punishment. The Tribunal dismissed the case on merits holding that the action taken against the petitioner is proper. The judgment passed by the Tribunal dismissing the case of the petitioner is placed on record as Annexure-A-4.

4. After the dismissal of the case the petitioner filed a review application which was also dismissed by the Tribunal and the copy of the same is placed on record as Annexure-A-5.

5. So far as Shri Indra Kumar Dwivedi is concerned who was employed as LDC also challenged the order of punishment by filing a case before the SAT which was registered as O.A. No. 37/1995. The Tribunal held that so far Shri Indra Kumar Dwivedi is concerned since he was only working as LDC, therefore the punishment which was awarded to him was disproportionate. His application

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was partly allowed. Shri Indra Kumar Dwivedi also preferred an appeal to the State Govt. on 07/05/1990 and his appeal was decided on 25/11/1994 and the appellate authority held that the disciplinary authority has given the fair treatment to him and accordingly the punishment of removal was confirmed by the appellate authority.

6. In this reference with profit, paragraph 14 of the judgment passed in O.A. 37/1995 (*Indra Kumar Dwivedi Vs. State of M.P. & others*) is concerned, the same is reproduced as under:-

The applicant had filed appeal on 07/05/1990. His appeal was decided on 25/11/1994 whereas the delinquent Naib Tehsildar had filed appeal on 05/05/1990 his appeal was decided on 31/05/1993. Thus the above facts show that the disciplinary authority has not given the fair treatment to the applicant. The said Naib Tehsildar was the delinquent employee who had given pattas to the non serving person in collusion with Patwari Shambhu Prasad Mishra the applicant had committed minor irregularities as mentioned in the charge sheet i.e working in the post of LDC at the relevant time the punishment awarded to the petitioner is not proportionate to the proved misconduct.

7. On the basis of the aforesaid paragraph from the judgment passed by the Tribunal, it is clear that so far as Shri Indra Kumar Dwivedi is concerned since he was found to be working on the post of LDC at the relevant time and there was no direct role played by him in manipulating the records. The State Govt. accepted the appeal submitted by the Naib Tehsildar Shri Prajapati and holding that the punishment is disproportionate, therefore the Tribunal held that the punishment is disproportionate.

8. After the judgment the present petitioner preferred a review to the State Govt. for consideration of his case also with regard to the punishment. The same was refused by the impugned order.

9. Learned Counsel appearing on behalf of the petitioner submitted that the petitioner earlier filed his case before the Tribunal i.e O.A. No.1016/1990 (Annexure-A-4), wherein the Tribunal has dismissed the appeal and the Tribunal in O.A. No. 37/1995 (*Indra Kumar Dwaivedi Vs. State of M.P.*) has held that the punishment is disproportionate in his case. It is contended that the State Govt. was not justified in rejecting the application for review of the present petitioner. It is also contended by him that since a common charge sheet was issued to all the three delinquents and a common departmental enquiry was conducted, therefore even though the case of the petitioner was earlier dismissed by the Tribunal yet petitioner is entitled to claim parity with regard to the punishment imposed on the petitioner.

10. Counsel for the petitioner relied upon the judgment passed by the Apex Court as reported in 1984 (Supp) SCC 351 (*Harinder Singh and others Vs. State of Punjab and anotehrs*) and also 1983 (4) SCC 225 (*Sengra Singh and*

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others Vs. State of Punjab and others) and on this basis it is submitted by him that this Court in exercise of its powers under Article 226 of the Constitution of India shall have power to decide about the disparity in imposing the punishment and shall also have power to direct the respondents to maintain the parity with regard to the punishment.

11. The respondents relied upon the judgment passed by the Apex Court in 2003(4)SCC 364. (*Chairman and Managing Director Vs. P.c. Kakkar*) and it was submitted that in the present case there were no similarity of the charges.

12. While arguing the case learned Counsel for the petitioner brought to the notice of this Court the order passed by the State Govt on 31st May 1993 whereby the appeal submitted by Naib Tehsildar Shri Prajapati was allowed. Shri Prajapati, Naib Tehsildar raised a ground that in the departmental enquiry it was not found proved that any undue pressure was applied by him on the Patwari, i.e the present petitioner who prepared the forged documents for giving benefit to certain persons. The aforesaid aspect was accepted by the appellate authority and the punishment which was imposed on him of removal from services was modified and he was imposed a penalty of withholding of one annual increment

13. The Tribunal recorded a finding in the favour of LDC Shri Indra Kumar Dwivedi that he has only committed minor irregularities as mentioned in the charge sheet.

14. The charge against the petitioner was that he has fabricated the documents giving favour to a litigant to show his valid possession on the land. It was also the charge against the present petitioner that under the pressure of Naib Tehsildar the present petitioner has shown possession on the land by a person in Patwari Khasra No. 799/1, 59,60, 487,618 in the year 1975-76 till 1980-81. In the departmental enquiry there was no evidence that the aforesaid act was done by the present petitioner under the pressure of Naib Tehsildar.

15. It is clear in the departmental inquiry that there was no evidence that any pressure was applied by Naib Tehsildar on the present petitioner to manipulate the record which is clear from the order dated 31/05/1993 of the State Govt. Thus for these reasons it is clear that manipulation was done by the present petitioner himself without there being any pressure by the Naib Tehsildar. So far as Shri Indra Kumar Dwivedi is concerned the Tribunal has recorded a finding in his favour that the minor irregularities were committed by him.

16. On the basis of the same, in two cases wherein in one case the Tribunal has allowed the case in favour of Shri Indra Kumar Dwivedi, LDC and in another case of Naib Tehsildar the State Govt. has allowed the appeal are distinguishable. The misconduct on the part of the petitioner to manipulate the record without any pressure by the Naib Tehsildar is a different and serious misconduct than the misconduct committed by the Naib Tehsildar and Indra Kumar Dwivedi, LDC particularly when there was no material found in the departmental enquiry by the

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State Govt. and also by the Tribunal. While considering the appeal of Naib Tehsildar the State Govt. came to the conclusion that there was no material against the Naib Tehsildar that he has applied undue pressure on the present petitioner to induce him to manipulate the record. Then the sole conduct of the petitioner is to be taken into account without any pressure to show a favour to a particular person by showing his possession from 1975-1976 to 1980-81. In this reference the judgment cited by the learned Counsel for the respondents becomes relevant. In 1997(3) SCC 371. (*Kuldeep Industrial Corporation Vs. Income Tax Officer and others*) Paragraph 6 of the said judgment is relevant which is reproduced as under:-

"6. So far as the assessment year 1977-78, is concerned, all the three members of the Commission unanimously rejected the application on the following reasoning ;

"20. Viewing the facts for this case against the observations made by us above, it appears to us that for the A. Y. 1977-78, the Department has a very strong case to raise objection on the ground that concealment of particulars of income or perpetration of fraud by the applicant has been or is likely to be established - particularly so in regard to the perpetration of fraud. In so far as this year is concerned, there is clear fabrication of accounts, the balances in the accounts have been fudged; the sale vouchers and goods receipts have been cooked up, and a false facade is created to mislead the Department and cover up the real state of the assessee's business transactions. It strains our sense of credulity too far to accept the applicant's claim that all this was being done only to save its skin from some other departments and its intentions vis-a-vis the Revenue were nothing but honourable. If that be so, how does the assessee in any case explain the inflation by Rs. 10 lacs of the carried forward balance in "Kuldip Prakash Imprest Account". To our minds, the Department has also succeeded in substance in rebutting the assessee's claim of so-called inaccuracies in the Commissioner's report. We do not find any distortion or misconception of facts in the Commissioner's report, nor can we subscribed to the view that it involves any colourable exercise of his powers. In fact, the Commissioner would have failed in his duty enjoined upon him by law, if he had not raised objection for the year 1977-78."

The findings recorded by the Commission are too eloquent to call for any emphasis. They could not have been expressed in more stronger language."

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17. The another judgment i.e 2003(4) SCC 364 (*Chairman and Managing Director Vs. P.C. Kakkar*) is also relevant of which 13 is reproduced as under :-

“13. In the case at hand the High Court did not record any reason as to how and why it found the punishment shockingly disproportionate. Even there is no discussion on this aspect. The only discernible reason was the punishment awarded in *M. L. Keshwani's case*. As was observed by this Court in *Balbir Chand v. Food Corporation of India Ltd. and Ors.* (1997 (3) SCC 371), even if a co-delinquent is given lesser punishment it cannot be a ground for interference. Even such a plea was not available to be given credence as the allegations were contextually different.”

18. The ratio of the aforesaid two judgments of the Supreme Court is that merely because certain persons were punished by imposing minor penalty and others have been punished with major penalty then that would not be a ground for judicial review.

19. In my earlier paragraphs I have already distinguished the nature of the misconduct committed by the petitioner and also by the other two persons who were inflicted the minor penalty in appeal and also by the Tribunal. I am of the view that the petitioner's role while manipulating the record was not similar to the other two employees so that it could be said the charges against all the three employees were common in nature so that a case of discrimination is made out.

20. The judgment which has been relied upon by the petitioner i.e *Harjinder Singh and others Vs. State of Punjab and another*, 1984(supp) SCC 351 is distinguishable because in that case all the employees were dismissed only on the charge that they have agitated which was impermissible under rules. In that case Supreme Court held that since the charges were common, therefore a parity has to be maintained. The judgments in *Sengra Singh and others Vs. State of Punjab and others* 1983(4) SCC 225 is also not distinguishable. The Apex Court in these cases of agitators directed for reinstatement as similarly situated agitators were not directed for the reinstatement therefore the Supreme Court found a case of disparity in imposing the punishment.

21. In the present case the order passed by the appellate authority i.e the State Govt in case of Naib Tehsildar itself indicates that there was no material against Naib Tehsildar in the departmental enquiry that Naib Tehsildar has pressurized the present petitioner for manipulating the record. Once the Naib Tehsildar is not found to be guilty in the departmental inquiry for applying undue pressure on the present petitioner then the present petitioner only becomes responsible for manipulating the record. So far as the LDC is concerned in his case the Tribunal found that he was only a LDC and was not responsible for maintenance of the

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record and further was not responsible to prepare the revenue record and being LDC he was to forward the record to the Naib Tehsildar, through note sheet.

22. In view of the aforesaid, if the wrong report or manipulated report was submitted by the Patwari i.e the present petitioner which was acted upon then the role of the present petitioner becomes severe in comparison to other two delinquents.

23. On this basis the aforesaid two judgments on which the heavy reliance was placed on behalf of the petitioner shall have no application. The another judgment of the Apex Court i.e 1997 (10) SCC 779 *M.Raghavelu Vs. Govt. of A.P. and another*, is also considered. In the aforesaid case the Supreme Court was considering the misconduct with regard to the lack of supervision by an officer. It was held by the Apex Court that a lack of supervision cannot be held to be severe nature of the misconduct. Paragraph 5 of the said judgment is relevant which is reproduced as under:-

“5 The argument of the learned Counsel for the appellant is that if the persons directly in charge of the construction work were found not guilty of the charge framed, the appellant, who was indirectly in charge of the work cannot be punished for similar charge leveled against him. We find force in the argument of the learned Counsel for the appellant and we do not think that the argument of the learned Counsel for the respondents that the enquiry officer in this particular case has gone into the merits and has given different finding should be accepted. As pointed out earlier, on the basis of the same set of evidence the officers who were directly in charge of the construction work were exonerated of the charge and we see no reason to pick out the appellant alone for finding him guilty of the charge.”

24. In the present case the factual scenario on appreciation of the facts of the case is entirely different. The petitioner was directly involved in manipulating the record and so far as the Naib Tehsildar is concerned he was indirectly involved even assuming that he had played role but he was indirectly involved. So far as the LDC is concerned he was only to put up the report to the Naib Tehsildar without playing any role to prepare the record. Thus the judgment on which the heavy reliance is placed i.e *M.Raghavelu Vs. Govt. of A.P. and another*, 1997 (10) SCC 779 is also distinguishable.

25. In view of my overall discussion as aforesaid, I do not find any case for interference and the petition is dismissed.

Petition dismissed.

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I.L.R. [2009] M. P., 1342

CONTEMPT PETITION

Before Mr. Justice R.S. Garg & Mr. Justice U.C. Maheshwari

9 January, 2009*

IN REFERENCE

Applicant

Vs.

KAILASH NAHTA

Non-applicant

A. Contempt of Courts Act (70 of 1971), Section 15(3) - Criminal Contempt - Contemnor, S.H.O. Police Station came in Court and dragged away three persons who were waiting for the delivery of judgment in their criminal case, took them in custody and thereafter registered a false case against them - Matter referred by lower Court to High Court - Held - Contemnor has unable to satisfy why without permission of the Court he dragged away three persons from the Court - He did not care for the personal liberty of these persons, violated the human right and registered a false case against them - He committed contempt of lawful authority of the Court and had also created false reports and false documents to cover up his illegalities - High Court found him guilty. (Paras 28 & 29)

क. न्यायालय अवमान अधिनियम (1971 का 70), धारा 15(3) - दाण्डिक अवमानना - अवमाननाकर्ता थाना प्रभारी न्यायालय में आया और तीन व्यक्तियों, जो अपने दाण्डिक मामले में निर्णय घोषित किये जाने की प्रतीक्षा कर रहे थे, को घसीटकर बाहर ले गया, उन्हें अभिरक्षा में रखा और उसके बाद उनके विरुद्ध मिथ्या मामला पंजीबद्ध किया - निम्न न्यायालय द्वारा मामला उच्च न्यायालय को सुपुर्द किया गया - अभिनिर्धारित - अवमाननाकर्ता यह समाधान करने में असमर्थ रहा कि क्यों न्यायालय की अनुमति के बिना वह न्यायालय से तीन व्यक्तियों को घसीटकर बाहर ले गया - उसने इन तीन व्यक्तियों की व्यक्तिगत स्वतंत्रता की परवाह नहीं की, मानवाधिकार का हनन किया और उनके विरुद्ध मिथ्या मामला पंजीबद्ध किया - उसने न्यायालय के विधिपूर्ण प्राधिकार की अवमानना की और अपनी अवैधानिकताओं को छिपाने के लिए मिथ्या रिपोर्टों और मिथ्या दस्तावेजों की रचना की - उच्च न्यायालय ने उसे दोषी पाया।

B. Contempt of Courts Act (70 of 1971), Section 15(3) - Criminal Contempt - Sentence - Contemnor tendering unconditional apology and seeking mercy - Held - Present is not a case where after committing the wrong, the wrong doer had come to the Court seeking mercy of the Court but present is a case where after committing misconduct and misdeed, the contemnor to cover his misconduct, has created false documents, registered a false case and took the innocent persons in the custody - Act is not pardonable - 3 months sentence awarded. (Para 35)

ख. न्यायालय अवमान अधिनियम (1971 का 70), धारा 15(3) - दाण्डिक अवमानना - दण्डादेश - अवमाननाकर्ता ने शर्तरहित क्षमायाचना निवेदन की और दया की माँग

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की - अभिनिर्धारित - वर्तमान मामला ऐसा नहीं है जहाँ गलती करने के बाद दोषकर्ता न्यायालय की दया की माँग करते हुए न्यायालय के पास आया हो बल्कि वर्तमान मामला ऐसा मामला है जहाँ अवचार और अपकर्म करने के बाद अवमाननाकर्ता ने अपने अवचार को छिपाने के लिए मिथ्या दस्तावेजों की रचना की, मिथ्या मामला पंजीबद्ध किया और निर्दोष व्यक्तियों को अभिरक्षा में लिया - कृत्य क्षमनीय नहीं - 3 माह का कारावास अधिनिर्णीत किया।

V.K. Shukla, for the applicant.

P.D. Gupta, for the Non-applicant.

ORDER (ORAL)

The Order of the Court was delivered by **R.S. GARG, J.** :- Vide letter dated 21.5.2007 Shri M. P. Tiwari, Judicial Magistrate, First Class, Sagar made a reference to the District and Sessions Judge, Sagar for referring the matter to the High Court so that an appropriate action is taken against the contemnor for committing contempt of lawful authority of the Court of Shri M. P. Tiwari.

2. The matter was referred by the Additional District and Sessions Judge, Sagar vide his letter dated 6.6.2007 bearing No.1307/BF/93, to this Court.

3. The matter was received in the Registry of this Court. After receiving the said reference, vide proceeding dated 20.11.2007, Registrar (Judicial) considered the reference to be under Section 15(3) of Contempt of Court Act 1971 and requested to Hon'ble the Chief Justice that, if approved, the matter may be registered as a Criminal Contempt and be placed before the appropriate Division Bench. Hon'ble the Chief Justice, vide his order dated 26.11.2007 approved the proposal and, accordingly, the matter was registered as Contempt case.

4. The matter came-up for consideration before the different Division Benches and ultimately on 15.9.2008 a Division Bench presided over by Hon'ble the Chief Justice directed that notice be issued to the respondent/contemnor to show cause as to why the contempt proceedings be not initiated against him.

5. On 5.1.2009, the matter was listed before us and it was heard. At the request of Shri Gupta, it was directed to be taken up on 7.1.2009. The matter was fully heard on 7.1.2009 but to give further opportunity to respondent, we directed that the matter be taken up today. Today, the contemnor has tendered his unconditional apology for the action taken by him. The acceptance and rejection of unconditional apology shall be considered at the appropriate stage.

6. Vide reference letter dated 21.5.2007 Shri M. P. Tiwari, learned Judicial Magistrate First Class, Sagar reported to this Court that Criminal Case No.850/2004 (*State of M. P. Vs. Kamalpat Gautam and others*) was fixed before the Court on 21.2.2007 for delivery of judgment. The accused persons, namely, Smt. Shanti Gautam, Kamalpat Gautam, Ramkankar Gautam, Ramakant and Ram Sunder were present in the Court, were sitting outside the Court room and waiting for

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delivery of judgment. Before the judgment could be delivered, an application was filed by the accused persons that the complainant Smt. Sanjna Mishra and her associates fought with the accused persons. The application was taken up for consideration at 4.30 p.m. and it was reported to the Court that contemnor Kailash Nahta came and dragged away accused Ramsunder, Ramkankar, Ramakant and Kamlapat and when he was dragging them the complainant Smt. Sanjana Mishra was also with Mr. Kailash Nahta. Thereafter, the learned Magistrate issued a notice to the Station House Officer of Police Station Gopalganj and thereafter Shri Sanjay Agrawal, City Superintendent of Police and non-applicant Kailash Nahta appeared in the Court at 5.15 p.m. Their explanations were sought by the Court.

7. In paragraph 3 of reference application, it is observed by the learned Magistrate that in the preliminary enquiry, it had come to the light that it was known to Shri Nahta that Criminal Case No.850/04 was listed before the Court on 21.2.2007 for delivery of judgment. He also observed that as the complainant Smt. Sanjana Mishra was accompanied Mr. Kailash Nahta, hence the contemnor knew about the registration of crime No.75/07.

8. The learned Court had observed that while the case was listed for delivery of judgment, the contemnor dragged away the accused and this act had created hindrance in judgment delivery system.

9. The Court further observed that the reply filed by Kailash Nahta was neither justifiable nor reasonable. The learned Court, accordingly, observed that the action taken by Kailash Nahta amounted to contempt of Court. The Court, therefore, requested to registrar to place the matter before this Court. The matter was accordingly registered and notices were issued.

10. Mr. Kailash Nahta has filed his reply, which runs in as many as six pages along with the number of Annexures which run in the 45 pages.

11. The fact that Mr. Nahta had taken away the accused persons from the Court has not been disputed by him. According to him on receiving wireless message that some persons were beating a constable, he came to the Court and when he wanted to make an enquiry from the accused persons, the accused persons anticipating that the alleged contemnor has come to arrest them in connection with crime No.75/07, pounced upon Mr. Nahta, caught hold of his collar and misbehaved with him. It is also submitted that he never intended to cause any hindrance in delivery of judgment and as he was informed that some persons were beating the constable, it was his duty to stop them and, therefore, he took away those persons and lodged them in motor vehicle and then again came to the Court. Placing strong reliance upon Annexure R-1, an application dated 21.2.2007 filed by Kamlapat and Smt. Shanti Devi and others, it is contented by the contemnor that in the said application filed on 21.2.2007 there is no reference of the fact that

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the present contemnor dragged the accused persons or misbehaved with them. On basis of this application it is submitted that the learned Judge was not justified in recording the proceeding at 4.30 p.m. on 21.2.2007 that the present contemnor dragged away Kamlapat, Ramkankar, Ramakant and Ramsundar. The said objection, at this very stage, can be very conveniently rejected. The application dated 21.2.2007 has been filed by Shri R. K. Pandey Advocate and signed by Kamlapat, Ramkankar and Shanti Devi and others. From this application, it would clearly appear that the said persons informed the Court that when those persons came to the Court to attend the court proceeding, the original complainant (Smt. Sanjna Mishra) and some others came to them, started beating them, extended threats and, therefore, they were making application to the Court for their protection.

12. Undisputedly, when the application was filed, the said persons Kamlapat, Ramkankar and Ramakant were not in the custody of contemnor otherwise they could not have endorsed their signatures on this application. It would also be justified to hold that the said application was filed before 4.30 p.m.

13. It appears that the application came up before the court at about 4.30 p.m. At about 4.30 p.m., Shri R.K. Pandey, learned counsel for the accused persons submitted before the Court that when the accused persons were sitting out side the court Shri Nahta, S.H.O. Police Station Gopalganj came there and dragged away three persons. The court recorded the proceeding at 4.30 p.m. and directed that Mr. Kailash Nahta be summoned. The application dated 21.2.2007 (Annexure R-1) does not refer to the name of present contemnor, Kailash Nahta, therefore, from the proceedings recorded at 4.30 p.m. it can not be assumed that in absence of an allegation against the respondent in Annexure R/1 that allegations against Mr. Nahta are concocted the argument is absolutely palpable and misconceived. We have already found that the application filed on 21.2.2007 was signed by the accused Kamlapat, Ramkankar and Ramakant, therefore, it has to be held that at the time of filing the application the accused persons were not in the custody and they were making the complaint that at that time, Smt. Sanjana Mishra came with certain persons and started beating the accused persons. From the proceedings recorded at 4.30 p.m., it would clearly appear that the complaint made by the learned counsel for the complainant was that the accused persons were dragged away by Mr. Kailash Nahta and other three persons. We do not find any ambiguity either in the application (Annexure R-1) or the Court proceeding dated 21.2.2007 recorded at about 4.30 p.m.

14. After the notices were issued to Mr. Nahta, Mr. Nahta and C. S. P. Shri Sanjay Agrawal appeared in the Court at 5.15 p.m. The Court issued a notice to Mr. Nahta to show cause that under what circumstance, he dragged away the accused persons from the Court. The Court thereafter recorded that in the given

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set of the situation, the judgment could not be pronounced. At that point of time the contemnor did not inform the Court that he had taken the said persons into custody as they had pounced upon the contemnor.

15. It is to be seen from records that Smt. Sanjana Mishra had submitted a written report on 21.2.2007 at the police station at 4.55 p.m. which was registered as First Information Report No.75/07.

16. We are referring to all these details to show that in what manner accused persons were subjected to police atrocities and how the authority of court was flouted. The report was received at 4.50 p.m. We would be justified in presuming that after receiving the report, the same has been recorded in the register as first information report.

17. According to the contemnor, he received a message at 17.05 from the Police Station that certain persons were fighting with a woman and were also beating a police officer. After receiving this information, Mr. Nahta proceeded towards the Court. The time of the wireless i.e. 17.05 is important in view of the Court proceedings recorded at 4.30 p.m. because according to Mr. Nahta after receiving the information at 17.05, he came to the Court, inquired about the persons who earned a fight with a woman and had beaten a constable. We had inquired from Mr. Nahta that where was he when he received the wireless message. Day before Yesterday, in the open Court, in presence of Mr. P.D. Gupta, learned counsel, he informed the Court that he was on patrolling but making an improvement to his statement he informed the Court that he was very close to the Court as he was informed that some theft has been committed.

18. According to Mr. Nahta, the statement which he made in the open Court that he came to the Court Campus, made inquiry from certain persons and then he was told that the persons who are fighting with a woman and beating the police constable were on the first floor of the Court. He also admitted in the open Court that he could not find the constable who was beaten by the accused persons. According to him, he reached to the first floor and when he was making inquiries from the accused persons, the accused persons apprehending that Mr. Nahta had come to arrest them in connection with Crime No. 75/2007, pounced upon him, caught hold of his collar and at that time constable Abid, Court Mohrir Devendra and other persons intervened. According to him, three persons namely, Kamlapat, Shyam Sunder and Ramakant were taken into custody and thereafter they were lodged in the police vehicle and immediately thereafter he came to the Court and informed the Court about the entire incident. It is to be noted that Mr. Nahta had appeared in the Court at 5.15 p.m. At that time he did not inform the Court (as it appears from the Court proceedings) that the three accused persons were taken into custody either in connection with Crime No. 75/2007 or because they made an assault on Mr. Nahta.

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19. It is to be further seen that the arrest of these persons was sought to be justified on the ground that in between 5 and 5.15 p.m. the accused persons had used criminal force against the police officer, beat him, caught hold of his collar and, therefore, they had committed an offence punishable under Section 353, 186, 332 all read with Section 34 IPC. It also cannot be lost sight of that after putting his appearance before the Court at 5.15 p.m. Mr. Nahta went to the police station and registered Crime No. 76/2007 against Kamlapat, Shyam Sunder and Ramakant. It would be necessary to refer to the defence of the alleged contemnor that the accused persons made an assault on him apprehending that Mr. Nahta had gone to arrest them in connection with Crime No. 75/2007. We are not able to understand that how could information relating to registration of Crime No. 75/2007 reach to the accused persons who are already in custody before 4.30 p.m. Even otherwise Crime No. 75/2007 was registered at 4.55 p.m. and the present contemnor received information at 5.05 p.m. and immediately thereafter he had come to interrogate the accused persons. If everything is within the knowledge of the officer who registered Crime No. 75/2007 and Mr. Kailash Nahta, then it would be imaginary on the part of Kailash Nahta to allege on oath before this Court that when the contemnor reached on spot, the accused persons probably thought that Mr. Nahta had gone to arrest them in connection with Crime No. 75/2007.

20. During course of the arguments, it was submitted that the three accused persons were arrested in connection with Crime No. 75/2007 at 17.35 p.m. which would also appear from Annexure-R/7, the arrest memo.

21. If the facts are correctly mentioned in Annexure-R/7 then this would again appear that the Panchnama is also false. The arrest memo has been alleged to have been prepared after 5.35 p.m. while the report before the Court was before 4.30 p.m. the three persons were dragged by Mr. Nahta from the Court premises. Even otherwise it would again appear from the first information report of Crime No. 76/2007 that the accused persons were taken into custody between 5 and 5.15 p.m. because the FIR clearly shows that on being asked, the accused gave their names as Kamlapat, Shyam Sunder and Ramakant and thereafter, the accused persons were taken into custody and were lodged in the police vehicle. If this all was done before 5.15 p.m. then the Panchnama Annexure-R/17, alleged to be prepared by the Investigating Officer of Crime No. 75/2007, would be false and would clearly show that it has been created, concocted and manufactured to cover the misdeeds of Mr. Kailash Nahta.

22. The first information report registered in Crime No. 76/2007 shows that he received the information between 5 and 5.15 p.m. while he was patrolling. Before this Court, it is sought to be submitted that the contemnor had gone to the Court in relation to some investigation. This submission that he had gone to make investigation into some theft case would again run contrary to the Rojnamcha Shana No. 1029 dated 21.2.2007 which clearly proves that Town Inspector Kailash

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Nahta left police station at 3.45 pm. for patrolling. According to him, rather according to his first information report in Crime No. 76/2007, it would clearly appear that he received the information that some persons have beaten some police people. This fact mentioned in the first information report is again incorrect because the wireless message No. 1029 clearly shows that the message was that some people had beaten a woman and have also beaten a police constable.

23. The fact relating to beating of the woman is conspicuously missing in the first information report of Crime No. 76/2007. The first information report says that when he interrogated certain persons, all these persons pounced upon him and created hindrance in discharge of official duties. If that was so, then he was obliged to inform the Court about the incident and arrest of the three persons. On one side, the defence of Mr. Nahta is that Investigating Officer of Crime No. 75/2007 had arrested three accused persons at 5.35 p.m. and, at the same time, in his own first information report (Crime No. 76/2007) he mentions that he had taken the persons into custody and thereafter he went back to the Court and gave information to the Court. It is not known to anybody that to which Court he went. If after arresting the accused persons he had gone to some Court to inform the Court about the arrest then the cat would be out of the bag because the statement made in the first information report would clearly prove that Mr. Nahta knew that such persons were to attend some Court proceedings and, therefore, Mr. Nahta was required to inform the Court regarding arrest of the accused persons. This was the first version in the first information report which was sought to be diluted by other documents and the replies. From the proceedings dated 21.2.2007 recorded at 5.15 p.m. it does not appear that Mr. Nahta, at any point of time, when the Court was recording the proceedings, informed the Court that he bonafidely arrested those persons because accused persons pounced upon him and caused hindrance while the contemnor was discharging his official duties. Not only that immediately after 5.15 p.m. even before registering the first information report at 17.45 p.m. he did not make any application to the Court that he had taken the accused persons in custody in connection with Crime No. 75/2007 or because the accused persons committed yet another offence by making an assault on the police officer. If up to 5.15 p.m. when contemnor Kailash Nahta appeared in the Court with City Superintendent of Police, Shri Sanjay Agrawal, there was nothing like arrest of the accused persons or an attack of those persons upon Mr. Kailash Nahta then we would be justified in observing that to justify his own wrong deeds and cover his misconduct, Shri Kailash Nahta had registered Crime No. 76/2007 against the accused persons.

24. In paragraph-2 (last line of paragraph-2) the contemnor has said that the bonafides of the contemnor would be clear from the fact that after lodging these persons in police vehicle and before actually taking them to police station, he appeared before the Hon'ble Judicial Magistrate, First Class and apprised him of

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the situation and soon on the next day a remand was granted. We have already found that on 21.2.2007, even up to 5.15 p.m. the contemnor did not inform the Court that he had taken the accused persons in custody. If the statement made in the reply is true then same proceedings should have been brought on record to show that before 5.15 p.m. the contemnor appeared in the Court and apprised the learned Judicial Magistrate of the situation or of the fact of the arrest.

25. The reply filed by the contemnor is an eye-wash. It appears that the contemnor has tried to take out the benefit of certain corrections made in the application dated 21.2.2007. Shri Gupta, after taking us through the application, submitted that originally the application mentioned that the accused persons after attending the proceedings when came out of the Court campus they were beaten by the complainant (Smt. Sanjana Mishra) and some other persons. While after making corrections, the application was made to read that while the accused persons were present in the Court for attending the proceedings, they were beaten by Smt. Sanjana Mishra and her associates. This fact or this defence, in our opinion, cannot provide any reasonable defence to Mr. Kailash Nahta because undisputedly up to 5.15 p.m. the Court's proceedings were not over and the judgment could not be delivered in the matter.

26. It would again be necessary to note that on 21.2.2007, it was informed to the Court and the Court recorded the proceedings at 4.30 p.m. that when the accused persons were awaiting their call for delivery of judgment, Mr. Nahta and some others came to the Court and dragged away Kamlapat, Ramkankar and Ramakant. If at 4.30 p.m. the Court had recorded the proceedings on the say of the counsel for the accused persons then we have no reason to hold that the proceedings recorded by the Court at 4.30 p.m. are wrong. If before 4.30 p.m. the accused persons were taken in custody and the fact was reported by the counsel for the accused to the Court then it would be height to say that the contemnor after receiving the message at 5.05 p.m., came to the Court and took away the accused persons in custody, lodged them in his vehicle, thereafter came to the Court and apprised the Court of the situation.

27. In our considered opinion, the contemnor knowing well that the accused persons were awaiting the delivery of judgment in the matter either on persuasion by Smt. Sanjana Mishra or for the one reason or the other, came to the Court, dragged away some of the accused persons, took them in custody and thereafter prepared a false arrest memo at 5.35 p.m. It also appears that after committing such illegalities to save his skin and cover his misdeeds, he has registered a false case against the accused persons as Crime No. 76/2007.

28. The conduct of Mr. Nahta is reprehensible. On one side, he did not show any reason to the Court which was ready and willing to deliver the judgment, did not care for the personal liberty of the accused persons, violated their human

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rights and thereafter registered a false case against the accused persons, got them arrested and on the false charge again took remand for their lodgment in the jail.

29. Taking into consideration the totality of the circumstances and for the reasons aforesaid, we hold that Mr. Kailash Nahta, the then Station House Officer, Police Station, Gopalganj, Sagar at present Inspector Human Rights Commission, Bhopal had committed contempt of the lawful authority of the Court and had also created false reports and false documents to cover up his illegalities. We accordingly hold him guilty.

30. After this part of the judgment was recorded, Mr. Nahta submitted before the Court that from Annexure-R/14, it would appear that the proceedings were recorded on 6.5.2007 and presence of A.D.O.(P.), Mr. Rajpoot is shown. According to him, the proceedings dated 6.5.2007 is wrong because 6.5.2007 was Sunday. We do not know that whether the proceedings were recorded on 6.5.2007 or any date before or after the date but that question was never raised by the contemnor before the Lower Court nor at any point of time, it was submitted to the Lower Court that the proceedings could not be recorded on 6.5.2007.

31. Assuming the proceedings dated 6.5.2007 were recorded in absence of the contemnor, the same is not going to make any difference because in proceedings dated 6.5.2007, the Court has simply observed that the matter be referred to the High Court for taking appropriate action under Section 15(3) of the Contempt of Courts Act. Such an action could be taken by the Court even on a holiday. Present is not a matter where the Court was required to deliver an order or judgment on a working day. These are the administrative matters and if on 6.5.2007 such proceedings were recorded, the same could not help to the contemnor.

32. At this stage, we have asked Mr. Gupta and the contemnor to make submission on question of quantum of sentence.

33. We had asked Mr. V.K. Shukla, learned Deputy Advocate General that in the set of the circumstances what sentence should be awarded, Shri Shukla except saying that the question of sentence is between the contemnor and the Court, did not say anything though he clearly admitted that present is a serious matter.

34. Shri P.D. Gupta, learned counsel for the contemnor submitted that present is a case where the contemnor had committed a mistake and the act was foolish but, in any case, he deserves an opportunity to improve. It is submitted that any punishment awarded to the contemnor would not only ruin him but ruin his family also. Mr. Nahta has stated before the Court that for all his acts and his deeds he had tendered his unconditional apology before the Lower Court and he also tenders unconditional apology before this Court.

35. We have considered the submissions made by Shri P.D. Gupta and Shri Nahta. On one side, Mr. Gupta and Mr. Nahta say that they are sorry for the act done by the contemnor but from the records it would clearly appear that after

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dragging away the accused persons from outside the Court room not only he committed contempt of the Court but to cover the misconduct and misdeeds not only three innocent persons were taken in custody on a false charge but they were kept in police custody and even on a false report lodged by Mr. Nahta, they were kept in custody. Present is not a case where after committing the wrong, the wrong doer had come to the Court seeking mercy of the Court but present is a case where after committing misconduct and misdeed, the contemnor to cover his misconduct, has created false documents, registered a false case and took the innocent persons in the custody. The act is not pardonable. We award three months' sentence to the contemnor. He be taken in custody and be sent to jail for undergoing the sentence.

36. A copy of this order be sent to the Chairman, Human Rights Commission to inform the Hon'ble Chairman that one of their Inspector has been found guilty for committing contempt of the Court and violating the human rights of certain persons.

37. Copy of this order be also sent to the Director General of Police and the Principal Secretary (Home) for taking appropriate action against the convicted contemnor.

Order accordingly.

I.L.R. [2009] M. P., 1351

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

23 October, 2008*

PRABHUDAYAL (DEAD) THROUGH LRS.

... Appellants

Vs.

SMT. RAMSIYA & anr.

... Respondents

A. Hindu Succession Act (30 of 1956) [As amended by Hindu Succession (Amendment) Act, 2005 w.e.f. 09.09.2005], Sections 6 & 23 - Section 23 of the Act has been omitted by Section 4 of the Amendment Act of 2005 - From the date of enforcement of amended provision to the Act the female heir of a coparcener can ask for partition of the dwelling house because according to Section 6 of the Act her status is also that of a coparcener. (Para 8)

क. हिन्दू उत्तराधिकार अधिनियम (1956 का 30) [हिन्दू उत्तराधिकार (संशोधन) अधिनियम, 2005 द्वारा यथासंशोधित 09.09.2005 से प्रभावी.] धाराएँ 6 व 23 - अधिनियम की धारा 23 संशोधन अधिनियम 2005 की धारा 4 द्वारा विलोपित कर दी गई है - अधिनियम के संशोधित उपबंध के प्रवर्तन की तारीख से किसी सहदायिक की महिला वारिस निवास गृह के विभाजन की माँग कर सकती क्योंकि अधिनियम की धारा 6 के अनुसार उसकी प्रास्थिति भी एक सहदायिक की है।

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B. Hindu Succession Act (30 of 1956) [As amended by Hindu Succession (Amendment) Act, 2005 w.e.f. 09.09.2005], Sections 6 & 23, General Clauses Act, 1897, Section 6 - Amendment Act 2005 does not contain the saving clause which would mean that omitted Section 23 of the Act of 1956 is not saved for pending cases - In view of the decision of S.C. in Kolhapur Canesugar Works Ltd [AIR 2000 SC 811], Section 6 of the General Clauses Act has no application - Appeal is a continuance of the suit, therefore, amended Section 6 would be applicable - Plaintiff is also entitled to sue for partition in respect of a dwelling house of a Joint Hindu Family being a coparcener. (Paras 10 & 11)

खा. हिन्दू उत्तराधिकार अधिनियम (1956 का 30) [हिन्दू उत्तराधिकार (संशोधन) अधिनियम, 2005 द्वारा यथासंशोधित 09.09.2005 से प्रभावी,] धाराएँ 6 व 23, साधारण खण्ड अधिनियम, 1897 धारा 6 - संशोधन अधिनियम 2005 में व्यावृत्ति खण्ड अन्तर्विष्ट नहीं है जिसका अर्थ यह होगा कि 1956 के अधिनियम की विलोपित धारा 23 लम्बित मामलों के लिए व्यावृत्ति नहीं की गई है - उच्चतम न्यायालय के कोल्हापुर केनसुगर वर्क्स लि. [AIR 2000 SC 811] में दिये गये निर्णय को दृष्टिगत रखते हुए साधारण खण्ड अधिनियम की धारा 6 लागू नहीं होती - अपील वाद की निरंतरता है इसलिए संशोधित धारा 6 लागू होगी - वादी भी एक सहदायिक होने से संयुक्त हिन्दू परिवार के निवास गृह के सम्बन्ध में विभाजन का वाद लाने की हकदार है।

Case referred :

AIR 2000 SC 811.

B.P. Sharma, for the appellant.

N.K. Patel with S.B. Patel, for the respondent No.1.

J U D G M E N T

A.K. SHRIVASTAVA, J. :-This first appeal under Section 96 of the Code of Civil Procedure, 1908 has been preferred by defendant No.1 assailing the judgment and decree dated 14th December, 2001 passed by learned 1st Additional District Judge, Raisen in Civil Suit No.17-A/2000 partly decreeing the suit of plaintiff/respondent No.1.

2. The facts leading to this first appeal are narrated in detail in para 2 to 10 of the judgment passed by this Court on 10.4.2007 when this first appeal was decided and allowed in part in terms of para 25 of the judgment. Thereafter, appellants who are the Lrs of defendant No.1 as well as plaintiff/respondent No.1 filed review applications which were registered as M.C.C. No.1393/2007 and M.C.C. No.1339/2007 respectively. Review application MCC No.1393/2007 which was filed by legal representatives of defendant No.1 was in regard to certain typographical errors and accordingly the said review application (MCC No.1393/2007) was allowed on 8.1.2008 and disposed of with a direction mentioned in para 4 of the said order which reads thus :

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"4. In this view of the matter, since there is a typographical error in the judgment and the position is not disputed by learned senior counsel for the respondent/ plaintiff, it is hereby held that in Khasra No.6, 7, 8, 21, 71/2 and 97 of village Rehma, LRS of defendant No.1 – Prabhudayal namely Smt. Saroj Shrivastava and others are having $\frac{3}{4}$ share and plaintiff – Smt. Ramsiya is having $\frac{1}{4}$ th share. MCC No.1393/2007 is, accordingly, allowed and disposed of with no order as to cost."

3. Review application (MCC No.1339/2007) which was filed by plaintiff Smt Ramsiya was also allowed since the amended provision of Section 6 of Hindu Succession Act, 1956 (in short the 'Act') vis-à-vis to section 23 of the Act was not taken into consideration and the said review application of plaintiff Ramsiya was also allowed and this first appeal was kept open for a limited purpose only. It would be relevant to quote para 8, 9 and 10 of the order dated 8.1.2008 passed in the review application which reads thus :

"8. This Court while deciding first appeal No.45/2002 filed on behalf of LRs of defendant No.1- Prabhudayal against appellant-Ramsiya, only considered Section 23 of the said Act and after testing the case on the anvil of Section 23 held that plaintiff cannot ask for partition in the dwelling houses as there is bar in Section 23 of the said Act. This Court did not take into consideration that what would be the impact of Section 6 of the said Act as amended by Amendment Act of 2005. I must fairly state that Shri Patel, learned senior counsel for plaintiff, addressed this Court while arguing the above said first appeal in respect to the provisions of Section 6 of the Amendment Act of 2005 and, therefore, in view of the Division Bench decision of this Court Jaswantpuri and others (supra), this review application filed on behalf of plaintiff- Ramsiya is hereby allowed and that part of the judgment of First Appeal No.45/2002 holding that plaintiff is not entitled to any share in the dwelling houses of village Rehma and Udaipura is hereby set aside and the above said first appeal, so far as it relates to the dispute in regard to dwelling houses of village Rehma and Talapura, is hereby directed to be reheard and the said first appeal be listed for hearing on that limited point only.

9. Accordingly, M.C.C. No.1339/2007 is also hereby allowed with no other as to costs.

10. Registry is hereby directed to list F.A. No.45/2002 for rehearing on a limited point only as indicated hereinabove."

4. In this manner for a limited purpose only that what is the impact of Section 6 of the Act as amended by Hindu Succession (Amendment) Act, 2005 (for

PRABHUDAYAL (DEAD) THROUGH LRS. Vs SMT. RAMSIYA

brevity 'the Amended Act of 2005'), on the dwelling houses of Udaipura and Rehma is to be taken into consideration. The appeal on all other points has already been decided on 8.1.2008.

5. The contention of Shri N.K.Patel, learned senior counsel is that Section 23 of the Act which deals with special provisions in respect to dwelling house has been omitted from the said Act by Amended Act of 2005 and Section 6 of the Act has been amended entitling the daughter of a coparcener shall by birth becoming a coparcener in her own right in the same manner as the son and would have the same rights in the coparcenary property as she would have had if she had been a son and shall be subject to the same liabilities in respect of the said coparcenary property as that of a son. The omission of Section 23 and amended Section 6 of the Act came into force with effect from 9.9.2005 vis. prior to the date of the passing of the judgment earlier on 10.4.2007 meaning thereby when the appeal was heard and decided the amended provision already came into force.

6. The contention of Shri Patel, learned senior counsel is that since the appeal is the continuation of a suit, therefore, plaintiff Ramsiya being the coparcener would also become a coparcener in view of amended Section 6 of the Act and, therefore, so far as the dwelling house of the suit property is concerned, she is also having 1/4th share.

7. The contention of Shri B.P.Sharma, learned counsel appearing for appellants who are Lrs of defendant No.1 is that the amendment is always prospective unless and until it is made retrospective in operation expressly or by necessary implication and, therefore, plaintiff cannot ask for a partition in respect of a dwelling house occupied by joint family until the male heirs choose to divide their respective shares therein.

8. The question which is required to be adjudged is whether plaintiff being a female heir can ask for partition of the dwelling house of a joint family. No doubt, before coming into force of Amended Act of 2005 certainly plaintiff being female heir of Hindu coparcener was not entitled to ask for partition of the dwelling house occupied by joint Hindu family until the male heirs choose to divide their respective shares therein but Section 23 of the Act has been omitted by Section 4 of the Amendment Act of 2005 which would mean that from the date of enforcement of amended provision to the Act, the female heir of a coparcener can ask for partition of the dwelling house because according to Section 6 of the Act, her status is also that of a coparcener. The Supreme Court in *Kolhapur Canesugar Works Ltd and another vs. Union of India and others*, AIR 2000 SC 811 in para 35 and 38 while considering the scope of omission of a provision in a particular statute vis-à-vis Section 6 of the General Clauses Act has laid down the law of land that it is not correct to say that in considering the question of maintainability of pending proceedings initiated under a particular provision of

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the law after the said provision was omitted the Court is not to look for a provision in the newly added statute for continuing the pending proceedings. It is also not correct to say that the test is whether there is any provision in the said statute to the effect that pending proceedings will lapse on omission of the particular provision. According to the Apex Court in such a case the Court is to look to the amended provision in the statute which has been newly introduced after the omission of the previous provisions in order to determine whether a pending proceeding will continue or lapse. If, there is a provision in the amended statute that pending proceedings shall continue and be disposed of in accordance to the old provision as if the said provision has not been deleted or omitted then such a proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there is a pari-material provision in the statute under which the newly amended provision has been framed in that case also the pending proceeding will not be affected by omission of that particular provision or Section. However, in absence of any such provision in the statute the pending proceedings would lapse on account of the omission of that particular provision or Section.

9. In para 38 of the said decision, the Supreme Court further held that the position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. The only exception is engrafted by the provisions of Section 6(1) of the General Clauses Act. If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable.

10. On going through the amended Section 6 as well as omitted Section 23 of the Act, there is no provision that pending proceedings shall continue under the old provision which has been omitted. On going through the Amendment Act of 2005, it is revealed that it does not contain the saving clause which would mean that omitted Section 23 of the Act is not saved for pending cases. Since there is no saving provision in favour of the pending proceedings, in view of the decision of Supreme Court *Kolhapur Canesugar Works Ltd* (supra), Section 6 of the General Clauses Act has no application and therefore I am of the view that plaintiff / respondent No.1 Smt Ramsiya is having 1/4th share in the dwelling house of Udaipura and village Rehma and is entitled to get those houses partitioned up to the extent of her share.

11. The present appeal has arisen from a partition suit filed by plaintiff Ramsiya who is respondent No.1. The suit was partly decreed on 14.12.2001 resulting into filing of this appeal. During the pendency of this appeal, Section 23 has been

SHAKUNTALADEVI Vs. SHIV SAH, BHUMI VIKAS BANK MARYADIT, SHIVPURI

omitted and Section 6 of the Act has been amended by Amendment Act of 2005. Since the appeal is continuation of the suit, therefore, I am of the view that even in pending proceedings, the amended Section 6 would be applicable which would mean that present plaintiff is also entitled to sue for partition in respect of a dwelling house of a joint Hindu family being a coparcener.

12. Thus, this appeal so far as it relates to the dwelling houses of Udaipura and Rehma is disposed of by holding that plaintiff/ respondent No.1 is also having ¼ share. Appellants who are the heirs of defendant No.1 Prabhudayal are entitled to 3/4th share in those house. The cross objections of plaintiff is allowed to that extent. The other points have already been decided in judgment dated 10.4.2007. The decree of the trial Court is accordingly modified.

13. Looking to the facts and circumstances of the case, the parties are directed to bear their own costs.

Order accordingly.

I.L.R. [2009] M. P., 1356

APPELLATE CIVIL

Before Mr. Justice P.K. Jaiswal

25 November, 2008*

SHAKUNTALADEVI & ors.

... Appellants

Vs.

SHIVPURI SAHKARI BHUMI VIKAS BANK

MARYADIT, SHIVPURI & ors.

... Respondents

Transfer of Property Act (4 of 1882), Section 52 - Doctrine of lis pendence - Decree for specific performance of contract passed against defendant No.4 in the year 1961 and decree was executed in 1967 - Defendant No.4 took loan in the year 1966 and mortgaged the land - Land auctioned in recovery proceedings and was purchased by defendant No.10 - Held - No right or title is acquired by defendant No.10 - Doctrine of lis pendence would apply - Section 52 places complete embargo on transfer of immovable property, right to which is directly and specifically in question in a pending litigation - Appeal allowed.

(Para 21)

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 52 - लम्बित वाद का सिद्धांत - प्रतिवादी क्रमांक 4 के विरुद्ध वर्ष 1961 में संविदा के विनिर्दिष्ट पालन की डिक्री पारित की गई और डिक्री 1967 में निष्पादित की गई - प्रतिवादी क्रमांक 4 ने वर्ष 1966 में ऋण लिया और भूमि बंधक की - वसूली कार्यवाहियों में भूमि की नीलामी की गई और प्रतिवादी क्रमांक 10 द्वारा क्रय की गई - अभिनिर्धारित - प्रतिवादी क्रमांक 10 द्वारा कोई अधिकार और स्वत्व अर्जित नहीं - लम्बित वाद का सिद्धांत लागू होगा - धारा 52 स्थावर सम्पत्ति के अंतरण पर पूर्ण रोक लगाती है, जिसका अधिकार प्रत्यक्षतः और विनिर्दिष्टतः किसी लम्बित वाद में प्रश्नगत हो - अपील मंजूर।

Cases referred :

AIR 1970 SC 1717, AIR 1967 SC 1440, (2004) 2 SCC 601, (2005) 11 SCC 403, 2008(4) MPLJ 141, (1989) 2 SCC 630, (1996) 7 SCC 101, 1996 RN 305, 1990(II) MPWN 69, 1978(II) MPWN 20, AIR 1990 MP 147, (2003) 8 SCC 745.

R.D. Jain with S.K. Jain; for the appellants.

None, for the respondent Nos.3 to 9 & 11:

Shishir Saxena, for the respondent No.10.

D.R. Sihare, G.A., for the respondent No.12.

J U D G M E N T

P. K. JAISWAL, J.—This second appeal is filed by the plaintiffs/appellants against the judgment and decree dated 1.9.1999 passed by the First Additional Judge to the Court of District Judge, Shivpuri in Civil Appeal No.15-A/97, whereby learned Additional District Judge affirmed the judgment and decree dated 2.2.1996 passed by Civil Judge, Class II, Shivpuri in Civil Suit No.1-A/81, by which trial Court dismissed the suit of the appellants.

2. On 20.1.2004 this appeal was admitted for hearing on the following substantial question of law:

(1) Whether Nathua had right to mortgage the suit property in favour of respondent no.1, Bank, when there was a decree for specific performance against him ? and

(2) Whether the respondent no.1 has acquired title to the suit property as he has purchased the suit property in the auction ?

3. On 26.6.2007, this Court framed following additional substantial questions of law:

(i) Whether attestation of the document by a witness without proof regarding the knowledge about the contents will operate as estoppel and will debar the witness from challenging the document ?

(ii) Whether, the conclusion drawn on the basis of the document Ex.D/3 and D/4 was illegal as these documents were never proved and simply marking the documents was not sufficient to prove the same ?

(iii) Whether, the Court has acted illegally in drawing the presumption about the documents which were copies of the original and section 90 of Evidence Act will not apply to these documents?

4. The facts briefly stated are that the Nathua defendant no.4 in the suit

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was holder of Survey No.153 (Old Survey No.151/1, 2,3,4,5,10, 11,12,14,19 and 158/2,4,5 total area 11 bigha) total area 11 Bigha with a house, a well and trees, situated in Village Jhingura, Pargana of District Shivpuri. On 13.10.1958 he had entered into an agreement to sell the said land in favour of Jhinguria-defendant no.6 for a sum of Rs.2500/-. Nathua in spite of agreement to sell dated 13.10.1958 failed to execute the sale deed in favour of the defendant no.6- Jhinguria and therefore, Jhinguria filed a suit for specific performance of contract vide Civil Suit No.85/60 against defendant no.4 Nathua. After service of notice defendant no.4 Nathua failed to appear before the trial Court and therefore, he was proceeded ex parte and ex parte judgment and decree was passed against him on 31.8.1960. Nathua on coming to know about the ex parte judgment and decree filed an application for setting aside the ex parte judgment and decree dated 31.8.1960 vide M.J.C.No.9/60. The said application was allowed and judgment and decree dated 31.8.1960 passed in Civil Suit No.85/60 was set aside. After setting aside of ex parte judgment the said civil suit was registered vide Civil Suit No.169/60. The defendant no.4 Nathua was again absent before the trial Court, the trial Court again proceeded ex parte against him and passed an ex parte judgment and decree on 31.7.1961 in Civil Suit No.169/60 and decreed the suit of the defendant no.6 Jhinguria, for specific performance of contract. On 17.12.1962 the defendant no.6-Jhinguria put the decree into execution. On 17.8.1967 (Ex.P.2) the Executing Court issued a sale certificate Under Order 21 Rule 34 of C.P.C., wherein on behalf of Nathua the Court executed a sale deed in favour of defendant no.6 Jhinguria. On the basis of the sale deed the defendant no.6 became owner and bhumiswami of the land in dispute.

5. The defendant no.6 thereafter sold the property to the plaintiff Prem Narayan Sharma (since deceased) by registered sale deed dated 17.5.1968 for a consideration of Rs.9,000/- (Ex.P.3) and delivered the possession. He on the basis of sale deed dated 17.5.1968 applied for mutation of his name before the Tehsildar, Shivpuri. The Tehsildar vide order dated 20.12.1968 allowed his application for mutation in case No.348/67-68 and name of Prem Narayan was mutated in the Khasra Panchshala on 13.1.1969 (Ex.P.6).

6. The defendant no.4 Nathua, who was holder of the suit land with a house, a well and trees obtained a loan of Rs.1900/- on 16.2.1966 from the Sahkari Bhumi Vikas Bank Ltd. Shivpuri and mortgaged the said survey number in favour of the respondent no.1-Bank. The loan amount was not paid by the defendant no.4. The Sahkari Bhumi Vikas Bank Ltd. Shivpuri started proceedings for recovering the loan amount. The Sale Officer appointed under section 28 of the Madhya Pradesh Sahkari Bhumi Vikas Adhiniyam, 1966 took action for auctioning the land for realising the mortgage debt.

7. Prem Narayan Sharma, who claims to be purchaser of the aforesaid land from one Jhinguria objected to the sale. His objection was that Nathua had entered into an agreement to sell the land on 13th October, 1958 for a sum of Rs.2500/- in favour of Jhinguria. Jhinguria obtained a decree for specific performance on 31st July 1961 and a sale deed was executed in pursuance of the said decree in favour of Jhinguria by the Court on 17th August, 1967. He purchased the land from Jhinguria on 17th May, 1978. His objection was dismissed by the Sale Officer on 13th June, 1973. Thereafter, auction of the land was held on 28.6.1973. The defendant no.5 Rameshwardayal is the auction purchaser who purchased the suit property in auction. Prem Narayan Sharma, challenged the order dated 13th June, 1973 by which his objection was dismissed, by filing Misc. Petition No.95/73 and prayed for quashing of the said order dated 13.6.1973 passed by the Sale Officer. On 12.7.1973 (Ex.P.12) the Division Bench of this Court admitted the petition and granted stay in favour of Prem Narayan Sharma. Later-on after hearing the learned counsel for the parties the Division Bench of this Court vide order dated 25.11.1978 (Ex.P.13) dismissed the Misc. Petition No.95/1973. Para 2 of order dated 25.11.1978 is relevant which reads as under:

“2. We have gone through the provisions of Chapter V of the Adhiniyam with the assistance of the learned counsel appearing for the parties. The learned counsel for the petitioner has failed to point out any provision in the Adhiniyam or the rules made thereunder under which the objection of the petitioner that the land could not be sold by the Sale Officer was maintainable. It appears to us that the petitioner's objection can be considered by the Civil Court when the purchaser applies under section 24 of the Adhiniyam for delivery of possession. We may mention that as provided in sub-section (3) of section 24, the provisions of Rules 97 to 103 of Order 21 of the Code of Civil Procedure have been made applicable to the proceedings under section 24 of the Adhiniyam. The other alternative under which the petitioner may get his right decided is by filing independently a civil suit. In the absence of any provision in the Adhiniyam or the rules made thereunder under which the petitioner could be object to the Sale Officer for determination of his right and title to the land, it cannot be said that the Sale Officer committed any error of jurisdiction or illegality in exercise of jurisdiction in dismissing the objection.”

8. The Division Bench while dismissing the Misc. Petition observed that the objection of the Prem Narayan can be considered by the Civil Court when the purchaser applies under section 24 of the Adhiniyam for delivery of possession.

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It is also observed that other alternative under which Prem Narayan Sharma may get his right decided is by filing independently a civil suit.

9. The original plaintiff Prem Narayan (since deceased) filed a suit for declaration, injunction, cancellation of auction sale in favour of defendant no.5 Rameshwar Dayal and for refund of Rs.5,000/- against the defendant no.5 and other defendants.

10. The suit property undisputedly belonged to Nathua-defendant no.4. According to the plaintiff on 13.10.1958 Nathua had entered into an agreement to sale the suit property to one Jhinguria-defendant no.6. Since Nathua failed to execute the sale deed in accordance with the agreement to sell, Jhinguria had filed a civil suit for specific performance of the contract against Nathua, which was decreed on 31.7.1961 and a sale deed was executed on 17.8.1967 by the Court on behalf of Nathua and possession was also delivered to Jhinguriya on 11.4.1968. Thereafter the name of Jhinguriya was also mutated in the revenue papers in pursuance of the order made in this regard in Revenue Case No.347/67-68/A/6 by the Tahsildar. The suit property was then sold on 17.5.1968 by Jhinguriya to plaintiff. The name of the plaintiff was also mutated in the revenue papers on 13.1.1969 vide order passed by the Tahsildar in Revenue Case No.348/67-68/A-6. The defendant no.4-Nathua, after a decree for specific performance of the contract had no right to mortgage the suit property with the respondent no.1-defendant no.1 and to take loan from the bank. The plaintiff is not bound by a sale of the suit property, after decree of specific performance of the contract of sale, the transfer in favour of respondent no.10-auction purchaser is hit by the doctrine of lis pendens and the transferee is bound by the judgment and decree dated 31.7.1961.

11. It appears that after the decision of M.P.No.95/1973 and on 6.12.1978, the plaintiff deposited a sum of Rs.5,000/- in accordance with the provisions of Section 20 of the M.P. Sahakari Bhumi Vikas Bank Adhiniyam (for short "the Adhiniyam") and made a prayer for setting aside the sale. This prayer was rejected on 11.11.1979 and the sale in favour of the respondent no.10 was confirmed on 7.3.1979 by the Sale Officer. The suit was filed by the plaintiff on 5.1.1981.

12. The respondent no.10 and other contesting defendants in the suit filed their written statement denying the plaintiff allegations. The respondent no.10 inter alia pleaded that the suit of the plaintiff was barred by time and that the Court has no jurisdiction to entertain the suit and to try it. On the basis of the pleadings of the parties, the trial Court framed issues on the question of limitation and jurisdiction as preliminary issues and decided the same in favour of the plaintiff by order dated 13.1.1982.

13. The respondent no.10 challenged the said order by filing Civil Revision No.970/1982. The said revision petition of the respondent no.10 was dismissed

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on 26.7.1985 and this Court has held that the civil court had jurisdiction to entertain the suit. This Court observed the following in para 9 of its order dated 26.7.1985 which reads as under:

“As has been earlier stated the suit of the non-applicant no.1 is based on his prior title over the suit property and the sale is not impeached on the ground that no one had arisen to authorise the sale or that due notice was not given on that the power was otherwise improperly or irregularly exercised. Consequently it cannot be said that the Civil Court had no jurisdiction to entertain the suit. I am further strengthened in my view from the observations made by this Court in M.P.No.95/1973 decided on 25.11.1978.”

14. The respondent no.10 also filed counter claim for possession and mesne profit @ Rs.3,000/- per year.

15. During pendency of the suit original plaintiff Prem Narayan died and his legal representatives were brought on record as appellants no.1 to 7.

16. On the basis of the pleadings of the parties the trial Court dismissed the suit of the appellants plaintiffs and decreed the counter claim on the ground that on 6.3.1962 (Ex.D.3) and 10.5.1962 (Ex.D.4) sale deeds, executed by Nathua in favour of Sukha and again by Sukha in favour of Nathua and in both the documents Jhinguriya was attesting witness and therefore, he had knowledge about the execution of sale deed by Nathua to Sukha and therefore provisions of Section 52 of the Transfer of Property Act will not be applicable. Both the sale deeds were executed with the consent of the plaintiff Jhinguriya.

17. The appellants challenged the said judgment and decree by which suit was dismissed and counter claim of the respondent no.10 was allowed by filing First Appeal before the Lower Appellate Court. During pendency of the appeal defendant no.4 Nathua died and his legal representatives were brought on record as respondent no.4 to 9. The Lower Appellate Court after appreciating the evidence on record dismissed the appeal and also dismissed the counter claim of respondent no.10 so far as it relates to the mesne profit is concerned.

18. Shri R.D. Jain, learned Senior counsel for the appellant submits that both the Courts below failed to consider the provisions of section 52 of the Transfer of Property Act (for short “the T.P.Act”). He submitted that the agreement to sell was executed by Nathua in favour of Jhinguriya on 13.10.1958 and thereafter suit for specific performance was decreed on 31.7.1961 against Nathua and thereafter Nathua mortgaged the suit land in favour of the respondent no.1 on 16.2.1966 and therefore, the said mortgage is hit by the provisions of section 52 of the T.P.Act. He also submitted that the Courts below had failed to consider that decree dated 28.7.1961 became final in favour of the

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Jhinguriya. He further submitted that mortgage by Nathua and sale by respondents no.1 to 3 Bank was during the pendency of execution proceedings in the civil suit and failed to consider that until the suit or proceedings have been disposed off by final decree or order of complete satisfaction or discharge of such decree for order. Thus, the he complete discharge of the proceedings or satisfaction of the decree was on 17.8.1967 when the sale was executed by the Court by virtue of decree dated 31.7.1961 in faovur of Jhinguriya and therefore any proceedings in between are hit by the provisions of section 52 of the T.P.Act. He further submitted that the findings of the Courts below that in between Nathua sold the property by registered sale deed in favour of one Sukha on 6.3.1962 and in the said sale deed Jhinguria was one of the attesting witness and this sale deed was executed with the consent of the Jhinguria is totally without any pleading or proved nor the said sale deed was in respect of discharge and satisfaction of the decree passed by the Court of Competent Jurisdiction on 31.6.1961. He lastly submitted that proceedings of sale initiated by respondents no.1 to 3 were also during the pendency of execution proceedings and according to the provisions of Section 52 of the T.P.Act any suit or proceedings in which the right of immovable property is directly and subsequently in question the property cannot be transferred or otherwise dealt with by any party of the suit or proceedings so as to effect the right of any other party thereof under the decree or order.

19. On the other hand learned counsel for the respondent no.10 submitted that the respondent no.10 has acquired title over the suit property as he purchased the suit property in auction sale on 28.6.1973 which was confirmed on 7.3.1979. He submitted that after passing of a decree for specific performance on 31.7.1961 and before execution of sale deed dated 17.8.1967 the suit property was mortgage by Nathua on 16.2.1966, but he failed to pay the loan amount and therefore, the suit property was auctioned by the Bank and sale made in favour of respondent no.1 was confirmed, the writ petition filed by the appellants was dismissed by this Court on 25.11.1978 (Ex.P.13) the appellants get no right, title or interest as Jhinguria had no right to transfer the suit property vide registered sale deed dated 17.5.1968 (Ex.P.3) in favour of the plaintiff. He further submitted that a decree for specific performance only declares the right of decree holder to have transfer of the property covered by the decree executed in his favour. The decree by itself does not transfer the title. It is the execution of the sale deed that transfers the property. Nathua on 16.2.1966 took a loan of Rs.1900/- and secured the loan by mortgaging the suit property and on that date no title or interest in the immovable property was transferred to the plaintiff and on 17.8.1967 when sale deed was executed in favour of Jhinguriya the Nathua had only right of equity of redemption. The said right of equity of redemption was transferred to Jhinguria and Jhinguria got nothing, but right to

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redemption of the mortgage loan, therefore, no title is vested in favour of the plaintiff. The Courts below have not committed any legal error in dismissing the suit of the plaintiff and decreeing the counter claim of the respondent no.10.

20. I have heard the arguments of the learned counsel for the parties and perused the record of the case. From the pleadings of the parties it is not in dispute that Nathua executed an agreement on 13.10.1958 in favour of Jhinguria in respect of the suit land. The suit for specific performance of contract filed by Jhinguria was decreed on 13.7.1961. In execution proceedings sale deed in respect of the suit property was executed in favour of Jhinguria, on 17.8.1967 (Ex.P.2). On 17.5.1968 Jhinguria transferred the suit property to the original plaintiff Prem Narayan Sharma vide (Ex.P.3). The name of Prem Narayan Sharma was mutated by the Tahsildar vide Ex.P.5. After death of Prem Narayan Sharma property was inherited by his wife and her name was mutated in the revenue record. On 16.2.1966 Nathua obtained loan from the respondent no.1 to 3 Bank and mortgage the suit land in favour of the Bank. No loan amount was paid and therefore, Bank initiated proceedings for auctioning the property. The sale Officer was appointed. The respondent no.10 in auction sale purchased the suit property on 28.6.1973. He being the highest bidder, his bid was accepted and the sale made in his favour was confirmed on 7.3.1979 by the Sale Officer. Thereafter on 5.1.1981 the civil suit was filed by the plaintiff. The objection of the respondents that the suit was barred by time and that the Court had no jurisdiction to entertain the suit and to try it was dismissed by the trial Court by deciding preliminary issues on 13.1.1982. The said dismissal order was confirmed by this Court in Civil Revision No.970/1982 on 26.7.1985.

21. The suit property was acquired pendente lite by the respondent no.10 after passing a decree in favour of Jhinguriya, the defendant no.10 acquirer is bound by the decree. Nathua had no right to mortgage the suit property in favour of the respondent Bank after 31.7.1961. Section 52 places a complete embargo on the transfer of immovable property, right to which is directly and specifically in question in a pending litigation. Therefore, the attachment is ineffective against the doctrine. This question was considered by the Apex Court in the case of Kedarnath Vs. Sheonarain, AIR 1970 SC 1717, wherein it has been held that if the property was acquired pendente lite, the acquirer is bound by the decree ultimately obtained in the proceedings pending at the time of acquisition. This result is not avoided by reason of the earlier attachment. Attachment of property is only effective in preventing alienation but it is not intended to create any title to the property. On the other hand, Section 52 places a complete embargo on the transfer of immovable property right to which is directly and specifically in question in a pending litigation. Therefore the attachment was ineffective against the doctrine.

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22. In the case of *Samarendra Nath Sinha Vs. Krishna Kumar Nag*, AIR 1967 SC 1440 it was observed by the Apex Court as follows:

"... The purchaser pendente lite under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him. This principle is well illustrated in *Radhamadhub Holder v. Monohar*, (1887) 15 Ind App 97 where the facts were almost similar to those in the instant case. It is true that Section 52, strictly speaking, does not apply to involuntary alienations such as court sales but it is well established that the principle of *lis pendens* applies to such alienations. (See *Nilkant v. Suresh Chandra*, (1885) 12 Ind App 171 and (1897) 24 Ind App 170 (PC))." This ground also has no validity.

23. In view of the law laid down by the Apex Court in the case of *Samarendra Nath Sinha* (supra) the contention of the learned counsel for the respondents that the sale was by auction through sale officer and the doctrine of *lis pendence* will not apply to such sale is misconceived and the same cannot be accepted. In the present facts and circumstances of the case the suit property purchased by Jhinguriya and thereafter by Prem Narayan Sharma was protected by doctrine of *lis pendence*.

24. The Apex Court in the case of *Raj Kumar Vs. Sardari Lal and others*, (2004) 2 SCC 601 has held that the decree passed against the defendant is available for execution against the transferee or assignee of the defendant judgment-debtor and it does not make any difference whether such transfer or assignment has taken place after the passing of the decree or before the passing of the decree without notice or leave of the court.

25. In the case of *Amit Kumar Shaw and another Vs. Farida Khatoon and another*, (2005) 11 SCC 403 it has been held that transferee pendente lite is bound by decree passed in suit. Para 15 is relevant which reads as under:

"15. Section 52 of the Transfer of Property Act is an expression of the principle "pending a litigation nothing new should be introduced". It provides that pendente lite, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his appointment. This Section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their opponent during the pendency of the suit. In order to constitute a *lis pendens*, the following elements must be present:

1. There must be a suit or proceeding pending in a Court of competent jurisdiction.

2. The suit or proceeding must not be collusive.

3. The litigation must be one in which right to immovable property is directly and specifically in question.

4. There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.

5. Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order."

26. Recently the Apex Court in the case of *Usha Sinha Vs. Dina Ram and others*, 2008 (4) M.P.L.J. 141 has held that purchaser of the suit property during the pendency of litigation has no right to resist or obstruct execution of decree passed by a competent Court. The doctrine of "lis pendens" prohibits a party from dealing with the property which is the subject matter of suit. "Lis pendens" itself is treated as constructive notice to a purchaser that he is bound by a decree to be entered in the pending suit. Para 24 is relevant which reads as under:

"24. Rule 29 of Order XXI of the Code deals with cases wherein a suit has been instituted by the judgment-debtor against the decree-holder and has no relevance to cases of lis pendens wherein transfer of property has been effected by the judgment debtor to a third party during the pendency of proceedings. The High Court, in our opinion, rightly held that the appellant could not be said to be a "stranger" to the suit inasmuch as she was claiming right, title and interest through defendant Nos.4 and 5 against whom the suit was pending. She must, therefore, be presumed to be aware of the litigation which was before a competent Court in the form of Title Suit No.140 of 1999 instituted by a present respondent against the predecessor of the appellant. As held in *Bellamy (supra)*, the fact that the purchaser of the property during the pendency of the proceedings had no knowledge about the suit, appeal or other proceeding is wholly immaterial and he/she cannot resist execution of decree on that ground. As observed in *Silverline Forum (supra)*, a limited inquiry in such cases is whether the transferee is claiming his right through the judgment-debtor. In our judgment, the High Court was also right in observing that if the appellant succeeds in the suit and decree is passed in her favour, she can take appropriate proceedings in accordance with law and apply for restitution. That, however, does not preclude the decree holder from executing the decree obtained by him. Since the appellant is a purchaser pendente lite and she

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has no right to offer resistance or cause obstruction and as her rights have not been crystallized in a decree, Rule 102 of Order 21 of the Code comes into operation. Hence, she cannot resist execution during the pendency of the suit instituted by her. The order passed by the High Court, therefore, cannot be said to be illegal, unlawful or otherwise contrary to law.

27. In the case of *Smt. Chandrakantaben Vs. Vadilal Bapalal Modi*, (1989) 2 SCC 630 it has been held by the Apex Court that there is no presumption that the attesting witnesses of a document must be assumed to be aware of its contents. In the case of *Badri Narayan and others Vs. Rajabagyathammal and others*, (1996) 7 SCC 101 the Apex Court has held that the predecessor-in-interest of the respondents was an illiterate person. He put his thumb impression as an attester on Ex. A-2. In the circumstances, the learned Single Judge held that unless it is established that the recitals in the documents were read out and explained to the said person, he cannot be deemed to have assented to them. In case of attesting by a person having interest in the subject matter of the document of transfer must be deemed to have affirmed the contents of the documents prima facie. In other words the rule stated is not a presumption of law nor an irrebuttable presumption. It is more in the nature of presumption of fact, whose efficacy and evidentiary value depends upon the facts of the given case.

28. The decision cited by Shri Shishir Saxena, learned counsel for the respondent no.10 in the case of *Rameshwar Dayal Vs. Sahkari Bhumi Vikas Bank and others*, 1996 RN 205, *P.K. Unni Vs. Nirmala Industries and others*, 1990 (II) MPWN 69, *Trilokchand Jain Vs. Heeralal and others*, 1978 (II) MPWN 20 and *Smt. Geetabai and others Vs. Babulal and others*, AIR 1990 MP 147 are not applicable in the present facts and circumstances of the case.

29. For the above mentioned reasons and in view of the law laid down by the Apex Court in the case of *Kedarnath* (supra) I am of the considered view that the purchase by Jhinguria was protected by the doctrine of *lis pendens*. Nathua had no right to mortgage the suit property in favour of the respondent no.1 Bank when there was a decree for specific performance against him and principle of *lis pendens* will be applicable to the subsequent purchaser i.e. respondent no.10, hence the question of law no.1 is answered accordingly. The auction proceedings and thereupon the sale certificate issued in favour of respondent no.10 is void and is not binding on the plaintiff because those proceedings were after the decree dated 31.7.1961, passed by the Civil Court in Civil Suit No.169/60, hence the question of law no.3 is answered accordingly. The findings of the Courts below that the sale deed Ex.D.3 and Ex.D.4 were executed with the consent of Jhinguriya, without there being any evidence to this effect is perverse and contrary to the principles laid down by the Apex Court in the case of *Smt. Chandrakantaben*

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(supra), *Badri Narayan* (supra) and *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and others*, (2003) 8 SCC 745. The conclusion drawn on the basis of Ex.D.3 and Ex.D.4 was illegal as these documents were never proved and simply marking the documents was not sufficient to prove the same. The Courts below have acted illegally in drawing the presumption about the knowledge of the execution of Ex.D.3 and Ex.D.4 by the Jhinguriya and the conditions of Ex.D.3 and Ex.D.4 will not operate as a estoppel and will not debar the appellants in challenging the documents, hence the questions no.3, 4 and 5 are answered accordingly.

30. For the above mentioned reasons, I am of the considered view that the Courts below committed legal error in dismissing the suit of the appellants. The impugned judgment and decree passed by the Court below is set aside. The suit filed by the plaintiff is accordingly decreed by answering substantial question of law in favour of the plaintiff and against the respondents.

31. In the result, the appeal filed by the appellants is allowed with costs throughout. Counsel fee Rs.3000/-.

Appeal allowed.

I.L.R. [2009] M. P., 1367

APPELLATE CIVIL

Before Mr. Justice Shantanu Kemkar

6 January, 2009*

BABULAL GUPTA (DR.)

... Appellant

Vs.

ANOOP PADLIYA

... Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(e) & (f) - Suit for eviction and arrears of rent - Plaintiff alleged that suit house was let out for residential purpose but tenant started using it for non-residential purpose - Suit house required for plaintiff's own residential and non-residential need - Defendant pleaded that house was let out for residential and non-residential purposes - Decree passed on the ground of bonafide requirement for residential and non-residential purposes - Appeal - Held - Through evidence, it is established that house was let out and required for both purposes - Even if the plaintiff's case was that the suit house was rented for residential purpose, decree could have been passed as plaintiff has been successful in proving his need for residential purpose also - Plaintiff became entitled to seek eviction from the entire house - Judgment and decree of trial court upheld - Appeal dismissed. (Paras 12 & 13)

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क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 12(1)(ई) व (एफ) — बेदखली और बकाया भाड़े के लिए वाद — वादी ने अभिकथित किया कि वादग्रस्त गृह नैवासिक प्रयोजन के लिए किराये पर दिया गया था किन्तु किरायेदार ने इसका प्रयोग अनिवासिक प्रयोजन के लिए करना प्रारम्भ कर दिया — वादग्रस्त गृह वादी के स्वयं की नैवासिक एवं अनिवासिक आवश्यकता के लिए अपेक्षित — प्रतिवादी ने अभिवचन किया कि गृह नैवासिक एवं अनिवासिक प्रयोजनों के लिए किराये पर दिया गया था — नैवासिक एवं अनिवासिक प्रयोजनों के लिए वास्तविक आवश्यकता के आधार पर डिक्री पारित — अपील — अभिनिर्धारित — साक्ष्य से यह साबित हुआ कि गृह दोनों प्रयोजनों के लिए किराये पर दिया गया था और दोनों ही प्रयोजनों के लिए अपेक्षित है — यद्यपि वादी का मामला यह था कि वादग्रस्त गृह नैवासिक प्रयोजन के लिए किराये पर दिया गया था तथापि डिक्री पारित की जा सकती थी क्योंकि वादी नैवासिक प्रयोजन के लिए भी अपनी आवश्यकता साबित करने में सफल रहा — वादी सम्पूर्ण गृह से बेदखली की माँग करने का हकदार हो गया — विचारण न्यायालय के निर्णय व डिक्री की पुष्टि की गई — अपील खारिज।

B. Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(e) & (f) - Suit house required by plaintiff for his own need - Plaintiff residing with his parents but due to dispute between his wife and mother require separate house - Held - Mother examined as witness and categorically stated about the dispute - No need for examination of wife - Merely because plaintiff is residing with his parents during pendency of suit, bonafide need for separate residence will not extinguish - Appeal dismissed. (Para 14)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 12(1)(ई) व (एफ) — वादी द्वारा वादग्रस्त गृह स्वयं की आवश्यकता के लिए अपेक्षित — वादी अपने माता-पिता के साथ निवासरत, किन्तु उसकी पत्नी व माता के बीच विवाद के कारण पृथक गृह अपेक्षित — अभिनिर्धारित — माता की साक्षी के रूप में परीक्षा की गई और विवाद के बारे में सुस्पष्ट रूप से कथन किया — पत्नी की परीक्षा की कोई आवश्यकता नहीं — केवल इसलिए कि वादी वाद के लम्बित रहने के दौरान अपने माता-पिता के साथ निवास कर रहा है, पृथक निवास की वास्तविक आवश्यकता समाप्त नहीं होगी — अपील खारिज।

Cases referred :

1991(II) MPWN 18, (2004) 8 SCC 490, (2005) 8 SCC 252, 1982 MPRCJ 152; 1982 JLJ 319, 2005(4) MPLJ 386.

M.G. Upadhyaya & S.S. Garg, for the appellant.

S.R. Saraf, for the respondent.

J U D G M E N T

SHANTANU KEMKAR, J. :- This appeal under Section 96 of the Civil Procedure Code has been filed by the appellant-tenant against the judgment and decree dated 17.02.2004 passed by the VI Additional District Judge, Indore in Civil Suit No.139-A/2001, by which a decree for eviction against him has been passed on the grounds under Section 12(1) (e) and (f) of the Madhya Pradesh Accommodation Control Act, 1961 (for short, the Act).

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2. Briefly stated, the respondent-landlord filed a suit on 27.09.2001 for eviction and for recovery of rent against the appellant-tenant on the grounds under Section 12 (1) (a), (c), (e) and (f) of the Act. In his plaint, he averred that House No.96 HIG junior (GH) situated at Scheme No.54, Indore owned and possessed by him was let out by him to the appellant-defendant in the month of November, 1986, for a monthly rent of Rs.1,300/- for residential purpose. He alleged that since last few years the appellant-tenant changed the use of the premises let out to him and instead of using it for residential purpose, had started using it as Nursing Home in the name of Gayatri Nursing Home. He alleged that the appellant-tenant is irregular in paying rent. A Civil Suit No.113-A/1987 was filed against him for recovery of rent and on his assurance that he will pay the rent regularly, the suit was compromised. Thereafter, again as he failed to pay the rent, a Civil Suit No.593-A/1995 was filed, which again was compromised on the basis of assurance given by him to pay the rent regularly. He also alleged that this repeated failure of payment of rent by the appellant and dishonour of cheque given towards rent caused nuisance to him. He also stated that presently he is residing with his parents in his father's house situated at 101, Indralok Colony, Indore. He and his family, consisting of his wife and two sons, now wants to reside in his own house in place of his father's house for family circumstances and for this purpose, he bona fide needs the suit house and for such need, he has no other house of his own in the city of Indore. He further stated that in one garage like room of the suit house, he will start business of General and Provision store and for this non-residential need, he has no accommodation of his own in the city of Indore. He averred that presently he is doing business of auto parts in the premises let out to him by Vaishnav Trust. He also averred that few days back the appellant-tenant started raising unauthorized construction on the terrace of the suit house which he did not stop even after repeated requests.

3. The appellant-tenant denied the plaint averments and stated that the suit house was let out to him for residential as well as non-residential purposes. The allegation levelled by the plaintiff that he is irregular in making payment of rent was also denied by the appellant. He also denied the bona fide need of the suit house of the respondent-plaintiff for residential as well as for non-residential purposes. According to him, alleged bona fide need of residential purpose is only a pretext to get the accommodation vacated from him. As regards allegation of nuisance, the same was also denied. He also denied the raising of any construction unauthorizedly on the terrace of the suit house.

4. On the basis of the pleadings, the trial Court framed seven issues. After recording evidence of both the sides, the trial Court passed the decree in favour of the respondent-plaintiff on the grounds of bona fide requirement of the suit house by him for residential and non-residential purpose. However, the trial Court

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did not pass decree on the grounds of arrears of rent and nuisance, holding that both these grounds have not been proved by the respondent-plaintiff.

5. Feeling aggrieved by the aforesaid judgment and decree passed by the trial Court, the appellant-tenant has filed this appeal. The respondent-plaintiff filed cross-objection against the impugned judgment and decree for not granting him a decree on the grounds of arrears of rent and nuisance. However, at the time of arguments, Shri S.R. Saraf, learned counsel for the respondent-plaintiff did not press cross objection. Accordingly, the cross-objection is dismissed as not pressed.

6. The contention of Shri S.S. Garg, learned counsel appearing for the appellant is that the plaintiff's case was that the suit house was let out to the appellant-tenant by the respondent only for residential purpose. In the circumstances, he argued that the need which was pleaded being for residential and non-residential purpose, the decree could not have been passed by the Court below for both the needs treating tenancy to be a composite tenancy. His contention is that granting of such decree would amount to splitting up of tenancy which could not have been done, instead, the trial Court ought to have rejected the plaintiff's suit. He also argued that the trial Court has committed error in holding that the plaintiff has been able to prove his bona fide need for residential purpose. According to him, non-examination of the plaintiff's wife to prove the dispute between her and her mother-in-law, is fatal and as such, the decree could not have been passed on the ground that the plaintiff wants to reside in his own house to avoid dispute between his wife and his mother. He submitted that the plaintiff having pleaded that the suit house was let out for residential purpose, the trial Court could not have passed the decree on the basis of defendant's plea that the accommodation was let out for both the purposes. According to him, the plaintiff has to prove his case and on the basis of pleadings/defence of the defendant, the decree could not have been passed. He placed reliance on the judgment passed by this Court in case of *Krishna Kumar Tiwari Vs. Ghasi Prasad Agrawal* [1991 Vol. 2 MPWN 18], *Pratap Rai Tanwani and another Vs. Uttam Chand and another* [(2004) 8 Supreme Court Cases 490] and on *Sait Nagjee Purushotam and Co. Limited Vs. Vimalabai Prabhulal and others* [(2005) 8 Supreme Court Cases 252].

7. Shri S.R. Saraf, learned counsel for the respondent-plaintiff, while supporting the impugned judgment and decree argued that no doubt, it was the case of plaintiff that the suit house was let out for residential purpose and the requirement as pleaded by him in the notice Ex.P/4 and in the plaint, was for residential as well as non-residential purpose, the trial Court has rightly passed the decree holding both the needs to be proved by the plaintiff. He submitted that it was the stand of the appellant-defendant that the suit house was let out to him for residential and non-residential purpose and the trial Court having held that the suit house was let out to him for residential as well as for non-residential purpose, the decree has rightly

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been passed in favour of the plaintiff. In support, he placed reliance on a Division Bench judgment of this Court in *Jagjitkumar Vs. Jagdeeshchandra* 1982 MPRCJ 152 = 1982 JLJ 319 and on *Avinash Agrawal alias Vanshi and others Vs. Smt. Reena Agrawal* (2005) 4 MPLJ 386.

8. Heard learned counsel for the parties. Perused the record of the case.

9. In order to prove his case, the respondent-plaintiff examined himself as PW-1, his mother Smt. Pramila (PW-2) and Mahesh Kumar (PW-3). The appellant-defendant examined himself as DW-1, Smt. Leela (DW-2), Vidyadhar (DW-4), Omprakash (DW-5) and Shakti Singh (DW-6).

10. Plaintiff Anoop Padalia (PW-1) in his deposition stated that House No.96, HIG Junior (GH) Scheme No.54, Indore was let out by him to the appellant-defendant on rent at the rate of Rs.1,300/- per month in November, 1986. The house was given on rent for residential purpose, but since last few years, the appellant-defendant stopped residing in it and without his consent and permission had started a Nursing Home in the name of Gayatri Nursing Home. He further stated that the appellant-tenant was always irregular in paying the rent and for recovery of rent, he had to file suits on earlier occasions. This act on the part of the appellant-tenant caused nuisance to him. In his deposition, he further deposed that presently, he and his family are residing in his father's House No.101, Indralok Colony, Indore. He stated that apart from him in his family, he is having his wife and two sons. He further stated that for family reasons, now, he does not want to reside with his parents and wants to live separately in his own house with his family members and for this purpose, he has no other house of his own in the city of Indore. He stated that in the suit house in one garage like room he will start business of General and Provision store and for this purpose, he has no accommodation of his own in Indore city. Presently, he is doing business of auto parts in the accommodation taken on rent from Vaishnav Trust. He also deposed about unauthorized construction by the tenant on the terrace of the suit house. In his cross-examination, he stated that he is the only son of his parents and having no grudge with his parents, however, he stated that disputes between his wife and his mother goes on, and to avoid such disputes, he wants to leave the house of his father and wants to live in his own suit house. He also stated that he is doing business since last 18-20 years in the shop rented out to him by Vaishnav Trust. He denied that he has falsely stated about the dispute between his wife and his mother. He deposed that he is in the need of the suit house since 2-3 years prior to the date of his deposition as there is increase in the disputes between his mother and his wife. The plaintiff's mother Smt. Pramila (PW-2) in her deposition made a categorical statement that because of her dispute with her daughter-in-law, she and her husband want to live separately. The plaintiff would reside with his family in his own house and she and her husband will continue to stay in her husband's house at 101, Indralok Colony, Indore. She also stated that for this purpose, the

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plaintiff has no other house of his own except the suit house in the city of Indore. In her cross examination, she stated that the plaintiff and his family were residing with them since 1989. She further deposed that in order to avoid disputes, it has been decided by her husband to reside separately. She stated that she is not having any dispute with his son but her dispute is with her daughter-in-law. Mahesh Kumar Mundra (PW-3) stated that he is working on the post of Cashier in the Vaishnav Educational and Charitable Trust. He stated that the plaintiff is a tenant of the Trust and is doing his business in the shop of the Trust constructed in the stadium of Vaishnav School premises.

11. Defendant Dr. Babulal Gupta (DW-1) did not dispute the tenancy and the rate of rent. He, however, stated that he was never irregular in making the payment. According to him, the suit house was given to him for residential as well as non-residential purpose for running a Nursing Home and for his residence. He stated that no nuisance was caused by him to the plaintiff and he did not raise the alleged unauthorized construction. According to him, the so-called construction was already existing when it was let to him on rent. He denied the plaintiff's bona fide need for residential as well as non-residential purposes. He, however, pleaded his ignorance to the plaintiff's case that he is doing the business in the shop rented out to him by Vaishnav Trust. Smt. Leela Mehta (DW-2) stated that the suit house was let out to the appellant-tenant for residential as well as non-residential purpose. Vidyadhar Shukla (DW-4) deposed that talks were going on between the plaintiff and the defendant about selling of the suit property to the appellant-tenant. Omprakash Tiwari (DW-5) deposed that the suit house was given to the appellant-tenant on rent for both the purposes i.e. residential as well as non-residential. Similar is the statement of Shakti Singh Pawar (DW-6).

12. After analyzing the aforesaid evidence, the trial Court recorded the finding that the suit house was let out by the respondent-plaintiff to the appellant-defendant not only for the purpose of his residence but also for the purpose of running a Nursing Home. Thus, on the basis of the evidence led by the parties and taking into consideration the stand taken by the defendant himself, a finding has been recorded by the trial Court that the suit house was let out for residential as well as non-residential purposes. The plaintiff's case from the very beginning was that the suit house was given for the residential purpose and the same is bona fide required by him for residential as well as for non-residential purpose. The plaintiff through his own evidence and on the basis of the evidence of his mother, Smt. Pramila (PW-2), has been able to prove that presently he is residing in his father's house situated at Indralok Colony, Indore and that he has no other suitable house of his own in the city of Indore. He has also been able to prove that he requires the suit house bona fide for residence of himself and for residence of his family consisting of his wife and two sons. His testimony as well as the testimony of Smt. Pramila (PW-2) clearly establishes that the plaintiff bona fide needs the

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suit house to live separately from his parents and to avoid disputes between his wife and his mother. The non-residential need has also been clearly established by the plaintiff from his evidence and the evidence of Mahesh Kumar (PW-3). It has come in their evidence that presently the plaintiff is doing his business of auto parts in the rented premises belonging Vaishnav Trust. He has also been able to prove that out of the suit premises in one garage like room he will start business of General and Provision store and for this purpose also, he has no accommodation of his own in Indore city.

13. In the light of the aforesaid, even if it is assumed that the suit house was let out by the plaintiff as per his own version only for residential purpose, the decree of eviction has rightly been passed by the trial Court as the plaintiff successfully proved the bona fide need for residential purpose also apart from non-residential purpose. In the present case, the appellant's-defendant's version that the suit house was let out for both the purposes has been found to be proved by the trial Court on the basis of the evidence led before it. The trial Court held that it was a case of composite tenancy. It also held that the plaintiff has been able to establish that he requires the suit house for both the purposes. Having held so in my view, a decree for eviction of the appellant-tenant from the entire suit house could have been and has rightly been passed. In the case of *Jagjitkumar Vs. Jagdeeshchandra* (supra) it has been held that even though a landlord requires a part of accommodation let out for the purpose for which the accommodation was let out, he becomes entitled to seek eviction from the entire accommodation, if he is able to prove the conditions specified under Section 12 (1) (e) and (f) of the Act. In the circumstances, even if the plaintiff's case was that the suit house was rented to the tenant only for residential purpose, the decree could have been passed as the plaintiff has been successful in proving his need for residential purpose also.

14. The contention of the appellant that since the plaintiff did not examine his wife and since he is residing for such a long time with his parents itself shows that the need is not bona fide, cannot be accepted. The plaintiff and his mother categorically stated about the dispute between the mother-in-law and daughter-in-law, therefore, in my considered view there was absolutely no necessity for the plaintiff to have examined his wife also. Merely because the appellant continued to reside with his parents during the pendency of the suit, it cannot be held that the bona fide need to reside separately with his family in his own house is extinguished. *Pratap Rai Tanwani and another Vs. Uttam Chand and another* (supra) on which reliance has been placed by the defendant does not support his case rather it supports the plaintiff's case because it has been held by the Supreme Court that crucial date is the date of the petition. It is pernicious unjust to shut the door before an applicant just on the eve of his reaching the finale after passing through all the previous levels of litigation merely on the ground that certain developments

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occurred pendente lite, because the opposite party succeeded in prolonging the matter for such unduly long period. If the cause of action is to be submerged in such subsequent events on account of malady of the system, it would shatter the confidence of the litigant despite the impairment already caused. True it is that a party has to plead and prove its case as held in the case of *Sant Nagjee Vs. Vimalabai* (supra). I find that the plaintiff pleaded that the suit house was given on rent for residential purpose, he pleaded the bona fide needs in regard to residential as well as non-residential purpose. The trial Court on appreciating the evidence recorded the finding that the suit house was let out for composite purpose, and accordingly passed the decree. I find no lacuna in the pleadings of the plaintiff. I also find that he has proved both the needs. The case of *Krishna Kumar Tiwari* (supra) is on different footing and has no application to the facts of this case.

15. In this view of the matter, I find that the impugned judgment and decree passed by the trial Court is based on sound appreciation of the evidence and it requires no interference what-so-ever. Accordingly, the impugned judgment and decree deserves to be and is hereby affirmed. The appeal is dismissed. The parties to bear their own cost.

Appeal dismissed.

I.L.R. [2009] M. P., 1374

APPELLATE CIVIL

Before Mr. Justice R.S. Jha

22 January, 2009*

SUJATA SARKAR (SMT.)

Vs.

ANIL KUMAR DUTTANI

... Appellant

... Respondent

A. Evidence Act (1 of 1872), Section 114 - *Presumption - Suit filed for bonafide requirement of son - Son examined as witness - Plaintiff could not examine herself on account of her old age and ill-health - Held - Extensive evidence has been brought on record through oral and documentary evidence - No withholding of evidence - Non-examination of plaintiff not fatal.*

(Para 10)

क. साक्ष्य अधिनियम (1872 का 1), धारा 114 - उपधारणा - पुत्र की वास्तविक आवश्यकता के आधार पर वाद पेश - पुत्र की साक्षी के रूप में परीक्षा की गई - वादी की स्वयं की परीक्षा उसकी वृद्धावस्था और अस्वस्थता के कारण नहीं की जा सकी - अभिनिर्धारित - मौखिक और दस्तावेजी साक्ष्य के द्वारा विस्तृत साक्ष्य अभिलेख पर लायी गई - कोई साक्ष्य नहीं रोका गया - वादी की परीक्षा न कराना घातक नहीं।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - *Bona fide requirement - Plaintiff required entire building for establishing*

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modern hospital - Requirement of son not satisfied with the part of accommodation which had fallen vacant - No accommodation available with him sufficient for the purposes of establishing hospital - Once bona fide requirement is proved by plaintiff, it is not open for Courts to decide sufficiency or insufficiency of accommodation. (Para 15)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – वादी को आधुनिक अस्पताल स्थापित करने के लिए सम्पूर्ण भवन की आवश्यकता – पुत्र की आवश्यकता स्थान के भाग से पूरी नहीं होती जो रिक्त पड़ा था – उसके पास अस्पताल स्थापित करने के प्रयोजनों के लिए पर्याप्त स्थान उपलब्ध नहीं – जब एक बार वादी द्वारा वास्तविक आवश्यकता साबित कर दी जाती है, न्यायालय को यह अधिकार नहीं है कि स्थान की पर्याप्तता या अपर्याप्तता विनिश्चित करे।

C. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - Bona fide requirement - Absence of pleading of non-availability of alternative accommodation - Sufficient evidence on record that plaintiff does not possess any other alternative suitable accommodation - Held - Absence of pleading would not be fatal - Appeal allowed. (Para 29)

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – वैकल्पिक स्थान की अनुपलब्धता के अभिवचन का अभाव – अभिलेख पर पर्याप्त साक्ष्य कि वादी के पास अन्य कोई वैकल्पिक उपयुक्त स्थान उपलब्ध नहीं है – अभिनिर्धारित – अभिवचन का अभाव घातक नहीं – अपील मंजूर।

Cases referred :

AIR 2002 SC 2256, AIR 2008 SC 773, AIR 2008 SC 1749, (2003) 1 SCC 462, (1999) 6 SCC 222, Raj Kumar Jain Vs. Smt. Usha Mukhariya S.A. No.973/2005 decided on 11.11.2008, AIR 1981 SC 1711, (1999) 1 SCC 141.

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

Rakesh Pandey, for the respondent.

J U D G M E N T

R.S. JHA, J. :- This appeal has been filed by the landlord against the reversing judgment and decree of the First Appellate Court passed in Civil Appeal No.59-A/2003 decided on 18.2.2005 whereby the judgment and decree passed by the Ninth Civil Judge, Class-II, Jabalpur, in Civil Suit No.5-A/97 decided on 22.4.2002 has been reversed and the suit filed by the landlord/plaintiff for eviction has been dismissed.

2. This Court had admitted this second appeal on the following substantial question of law:-

“1. Whether non-examination of the plaintiff was fatal to the eviction suit, when her son Dr. Sanjeev Sarkar and his wife Dr. Rupa Sarkar were examined to prove their bonafide need?”

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3. At the time of hearing it is observed that the following additional substantial questions of law also arise for adjudication in this appeal namely:-

“2. Whether the First Appellate Court has committed gross error of law by ignoring the extensive and cogent evidence on record in respect of bonafide need of the son of the appellant/plaintiff while allowing the appeal filed by the tenant ? and

3. Whether in the absence of any pleading in the plaint, as amended by the appellant/plaintiff that in the presence of adequate evidence on record to the effect that she has no other alternative suitable accommodation in the city, the appeal filed by the landlord/plaintiff deserves to be dismissed ?”

4. In respect of the first substantial question of law it is submitted by the learned Senior Counsel for the appellant/plaintiff and the appellant/plaintiff had filed a suit for eviction of the shop situated in House No.308/2 (old) Ram Manohar Lohia Ward, Marhatal, Jabalpur, which is in occupation of the respondent/tenant, for the purposes of bonafide requirement of her son for extending and expanding the hospital being run by him in the other portion of the accommodation. It is submitted that the trial court, on extensive examination of the evidence on record, recorded a finding to the effect that the tenanted premises was required bonafide by the appellant/plaintiff for her son for the purposes of establishing a modern hospital and decreed the suit, but the First Appellate Court allowed the appeal on the ground that the appellant/plaintiff had failed to establish the bonafide requirement of the firm for whose requirement the accommodation was required on account of the fact that the appellant/plaintiff herself did not appear in the witness box to make a statement in respect of the bonafide requirement and in such circumstances the decree for eviction, sought by the appellant/landlord, could not be granted. It is submitted that in view of the fact that the accommodation was required for the bonafide requirement of her son Dr. Sanjeev Sarkar and his wife Dr. Roopa Sarkar, both of whom have been examined as P.W-3 and P.W-4 respectively, the First Appellate Court has erred in law in allowing the appeal filed by the respondent/defendant on this count as non-examination of the plaintiff cannot be said to be fatal to the appellant's case in the facts and circumstances of the present case.

5. The learned counsel appearing for the respondent/defendant on the other hand submits that the plaintiff has not entered into the witness box to affirm the case set up by her before the trial court and in such circumstances the First Appellate Court was right in allowing the appeal by drawing an adverse inference in accordance with the provisions of Section 114 (g) of the Indian Evidence Act, 1872 (hereinafter referred to as ‘the Evidence Act’).

6. Before I advert to the discussion on the aforesaid substantial question of law, it is appropriate to take note of the fact that the plaintiff had initially filed a

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suit claiming bonafide requirement of the accommodation for a firm of which she was alleged to be the managing partner. Subsequently, the plaint was amended before the trial court by adding para 4B therein and setting up a case of bonafide requirement of the son and daughter-in-law of the appellant/plaintiff and the matter was contested on that basis before the trial court and the trial court decreed the suit by recording a finding that the accommodation in question was required bonafide by the appellant/plaintiff for the requirement of her son. The first appellate court allowed the appeal filed by the tenant on the ground that the appellant/plaintiff had failed to establish the bonafide requirement of the firm. Before this Court, the plaintiff filed an application for amendment for smoothening out the discordancy in the pleadings by amending the plaint by deleting the portion wherein requirement of the firm was pleaded and this Court by a detailed order allowed the amendment on 13.1.2009. Consequent amendment sought by the respondent/tenant in the written statement was also allowed by this Court on 20.1.2009 and, therefore, it is now an admitted fact that the suit filed by the appellant/plaintiff is for the bonafide requirement of her son.

7. It is also apparent from a perusal of the statements of P.W-1 Rajnikant Sarkar, P.W-3 Dr. Sanjeev Sarkar and P.W-4 Dr. Roopa Sarkar that the case set up by the appellant/plaintiff was in respect of bonafide requirement of her son and daughter-in-law. In para-1 of the deposition of P.W-1 Rajnikant Sarkar has stated that he looks after the property of the plaintiff and has full knowledge about the case and that the appellant/plaintiff is unable to depose before the Court on account of advanced age. P.W-3 Dr. Sanjeev Sarkar, in his cross-examination in para-11 of his evidence, has stated that the plaintiff is old and is not keeping good health and was, therefore, unable to appear as witness in the court. From a perusal of the evidence of these witnesses, it is also manifestly clear that they have made specific and categorical statements in respect of the bonafide requirement of the tenanted accommodation for the business of Dr. Sanjeev Sarkar (P.W-3), son of the appellant/plaintiff.

8. Section 114 of the Evidence Act, on which heavy reliance has been placed by the learned counsel for the respondent, specifically illustration (g) thereunder, reads as under:-

“114. Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume-

(a) xxx xxx xxx

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(b) xxx xxx xxx

(c) xxx xxx xxx

(d) xxx xxx xxx

(e) xxx xxx xxx

(f) xxx xxx xxx

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.”

9. Apparently, the presumption under illustration (g) of the Evidence Act, can be drawn by a Court only against a person who withholds evidence which could have been produced by him but is not produced and in case it would have been produced it would not have been unfavourable to him.

10. In the instant case, the evidence that the appellant/plaintiff was required to adduce in support of her claim was in respect of bonafide requirement of the accommodation for the business of her son. That evidence has been brought on record extensively through the oral and documentary evidence and, therefore, there is no withholding of evidence by the appellant/plaintiff. It is also clear that the appellant/plaintiff could not depose before the Court in person on account of her old age and ill health. That apart, from a perusal of the evidence on record it is apparent that the respondent/defendant had full opportunity to adduce all documentary evidence to refute the claim of the plaintiff and has extensively cross-examined all the witnesses in respect of the bonafide requirement of the appellant/plaintiff. In such circumstances, I am of the considered opinion that the non-examination of the appellant/plaintiff is not fatal to the case of the appellant/plaintiff in the facts and circumstances existing in the present case and the conclusion recorded by the appellate court in this respect being erroneous, is unsustainable. The first substantial question of law is answered accordingly.

11. As far as the second substantial question of law is concerned, it is submitted by the learned Senior Counsel for the appellant that a perusal of the documents filed by the appellant/plaintiff as well as the oral evidence on record, the bonafide need of the plaintiff for establishing a full fledged modern hospital for her son and daughter-in-law is established and the trial court, on the basis of this evidence, gave a positive finding in favour of the landlord. It is submitted that the first appellate court, while deciding the appeal filed by the respondent/defendant, has not reversed the finding in respect of bonafide requirement of the son but has ignored the same by treating the case of the appellant/plaintiff to be one of bonafide requirement for the firm by ignoring the pleadings and evidence regarding bonafide requirement of the son and by recording a finding that the plaintiff has failed to adduce any evidence or establish the bonafide requirement of the firm has allowed the appeal.

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12. The learned Senior Counsel for the appellant/plaintiff has taken this Court through the finding recorded by the first appellate court in paras 41, 46 and 47 of the impugned judgment of the appellate court, wherein it has held that the finding of the trial court to the effect that the bonafide requirement of the firm is established is erroneous as the suit filed by the appellant/plaintiff was in respect of bonafide requirement of the firm but the evidence led by the plaintiff is in respect of bonafide requirement of her son, and has pointed out that the finding recorded by the first appellate court is perverse inasmuch as the trial court in para-11 of the impugned judgment has clearly and specifically recorded a finding to the effect that on the basis of the oral evidence on record the case of the appellant/plaintiff is for the bonafide requirement of her son and not that for the firm and that the son requires the accommodation for establishing a modern hospital which may be managed by the firm and, therefore, the trial court had not recorded any finding to the effect that the appellant/plaintiff had established a case for bonafide requirement of the firm which alleged finding has been erroneously set aside by the appellate court.

13. On a minute scrutiny of the judgment of the trial court as well as the first appellate court, the contention of the learned Senior Counsel for the appellant appears to be correct as the trial court in para-11 of its judgment, while allowing the evidence of the appellant/plaintiff has clearly stated that the case of the plaintiff before the trial court was for getting the accommodation vacated for the bonafide requirement of her son and not for the bonafide requirement of the firm and, therefore, the question of setting aside the finding of bonafide requirement of the firm by the first appellate court in paras 41, 46, 47 and 48 does not arise. Apparently, the first appellate court misread the finding recorded by the trial court in this regard and, therefore, the finding recorded by it in this respect is perverse.

14. It is also apparent from a perusal of the statement of the architect who prepared the plan for the modern hospital namely, Neeraj Agrawal (P.W-2), Dr. Sanjeev Sarkar (P.W-3) and Dr. Roopa Sarkar (P.W-4) and the map of the proposed modern hospital which has been filed by the appellant/plaintiff alongwith the plaint, that the case of the appellant/plaintiff is that the tenanted premises is required by the appellant/plaintiff for the bonafide requirement of her son to set up a modern hospital in the entire building and that the accommodation which is already in possession of the plaintiff's son in which he has commenced his medical practice is not sufficient for establishing the aforesaid modern hospital. It has been stated by the learned Senior Counsel for the appellant and agreed to by the learned counsel appearing for the respondent that there were in fact seven shops in the house out of which five have been vacated and they are being utilized by the plaintiff's son and daughter-in-law for the purpose of their medical practice and only two shops, the one involved in the present appeal and the other involved in Second Appeal No.1481/2005, are still in occupation of tenants. It is also clear

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from the evidence on record that the plaintiff's son, with a view to set up a modern hospital, is required to establish an Emergency Room, Sonography Unit, Consultation Chamber, Emergency Delivery Room, a Child Care Intensive Unit, etc, in the ground floor and for that purpose he needs the entire House No.308/2 (old), Ram Manohar Lohia Ward, Marhatal, Jabalpur. For this purpose he has filed a map alongwith the plaint indicating each of the aforesaid aspects specifically. It is also apparent from a perusal of the judgment of the trial court that on the aforesaid evidence a finding in the affirmative in respect of bonafide requirement of the landlord has been recorded by the court below.

15. Though the finding has been assailed by the learned counsel appearing for the respondent on the ground that the accommodation which has fallen vacant during the pendency of the suit and in which the plaintiff's son had already started his medical practice is sufficient for the purpose of his need, I am of the considered opinion that on the basis of the evidence on record it is apparent that the appellant/plaintiff required the entire building for the purposes of establishing the modern hospital and that her requirement for her son is not satisfied nor is the accommodation available with him sufficient for the purposes of establishing the same. I also do not find any substance in the submission of the learned counsel for the respondent that the accommodation is sought to be vacated only for the purposes of enhancement of rent, in view of the fact that the plaintiff's son has utilized the accommodation vacated during the pendency of the suit only for the purposes of the aforesaid hospital and has not let out the shops on higher rent which fact has been asserted by the respondent/defendant himself in the written statement. The plaintiff has, therefore, been able to establish his bonafide need for the accommodation.

16. The learned Senior Counsel appearing for the appellant/plaintiff, in support of his contention, has relied upon the judgment of the Supreme Court in the case of *Joginder Pal vs. Naval Kishore Behal*, AIR 2002 SC 2256, *Yadvendra Arya and another vs. Mukesh Kumar Gupta*, AIR 2008 SC 773 and *Kashmir Singh vs. Harnam Singh and another*, AIR 2008 SC 1749.

17. The Supreme Court, in the case of *Akhilshwar Kumar and Others vs. Mustaqim and others*, (2003) 1 SCC 462 has held that once the plaintiff establishes her bonafide need for the accommodation then it is not for the courts to decide as to the sufficiency or insufficiency of the accommodation as the need of landlord is paramount and he cannot be directed or forced to make do with the accommodation available with him nor can a decree of eviction be denied on the ground that the accommodation available with him is sufficient once the bonafide need of the landlord is established and has held in para-4 as under:-

“4....Once it has been proved by a landlord that the suit accommodation is required bona fide by him for his own purpose

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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. ...”

18. Similarly in the case of *Shiv Sarup Gupta vs. Dr. Mahesh Chand Gupta*, (1999) 6 SCC 222, it has been held in para-13 as under:-

“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.”

19. In view of the aforesaid law laid down by the Supreme Court and in the facts and circumstances of the present case, the second substantial question of law framed by this Court is answered in favour of the appellant/plaintiff and the finding recorded by the first appellate court in this regard is set aside.

20. As regards the third substantial question of law, it is submitted by the learned counsel appearing for the respondent/defendant that in view of the amended plaint as it stands today, the plaintiff has not pleaded that she has no other alternative suitable accommodation available with her in the city of Jabalpur which is a mandatory requirement of Section 12(1)(f) of the M.P. Accommodation Control Act, 1961 (hereinafter referred to as ‘the Act’) and in the absence of such pleadings, the suit filed by the appellant/plaintiff itself deserves to be dismissed and, consequently, the appeal filed by him also deserves to be dismissed.

21. Per contra learned Senior Counsel appearing for the appellant submits that the aforesaid submission of the learned counsel for the respondent does not deserve consideration in view of the fact that the respondent/defendant did not, at any point of time, plead that the appellant/plaintiff had an alternative suitable accommodation available with her in the city of Jabalpur. On the contrary, the case set up by the defendant in the suit was that the plaintiff during the pendency of the suit had acquired possession of certain other shops in the same building as a result of which her requirement for setting up a modern hospital by her son

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stood satisfied and in such circumstances the contention of the learned counsel for the respondent deserves to be rejected.

22. From a perusal of the record it is clear that the pleading regarding non-availability of an alternative suitable accommodation stands deleted in the amended plaint and, therefore, the appellant/plaintiff has not made any specific pleading in writing to the effect that no alternative suitable accommodation is available with her in the city of Jabalpur, but she has stated in para-4 of the plaint that the portion of the building in possession of her son Dr. Sanjeev Sarkar is not sufficient to cater for his needs and that he needs the entire accommodation for the purposes of running a hospital. It is also apparent from a perusal of para-4 of the statement of P.W-1 Rajnikant Sarkar, husband of the plaintiff, that he has unequivocally stated that they have no other alternative suitable accommodation in the city of Jabalpur. Similar specific statement has also been made by P.W-3 Dr. Sanjeev Sarkar in para-1 of his deposition. On the contrary, there is no assertion or averment by the respondent/defendant to the effect that the plaintiff has some other suitable alternative accommodation in the city of Jabalpur.

23. The respondent/defendant has heavily relied upon the judgment of this Court passed in the case of *Raj Kumar Jain vs. Smt. Usha Mukhariya* (Second Appeal No.973/2005) decided on 11.11.2008 in support of his contention that in the absence of any pleading in respect of the second part of Section 12(1)(f) of the Act, the suit and consequentially the appeal filed by the landlord claiming eviction on the ground of bonafide non-residential requirement deserves to be dismissed.

24. From a perusal of the judgment of this Court passed in *Raj Kumar Jain vs. Smt. Usha Mukhariya*, Second Appeal No.973/2005, it is apparent that in that case the plaintiff/landlord apart from not pleading and specifically stating in the plaint that she had no other alternative suitable accommodation in the city had also not made any such statement in her deposition. On the contrary, the defendant/tenant had specifically set up a case before the court below that the plaintiff had acquired vacant possession of an alternative suitable accommodation during the pendency of the suit and had also put a specific question to that effect to the plaintiff in her cross-examination and the plaintiff had accepted the fact that she had acquired vacant possession of the shop but had not made any statement with regard to the fact that it was not an alternative suitable accommodation and, therefore, in the total absence of any pleading or proof, this Court relying upon the judgment of the Supreme Court in the case of *Hasmat Rai and another vs. Raghunath Prasad*, AIR 1981 SC 1711 had allowed the Second Appeal filed by the tenant.

25. Apparently, the facts of the present case are totally different. In the instant case, though in view of the amendment in the plaint, the pleadings in respect of availability of an alternative suitable accommodation are not there in the plaint but

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specific and categorical statement to that effect have been made by P.W-1 Rajnikant Sarkar, husband of the plaintiff and P.W-3 Dr. Sanjeev Sarkar, her son for whose need the accommodation is sought to be vacated. Pertinently, the respondent/defendant has neither set up a case in the written statement to the effect that the appellant/plaintiff has some suitable alternative accommodation in the city of Jabalpur nor have the witnesses been examined or cross-examined to that effect and, therefore, the present case is not one of total absence of any evidence as was the factual situation in the case of *Raj Kumar Jain* (supra) and, therefore, the reliance placed by the learned counsel for the respondent/defendant on that judgment is misconceived.

26. In the case of *Hasmat Rai* (supra) the Supreme Court while analyzing the provision of Section 12(1)(f) of the Act, held that for obtaining eviction under that section of the Act the landlord apart from showing that his need for the accommodation is bonafide, must also show that he has no other alternative suitable accommodation in the city and if he maintains utter silence on this issue, he cannot be granted a decree of eviction under section 12(1)(f) of the Act.

27. In the case of *Ram Narain Arora vs. Asha Rani and others*, 1999 (1) SCC 141, the Supreme Court while dealing with a similar issue has specifically held that even in the absence of pleading, the court can look into the evidence on record to determine the issue as to whether the landlord has in her possession some alternative suitable accommodation and that mere absence of pleading would not be fatal as the courts cannot take up a pedantic or dogmatic approach in the matter, in the following terms in paras 10 and 11:-

“10. In making a claim that the suit premises is required bonafide for his own occupation as a residence for himself and other members of his family dependent on him and that he has no other reasonably suitable accommodation is a requirement of law before the court can state whether the landlord requires the premises bonafide for his use and occupation. In doing so, the court must also find out whether the landlord or such other person for whose benefit the premises is required has no other reasonably suitable residential accommodation. It cannot be said that the requirement of the landlord is not intermixed with the question of finding out whether he has any other reasonably suitable accommodation. If he has other reasonably suitable accommodation, then necessarily it would mean that he does not require the suit premises and his requirement may not be bonafide. In such circumstances, further inquiry would be whether that premises is more suitable than the suit premises. Therefore, the questions raised before the court would not necessarily depend upon only the pleadings. It could be a good defence that the landlord

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has other reasonably suitable residential accommodation and thereby defend (sic defeat) the claim of the landlord.

11. There cannot be a pedantic or a dogmatic approach in the matter of analysis of pleadings or of the evidence adduced thereto. It is no doubt true that if the pleadings are clearly set out, it would be easy for the court to decide the matter. But if the pleadings are lacking or vague and if both parties have understood what was the case pleaded and put forth with reference to requirement of law and placed such material before the court, neither party is prejudiced. If we analyse from this angle, we do not think that the High Court was not justified in interfering with the order made by the Rent Controller.”

A reading of the aforesaid two judgments clearly indicates that the requirement of the provision of law is that the appellant/plaintiff must show or bring material on record to the effect that he has no other alternative suitable accommodation in the city. Neither of the aforesaid two judgments lay down the law that pleading in this respect in writing in the plaint is mandatory or that absence of such pleading would non-suit the landlord from claiming a decree of eviction under section 12(1)(f) of the Act for bonafide non-residential requirement.

28. Even from a perusal of Section 12(1)(f) and other provisions of the Act, it is clear that there is no statutory mandate requiring that the plaintiff to maintain a suit on that ground, must compulsorily plead in the plaint that she has no alternative suitable accommodation in her possession. Even in the judgment of the Supreme Court in the case of *Hasmat Rai* (supra) and *Ram Narain Arora* (supra) the Supreme Court has held that what is required is that the plaintiff must show, establish or prove that he has no other alternative suitable accommodation in the city and in view of the aforesaid I am unable to agree with the learned counsel for the respondent/defendant that mere absence of pleading in the plaint in respect of non-availability of alternative suitable accommodation is fatal to the appellant's case specifically in the facts and circumstances of the present case wherein the appellant/plaintiff, through the evidence of P.W-1 Rajnikant Sarkar and P.W-3 Dr. Sanjeev Sarkar, who have specifically stated in their deposition that they do not possess any other alternative suitable accommodation in the city of Jabalpur, has been able to show, establish and prove the requirements of Section 12(1)(f) of the Act, moreso in view of the fact that the respondent/defendant has neither pleaded nor set up a case that the plaintiff owned or possessed any other alternative suitable accommodation in the city of Jabalpur. On the contrary, what has been pleaded by the respondent/defendant is that the plaintiff's son, during the pendency of the suit, has acquired vacant possession of a portion of the same premises and, therefore, his need is satisfied and that the trial court, on the basis of the evidence on record, has specifically recorded a finding that the bonafide requirement of the

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plaintiff's son to establish a modern hospital in the entire building is not satisfied even on acquiring vacant possession of the vacated portion.

29. In the facts and circumstances of the present case, I am of the considered opinion that mere absence of pleading in the plaint in respect of availability of an alternative suitable accommodation, when there is adequate and sufficient oral evidence on record to the effect that the plaintiff does not possess any other alternative suitable accommodation in the city of Jabalpur, is not fatal to the plaintiff's case nor does it disqualify the appellant/plaintiff from seeking or being granted a decree of eviction under section 12(1)(f) of the Act. The third question of law is answered accordingly.

30. In view of the aforesaid analysis, the judgment of the first appellate court reversing the judgment and decree of the trial court on the ground that the plaintiff has not established the need of the firm and that in the absence of examining the plaintiff in person, the suit filed by the appellant/plaintiff deserves to be dismissed, cannot be sustained and deserved to be set aside. I am also of the opinion that the plaintiff has been able to establish her bonafide requirement of the accommodation for establishing a modern hospital by her son and daughter-in-law and, therefore, the appeal deserves to be and is hereby allowed and the judgment and decree of the first appellate court passed in Civil Appeal No.59-A/2003 decided on 18.2.2005 is hereby set aside.

31. In the result, the appeal filed by the appellant/plaintiff is allowed. A decree be drawn up accordingly.

32. In the facts and circumstances of the case, there shall be no order as to the costs.

Appeal allowed.

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APPELLATE CIVIL

Before Mr. Justice Shantanu Kemkar

27 January, 2009*

SURAJ PRASAD

... Appellant

Vs.

EXECUTIVE ENGINEER (SUPPLY/MAINTENANCE)

M.P. STATE ELECTRICITY BOARD, SHAJAPUR & anr.

... Respondents

A. Workmen's Compensation Act (8 f 1923) Section 4A - Workman suffered grievous injuries by an accident which arises out of act in the course of employment - Commissioner awarded compensation and directed that in case employer failed to deposit compensation within 30 days, workman shall be entitled for interest @ 12% p.a. - Held - Under the provisions of Act,

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compensation shall be paid as soon as it falls due - Amount of compensation fell due on the date of accident itself - Employer failed to deposit compensation after the accident - Workman entitled for interest @ 12% p.a. from the date of accident till payment - Appeal allowed. (Paras 10 & 11)

कं. कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 4ए — कर्मकार नियोजन के अनुक्रम में कार्य से हुई दुर्घटना से गंभीर क्षतियों से पीड़ित हुआ — कमिश्नर ने प्रतिकर अधिनिर्णीत किया और निदेशित किया कि यदि नियोक्ता 30 दिनों के भीतर प्रतिकर जमा करने में विफल रहता है तो कर्मकार 12 प्रतिशत प्रतिवर्ष की दर से ब्याज का हकदार होगा — अभिनिर्धारित — अधिनियम के उपबंधों के अधीन प्रतिकर अदा करना होगा जैसे ही वह देय हो जाता है — प्रतिकर की राशि दुर्घटना दिनांक को ही देय हो गयी — नियोक्ता दुर्घटना के बाद प्रतिकर जमा करने में विफल रहा — कर्मकार दुर्घटना दिनांक से अदायगी तक 12 प्रतिशत प्रतिवर्ष की दर से ब्याज का हकदार — अपील मंजूर।

B. Precedent - Conflict between two decisions of the Apex Court - Judgment of 2 Judges Bench in National Insurance Co. Ltd. Vs. Mubasir Ahmed & anr. [2007 LIC 1452] not noticing the earlier judgment of 4 Judge Bench of Pratap Narain Singh Deo Vs. Shrinivas Sabata & anr [AIR 1976 SC 222] - Judgment of the Larger Bench will have to be followed. (Para 10)

ख. पूर्वनिर्णय — शीर्ष न्यायालय के दो निर्णयों में अन्तर्विरोध — दो न्यायाधीशों की न्यायपीठ द्वारा नेशनल इश्योरेंस कं. लि. विरुद्ध मुबासिर अहमद व अन्य [2007 LIC 1452] में दिये गये निर्णय में 4 न्यायाधीशों की न्यायपीठ के प्रताप नारायण सिंह देव विरुद्ध श्रीनिवास सबाता व अन्य [AIR 1976 SC 222] के पूर्ववर्ती निर्णय को ध्यान में नहीं रखा — वृहत्तर न्यायपीठ के निर्णय का अनुसरण करना होगा।

Cases referred:

AIR 1976 SC 222, 2007 (115) FLR 1106, 2008(2) ACCD 1383, 2007 LIC 1452, 2003(1) MPLJ 513.

Mahesh Choudhary, for the appellant.

G.S. Patwardhan, for the respondents.

O R D E R

SHANTANU KEMKAR, J. :-With consent, heard finally.

THIS Misc. Appeal has been filed under Section 30 of the Workmen's Compensation Act, 1923 [for short "the Act"] against the order dated 04.12.2007 passed by Commissioner for Workmen's Compensation (Labour Court), Ujjain in Case No.68/05/W.C.Act (N.F.).

2. Briefly stated the appellant was working with the Respondents on the post of Line-man. On 17.06.2002 at about 06.00 AM while he was repairing high tension electricity line, on account of electrocution he suffered grievous injuries to his left hand. As a result, his hand from shoulder was amputated. He filed a claim petition under the Act seeking compensation from the Respondents.

3. The Respondents opposed the claim petition by denying the averments made

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by the appellant in his claim petition. The Commissioner framed 6 Issues and after recording evidence awarded compensation of Rs.2,53,344-00 to the appellant. The Commissioner further ordered that in case the Respondents failed to deposit the compensation amount within 30 days, the appellant shall be entitled for interest @.12% per annum. Feeling aggrieved by the direction of the Commissioner in regard to the fixing of liability to pay interest only in case the amount is not deposited within 30 days, the appellant has filed this appeal.

4. The only substantial question of law argued and involved in this case is as to whether the Commissioner has erred in not allowing the interest on compensation from the date of accident and erred in fixing the liability to pay interest on the Respondents in case of non deposit of amount within 30 days and thereby not followed the mandate of the law as provided under Section 4-A (3) of the Act.

5. In support of the contention that the appellant is entitled for interest @ 12% per annum from the date of accident, learned counsel for the appellant placed reliance on the judgment of the Supreme Court in case of *Pratap Narain Singh Deo v/s Shrinivas Sabata and another* [AIR 1976 SC 222]; on the Division Bench judgment of Kerala High Court in case of *National Insurance Co. Ltd. v/s Rekha and others* [2007 (115) FLR 1106]; and a Single Bench judgment of Gujrat High Court in case of *United India Insurance Co. Ltd. v/s Shakura Ishaq Bhaya and another* [2008 (2) ACCD 1383].

6. On the other hand Shri G.S.Patwardhan, learned counsel for the Respondents placed reliance on a judgment of the Supreme Court in case of *National Insurance Co. Ltd. v/s Mubasir Ahmed and another* [2007 LIC 1452].

7. In order to decide the controversy involved in this appeal, it would be appropriate to quote Section 4-A of the Act:-

“4A.- Compensation to be paid when due and penalty for default.- (1) Compensation under section 4 shall be paid as soon as it falls due.

(2) In case where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall -

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve

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per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears, and interest thereon pay a further sum not exceeding fifty per cent of such amount by way of penalty.

Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed."

8. The Supreme Court in the case of *Pratap Narain Singh Deo v/s Shrinivas Sabata and another* (Supra), while dealing the identical question, in paragraphs 7 & 8 has held as under :-

"In case of a personal injury caused to a workman by an accident which arises out of and in the course of employment, unless the right to compensation is taken away under sub-sec. (5) of Sec. 3, the employer becomes liable to pay the compensation as soon as the aforesaid personal injury is caused to the workman. S. 19 only provides for settlement by the Commissioner of any question regarding liability of any person to pay compensation or the amount or duration of compensation, in default of any agreement, if such question arises in any proceeding under the Act. The section does not have the effect of suspending the liability of an employer to pay compensation under S. 3 till after the settlement contemplated under S. 19. It is the duty of the employer to pay compensation under S. 4-A (1) at the rate provided by S. 4 as soon as the personal injury is caused to the workman. Where the employer fails to do so and also makes no provisional payment under S. 4 (2) but challenges the jurisdiction of the Commissioner, the employer is liable to pay interest and penalty."

9. In the case of *National Insurance Co. Ltd. v/s Rekha and others* (Supra), the Division Bench of Kerala High Court considered the words "fell due" as provided under Section 4-A of the Act and has observed thus :-

"When compensation "fell due" is the main dispute. Section 3 mandates payment of compensation by employer immediately when injury occurs to a workman in the course of employment arising out of employment. Section 4-A (1) also casts liability to pay compensation "as soon as it falls due" and Section 4-A (3) casts liability to pay interest if it is not paid within one month from

the date compensation amount "fell due". It is clear from the statutory provisions that amount of compensation fell due on the date of accident itself. Interest liability can be avoided by making payment/deposit or at least provisional payment/deposit within a month of the accident. If compensation "falls due" only on the date of award, compensation has to be calculated on the provisions of the Act existing on the date of award. Now, it is settled law that compensation has to be calculated with reference to the provisions of the Act as on the date of accident as compensation "fell due" on that date itself."

10. In the case of *United India Insurance Co. Ltd. v/s Shakura Ishaq Bhaya and another* (Supra), the Gujrat High Court while considering the judgment of the Supreme Court in the case of *Pratap Narain Singh Deo v/s Shrinivas Sabata and another* (Supra) as also the judgment of the Supreme Court in the case of *National Insurance Co. Ltd. v/s Mubasir Ahmed and another* (Supra) noticing the fact that the judgment of *Pratap Narain Singh Deo v/s Shrinivas Sabata and another* (Supra) being a judgment of Bench consisting of 4 Judges of the Supreme Court and the judgment of the Supreme Court in the case of *National Insurance Co. Ltd. v/s Mubasir Ahmed and another* (Supra) being a judgment of 2 Judge Bench not noticing the earlier judgment of 4 Judge Bench has held that as per settled law the judgment of the Larger Bench will have to be followed and accordingly followed the judgment of the Supreme Court in the case of *Pratap Narain Singh Deo v/s Shrinivas Sabata and another* (Supra). The view taken by the Gujrat High Court to follow the judgment of the Larger Bench of the Supreme Court finds support by the judgment of the Special Bench of this court consisting of 5 Judges in the case of *Jabalpur Bus Operators Association and others v/s State of M.P. and others* [(2003) 1 MPLJ 513].

11. Having regard to the aforesaid legal position and the fact that the accident occurred on 17.06.2002 of which no compensation was deposited by the Respondents, in my considered view having regard to provisions contained in Section 4-A of the Act and the law laid down in the case of *Pratap Narain Singh Deo v/s Shrinivas Sabata and another* (Supra), the impugned order passed by the Commissioner cannot be sustained.

12. The appellant is entitled for interest @ 12% per annum from the date of accident till payment. Thus, the appeal deserves to be and is hereby allowed to the extent that the appellant shall be entitled for interest @ 12% per annum from the date of accident till payment.

13. No other point is urged.

14. The appeal is accordingly allowed. No order as to costs.

Appeal allowed.

USHA (Smt.) Vs. RAJESH

I.L.R. [2009] M. P., 1390

APPELLATE CIVIL

Before Mr. Justice Shantanu Kemkar

27 January, 2009*

USHA (Smt.) & Ors.

... Appellants

Vs.

RAJESH & Ors.

... Respondents

Motor Vehicles Act (59 of 1988), Section 166, Rules of the Road Regulations, 1989, Rules 8 & 9 - Compensation - Contributory negligence - Burden of proof - Precaution so as to avoid accident at the intersection of roads - Deceased was going on a motorcycle dashed by a truck at intersection of roads - Tribunal found 50% contributory negligence of deceased - Held - Respondents failed to examine any witness to disprove version of eye witness - Respondents failed to discharge burden to prove that deceased was himself negligent - No presumption of negligence of deceased can be drawn merely because accident occurred at the intersection of roads - Finding of tribunal that deceased was contributory negligent erroneous - Appeal allowed.

(Paras 7 & 8)

मोटर यान अधिनियम (1988 का 59), धारा 166, सड़क विनियमन के नियम, 1989, नियम 8 व 9 - प्रतिकर - योगदायी उपेक्षा - सबूत का भार - पूर्ववधानियों ताकि सड़कों के चौराहे पर दुर्घटनाओं से बचा जा सके - मृतक जो एक मोटरसायकल पर जा रहा था, को सड़कों के चौराहे पर ट्रक द्वारा टक्कर मारी गई - अधिकरण ने मृतक की 50 प्रतिशत योगदायी उपेक्षा पायी - अभिनिर्धारित - प्रत्यर्थी प्रत्यक्षदर्शी साक्षियों के बयानों को नासाबित करने के लिए किसी साक्षी की परीक्षा कराने में विफल रहे - प्रत्यर्थी यह साबित करने का भार उन्मोचित करने में विफल रहे कि मृतक स्वयं उपेक्षावान था - केवल इस कारण कि दुर्घटना सड़कों के चौराहे पर घटित हुई, मृतक की उपेक्षा की कोई उपधारणा नहीं की जा सकती - अधिकरण का निष्कर्ष कि मृतक योगदायी उपेक्षावान था, त्रुटिपूर्ण - अपील मंजूर।

Manish Jain, for the appellants.

S.V. Dandwate, for the respondent no. 3.

ORDER

SHANTANU KEMKAR, J. :-With consent, heard finally.

Feeling dissatisfied with the amount of compensation awarded to them the appellants/claimants have filed this appeal under Section 173 of the Motor Vehicles Act, 1988 { for short the Act} for enhancement of the compensation awarded to them vide award dated 17.04.2007 passed by 8th Additional Motor Accident Claims Tribunal, Indore {for short the Tribunal} in Claim Case No.175/07.

2. Briefly stated on 09.10.2005 deceased Nanuram was going alongwith

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Mahesh on his motorcycle bearing Registration No.MP 09 JX 8974. When the motorcycle reached at Tejajinagar, Indore By-pass square a Truck Trolley bearing Registration No.HR 68-A-7585 coming from Dewas side dashed the motorcycle resulting into death of the said Nanuram on the spot. The appellants/claimants being widow, son, daughter and mother of the deceased filed a claim petition under Section 166 of the Act seeking compensation of Rs.20,00,000/- from the respondents.

3. The owner and the driver remained ex-parte before the Tribunal. The respondent No.3 Insurer filed written statement and denied the averments made in the claim petition. The Tribunal framed as many as 5 issues and after recording evidence taking the income of the deceased to be Rs.3,000/- per month deducting 1/4th for his personal expenditure and applying the multiplier of 17 assessed the compensation of Rs.4,59,000/- for loss of dependency. However, the amount was restricted to 50% on the ground of contributory negligence of the deceased himself. The Tribunal after restricting the amount of compensation to the extent of 50% by adding Rs.4,500/- for loss of consortium to wife and Rs.2,000/- for funeral expenses awarded total compensation of Rs.2,36,000/- to the appellants /claimants.

4. Shri Manish Jain, learned counsel for the appellants argued that the Tribunal has committed error in deducting the amount of compensation by holding that there was contributory negligence on the part of the deceased. He submitted that there was no evidence to prove that the deceased who was riding the motorcycle was negligent. He further submitted that when the accident had occurred at intersection of two roads and when as per the spot map (Ex.P/2) the Truck Trolley was coming from Dewas side and was going to wrong side and the deceased was coming from Khandwa side and was going towards Indore side, it was not a case of head on collision. He referring to the spot map (Ex.P/2) argued that the dash to the motorcycle was from its side and there was no head on collision. He argued that the driver of Truck Trolley having been not produced in the evidence, adverse inference was required to be drawn as burden to prove contributory negligence was upon the respondent No.3 who had taken such defence. His next submission was that the assessment of the income of the deceased by the Tribunal is on lower side. He submitted that when there was ample evidence about the income including the Income Tax Returns of the deceased the same ought to have been taken into consideration for appropriate assessment of the income of the deceased. Thus, according to him the award being on much lower side it deserves enhancement.

5. Shri S.V.Dandwate, learned counsel appearing for the third respondent Insurer argued that in view of Rule 8 and 9 of the Road Regulations Act, 1989 while entering into the intersection of the road the deceased motorcycle rider was expected to have taken appropriate precaution so as to avoid the accident with the Truck Trolley which is coming from his right side. He submitted that

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having not done so the Tribunal has rightly held the motorcyclist guilty of contributory negligence. He next submitted that in the absence of any details as to the source of the income disclosed by the deceased in his income tax returns, the Tribunal has rightly assessed the income of the deceased to the extent of Rs.3,000/- per month. He argued that having regard to the number of dependent members the deduction for personal expenditure ought to have been to the extent of 1/3rd of the total income of the deceased instead of 1/4th as has been deducted by the Tribunal.

6. In order to prove the accident the appellants/claimants examined Leeladhar (PW-3). He stated that he is having a Tea shop at Tejjainagar, Indore By-pass Square, while he was in the said Tea shop at about 9:30 PM a motorcycle coming from Khandwa side was dashed at the said square by a Truck Trolley coming at an excessive speed in a zigzag manner. According to him, the accident occurred due to sole rash and negligent driving on the part of the Truck Trolley driver. He further stated that the motorcyclist died on the spot and the Truck Trolley driver left the vehicle and fled from the spot. He further stated that he reported the incident vide F.I.R. (Ex.P/1).

7. Spot map (Ex.P/2) reveals that the Truck trolley was coming from Dewas and was going to Rao. It also reveals from it that the motorcycle was coming from Khandwa side and was going to Indore side. At the intersection of the road at Tejjainagar square the accident occurred and the motorcycle was dashed to its side. The driver of the Truck Trolley or any other person has not been examined by the respondents in order to prove that there was contributory negligence of the motorcyclist. No one has been examined on the part of the respondents to disprove the version of the eye-witness (PW-3) Leeladhar that the driver of the Truck was negligent. The burden to prove that there was contributory negligence on the part of the motorcyclist having not been discharged by the respondents by adducing evidence in that respect by producing driver of the Truck Trolley or any other witness in the circumstances in my considered view, the Tribunal has committed error in holding the contributory negligence of the deceased motorcyclist.

8. The evidence of Leeladhar (PW-3) which also finds support from the spot map (Ex.P/2) clearly establishes the sole negligence of the driver of Truck Trolley in causing the accident. The burden to prove that the deceased had violated the Rule 8 or 9 of the Road Regulations, 1989 was also on the respondent which has not been discharged by adducing any evidence. Even otherwise no presumption of negligence of the deceased motorcyclist can be drawn merely because the accident occurred at the intersection of two roads. Thus, the finding recorded by the Tribunal that the deceased was contributory negligent in the accident, being erroneous the same is set aside and as a result deduction of 50% of the compensation amount on that account cannot be ordered.

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9. Now coming to the question as to whether the amount of compensation assessed by the Tribunal is inadequate and unjustly low. The Tribunal disbelieved the income tax returns and the statement of computation sheets of Income Tax Exs. P/22 and P/25 on the ground that the details about the source of income of the deceased from the interest as shown in the said computation sheets has not been proved by the appellants /claimants. In my considered view the approach of the Tribunal cannot be said to be justified. When the claimants have proved that the deceased was in the business of Electrics and Electronic Goods as also in the business of Finance as per the certificates Ex.P/18 and Ex.P/20 it was not incumbent upon the appellants/claimants to have given the details as to from which source the deceased earned the income of interest. The deceased was income tax payee since the year 1999-2000. His income tax return of the year 2003-2004 was filed much prior to the date of accident and death. Taking into consideration the said Income Tax Return of the year 2003-2004 submitted by the deceased himself his yearly income can be safely assessed to Rs.71,230/-. The Tribunal has correctly applied the multiplier of 17 for the deceased aged 32 years. The Tribunal has deducted 1/4th of the income of deceased for his personal expenditure, taking into account the number of dependants to be 5. However, having regard to the nature of his business, the age of minor son, minor daughters and the age of mother to be 70 years at the time of accident, in my considered view deduction of 1/3rd for the personal expenditure of the deceased would be appropriate. Thus, deducting 1/3rd for the personal expenditure the annual dependency comes to Rs.46,820/-. The appellants/claimants shall be entitled for compensation of Rs.46,820 x 17 = 7,95,940/-. In addition the appellants would be entitled for Rs.5,000/- for loss of consortium, Rs.5,000/- each to the son, daughters and mother for loss of love and affection, Rs.2,500/- for loss of estate and Rs.2,000/- towards funeral expenses. Thus, the total compensation for which the appellants are entitled is Rs.8,25,440/-. The enhanced compensation shall carry interest at the rate of 9% per annum from the date of application till payment.

10. The appeal stands allowed.

No orders as to the costs.

Appeal allowed.

LEELAWATI (Smt.) Vs. EMANUEAL

I.L.R. [2009] M. P., 1394

APPELLATE CIVIL*Before Mr. Justice Shantanu Kemkar*

29 January, 2009*

LEELAWATI (SMT.) & ors.

.... Appellants

Vs.**EMANUEAL**

... Respondent

Succession Act (39 of 1925), Sections 276 & 263 - Ex parte probate of will - Application to set-aside u/O. 9 R. 13 CPC filed - Alleged that deceased testator of will was suffering from blood cancer and admitted in hospital one day before the alleged date of execution and died on the next day - Application for amendment so as to treat it as application for revocation of probate also filed - Rejection holding that no case for setting-aside ex-parte order is made - Appeal - Held - Aspect of admitting deceased testator in hospital and death on the very next day of execution of will was not disclosed by respondent - Non-disclosure of these facts would amount to concealment from Court something material to the case so as to invoke jurisdiction of revocation of grant of probate for just cause - Powers of the court u/s 263 are wide enough to revoke or annul the grant of probate for just cause - Case remanded for fresh decision - Appeal allowed.

(Paras 13 to 15)

उत्तराधिकार अधिनियम (1925 का 39), धाराएँ 276 व 263 - वसीयत का एकपक्षीय प्रोबेट - अपास्त कराने के लिए सि.प्र.सं. के आदेश-9 नियम 13 के अधीन आवेदन पेश - यह अभिकथित किया गया कि वसीयत का मृत वसीयतकर्ता ब्लड कैंसर से पीड़ित था और निष्पादन की कथित तारीख के एक दिन पूर्व अस्पताल में भर्ती किया गया और अगले दिन मृत्यु हो गयी - संशोधन के लिए आवेदन भी पेश किया गया ताकि इसे प्रोबेट के प्रतिसंहरण के लिए आवेदन माना जाए - यह अभिनिर्धारित करते हुए खारिज किया गया कि एकपक्षीय आदेश अपास्त करने के लिए कोई मामला नहीं बनता - अपील - अभिनिर्धारित - मृतक वसीयतकर्ता को अस्पताल में भर्ती करने और वसीयत के निष्पादन के अगले ही दिन मृत्यु होने का तथ्य प्रत्यर्थी द्वारा प्रकट नहीं किया गया - इन तथ्यों का अप्रकटीकरण मामले की तात्त्विक जानकारी को न्यायालय से छुपाने की कोटि में आयेगा ताकि प्रोबेट के प्रतिसंहरण की अधिकारिता का न्यायसंगत कारण के लिए अवलंब लिया जाए - धारा 263 के अधीन न्यायालय को न्यायसंगत कारण के लिए प्रोबेट प्रदान करने को प्रतिसंहृत या रद्द करने की व्यापक शक्तियाँ हैं - मामला पुनः विनिश्चय के लिए प्रतिप्रेषित - अपील मंजूर।

Cases referred :

AIR 1959 SC 443, AIR 1998 SC 861.

*G.M. Chaphekar with D.S. Kale, for the appellants.**Prakash Verma, for the respondent.*

O R D E R

SHANTANU KEMKAR, J. :-This appeal under Order 43 Rule 1 (d) of the Code of Civil Procedure {for short the CPC} read with Section 299 of the Indian Succession Act, 1925 {for short the Act} has been filed against the order dated 05.04.2005 passed by the 16th Additional District Judge, Indore in M.J.C. No.04/2005 (Old No.3/2002).

2. Briefly stated the respondent filed an application under Section 372 of the Act (which ought to have been filed under Section 276 of the Act) for grant of Probate of the Will said to have been executed by his brother deceased Daniel Robert in his favour. The application was registered as Probate Case No.9/98, (New No.31/2000). On being noticed the appellants appeared and participated in the few proceedings. However, after participating in few proceedings they remained absent and as such the Trial Court proceeded ex-parte against them. The Trial Court after recording ex-parte evidence of the respondent and his witnesses vide its order dated 07.01.2002 granted Probate in favour of the respondent. On getting the knowledge of passing of said ex-parte order dated 7.01.2002 the appellants moved an application on 14.01.2002 under Order 9 Rule 13 read with Section 151 of the CPC for setting aside the ex-parte order and also for revocation of probate, if issued in favour of the respondent.

3. The aforesaid application MJC No.3/2002 (New No.04/2005) was opposed by the respondent by filing reply. The 4th Additional District Judge, recorded the evidence and fixed the case for arguments. At that stage the appellant filed an application dated 25.6.2004 under Order 6 Rule 17 read with Section 151 of the CPC seeking amendment in the application dated 14.01.2002 so as to make it as an application under Section 383 of the Act read with Order 9 Rule 13 of the CPC and also sought amendment in the application so as to treat it as an application for revocation of order dated 7.1.2002 granting probate to the respondent and for revocation of certificate of probate granted in favour of the respondent.

4. The said application dated 25.6.2004 filed by the appellant seeking amendment in the application under Order 9 Rule 13 of the CPC was considered and decided by the 4th Additional District Judge, Indore vide order dated 17.08.2004. While rejecting the said amendment application, the learned Court below observed that mentioning of wrong section in the said application dated 14.1.2002 will not come in the way of the Court for deciding the case by applying correct provision of law. It further observed that while deciding the case the Court has to consider the subject matter of the application and, therefore, the amendment as sought for, is not necessary also. However, on 04.02.2005 the case was transferred to the Court of XVI Additional District Judge. After hearing the arguments the learned Judge rejected the appellants' application dated 14.1.2002 by the impugned order dated 5.4.2005 holding that no case for setting aside the

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ex-parte order is made out. Feeling aggrieved the appellants have filed this miscellaneous appeal.

6. Shri G.M.Chaphekar, learned senior counsel for the appellants argued that the Will was executed by the deceased on 16.09.1991 and not on 16.01.1991 as was stated by the respondent in his application for grant of Probate. He submitted that this was a deliberate misstatement of the fact on the part of the respondent so that the Court may not have prima facie doubt about the execution of the Will by the deceased who died on 17.9.1991. He further argued that the deceased Testator of the Will was suffering from Blood Cancer and was admitted on 15.9.1991 in the T.Choithram Hospital, Indore and was kept in isolation on account of repeated vomiting of fresh Blood. He submitted that the executor of the Will on account of his serious ailment was not in a fit mental and physical condition so as to execute the Will. According to him, all these material facts were concealed by the respondent in the application for grant of Probate. These facts were also not brought on record in the Probate case by way of oral evidence of the respondent himself and was also not stated by any of the witnesses. He, therefore, submitted that when these facts were brought to the notice of the Court below by way of an application under Order 9 Rule 13 read with Section 151 of the CPC and also in the application under Order 6 Rule 17 of the CPC, it was incumbent upon the Court below to have gone into this question as to whether there exists a just cause for revocation of grant of Probate instead of only dealing with the question whether the appellants have made out a case under Order 9 Rule 13 of the C.P.C. The learned Senior counsel on the strength of well settled principle of law on the basis of various judgments of the Supreme Court including *H. Venkatachala Iyengar Vs. B.N.Thimmajamma* (AIR 1959 SC 443) and in the case of *Gurdial Kaur Vs. Kartar Kaur and others* (AIR 1998 SC 861) argued that Court below ought to have satisfied that the will was not only executed and attested in manner required under the Act but was also required to satisfy as to whether the said will was the product of the free volition on the part of executor and the executor had executed the same after knowing and understanding the contents of the Will. He submitted that when sufficient material was available on record the Trial Court by not examining the same committed illegality. He further argued that the Court below while rejecting the application dated 25.06.2004 seeking amendment in the application dated 14.1.2002 had already made the observations as stated above could not have rejected the application only on the ground that no case for setting aside ex-parte order is made out, but should have considered the matter, in the light of its observation made in the order dated 17.8.2004.

7. Shri Prakash Verma, learned counsel appearing for the respondent on the other hand argued that when the application was filed under Order 9 Rule 13 of the CPC there was no option to the Court below except to decide the same in accordance with the provision contained in Order 9 Rule 13 of the CPC. He

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submitted that the appellants having not chosen to invoke the provisions of revocation of the Probate cannot be permitted to agitate the said ground in this appeal which has been filed against the order rejecting the appellants' prayer for setting aside the ex-parte order.

8. Heard the learned counsel for the parties and perused the record.

9. In order to deal with the question involved in this Misc. Appeal it would be appropriate to examine the relevant provisions of the Act. In fact Section 372 of the Act under which the respondent filed the application is not attracted for grant of Probate. It is also equally correct to say that in the application dated 25.06.2004 filed by the appellants to amend the application dated 14.1.2002, they have also quoted a wrong Section i.e. Section 383 of the Act whereas for revocation of Probate Section 263 is attracted. The Section 372 is attracted for application for grant of succession certificate and Section 383 deals with revocation of succession certificate. However, mere mention of wrong provision of law itself would not be a ground to deny the relief.

10. Section 276 of the Act provides for petition for Probate. Section 263 of the Act provides for revocation or annulment of the grant of Probate or letters of administration for just cause which reads as under :-

"263.Revocation or annulment for just cause.- The grant of probate or letters of administration may be revoked or annulled for just cause.

***Explanation* – Just cause shall be deemed to exist where -**

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in the point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect."

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11. Section 268 provides that the proceedings of the Court of the District Judge in relation to the granting of Probate and letters of administration shall, save as hereinafter otherwise provided; be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908 (5 of 1908).

12. In the case of *H. Venkatachala Vs. B.N. Thimmajamma* (supra) the Supreme Court has held that the question as to whether the Will set up by the propounder is proved to be the last Will of the Testator has to be decided in the light of provisions contained in Section 67 and 68 read with Section 47 of the Evidence Act. It also held that Sections 59 and 63 of the Indian Succession Act are also relevant. The Supreme Court taking note of another important feature in the case of proving the Will in Paras 20, 21 and 22 held as under :-

“However, there is one important feature which distinguishes will from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance

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of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicious should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will and in such circumstances it will be a part of the initial onus to remove any such legitimate doubts in the matter.

Apart from the suspicious circumstances above referred to in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decision of English Courts often mention the test of the satisfaction of judicial conscience. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it has been validly executed by the testator who is no longer alive.

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It is obvious that for deciding material question of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties.: AIR 1946 PC 156 Rel.on.”

13. In Probate Case No.9.98 (New No.31/2000) since the appellants failed to appear after participating in the few proceedings the Trial Court proceeded ex-parte against the appellants. According to the appellants on receiving knowledge of the ex-parte order, they moved an application under Order 9 Rule 13 read with Section 151 of the C.P.C. In paragraph 5 of the said application the appellants stated that on the date of execution of the Will the physical and mental condition of the Testator of the Will was such that he was unable to speak, understand or execute the Will. In the said application, a prayer was also made to cancel the certificate of Probate, if issued, in pursuance of the order dated 07.01.2002. In the application under Section 151 of the CPC and in the application under Order 6 Rule 17 of the CPC it was alleged by the appellants that the said Will is forged. Apart from this it was also alleged that the Testator of the Will was admitted in T.Choithram Hospital and was under treatment. It was also stated that in view of this, in the absence of the statement of the Doctor that the Testator of the Will Daniel was in a fit condition to execute the Will, the order of Probate could not have been passed. In the applications prayer to revoke the order of Probate dated 07.01.2002 and to revoke the certificate of Probate was made. The Trial Court while rejecting the application dated 25.06.2004 for amendment made it clear that appropriate orders will be passed taking note of the subject matter of the application by applying correct provisions of law and had also observed that, in the circumstances, the amendment sought for is not necessary even. However, on perusal of the impugned order, it is clear that the Court below has considered the application only under Order 9 Rule 13 of the CPC and did not consider as to whether any case for revocation of Probate is made out or not.

14. In my considered view, having regard to the facts and circumstances brought on record by the appellants in their aforesaid applications and which has also

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come in the evidence recorded in the proceedings under Order 9 Rule 13 of the C.P.C. the Trial Court should have exercised the powers vested in it under Section 263 of the Act and should have passed appropriate orders. The powers of the Courts under Section 263 of the Act are wide enough to revoke or annul the grant of Probate for just cause. The Court was duty bound to examine as to whether the 'Just Cause' was existing. As observed not only in the averments made in the application under Order 9 Rule 13, Order 6 Rule 17 and Section 151 of the C.P.C. but also in the evidence recorded by the Trial Court on the application under Order 9 Rule 13 of the CPC it has come that the Testator of the alleged Will was admitted on 15.9.1991 in the Hospital on account of his serious ailment of Blood Cancer and died on 17.9.1991 immediately on the next date of executing the alleged Will dated 16.9.1991. This aspect was not disclosed by the respondent in his application for grant of Probate that the Testator was admitted in the Hospital on 15.9.1991 and died of Blood Cancer on 17.9.1991 in the Hospital. Neither the respondent nor his witnesses who were examined in the Probate case disclosed these facts. In the circumstances, when these facts have come on record in the proceedings under Order 9 Rule 13 and also in the application for amendment the Court below should have recorded a finding as to whether non-disclosure of these facts would amount to concealment from the Court something material to the case so as to invoke jurisdiction of revocation of grant of Probate for just cause. Having failed to do so in my considered view the Trial Court has committed gross illegality and injustice.

15. In the circumstances, I am inclined to allow this appeal and remand the matter to the Trial Court for deciding the question as to whether the respondent by not disclosing the fact that the deceased was admitted in T.Choithram Hospital on 15.09.1991 and the Will was executed on 16.9.1991 when he was admitted in the Hospital for treatment of Blood Cancer has concealed something material to the case which would entail revocation of Probate.

16. Accordingly, the impugned order is set aside and the appeal is allowed by remanding the case to the Trial Court for fresh decision of the matter in the light of the aforesaid direction, after affording opportunity of leading further evidence to the parties, if they so desire. The documents filed by the appellants along with I.A. No.4572/08 filed under Order 41 Rule 27 of the CPC be sent to the Trial Court along with the record of the case. No orders as to the costs.

Parties to appear before the Trial Court on 26.02.2009.

Appeal allowed.

BIPTA BAI (Smt.) Vs. SMT. SHIPRA BAI**I.L.R. [2009] M. P., 1402****APPELLATE CIVIL****Before Mr. Justice U.C. Maheshwari****16 February, 2009*****BIPTA BAI (SMT.)**

... Appellant

Vs.

SMT. SHIPRA BAI & ors.

... Respondents

A. Civil Procedure Code (5 of 1908), Section 9 - Challenge as to validity of sale deed - In life time of owner of property, his probable heirs do not have any right or title in his property - Owner sold his property and never challenged such transaction in his life time - Appellant had no authority to challenge the same. (Para 12)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 — विक्रयपत्र की वैधता को चुनौती — सम्पत्ति के स्वामी के जीवनकाल में उसके संभाव्य वारिसों को उसकी सम्पत्ति में कोई अधिकार या स्वत्व नहीं होता — स्वामी ने सम्पत्ति विक्रय कर दी और उसके जीवनकाल में ऐसे संव्यवहार को कभी भी चुनौती नहीं दी — अपीलार्थी को उसे चुनौती देने का कोई प्राधिकार नहीं था।

B. Limitation Act (36 of 1963), Section 3 - Bar of limitation - Sale deed executed on 05.06.1972 - Suit challenging sale deed filed on 15.12.1986 i.e., after more than 14 years - Held - Case is barred by limitation. (Para 13)

ख. परिसीमा अधिनियम (1963 का 36), धारा 3 — परिसीमा का वर्जन — विक्रयपत्र दिनांक 05.06.1972 को सम्पादित — विक्रयपत्र को चुनौती देते हुए वाद 15.12.1986 को अर्थात् 14 वर्ष से अधिक समय बाद पेश — अभिनिर्धारित — मामला परिसीमा से वर्जित है।

C. Civil Procedure Code (5 of 1908), Section 100 - Substantial question of law - "Whether the lower appellate court erred in law in reversing the judgment & decree passed by the Trial Court" - Held - Framed question of law could not be treated to be substantial question of law u/s 100. (Para 17)

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 — विधि का सारवान प्रश्न — "क्या निम्न अपीलीय न्यायालय ने विचारण न्यायालय द्वारा पारित निर्णय व डिक्री को उलटने में विधि की त्रुटि की" — विरचित विधि का प्रश्न धारा 100 के अन्तर्गत विधि का सारवान प्रश्न होना नहीं माना जा सकता।

Cases referred :

AIR 1968 SC 200, AIR 1982 SC 84, 1960 MPLJ 879, 1993 MPWN (II) 105, 2008(3) MPLJ 57, 2007(1) MPLJ 17, 2004(2) MPLJ 332.

L.N. Sakle, for the appellant.

Imtiyaz Hussain with Ishtihaq Hussain, for the respondent No.1 & 2.

Sudesh Verma, G.A., for the respondent No.3.

J U D G M E N T

U. C. MAHESHWARI, J.:—This appeal is directed by the appellant/ plaintiff under Section 100 of CPC being aggrieved by the judgment and decree dated 30.9.1993 passed by Additional Judge of Harda to the District Judge Hoshangabad in Civil Original Appeal No.11-A/90 allowing the appeal of respondent No.1 and 2 and setting aside the judgment and decree dated 21.1.1992 passed by Additional Civil Judge, Harda in C. O. S. No.284-A/1989, whereby the suit of the appellant for declaration, possession and perpetual injunction was decreed by the trial court.

2. The brief facts of the case which are necessary for adjudication of this Appeal are that the appellant/ plaintiff filed a suit for declaration, possession and perpetual injunction against respondent No.1 and 2 for half share with respect to agricultural land bearing survey No.163 area 9.54 acre, situated at Village Karasni. As per averment of the plaint the appellant and respondent No.1 being real sisters are daughters of deceased Mohan Singh who was the Bhumiswami of aforesaid agricultural land and also had a three Chasma house in the village. On account of his old age his agricultural operation was looked after by respondent No.1 Shipra bai and her family members as he was residing with them in the village. The appellant became widow in the lifetime of Mohan Singh on which before his death she asked him to provide some help on which she was assured by him stating that she would take her share of the property from respondent No.1. After demise of Mohan Singh appellant demanded her share from respondent No.1 then it was known to her that by taking advantage of old age of Mohan Singh Respondent No.1 got executed sale deed of the aforesaid land from him in favour of her son respondent No.2 on 5.6.1972 and also got mutated the land in his name. The alleged sale deed was executed by stating very lesser consideration i. e. only Rs. 4,000/-. It is further pleaded that respondent No.2 has not acquired any title or legal right in the aforesaid land. After death of the father the plaintiff is entitled for her share in the same. In addition it is pleaded that plaintiff does not want to raise any dispute with respect of the house property. With these pleadings by filling the suit plaintiff prayed for half of the share in the aforesaid land.

3. In the written statement of respondent No.1 and 2, the averments of the plaint are denied. In addition it is stated that in the year 1972 Mohan Singh sold the aforesaid land with his free consent and in consideration of Rs.4,000/- to the respondent No.2 through his mother respondent No.1 as he was minor during that period. In order to perform the aforesaid sale he executed a sale deed and got it registered after receiving its due consideration. The plaintiff/ appellant never visited the village Karsani to look after her father Mohan Singh on the contrary by raising some quarrel she had taken Rs.1500/- from him after the aforesaid transaction. It is further pleaded that plaintiff/ appellant did not have any right to demand as her share in the aforesaid land. As such at the time of death of Mohan Singh he did not have any property in his name or title. On the strength of

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the aforesaid sale-deed the name of respondent No.2 was duly mutated as Bhoomiswami in the record of the rights kept by the Revenue Department. The plaintiff's suit is based on false allegation. In such premises the prayer for dismissal of the suit along with Rs.500/- as compensatory cost is made.

4. In view of the pleadings of the parties as many as four issues were framed, on which evidence was recorded by the trial court. On appreciation of the same the suit of the appellant was decreed for half of the aforesaid land with a direction to give its possession to her. The same was challenged by the respondent No.1 and 2 before the lower appellate Court. On reconsideration by allowing their appeal the judgment and decree passed by the Trial Court was set aside and suit of the plaintiff was dismissed, on which the appellant/ plaintiff come forward to this Court.

5. This appeal was admitted vide order dated 12.4.1994 on following substantial question of law:

“Whether the lower appellate Court erred in law in reversing the judgment and decree passed by the trial Court”.

6. Shri L. N. Sakle, learned counsel of the appellant assailed the judgment of the appellate Court saying that the alleged sale deed Ex.D.1 executed by deceased Mohan Singh in favour of respondent No.2 was ab-initio void and the same was not acted upon at any point of time. By elaborating his argument he said that such sale deed was never executed by deceased Mohan Singh with free consent. The same was got executed by respondent No.1 and 2 by practicing some misrepresentation and fraud with Mohan Singh only with intention to defeat the interest of the appellant after his demise. The consideration of aforesaid sale was never paid to Mohan Singh by the respondents and the possession of the land was also not delivered to the respondents by Mohan Singh in his life time. In the lack of consideration and delivery of possession it could not be inferred that the document was acted upon by the respondent in the lifetime of Mohan Singh. In such premises Mohan Singh was the owner of such land, thus, the appellant being one of his daughter has equal share in it with respondent No.1. In such premises the appellate Court has committed grave error in reversing the findings of the trial Court on re-appreciation of the evidence, which is not permissible under the law. According to him it is trite law that if the approach of the Trial Court on appreciation of evidence was probable one, the same could not be changed by the Appellate Court on reappreciation of evidence. With these submissions he prayed for setting aside the judgment and decree of the Appellate Court and restoring the judgment and decree of the trial court by allowing this appeal.

7. In response of the aforesaid argument by justifying the findings of the appellate Court Shri Imtiaz Hussain, learned counsel for the respondent No.1 and 2 argued that the same are based on proper appreciation of the evidence and also

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are in conformity with law. He further said that the substantial question of law as framed in this appeal is not covered under the provision of Section 100 of Code of Civil Procedure. By elaborating this argument he said that the findings of the Appellate Court even if erroneous the same could not be treated to be a substantial question of law as the same are based on factual matrix. In such premises, firstly he prayed to dismiss the appeal on this preliminary ground. In alternative he said that the appellant has no authority to challenge the sale deed Ex.D.1 executed by Mohan Singh in favour of respondent No.2 in any manner, either in respect of consideration or with respect of its averments, in which the delivery of possession is also mentioned. Such document was executed in the year 1972 and Mohan Singh had died in the year 1985 during this period in his lifetime he himself never challenged the aforesaid transaction of sale. Thus, the appellant has no authority to challenge such transaction after death of Mohan Singh. In any case the plaintiff did not have any cause of action to file the suit in the year 1986 or any point of time. He further said that the appellant had utterly failed to prove the circumstance showing that aforesaid sale deed was executed by Mohan Singh in favour of respondent No.2 without consideration or without delivery of possession of the land. In the available circumstances, it could not be inferred that respondent no.1 and 2 or any of them got executed the said deed from Mohan Singh by practicing any fraud or misrepresentation.

8. Having heard, after perusing the record of the Courts below and the impugned judgment, I am of the considered view that this appeal deserves to be dismissed because of following reasons.

9. It is apparent on record that initially the disputed property was belonging to Mohan Singh, the father of appellant and respondent No.1. As per pleadings of the parties and evidence available in the record it is apparent that aforesaid land was sold by said Mohan Singh to respondent No.2 through respondent No.1 (the mother of respondent No.2) by registered sale deed dated 5.6.1972 in consideration of Rs.4,000/-. As per endorsement of Sub-Registrar on the sale deed deceased Mohan Singh acknowledged before him to receive the consideration of Rs.4,000/- of such transaction. It appears from the record that on the strength of such sale deed the land was also got mutated in the name of respondent No.2. Such sale deed Ex. D-1 was also proved not only by Sabbal Singh respondent No.2 but also by one of it's attesting witness Nathuram (D. W. 2).

10. As per averments of such sale deed the possession of the land was also handed over to respondent No.2 through his natural guardian respondent No.1. As per allegation of the appellant such document sale deed (Ex.D.1) got executed by respondent No.1 and 2 by practicing the fraud and misrepresentation with Mohan Singh and also by taking advantage of his old age but the same has neither been pleaded nor proved by the appellant with any cogent and reliable evidence. In the lack of pleadings, the appellant is not entitled for any relief on this ground as

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the law is well settled that in the absence of pleadings the evidence can not be looked into even if adduced on record. Although in order to prove such circumstance the appellant examined herself as Vipta Bai (P.W.1) and Ranchhor (P.W.2), the resident of village Kasarni. Appellant Vipta Bai in paragraph 8 of her deposition categorically stated that when she visited her father's house lastly at that time he was 75 years of the age and was not ill. She also admitted that she was used to take money from her father and also deposed some occasions in that respect. But she categorically denied that out of said sale consideration she received Rs.1,500/- from her father. But in entire deposition she could not state any incident, occasion or circumstance showing that by taking advantage of the old age of Mohan Singh any fraud or misrepresentation to get executed the sale deed from him was committed by any of the respondents.

11. In the lack of such evidence it could not be inferred that such sale deed got executed in favour of respondent No.2 by practicing any fraud or misrepresentation with Mohan Singh or without payment of any consideration. The execution of the sale deed by Mohan Singh appears to be admitted fact as per averment of the plaint. Besides this the same has been proved by witnesses as stated above. There was a heavy burden on the plaintiff to prove that sale deed was got executed in favour of the respondent No.2 without consideration by practicing the fraud and misrepresentation. But the appellant had failed to discharge such burden. In such situation the trial Court was bound to dismiss the suit of the appellant but the same was decreed under wrong premises on which the the lower appellate court has rectified such mistake.

12. It is a settled proposition of law that in the lifetime of the owner of the property his probable heirs or probable legal representatives do not have any right or title in his property and such owner may deal with it according to his own wish and choice. Therefore, if Mohan Singh being Bhoomiswami has sold his land to the respondent no. 2 with consideration by executing the abovementioned registered document and subsequent to it he never challenged such transaction his life time either on the ground of non-payment of consideration or practicing any fraud or misrepresentation with him then after his demise his heirs or legal representatives like appellant had no authority to challenge the same. There is sufficient evidence showing that since 1972 up to death of Mohan Singh in the year 1985 the land being in the possession of respondent No.1 and 2 was cultivated by them. In such premises the appellant did not have cause of action to claim the aforesaid land contrary to the rights of the respondent no.2.

13. At this stage, I would like to mention here that the aforesaid transaction of sale took place on 5.6.1972 and the present suit was filed on 15.12.1986 i. e. after more than fourteen years. In any case it was barred by limitation as respondent No.2 acquired the title of the aforesaid land by virtue of sale deed (Ex.D.1) dated 5.6.1972.

14. Besides above as per provision of Benami Transaction Prohibition Act 1988, such sale transaction could not be said to be ab-initio void because the sale deed

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was executed by the then Bhoomi Swami in favour of respondent No.2 who was not coparcener of his family. The aforesaid Act is made enforceable with retrospective effect, therefore, in view of provision of Section 4 of this Act aforesaid transaction of sale could not be held to be ineffective.

15. Considering all the aforesaid facts and available evidence on record, it could not be said that lower appellate court has committed any error in allowing the appeal of the respondents and dismissing the suit of the appellant by setting aside the judgment and decree of the trial court. Although on behalf of the appellant various case laws i. e. (i) AIR 1968 S. C. 200 (*Commissioner of Income-tax, v. M/s. Motors and General Stores (P) Ltd.*), (ii) AIR 1982 S. C. 84 (*Prasad Vs. V. Govindaswami Mudaliar*) (iii) 1960 MPLJ 879, (*Sayyed Ibne Hasan Vs. Mehtab Latifat Hussain*), (iv) 1993 MPWN (2) 105 (*Sadhuram Vs. Ramadhar Singh*) and (v) 2008 (3) MPLJ 57 (*Mahadev Prasad Vs. Mst. Rambai*) are cited. Although this Court does not have any dispute with respect of the principles laid down in such cases but in the facts and circumstance of the case at hand the same are distinguishable not only on facts but also on the legal principles laid down in such cases and the nature of dispute involved in this appeal. Thus, same are not helping to the appellant.

16. Before answering the said question or law I would like to state here that in view of the decision of the Apex Court in the matter of *Hero Vinoth Vs. Seshammal* reported in 2007 (1) MPLJ 17, the framed question is not covered under Section 100 of CPC. In other words it could not be treated to be a substantial question of law. While dealing with the issue the Apex Court has held as under :

“19. 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, the 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.”

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17. In view of the aforesaid discussion it has been revealed that the findings of the appellate court are neither contrary to any mandatory provisions of law nor contrary to any pronouncement made by the Apex Court. In such premises, it is held that said framed question could not be treated to be substantial question of law under Section 100 of Code of Civil Procedure.

18. In the case of *Radheshyam Vs. Ramakant (Deceased) through LRs.* reported in 2004 (2) MPLJ 332, it was held by this Court that the findings of the appellate Court if without flaw and fault and based on proper appreciation of the evidence then same does not give rise to any substantial question of law and the same could not be a ground to frame the substantial question of law. In view of this principles also the framed question in the light of aforesaid discussion could not be treated to be substantial question of law.

19. For the reasons stated above, the framed question could not be held to be substantial question of law as per requirement of Section 100 of the Code of Civil Procedure and the same is held. Accordingly the aforesaid question is answered. Even otherwise in view of the aforesaid discussion in the available facts and circumstances, this appeal does not have any merits and deserves to be dismissed.

20. Therefore, by affirming the judgment and decree of the appellate court this appeal is hereby dismissed. In the facts and circumstance of the case there shall be no order as to costs. Decree be drawn up accordingly.

21. Appeal is dismissed as indicated above.

Appeal dismissed.

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APPELLATE CIVIL

Before Mr. Justice P.K. Jaiswal

17 March, 2009*

DILIP KUMAR

Vs.

VIJAY BAHADUR SINGH & ors.

... Appellant

... Respondents

A. Civil Procedure Code (5 of 1908), Order 21 Rules 98, 100, 101 & 102, Transfer of property Act, 1882, Section 52 - *Rules not applicable to transferee pendente lite - Whether purchaser pendente lite has a right to cause obstruction in a decree - Held - A purchaser pendente lite has no right to offer resistance or cause obstruction and as his rights have not been crystallized in a decree, Rule 102 of Order 21 of the Code comes into operation and hence, he cannot resist execution during the pendency of the proceedings.* (Para 23)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 98, 100, 101 व

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102. सम्पत्ति अन्तरण अधिनियम, 1882, धारा 52 — वादकालीन अंतरिती को लागू न होने वाले नियम — क्या वादकालीन क्रेता को डिक्री में बाधा उत्पन्न करने का अधिकार है — अभिनिर्धारित — वादकालीन क्रेता को प्रतिरोध करने या बाधा कारित करने का कोई अधिकार नहीं है और चूंकि उसके अधिकार किसी डिक्री में स्फटित नहीं किये गये हैं इसलिए संहिता के आदेश 21 का नियम 102 प्रवृत्त होता है और इसलिए वह कार्यवाहियों के लम्बित रहने के दौरान निष्पादन का प्रतिरोध नहीं कर सकता।

B. Civil Procedure Code (5 of 1908), Order 21 Rule 29, Transfer of property Act, 1882, Section 52 - Stay of execution pending suit between decree holder and judgment debtor - Applicability of the rule to transferee lis pendente lite - Held - Rule 29 of Order 21 CPC deals with cases wherein a suit has been instituted by the judgment debtor against the decree holder and has no relevance to cases of lis pendens wherein transfer of property has been effected by the judgment debtor to a third party during the pendency of the proceedings. (Para 23)

खा. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 29, सम्पत्ति अन्तरण अधिनियम, 1882, धारा 52 — डिक्रीदार और निर्णीत ऋणी के मध्य वाद के लम्बित रहते निष्पादन पर रोक — वादकालीन अंतरिती को नियम की प्रयोज्यता — अभिनिर्धारित — सि.प्र.सं. के आदेश 21 का नियम 29 उन मामलों के लिए है जिनमें निर्णीत ऋणी द्वारा डिक्रीदार के विरुद्ध कोई वाद संस्थित किया गया है और विचाराधीन वाद के उन मामलों से कोई सम्बद्धता नहीं रखता जिनमें निर्णीत ऋणी द्वारा कार्यवाहियों के लम्बित रहने के दौरान तृतीय पक्ष को सम्पत्ति का अंतरण किया गया है।

Case referred :

(1998) 3 SCC 723.

N.K. Gupta, for the appellant.

J.P. Mishra, for the respondent Nos.1 & 2.

J U D G M E N T

P.K. JAISWAL, J. :- Heard on admission.

This appeal is filed by the objector against the judgment and order dated 8.2.08 passed by the Second Additional District Judge (FTC) Ganj Basoda, District Vidisha. in Civil Appeal No.25-A/08, by the said order, the Second Additional District Judge dismissed the appeal filed by the appellant and affirmed the order dated 17.9.07 passed by the Executing Court, Ganj Basoda, in Execution Case No.20-A/63x94, whereby objection of the appellant was rejected.

2. Short facts of the case are that Maan Singh, father of respondents no. 1 and 2 and husband of respondent no.3 filed a suit bearing Civil Suit No.20A/63x94 against Pratap S/o Hukum Singh and State of Madhya Pradesh through Collector, Vidisha, in the Court of Civil Judge Class-II, Basoda, which was decreed on 11.11.65. Trial Court directed that defendant no. 1-Pratap Singh shall hand over the possession of the disputed land (Survey Numbers 143, 146, 152, 164, 169, 185,

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186, 188 and 205 situated in Village Madiya Peeniya, Tahsil Basoda, District Vidisha) within one month from the date of the judgment. In case of default of handing over possession as above; the defendant no. 1 shall pay mesne profits to the plaintiffs @ 504.70 Paise, which is ten times of the land revenue payable as per Ex.D/7. In view of the provisions of Section 202 (7) and 250 (6) of the M.P. Land Revenue Code, 1959. Trial Court also declared that the plaintiff is Bhumiswami of the disputed land.

3. Defendant no. 1 challenged the said judgment and decree before the Additional Judge Ganj Basoda to the Court of District Judge, Vidisha, by filing Civil Appeal No.27-A/93, which was dismissed on 22.7.94.

4. On the death of original defendant no.1 Pratap Singh, his legal heirs challenged the judgment and decree of the Courts below by filing SA No. 121/94, which was also dismissed by this Court on 18.1.99.

5. Devi Singh legal heir of Pratap Singh challenged the order dated 18.1.99 passed in SA No. 121/94 by filing Civil Appeal No.6065/00 before the Supreme Court of India. The Apex Court dismissed the said appeal vide order dated 1.5.07 by holding that they see no reason to interfere with well merited concurrent finding of facts recorded by all the Courts below. The appeal being devoid of merit was accordingly dismissed.

6. Appellant-objector during the pendency of Civil Appeal No.27-A/93 before the Additional District Judge, Ganj Basoda, entered into an agreement on 30.6.1989 with Smt. Narbadi Bai widow of Pratap Singh in respect of an area of 1.453 hectares of Survey Numbers 164 and 169 for a consideration of Rs.50,000/- and thereafter on 17.7.1989, she executed a sale deed in his favour. Devi Singh and Omkar Singh, who are sons of Pratap Singh, gave their consent to her mother for execution of the said sale deed.

7. Objector after execution of the sale deed executed a registered consent letter with Maan Singh S/o Mannu Singh Rajput on 15.3.1990. On the basis of the consent letter and sale deed, objector filed an objection before the Executing Court vide IA No. 11/07 on 1.8.2007. This objector during the pendency of Civil Appeal No.27-A/93 purchased the property in question knowing well that the trial Court in the year 1965 passed a decree against Pratap Singh and after the death of original defendant Pratap Singh, his widow Mst. Narbadi Bai was brought on record a legal representative and after her death her son and three daughters, namely, Devi Singh, Sahadara Bai, Parvati Bai and Girja Bai were brought on record. The said legal heirs challenged the judgment and decree by filing SA No. 121/94, which was dismissed by this Court on 18.1.99. After dismissal of the second appeal, Devi Singh, one of the legal heir of Pratap Singh, challenged the said judgment by filing an appeal before the Apex Court, which is evident from the order dated 1.5.07 passed by the Apex Court.

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8. Objection was filed on the ground that after execution of the sale deed dated 17.7.89 from Smt. Narbadi Bai, the decree holder Maan Singh executed a consent deed by which he gave his consent in respect of execution of the sale deed dated 17.7.89 and he has no objection in future in respect of the land of Survey Numbers 164 and 169. By the said consent, he relinquished his right and there is adjustment with regard to the land, which was purchased by the appellant-objector, therefore, execution proceedings to that extent against the objector is not maintainable and prayed for its dismissal.

9. The respondents no. 1, 2 and 3, who are sons of decree holder Maan Singh, filed their reply and contended that objector Dilip had knowledge about pendency of the Civil Appeal and judgment and decree dated 11.11.65 against Pratap Singh, husband of Narbadi Bai. The objector purchased the property from the judgment debtor during the pendency of the litigation has no independent right to property to resist, obstruct or object execution of a decree. The doctrine of *lis pendens* would apply to the transaction in question and prayed for dismissal of the objection. Respondents no. 1 and 2 decree holder also denied about execution of the consent deed by Maan Singh and contended that they have no knowledge about consent deed, which was said to be executed during the pendency of the suit and therefore the said sale deed is void. With the above, they prayed for dismissal of the objection.

10. The Executing Court vide order dated 17.9.07 rejected the objection by holding that the Order 21 Rule 29 of CPC has no relevance to cases wherein transfer of property has been effected by the judgment debtor to a third party during the pendency of proceedings. The appellant-objector purchased the property during the pendency of proceedings and therefore the doctrine of *lis pendens* would apply to the transaction in question and rejected the objection of the appellant.

11. The appellant challenged the said order dated 17.9.07 by filing First Appeal before the lower appellate Court. The lower appellate Court by the impugned judgment dated 6.2.08 dismissed the appeal and affirmed the order passed by the Executing Court on 17.9.07.

12. Learned counsel for the appellant drew my attention to the consent letter dated 15.3.90 said to be executed by the decree holder during his lifetime in favour of the objector and sale deed dated 17.7.89 issued by Smt. Narbadi Bai widow of the judgment debtor and submitted that when there is an adjustment by the registered document, then such document can be taken into consideration by the Executing Court and Courts below erred in not granting opportunity to lead evidence to the appellant and failed to consider the fact that Maan Singh, father of the decree holder, has executed deed dated 15.3.90 in favour of the appellant, whereby he had right, title and interest over the property and when the contents of the application were not specifically denied by the respondents, the fact as pleaded in the application is liable to be admitted under Order 6 Rules 4 and 5 of CPC and the Courts below committed error in dismissing the application.

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13. On the other hand, the learned counsel for the respondents no. 1 and 2 drew my attention to the reply of the said objection and submitted that the respondents very specifically denied about the execution of consent letter and also submitted that the sale deed was executed during the pendency of the proceedings on 17.7.89 and objector for a period of 20 years did not file any application before the lower appellate Court nor he filed an application during the lifetime of Maan Singh and when the appeal of the appellant-judgment debtor was dismissed by the Apex Court, he with a malafide intention has filed this application to delay the proceedings and delivery of possession in pursuance to the decree, which was passed in the year 1965, i.e., on 11.11.1965. The appellant objector, who is a third party and purchased the property from the judgment debtor during the pendency of the suit has no independent right to property to resist, obstruct or object execution of a decree. Both the Courts below have not committed any legal error in dismissing the objection and prayed for dismissal of this second appeal.

14. Rule 97 to 106 of Order 21 of the Code deal with "resistance or obstruction to delivery of possession to decree holder or purchaser". Rule 97 enables the decree holder or auction purchaser to complain to executing court if he/she is resisted or obstructed in obtaining possession of such property by "any person". The Court on receipt of such application will proceed to adjudicate it.

15. Rule 101 requires the Court to make full-fledged inquiry and determine all questions relating to right, title and interest in the property arising between the parties to the proceeding or their representatives. The court will then pass an order upon such adjudication (Rule 98).

16. Rule 99 permits any person other than the judgment debtor who is dispossessed by the decree holder or auction purchaser to make an application to executing court complaining such dispossession. The court, on receipt of such application, will proceed to adjudicate it (Rule 100).

17. Rule 103 declares that an order made under Rule 98 or Rule 100 shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

18. Rule 102 clarifies that Rules 98 and 100 of Order 21 of the Code do not apply to transferee pendente lite. That Rule is relevant and material and may be quoted in extenso:

"102. Rules not applicable to transferee pendente lite.- Nothing in Rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person."

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Bare reading of the Rule makes it clear that it is based on justice, equity and good conscience. A transferee from a judgment debtor is presumed to be aware of the proceedings before a court of law. he should be careful before he purchases the property which is the subject matter of litigation. It recognizes the doctrine of *lis pendens* recognized by Section 52 of the Transfer of Property Act, 1882. Rule 102 of Order 21 of the Code thus takes into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending. If unfair, inequitable or undeserved protection is afforded to a transferee pendente lite, a decree holder will never be able to realize the fruits of his decree. Every time the decree holder seeks a direction from a court to execute the decree, the judgment debtor or his transferee will transfer the property and the new transferee will offer resistance or cause obstruction. To avoid such a situation, the Rule has been enacted.

19. It is thus settled law that a purchaser of suit property during the pendency of litigation has no right to resist or obstruct execution of decree passed by a competent court. The doctrine of "*lis pendens*" prohibits a party from dealing with the property which is the subject matter of suit. "*Lis pendens*" itself is treated as constructive notice to a purchaser that he is bound by a decree to be entered in the pending suit. Rule 102, therefore, clarifies that there should not be resistance or obstruction by a transferee pendente lite. It declares that if the resistance is caused or obstruction is offered by a transferee pendente lite of the judgment debtor, he cannot seek benefit of Rules 98 or 100 of Order 21.

20. The Apex Court in the case of *Silverline Forum (P) Ltd. v. Rajiv Trust* (1998) 3 SCC 723 has held that where the resistance is caused or obstruction is offered by a transferee pendente lite, the scope of adjudication is confined to a question whether he was a transferee during the pendency of a suit in which the decree was passed. Once the finding is in the affirmative, the executing court must hold that he had no right to resist or obstruct and such person cannot seek protection from the executing Court. The Apex Court stated:

"10. It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree holder. Rule 101 stipulates that all questions "arising between the parties to a proceeding on an application under Rule 97 or Rule 99" shall be determined by the executing court, if such questions are "relevant to the adjudication of the application". A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt if the resistance was made by a transferee pendente lite of the judgment debtor, the scope of the adjudication would be shrunk to the limited question whether he is such a

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transferee and on a finding in the affirmative regarding that point the execution court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act.”

21. Thus, purchasing the property from the judgment debtor during the pendency of the suit has no independent right to property and to resist or obstruct or object to the execution of a decree. Resistance at the instance of transferee or judgment debtor during the pendency of the proceedings cannot be said to be resistance or obstruction by a person in his own right and therefore is not entitled to get his claim adjudicated.

22. As already noted earlier: Civil Suit was instituted in the year 1963. The litigation was pending in respect of the property in question and the matter was sub-judice. The appellant thereafter purchased the property from Smt. Narbadi Bai widow of the original defendant on 17.7.89, i.e., during the pendency of Civil Appeal No.27-A/93. It is also not in dispute that thereafter the lower appellate Court dismissed the appeal and affirmed the judgment and decree of the trial Court on 22.7.94. The appellant, who entered into an agreement for purchase of the property in question on 30.6.89, never intimated this fact nor filed any application before the lower appellate Court during the pendency of the first appeal, second appeal before this Court or before the Apex Court nor he during the lifetime of Maan Singh filed an application for adjustment of decree or dismissal of the appeal in respect of the property in question in view of the consent letter given by the decree holder Maan Singh. In such a situation I am of the considered view that the doctrine of *lis pendens* would apply to the transaction in question and the lower appellate Court was wholly right in dismissing the appeal of the appellant.

23. Rule-29 of Order 21 CPC deals with cases wherein a suit has been instituted by the judgment debtor against the decree holder and has no relevance to cases of *lis pendens* wherein transfer of property has been effected by the judgment debtor to a third party during the pendency of the proceedings. The lower appellate Court, in my opinion, has rightly held that the appellant could not be said to be a “stranger” to the suit inasmuch as he was claiming right, title and interest through Smt. Narbadi Bai against whom the suit was pending. The appellant, therefore, be presumed to be aware of the litigation which was before a competent court in the form of Civil Appeal No.22A/93 instituted by Smt. Narbadi Bai and other legal heirs of Pratap Singh. Since the appellant is a purchaser pendente lite and as he has no right to offer resistance or cause obstruction and as his rights have not been crystallized in a decree. Rule 102 of Order 21 of the Code comes into operation and hence, he cannot resist execution during the pendency of the proceedings, ‘the order passed by the Courts below cannot be said to be illegal,

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unlawful or otherwise contrary to law. No question of law. much less a substantial question of law is arising in this appeal and the appeal deserves to be dismissed.

24. The appeal filed by the appellant has no merit and is accordingly dismissed with costs. Counsel's fee Rs.5,000/-.

Appeal dismissed.

I.L.R. [2009] M. P., 1415

APPELLATE CIVIL

Before Mr. Justice A.P. Shrivastava

15 April, 2009*

CHAIRMAN, M.P.S.E.B., JABALPUR & ors.
Vs.

... Appellants

MULU @ MOOLCHANDRA & ors.

... Respondents

A. Law of Torts - Compensation - Determination - Held - Under the tort, the Acts do not provide the principle on which damages are to be assessed - The English Act merely say that "damages may be awarded as are proportioned to the injury resulting from the death to the dependants respectively" - The Indian Act similarly says that "the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively." (Para 22)

क. अपकृत्य विधि - प्रतिकर - अवधारण - अभिनिर्धारित - अपकृत्य के अधीन अधिनियम सिद्धांत का उपबंध नहीं करते हैं जिस पर क्षतिपूर्ति निर्धारित की जानी है - अंग्रेजी अधिनियम केवल यह कहता है कि "क्षतिपूर्ति क्रमशः आश्रितों को मृत्यु के परिणामस्वरूप हुई क्षति के अनुपात में अधिनिर्णीत की जा सकती है" - इसी प्रकार भारतीय अधिनियम कहता है कि "न्यायालय ऐसी क्षतिपूर्ति दे सकेगा जितनी वह ऐसी मृत्यु से क्रमशः पक्षकारों को हुई हानि के अनुपाती समझे।

B. Law of Torts - Death by negligence - Deceased died due to electrocution - Appellants stated that a squirrel came in contact with wires resulting to a short circuit due which wire snapped from the pole and fell on the ground - Held - Stand taken by the appellant does not find mention in the written statement and witness states that he made statement on the basis of his experience - Parties cannot deviate from the pleadings - Maintenance of the lines were also done 5 months prior to incident - Appellants did not adduce any satisfactory evidence that safety measures were taken. (Paras 17 & 18)

ख. अपकृत्य विधि - उपेक्षा से मृत्यु - मृतक की मृत्यु विद्युत करंट से हुई - अपीलार्थी ने कथन किया कि एक गिलहरी तार के सम्पर्क में आयी जिसके परिणामस्वरूप शॉर्ट सर्किट हुआ जिसके कारण तार खम्बे से टूटकर जमीन पर गिर गया - अभिनिर्धारित - अपीलार्थी द्वारा लिया गया आधार लिखित कथन में उल्लिखित होना नहीं पाया गया और साक्षी ने कथन किया कि उसने अपने अनुभव के आधार पर कथन किया - पक्षकार अभिवचनों से विचलित नहीं हो सकते हैं - विद्युत

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लाईन का सुधार भी घटना के 5 माह पूर्व किया गया – अपीलार्थियों ने कोई समाधानप्रद साक्ष्य पेश नहीं की कि सुरक्षा उपाय किये गये थे।

Cases referred :

(2005) 6 SCC 156, 2007(2) MPLJ 513, (2003) 4 MPLJ 466.

Vivek Jain, for the appellants/defendant Nos.2 to 4.

Shishir Saxena, for the respondent Nos.1 & 2/plaintiffs.

J U D G M E N T

A.P. SHRIVASTAVA, J. :-Appellants/defendants no.2 to 4 have filed this appeal under Section 96 of the Code of Civil Procedure, 1908, arising out of the judgment and decree dated 18.04.06 passed by the learned Additional District judge, Lahar, District Bhind, in Civil Suit No. 2B/05 by which the compensation for Rs.3,00,000/- was allowed by the court to be paid to the respondents/plaintiffs no. 1 and 2.

2. As per the plaint allegations, on 31.03.2003 early in the morning the deceased Santosh who was the son of the respondents no.1 and 2 was going from his village Rahawali Uwari to Indurkhi fair by his bicycle, It is alleged that when the deceased reached the agricultural fields of Baccha Saheb and Mahesh Singh, an electricity supply wire snapped and fell on the side wall of the canal. The deceased Santosh came into contact with the falling wire and died on the spot due to electrocution. The deceased was a young man of about 26 years of age and was earning about Rs.5,000/- per month from agriculture and from the business of selling milk. Therefore, it is alleged that the wire had fallen due to negligent act of the appellants.

3. By way of compensation, Rs.4,00,000/- were claimed by the respondents no. 1 and 2 but the trial court granted compensation to the tune of Rs.3,00,000/-. The appellants filed their written statement. In their written statement, it is denied that the accident has taken place out of any negligence on the part of the appellants but the on the other hand it has occurred as a squirrel came in contact with the wires resulting to a short-circuit which lead to snapping of the pin insulator of the wire due to which the wire snapped from the pole and fell to the ground. The dead squirrel was lying in the wires at the spot. The accident has not arisen out of any negligence on the part of the appellants but has occurred as an act of God and beyond the control of the appellants.

4. The trial court after framing the issues and recording the evidence of both the sides came to the conclusion that the death of the deceased was caused due to irresponsible and negligent act of the appellants, thereby he died due to electrocution and further awarded the compensation to the tune of Rs.3,00,000/-.

5. The impugned judgment and decree is challenged by the appellants on the ground that the trial court has not appreciated the evidence adduced by the parties properly and the finding regarding irresponsible and negligent act of the appellants is not correct and the suit is liable to be dismissed on this count.

6. It is also submitted that the compensation as awarded by the trial court is on higher side looking to the income of the deceased.

7. The case of the respondents is that when the deceased was going on his bicycle and when he reached in the fields of Baccha Saheb and Mahesh Singh, an electricity supply wire snapped and fell on the side wall of the canal. The deceased Santosh came into contact with the falling wire and died on the spot due to electrocution. In support of his contention, Mulu alias Moolchand who is the father of the deceased examined on oath and he deposed that Santosh was his son who died due to electric current on 31.03.2003. He lodged the report at the police station.

8. Kaptan Singh was also examined who is an eye-witness and he deposed that when Santosh was going near the canal by bicycle, the electric wire was snapped on him and due to current he died on the spot.

9. Dr. Dinesh Kumar Gupta (PW-3) who conducted the postmortem of the deceased also confirmed the death of the deceased was due to electric current and the report is Ex.P-2.

10. On behalf of the appellants, Vijay Ahuja (D.W.1) who is the Junior Engineer in MPEB, Mihona filed an affidavit that accident was not occurred due to any negligence on their part but the accident happened as a squirrel came into contact with the wires resulting to a short-circuit which lead to snapping of the pin insulator of the wire due to which the wire snapped from the pole and fell to the ground. The accident had occurred all of a sudden. It is also submitted that the maintainance work was conducted on 22.10.02. Line guide is used in public places or on the way which is used by the public. In cross-examination para-6, it is admitted by the witness that there is no record in the office which could show that the wire was snapped due to squirrel on account of which the accident occurred. This submission has been given on the basis of experience and not on record. The maintainance was done on 22.10.02 while the accident occurred on 31.03.03. He is also unable to state whether the accident occurred is the way of public trespass or not and also admits that there was no guarding done where the accident occurred because which was not fit for that. Similar statement was given by V.K. Saini (D.W.2) in his affidavit.

11. So far as the death of Santosh is concerned, this is not in dispute that due to snapping of the wire he died due to electrocution. The main question is about the negligent act of the appellants.

12. Counsel for the appellants/defendants no.2 to 4 drew attention of this court towards Rule 87(3) of the Indian Electricity Rules 1956 which lays down as under :

87. Lines crossing or approaching each other:— (1)

Where an overhead line crosses or is in proximity to any telecommunication line, either the owner of the overhead line or the telecommunication line, whoever lays his line later, shall arrange

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to provide for protective devices or guarding arrangements, in a manner laid down in the code of Practice or the guidelines prepared by the power and telecommunication Co-ordination Committee and subject to the provisions of the following sub rules.

[2] When it is intended to erect a telecommunication line or an overhead line which will cross or be in proximity to an overhead line or a telecommunication line, as the case may be, the person proposing to erect such line shall give one month's notice of his intention so to do along with the relevant details of protection and drawings to the owner of the existing line.

[3] Where an overhead line crosses or is in proximity to another overhead line, guarding arrangement shall be provided so as to guard against the possibility of their coming into contact with each other.

Where an overhead line crosses another overhead line, clearances shall be as under

Minimum clearances in metres between lines when crossing each others:

S.No.	Nominal System Voltage	11-66 KV	110-132 KV	220 KV	400 KV	800 KV
1	Low & Medium	2.44	3.05	4.58	5.49	7.94
2	11-66 KV	2.44	3.05	4.58	5.49	7.94
3	110-132 KV	3.05	3.05	4.58	5.49	7.94
4	220 KV	4.58	4.58	4.58	5.49	7.94
5	400 KV	5.49	5.49	5.49	5.49	7.94
6	800 KV	7.94	7.49	7.94	7.94	7.94

Provided that no guardings are required when an extra high voltage line crosses over another extra-high voltage, high voltage, medium or low voltage line or road or a tram subject to the condition that adequate clearances are provided between the lowest conductor of the extra-high voltage line and the top most conductor of the overhead line crossing underneath the extra-high voltage line and the clearances as stipulated in rule 77 from the topmost surface of the road is maintained.

13. He also relied on a decision rendered by the Apex Court in the case of *SDO, Grid Corporation of Orissa Ltd and others Vs. Timudu Oram* reported in [2005]

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6 SCC 156. In this case, a writ was filed under Article 226 of the Constitution of India and he referred para 6 of the judgment in which it is held that mere fact that the wire of the electric transmission line belonging to Appellant I had snapped and the deceased had come in contact with it and had died was not by itself sufficient for awarding compensation. The court was required to examine as to whether the wire had snapped as a result of any negligence on the part of the appellants and as a result of which deceased had come in contact with the wire. In view of the specific defences raised by the appellants in each of these cases they deserved an opportunity to prove that proper care and precautions were taken in maintaining the transmission lines and yet the wires had snapped because of circumstances beyond their control or unauthorised intervention of third parties.

14. The counsel for the respondents no. 1 and 2 supported the judgment of the trial court and submitted that the trial court has rightly given its finding that the accident occurred due to irresponsible and negligent act of the appellants and there were proper code and safety measures which could have been taken by the appellants to prevent such unfortunate events.

15. It is also submitted that guarding was also not done by the appellants to prevent such happenings. In this regard he referred Rule 88 Indian Electricity Rules 1956, the relevant portion of which is as under:

88. Guarding.- (1) Where guarding required under these rules the provisions of sub-rules (2) to (4) shall apply.

(2) Every guard-wire shall be connected with earth at each point at which its electrical continuity is broken.

(3) Every guard-wire shall have an actual breaking strength of not less than 635 kg and if made of iron or steel, shall be galvanised.

(4) Every guard-wire or cross-connected system of guard-wires shall have sufficient current-carrying capacity to ensure the rendering dead, without risk of fusing of the guard-wire or wires till the contact of any live wire has been removed.

Counsel for the respondents no. 1 and 2 also relied on the decision of the Division Bench in the case of *Jagdish & Others Vs. Naresh Soni & Others* reported in 2007(2) MPLJ 513 in which it is held that deceased died of electric shock received from loose electric wires lying on the ground. MPEB failed to take all such safety measures to prevent the accident. It cannot claim exoneration from paying damages to the appellants on account of death of the deceased due to electric shock.

16. The main point is that whether the act of the appellants comes within the purview of negligence. Negligence may mean a mental element in tortious liability or it may mean an independent tort. Negligence as a tort is the breach of a legal

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duty to take care which results in damage, undesired by the defendant, to the plaintiff. Thus, its ingredients are: (a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty; (b) breach of that duty; (c) consequential damage to B. Because the concept of foreseeability plays a part in all of these elements they cannot always be kept apart, and it has been said that "they are simply three different ways of looking at one and the same problem. It is true that it is not for every careless act that a man may be held responsible in law, nor even for every careless act that causes damage. He will only be liable in negligence if he is under a legal duty to take care. In the tort of negligence, breach of "duty" is the chief ingredient of the tort; in fact there is no other except damage to the plaintiff.

17. In this case, the main defence taken by the appellants is that the incident occurred as a squirrel came in contact with the wires resulting to a short-circuit which lead to snapping of the pin insulator of the wire due to which the wire snapped from the pole and fell to the ground but no such plea is taken by the respondent no-3/defendant no. 1 in its written statement. Further, a party cannot be permitted to go beyond its pleadings. Apart from this, defendant witness Vijay Ahuja (D.W.1), in cross-examination, admits that there is no record in the office that the incident had occurred due to squirrel and he is telling this fact on affidavit on the basis of experience and not on record. Therefore, the testimony regarding the incident occurred due to squirrel is not acceptable because there is no such pleading and further the evidence which was given by the defence witness is also not reliable.

18. It is also relevant to note that as per the evidence adduced by the appellants regarding the safety measures taken by the department from time to time is not convincing because the last time maintainance had taken place on 22.10.02 and the incident occurred on 31.03.03. It appears that no maintainance was conducted from nearly five months when the accident took place. Both the parties referred Rule 87(3) and 88 but no satisfactory evidence has been adduced regarding the safety measures which are taken by the appellants.

19. Therefore, the finding of the trial court regarding careless and negligent act of the appellants does not require any interference.

20. Now, I will discuss about the quantum of compensation. It is submitted by the learned counsel for the appellants that the deceased was an agriculturist and also doing the business of milk. It is further submitted that the income of Rs.3,000/- per month as accepted by the trial court is not correct because no supporting documentary evidence has been adduced about the income from agricultural produce & from selling milk. Further, the dependency has also not been calculated properly. He relied on *Halkibai and another Vs. Managing Director, Rajasthan State Road Transport Corporation and another* reported in 2003(4) MPLJ 466.

21. On the other hand, it is submitted by the counsel for the respondents no. 1

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and 2 that in the suit compensation of Rs.4,00,000/- was claimed by the respondents no. 1 and 2 but the trial court already granted amount to the tune of Rs.3,00,000/-. He relied on the decision rendered in the case of *Jagdish & others Vs. Naresh Soni and others* reported in 2007(2) MPLJ 513. In this case, the court assessed the income of the deceased at Rs.1,000/- per month and awarded compensation to the tune of Rs.2,00,000/- which is upheld by this court. He also made oral prayer regarding the enhancement of the amount by way of cross-objections. However, this prayer cannot be acceptable.

22. Under the tort, the Acts do not provide the principle on which damages are to be assessed. The English Act merely says that "damages may be awarded as are proportioned to the injury resulting from the death to the dependants respectively". The Indian Act similarly says that "the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively."

23. The assessment of damages to compensate the dependants is beset with difficulties because from the nature of things, it has to take into account many imponderables, e.g., the life expectancy of the deceased and the dependants, the amount that deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income altogether. That sum, however, has to be taxed down by having regard to the facts, circumstances and uncertainties.

24. In this case also the income was assessed by the trial court at Rs.3,000/- per month and after deduction of personal expenses awarded Rs.3,00,000/- as compensation to the respondents. Looking to the facts, circumstances and as discussed earlier, the compensation as awarded by the trial court appears to be just and reasonable and thus, no interference is called for.

25. In the result, the present appeal stands dismissed. Parties to bear their own costs.

Appeal dismissed.

DAYARAM Vs. STATE OF M.P.

I.L.R. [2009] M. P., 1422

APPELLATE CRIMINAL*Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava*

4 December, 2008*

DAYARAM & anr.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Evidence Act (1 of 1872), Section 32 - Dying declaration - Absence of signature or thumb impression of deceased - Deceased suffering lacerated wounds with multiple fractures in his both hands - Naib Tahsildar who recorded dying declaration could not obtain signature or thumb impression due to fractures - Held - No animus or ill-will of Naib Tahsildar towards the appellants - Dying declaration could not be discarded. (Para 13)

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - मृतक के हस्ताक्षर या अंगुष्ठ चिह्न का अभाव - मृतक के दोनों हाथों में कई फ्रेक्चर सहित कटे-फटे घाव हुए - नायब तहसीलदार, जिसने मृत्युकालिक कथन अभिलिखित किया, फ्रेक्चर के कारण हस्ताक्षर या अंगुष्ठ चिह्न अभिप्राप्त नहीं कर सका - अभिनिर्धारित - नायब तहसीलदार का अपीलार्थियों के प्रति कोई विद्वेष या दुर्भावना नहीं - मृत्युकालिक कथन को अमान्य नहीं किया जा सकता।

B. Evidence Act (1 of 1872), Section 32 - Dying declaration - Absence of certificate of Doctor - Naib Tahsildar admitted that declarant was fully conscious and fit to give statement - Doctor also certified at the foot of declaration that declarant remained fully conscious during his statement - It cannot be said that dying declaration cannot be accepted.

(Para 14)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - चिकित्सक के प्रमाण पत्र का अभाव - नायब तहसीलदार ने यह स्वीकार किया कि घोषणाकर्ता बयान देने के लिए पूर्णतः सचेतन और स्वस्थ था - चिकित्सक ने भी घोषणा के निचले भाग में प्रमाणित किया कि घोषणाकर्ता उसके बयान के दौरान पूर्णतः सचेतन रहा - यह नहीं कहा जा सकता कि मृत्युकालिक कथन स्वीकार नहीं किया जा सकता।

C. Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 32 - Dying declaration - Dying declaration can form the sole basis for conviction, if it is found to be true and voluntary. (Para 17)

ग. दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धारा 32 - मृत्युकालिक कथन - मृत्युकालिक कथन दोषसिद्धि का एकमात्र आधार बन सकता है यदि यह सत्य और स्वेच्छया होना पाया जाए।

Case referred :

AIR 2002 SC 2973, AIR 2005 SC 1473.

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L.N. Sakle, for the appellants.

T.K. Modh, Dy.A.G., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by **SMT. SUSHMA SHRIVASTAVA, J.** :—Appellants have preferred this appeal challenging their conviction and order of sentence passed by First Additional Sessions Judge, Chhatarpur in S.T. No.20/92, decided on 5.2.94.

2. Appellants have been convicted under Section 302 of IPC and sentenced to imprisonment for life by the impugned judgment.

3. According to prosecution, on 19.12.91 about three 'O'clock in the noon, deceased Ghansu (hereinafter referred to as 'deceased') had gone to Isanagar Police Station to lodge a report against appellant Dayaram, who had beaten his son Chandu. When Ghansu and his son Chandu were returning back to their village Pahargaon and reached near the culvert, appellant Dayaram and Parsu armed with lathi emerged there, intercepted the deceased and said "साला बहुत बढ़ गया है अपने खिलाफ रिपोर्ट करता है आज इसे जान से ही खतम कर दो"; both the appellants then started assaulting the deceased by lathi. Both the appellants gave repeated lathi blows on his scalp and leg; as a result Ghansu fell down and got unconscious. Thinking him dead, appellants threw him in the nearby canal and fled away. Deceased, however, regained consciousness in water and shouted for help. A few villagers then came there, took him out of water and carried him to the Police Station on a cot.

4. The FIR of the incident was lodged by the deceased himself, on the basis of which an offence was registered against the appellants and was investigated. Deceased was sent for medical examination to the Primary Health Centre, Isanagar. His dying declaration was also recorded by the Executive Magistrate. However, his condition being precarious, deceased was referred to District Hospital, Chhatarpur, where he succumbed to his injuries. The intimation of his death was given to Police from the Hospital. Merg intimation was then recorded and merg inquest report was prepared. The dead body of deceased Ghansu was sent for postmortem examination. During investigation, lathi used in the commission of the offence was seized at the instance of appellants. Blood stained earth and plain earth were seized from the spot and the spot map was prepared. The seized articles were sent for forensic examination. After due investigation, appellants were prosecuted under Section 302/34 of IPC and were put to trial.

5. Appellants abjured the guilt and pleaded false implication.

6. After trial and upon appreciation of the evidence adduced in the case, learned Trial Judge found the appellants guilty under Section 302 of IPC for committing murder of Ghansu, convicted and sentenced them as aforesaid by the impugned judgment, which has been challenged in this appeal.

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7. We have heard the learned counsel for the parties and perused the evidence on record.

8. It was no longer disputed that deceased Ghansu met a homicidal death. It is also reflected from the testimony of Dr. Ramakant Chaturvedi (P.W-14), who had medically examined the deceased on 19.12.91 at about 5 'O'clock in the evening, that multiple lacerated wounds and other injuries were found on his person. Dr. Hari Agrawal (P.W-17), who conducted the autopsy on the dead body of deceased Ghansu, also found the following antemortem injuries on his body :-

(i) One wound on right forearm of $\frac{1}{2}$ " x $\frac{1}{2}$ " size, underlying bone is broken in pieces.

(ii) One wound of $\frac{1}{2}$ " x $\frac{1}{2}$ " size on left forearm with contusion on medial border forearm lower $\frac{1}{3}$. Underlying bone broken in pieces.

(iii) One deep wound on right III webspace of 2" x 1" x 1" size. Underlying bone. p.p. of II and IV finger & Vth metacarpal broken.

(iv) One deep lacerated wound on the scalp of 2" x $\frac{1}{2}$ " size underlying parietal bone is broken and haematoma collection, subdural and epidural.

(v) Lacerated wound of $\frac{1}{2}$ " x $\frac{1}{2}$ " size on right leg.

(vi) Parietal bone broken.

9. In the opinion of Dr. Hari Agrawal (P.W-17) cause of death of the deceased was shock due to head injury and other injuries. The detailed postmortem report (Ex.P-22) is also placed on record. It was thus, clearly evident that deceased met a homicidal death.

10. Learned counsel for the appellants, however, submitted that learned trial judge erred in convicting the appellants by placing implicit reliance on the dying declaration (Ex.P-19) of the deceased, though it was not signed by the deceased and also suffered from interpolation and other infirmities. Learned counsel for the appellants also submitted that the trial court also erred in relying upon the FIR (Ex.P-20) as the dying declaration of the deceased, though it was doubtful that the deceased was conscious and able to lodge the FIR.

11. Learned counsel for the respondent/State, on the other hand, justified and supported the conviction of the appellants and submitted that the dying declaration (Ex.P-19) of the deceased was wholly reliable and consistent with the FIR (Ex.P-20) lodged by the deceased.

12. The dying declaration (Ex.P-19) of the deceased was recorded by Naib Tahsildar and Executive Magistrate Satish Awasthy (P.W-19) on 19.12.91 at about

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4.55 A.M. at Isanagar Government Hospital. Naib Tahsildar Satish Awasthy (P.W-19) categorically deposed in his evidence that he had recorded the dying declaration (Ex.P-19) of the deceased as per statement given by him and he had also read it over to the deceased after reducing it into the writing. Naib Tahsildar Satish Awasthy (P.W-19) further deposed that when he recorded his statement, deceased was conscious, though he was sighing with pain. According to P.W-19 Satish Awasthy, as both the hands of the deceased were fractured, he could not take his signatures or thumb impression on the dying declaration (Ex.P-19) and he also appended a note to this effect in the dying declaration (Ex.P-19) and got it signed by the two witnesses. P.W-19 Satish Awasthy further stated that Govt. Doctor was also present at the time of recording of dying declaration and he had certified on the dying declaration (Ex.P-19) that Ghansu remained conscious at the time of his statement. Dr. Ramakant Chaturvedi (P.W-14) also testified that dying declaration (Ex.P-19) of the deceased was recorded in his presence and he had certified thereon that the declarant remained fully conscious during the statement.

13. The first submission of the learned counsel for the appellants has been that the dying declaration (Ex.P-19) had no authenticity, as it did not bear the signature or thumb impression of the deceased. However, Naib Tahsildar Satish Awasthy (P.W-19) clearly explained in his evidence that the signatures or thumb impression of declarant could not be taken due to fracture in his both the hands. This fact is also mentioned in the dying declaration (Ex.P-19). The fact, that the deceased had fractures in his both hands, is also fortified by the medical evidence of Dr. Hari Agrawal (P.W-17), who conducted the postmortem on the dead body of deceased Ghansu and found lacerated wounds in both of his hands with multiple fractures. More so, there is nothing on record to suspect that Naib Tahsildar (P.W-19) would himself manipulate the dying declaration (Ex.P-19), as he had no animus or ill-will towards the appellants. In view of the aforesaid facts, dying declaration (Ex.P-19) of the deceased could not be discarded on the score that it did not bear the signatures or thumb impression of the deceased.

14. Learned counsel for the appellants next submitted that before recording of the dying declaration Naib Tahsildar (P.W-19) admittedly did not obtain any certificate from the doctor that the declarant was fully conscious and fit to give the statement. However, Naib Tahsildar (P.W-19) explained in his evidence that as declarant Ghansu was fully conscious, he did not consider it necessary to obtain a prior certificate from the doctor about his consciousness, particularly when the doctor himself was present at the time of recording the dying declaration. Besides, dying declaration (Ex.P-19) also contains the certification by the doctor at the foot to the effect that the declarant remained fully conscious during his statement, which stood duly proved by the testimony of Naib Tahsildar (P.W-19) as well as by Dr. Ramakant Chaturvedi (P.W-14) himself. There are no reasons to disbelieve the version of Naib Tahsildar (P.W-19) as well as Dr. Ramakant Chaturvedi (P.W-14)

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that the declarant Ghansu was fully conscious before recording of his dying declaration (Ex.P-19). The constitutional Bench of the Apex Court in the case of *Laxman Vs. State of Maharashtra* reported in AIR 2002 Supreme Court page 2973 has held that in absence of certification of the doctor as to the fitness of the mind of declarant, it cannot be said that the dying declaration cannot be accepted. It would be profitable to reproduce the following observations made by the Apex Court in the case of *Laxman Vs. State of Maharashtra* (supra):-

“What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.”

15. As already said, in the instant case, it was clearly proved from the evidence of Naib Tahsildar Satish Awashy (P.W-19) and Dr. Ramakant Chaturvedi (P.W-14) that the declarant was fully conscious before recording of his dying declaration (Ex.P-19). There was also a certification by the doctor appended at the foot of the dying declaration (Ex.P-19) that the declarant remained fully conscious during his statement. Thus, there are no reasons to doubt that the declarant was not conscious or fit to give the statement. There was also nothing on record to indicate that the dying declaration (Ex.P-19) made by the deceased was the result of any tutoring or prompting or product of imagination. In fact, there are no reasons to suspect that the dying declaration (Ex.P-19) is not the true or voluntary statement made by the deceased.

16. There was also no inconsistency in the dying declaration (Ex.P-19) and the FIR (Ex.P-20) lodged by the deceased and recorded by A.S.I. N.D. Mishra (P.W-16), which was to be treated as dying declaration after his death. As per evidence of A.S.I. N.D. Mishra (P.W-16) the FIR (Ex.P-20) was lodged by Ghansu Yadav (deceased), at Police Station Isanagar on 19.12.91 at 16.20 P.M. and it also contained his thumb impression. According to N.D. Mishra (P.W-16), he had recorded the FIR (Ex.P-20) verbatim as per information given by the deceased. There are also no reasons to disbelieve the version of P.W-16 N.D. Mishra that he had recorded the FIR (Ex.P-20) as per information given by the deceased.

17. The substratum of both the declarations (Ex.P-19 & Ex.P-20) remained the same that both the appellants had assaulted the deceased by lathi when he was coming back from Isanagar Police Station where he had gone to lodge the report against appellant Dayaram, who had beaten his son Chandu. The dying declaration (Ex.P-19) recorded by Naib Tahsildar (P.W-19) also clearly spells out

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that both the appellants had mercilessly beaten the deceased by lathi. The dying declaration (Ex.P-19) coupled with the medical evidence thus establishes that appellants had mercilessly beaten the deceased causing multiple fractures in his both the hands and parietal bones and thereby intentionally caused his death. Needless to emphasize, as also reiterated by the Apex Court in the case of *Muttu Kuty and another Vs. State by Inspector of Police, Tamilnadu* reported in AIR 2005 SC 1473 that the dying declaration can form the sole basis for conviction, if it is found to be true and voluntary.

18. In the wake of aforesaid, we are of the considered opinion that the trial court did not err in relying upon the dying declaration (Ex.P-19) of the deceased and the FIR (Ex.P-20) as the basis for conviction of the appellants for committing murder of Ghansu Yadav. Therefore, the conviction of the appellants as recorded by the trial court under Section 302 of IPC and life imprisonment awarded to him do not warrant any interference in this appeal.

19. Thus, we find no merit and substance in the appeal. We uphold the conviction of the appellants and sentence passed on them under Section 302 of IPC.

20. Appeal fails and is dismissed.

Appellants are on bail. They shall forthwith surrender to their bails bonds to serve out the remaining part of their sentence.

Appeal dismissed.

I.L.R. [2009] M. P., 1427
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
13 January, 2009*

BHARAT SINGH
Vs.

... Appellant

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Sections 304-B & 498-A - Husband or relative of husband of a woman subjecting her to cruelty - No charge u/s 498-A was framed - Appellant acquitted of charge u/s 304-B and convicted u/s 498-A - Held - No impediment in convicting appellant u/s 498-A, who was charged with and acquitted of the offence u/s 304-B. (Para 7)

क. दण्ड संहिता (1860 का 45), धाराएँ 304-बी व 498-ए - किसी स्त्री के पति या पति के नातेदार ने उसके साथ क्रूरता की - धारा 498-ए के अधीन कोई आरोप विरचित नहीं किया गया - अपीलार्थी को धारा 304-बी के आरोप से दोषमुक्त किया और धारा 498-ए के अधीन दोषसिद्ध किया - अभिनिर्धारित - अपीलार्थी को धारा 498-ए के अधीन दोषसिद्ध करने में कोई बाधा नहीं, जिस पर धारा 304-बी के अपराध का आरोप लगाया गया और दोषमुक्त किया गया।

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B. Evidence Act (1 of 1872), Section 32 - Dying declaration - More than one dying declaration - If some inconsistencies are noticed between one dying declaration and the other, the Court has to examine the nature of inconsistencies, namely whether they are material or not. (Para 9)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - एक से अधिक मृत्युकालिक कथन - यदि एक मृत्युकालिक कथन और दूसरे मृत्युकालिक कथन में कुछ असंगतियाँ हैं तो न्यायालय को असंगतियों की प्रकृति की जाँच करनी होगी अर्थात् क्या वे तात्त्विक हैं अथवा नहीं।

Cases referred :

(2004) 8 SCC 251, (1993) 2 SCC 684, (2001) 6 SCC 407.

Jagat Sher Singh, for the appellant.

Ramesh Shukla, Dy.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 24.09.1994 passed by Sessions Judge, Sidhi in Sessions Trial No.25/1993 whereby the appellant was convicted under Section 498-A of the IPC and sentenced to undergo R.I. for 3 years.

2. The prosecution case, in short, may be stated as under : -

(i) Marriage of Padmawati (since deceased) was solemnized with the appellant nearly 6 years prior to the incident in question. On 10.03.1992 at about 8.30 a.m., for treatment of suspected poisoning, Padmawati was admitted to the VSTPP hospital where she breathed her last at 12.30 p.m. In the meantime, two dying declarations were recorded. In one of declarations (Ex.P-9) scribed by the treating doctor S.P. Verma (PW5), she disclosed that she had consumed tablets of the insecticides used for preservation of wheat whereas in the other one (Ex.P-5), as recorded by the investigation officer Parmatma Singh (PW8), she alleged that the appellant had administered as many as four tablets of insecticides.

(ii) After inquest proceedings, dead body of Padmawati was sent for post-mortem that was performed by Dr. G.S. Soni (PW6). He opined that cause of Padmawati's death was poisoning only. The evidence collected in the course of the marg inquiry revealed that Padamawati was persistently subjected to maltreatment by the appellant due to non-satisfaction of demand of scooter or a cash amount of Rs.25,000/- in lieu thereof. Accordingly, ASI Parmatma Singh (PW8) recorded the FIR (Ex.P-12) and registered a case under Sections 498-A and 304-B of the IPC.

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3. The appellant was charged with the offence punishable under Section 304-B of the IPC only. He abjured the guilt and, in his examination, under Section 313 of the Code of Criminal Procedure, he further asserted that he had showered abundant love and affection on Padmawati despite the fact that she was not able to beget a child. His brother Ramanuj (DW1) and neighbour Tejbhan (DW2) were also called in defence.

4. To bring home the charge of dowry death, the prosecution examined nine witnesses including Brijbhushan @ Phussu (PW2) and Mandavi Sharan (PW3) respectively the father and brother of the deceased. Learned trial Judge, after considering the entire evidence on record, proceeded to acquit the appellant of the offence under Section 304-B of the IPC primarily on the ground that the evidence as to dowry demand as well as torture meted out to Padmawati due to its non-fulfillment of demand of a scooter or money equivalent to its price suffered from serious infirmities. However, he was of the view that the residual evidence was sufficient to establish the ingredients of the offence punishable under Section 498-A of the IPC beyond a reasonable doubt. He, therefore, proceeded to convict the appellant and sentenced him as indicated hereinabove.

5. Learned counsel for the appellant has strenuously assailed legality and propriety of the impugned conviction mainly on the ground of what is termed as an improper appreciation of evidence. According to him, the evidence, which was found deficient with regard to the dowry harassment, was also not sufficient to prove any other form of cruelty within the meaning of Section 498-A of the IPC. In his opinion, learned trial Judge ought to have held that Padmawati had died by ingesting celphos tablets accidentally. However, learned Dy. Govt. Advocate, by making reference to the incriminating pieces of evidence on record, has submitted that the conviction under challenge was fully justified.

6. Although, Brijbhushan (PW2) and Mandavi (PW3), in their sworn testimony, reiterated the allegation that Padmawati had been subjected to cruelty and harassment by the appellant on account of non-satisfaction of demand for a scooter or a sum of Rs.25,000/- yet, their statement on the point of dowry torture was rejected by the trial Court as unworthy of credence.

7. The words "wilful conduct" in Explanation (a) to Section 498-A of the IPC contemplates other forms of cruelty to which a woman may be subjected in her matrimonial home. As indicated already, no specific charge of the offence under Section 498-A of the IPC was framed against the appellant. However, there was no legal impediment in convicting the appellant, who was charged with and acquitted of the offence under Section 304-B of the IPC, for the offence under Section 498-A of the IPC (See. *Arun Garg vs. State of Punjab* (2004) 8 SCC 251). The obvious question is as to whether the appellant had committed any act of cruelty that was likely to drive Padmawati to commit suicide.

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8. Iqbal Bahabur Singh (PW1), who was living in the neighbourhood for the last one year and Achchhelal (PW7), who was referred to in the dying declaration (Ex.P-9), was one of the relatives of the deceased, did not support the accusation that Padmawati had been subjected to harassment by the appellant for any reason whatsoever. Tejbhan (DW2), who was residing in the quarter situated just below the one wherein the appellant was living with Padmawati, also supported the assertion that their married life was fairly smooth.

9. Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, if some inconsistencies are noticed between one dying declaration and the other, the Court has to examine the nature of the inconsistencies namely whether they are material or not. (*Kundula Bala Subrahmanyam vs. State of A.P.* (1993) 2 SCC 684 referred to).

10. Achchhelal (PW7), who had seen Padmawati coming down the stairs, clearly admitted that while vomiting and being incoherent, Padmawati did not give a precise answer to his question as to what had happened? The dying declarations (Ex.P-5 and P-9), bearing a common signature of treating doctor S.P. Verma (PW5), were apparently inconsistent with each other. Had the dying declaration (Ex.P-5) said to have been recorded by ASI Parmatma Singh in presence of CMO Dr. G.C. Mishra (PW4), been voluntary and reliable, it would have formed basis of conviction of the appellant for the offence of murder. However, it contained an apparently incorrect fact that the appellant has deserted Padmawati for a continuous period of ten years after their marriage whereas as per the statement of Mandavi (PW3), the brother of Padmawati, her marriage was solemnized in the year 1986 only.

11. In the other dying declaration (Ex.P-9) sought to be proved by examining its scribe Dr. S.P. Verma (PW5), the persistent cause of domestic quarrel was described as the non-fulfillment of the dowry demand only. But, as pointed out already, the prosecution version as to continuous dowry harassment was disbelieved by learned trial Judge for variety of reasons including absence of any previous complaint and non-corroborative evidence of the neighbours including Achchhelal, the relative of the deceased.

12. To sum up, there was neither a specific charge nor any cogent evidence to prove cruelty within the meaning of Explanation (a) to Section 498-A of the IPC which is a question of fact (*Arvind Singh vs. State of Bihar* (2001) 6 SCC 407 relied on). Further, the finding of not guilty in respect of dowry harassment, which falls under Explanation (b) to the penal provision, has already attained finality. In such a situation, Padmawati's death due to poisoning, by itself, was not sufficient to lead to an inference that she was subjected to any form of cruelty. Thus, the impugned conviction, being not sustainable on facts, deserves to be interfered with.

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13. Consequently, the appeal is allowed. The conviction under challenge and consequent sentence passed against the appellant are hereby set-aside. The appellant is on bail. His bail bonds stand discharged.

Appeal allowed.

I.L.R. [2009] M. P., 1431

APPELLATE CRIMINAL

Before Mr. Justice Arun Mishra & Mr. Justice S.A. Naqvi

16 April, 2009*

BASANTLAL & anr.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Evidence Act (1 of 1872), Section 32 - Dying declaration - On the basis of a reliable dying declaration, conviction can be based.

(Para 10)

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - विश्वसनीय मृत्युकालिक कथन के आधार पर दोषसिद्धि आधारित हो सकती है।

B. Penal Code (45 of 1860), Sections 302/34, 342 - Murder or Wrongful confinement - Appellant No.2 caught hold of deceased and appellant No.1 caused knife injuries - Appellant No.1 did not utter a single word before dealing knife blows - He also did not exhorted to appellant No.2 to catch hold the deceased - Held - It can be held that appellant No.2 was not having knowledge that suddenly appellant No.1 would cause knife blows - No circumstance to hold that appellant No.2 was sharing common intention - He is guilty of wrongfully confining the deceased - Acquitted u/s 302/34 and convicted u/s 342 of IPC.

(Para 11)

ख. दण्ड संहिता (1860 का 45), धाराएँ 302/34, 342 - हत्या या सदोष परिरोध - अपीलार्थी क्रमांक 2 ने मृतक को पकड़ा और अपीलार्थी क्रमांक 1 ने चाकू से क्षतियाँ कारित कीं - अपीलार्थी क्रमांक 1 ने चाकू के प्रहार करने के पूर्व एक भी शब्द नहीं कहा - उसने मृतक को पकड़ने के लिए अपीलार्थी क्रमांक 2 को प्रेरित भी नहीं किया - अभिनिर्धारित - यह अभिनिर्धारित किया जा सकता है कि अपीलार्थी क्रमांक 2 को यह ज्ञान नहीं था कि अपीलार्थी क्रमांक 1 अचानक चाकू के प्रहार कारित करेगा - यह अभिनिर्धारित करने के लिए कोई परिस्थिति नहीं कि अपीलार्थी क्रमांक 2 सामान्य आशय में भागीदार था - वह मृतक का सदोष परिरोध करने का दोषी है - धारा 302/34 के अधीन दोषमुक्त और भा.द.सं. की धारा 342 के अधीन दोषसिद्ध।

Siddharth Datt, for the appellants.

Aseem Dixit, G.A., for the respondent/State.

BASANTLAL Vs. STATE OF M.P.**J U D G M E N T**

The Judgment of the Court was delivered by S.A. NAQVI, J. :-Challenge is to the judgment dated 15.4.1994 passed by 1st Additional Sessions Judge, Mudwara (Katni) in S.T. No.560/93, whereby the appellants Basantlal and Vinod have been convicted under Section 302 of the IPC and under Section 302/34 of the IPC respectively and sentenced to undergo rigorous imprisonment for life.

2. The facts of the case are that on 27.10.1992 at village Jharela a drama company had come. In that drama company, there was a girl. On 27.10.1992 at about 4:00 p.m. Sunai @ Sonelal Choudhary was sitting at Chara of Nannu alongwith Pullu @ Yogendra Singh and Shambhu Vishwakarma, at this point of time, Sonelal commented that Pullu @ Yogendra Singh and the appellant No.1 Basantlal had committed rape with the said girl. Pullu @ Yogendra objected to it and went to his field. In the evening, the appellant No.1 Basantlal met Pullu @ Yogendra near river and asked about the comment, made by Sonelal. Thereafter, the appellant Basantlal came to know about the comment. On this count, the appellant No.1 Basantlal lost temper. He started going towards his house. Near Tiraha, the appellant No.1 Basantlal met Sonelal and there was a hot exchange of words between them, and scuffle took place. On intervention by Pullu @ Yogendra Singh and appellant No.2 Vinod, the appellant Basantlal and Sonelal being separated and the appellant Basantlal went to his house. Thereafter, the appellant Basantlal came back and the appellant No.2 Vinod caught hold of Sonelal and the appellant Basantlal gave knife blows on the abdomen of Sonelal and they ran away from the spot. FIR (Ex.P/25) was lodged. Sonelal was medically examined by Dr. R.K. Jhariya (PW-13). Dying declaration (Ex.P/1) of Sonelal was recorded by A.S.I. S.K. Pandey (PW-18). Sonelal was shifted to Government Hospital, Katni. On 28.10.1992 at about 9:00 a.m., Sonelal succumbed to the injuries. Postmortem of Sonelal was conducted by Dr. Naresh Saravgi (PW-21). He opined that Sonelal died due to shock and haemorrhage as a result of the injuries. After completion of investigation, the appellants were charge-sheeted. Case was committed to the Court of Sessions for trial.

3. Learned trial Court framed charges under Section 302 of the IPC against the appellant No.1 Basantlal and under Section 302/34 of the IPC against the appellant No.2 Vinod. Both the appellants abjured the guilt and pleaded innocence and false implication due to enmity.

4. Prosecution examined 21 witnesses. No witness has been examined in defence. After hearing learned counsel for both the parties, perusing evidence and material on record, learned trial Court convicted the appellant No.1 Basantlal under Section 302 of the IPC and the appellant No.2 Vinod under Section 302/34 of the IPC and sentenced them as hereinabove mentioned. Being aggrieved by the impugned judgment both the appellants have preferred the appeal.

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5. We have heard learned counsel for both the parties, perused impugned judgment, evidence and material on record.

6. Shri Siddharth Datt, learned counsel for the appellants vehemently argued that learned trial Court over sighted the material contradictions and omissions in the statement of prosecution witnesses. Independent witnesses did not support the prosecution case. Learned trial Court committed error in relying upon the dying declaration Ex.P/1 of the deceased Sonelal. No case is made out against the appellant No.1 Basantlal under Section 302 of the IPC and the appellant No.2 Vinod under Section 302/34 of the IPC. Alternatively, learned counsel for the appellants urged that at the most, the appellant No.2 Vinod can be convicted under Section 342 of the IPC. Learned trial Court committed error in convicting and sentencing the appellants as hereinabove mentioned. Contrary to that, Shri Aseem Dixit, learned GA for the respondent/State supported the impugned judgment and contended that learned trial Court did not commit any error in convicting and sentencing the appellants.

7. Ramdas (PW-1) deposed that deceased Sonelal sustained knife injuries on his abdomen. Chandan Singh (PW-2) also supported the statement of Ramdas (PW-1). Vinod Singh (PW-4), Shukla (PW-5), Shyamlal (PW-6), Nandkishore (PW-7) Somnath (PW-8), Phullu @ Yogendra Singh (PW-9), Shambhu Lal (PW-10), Sheeshpal (PW-11) and Rammu (PW12) turned hostile. They are deposing against their previous statement. Statement of these witnesses are not reliable. Dürkhi Bai (PW-14) saw that the deceased Sonelal was injured condition. Dr. R.K. Jhariya (PW-13) on 28.10.1992 examined Sonelal and found following injuries on his person as per MLC report Ex.P/16:

(i) Incised wound on the left side of the chest and on the 8th intercostals space. This wound was oblique and 3 cm x 1 cm x 1 ½ cm fresh bleeding was present,

(ii) Incised wound on left side of the chest on 6th intercostals space of 3 x 1 cm. fresh bleeding was present.

(iii) Incised wound on left scapular region, oblique 3 cm x 1 cm x 1 cm. fresh bleeding was present.

Injuries were caused by hard and sharp object. Evidence of Dr. R.K. Jhariya (PW-13) is corroborated by medical report Ex.P/16. His evidence is reliable. It is proved beyond reasonable doubt that deceased Sonelal sustained three incised wound as hereinabove mentioned.

8. Sonelal was referred to Surgical Specialist and he was treated at Government Hospital, Katni where he succumbed to the injuries. Dr. Naresh Saravgi (PW-21) conducted autopsy of the deceased Sonelal and found injuries on his person. He opined that cause of death of Sonelal was due to shock and haemorrhage. Injuries were ante mortem in nature. Death of Sonelal was homicidal in nature as per postmortem report Ex.P/31.

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9. Chandan Singh (PW-2) deposed that he was on his brother's shop. At about 8:00 p.m., he saw that Sonelal was lying at a distance of shop. Sonelal told him that Basantlal and Vinod (Appellants) had beaten him. He narrated the incident to Babadin and his mother. This witness also declared hostile and cross-examined by Government Advocate, but nothing fruitful came out of his cross examination. But, fact remains in his statement that Sonelal told him that Basantlal and Vinod had beaten him is unchallenged. He is witness of oral dying declaration of deceased Sonelal. Babadin is also witness of oral dying declaration of deceased Sonelal. Babadin deposed that when he reached on the spot, Sonelal was lying in injured condition. Sonelal told him that Basantlal (Appellant) dealt knife blows on his person and Vinod caught hold him. This part of evidence of Babadin has not been impeached in his cross-examination. Evidence of Chandan Singh and Babadin is reliable in respect of causing injuries by knife on the person of Sonelal by the appellant Basantlal and catching the deceased by the appellant No.2 Vinod.

10. Dr. R.K. Jhariya (PW-13) deposed that looking to the serious condition of the deceased Sonelal, he gave permission to record dying declaration (Ex.P/1). He further deposed that A.S.I. S.K. Pandey (PW-18) recorded dying declaration of Sonelal. Sonelal was fully conscious when his dying declaration was recorded. A.S.I. S.K. Pandey (PW-18) deposed that he recorded dying declaration (Ex.P/1) of deceased Sunai (Sonelal), Sunai told him that Basantlal dealt knife blows on his person and Vinod caught hold him. Dying declaration is written by S.K. Pandey (PW-18) and signed by him. On going through the evidence of Dr. R.K. Jhariya (PW-13) and A.S.I. S.K. Pandey (PW-18), it is clear that injured Sunai @ Sonelal was fully conscious and he was in fit mental and physical condition to give dying declaration (Ex.P/1). S.K. Pandey (PW18) fully satisfied that Sunai @ Sonelal was fully conscious and was in fit mental and physical condition to give dying declaration. Hence, evidence of R.K. Jhariya (PW-13) and S.K. Pandey (PW-18) is reliable and it is proved beyond reasonable doubt by their evidence that dying declaration (Ex.P/1) of Sonelal was recorded. Dying declaration of Sonelal is wholly reliable. It is settled principle of law that on the basis of reliable dying declaration, conviction can be based. Hence, on the basis of oral dying declaration of the deceased Sonelal, it is proved beyond reasonable doubt that the appellant Basantlal dealt fatal knife blows on the abdomen of the deceased Sonelal and he succumbed to the injuries. There is sufficient evidence on record that intention of the appellant Basantlal was to cause murder of the deceased Sonelal. Hence, offence under Section 302 of the IPC is proved beyond reasonable doubt against the appellant Basantlal and learned trial Court rightly convicted him under this section. Consequently, conviction of the appellant Basantlal is hereby affirmed.

11. There is evidence on record that the appellant No.2 Vinod simply caught hold the deceased Sonelal. On going through the dying declaration (Ex.P/1) of the deceased Sonelal and evidence on record that before dealing knife blows on the

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abdomen of the deceased Sonelal, the appellant Basantlal has not utter a single word in this respect and he has not exhorted to the appellant Vinod to catch hold the deceased Sonelal. Looking to the facts and circumstances of the case and evidence on record, it can be held that the appellant Vinod was not having knowledge that, suddenly the appellant Basantlal would cause knife blows on the abdomen of the deceased Sonelal, which proves fatal. There is no circumstance on record to hold that the appellant Vinod had common intention with the appellant Basantlal to cause murder of the deceased Sonelal. Hence, learned trial Court committed error in convicting the appellant Vinod under Section 302/34 of the IPC. The judgment of conviction of the appellant No.2 Vinod is not sustainable in law. Certainly, the appellant Vinod caught hold the deceased Sonelal and restrained him to go to any side. Consequently, he committed offence to wrongfully confined of deceased Sonelal, it is punishable under Section 342 of the IPC. The conviction of the appellant Vinod under Section 302/34 of the IPC and order of sentence is hereby set aside and he is convicted under Section 342 of the IPC.

12. Consequently, the appeal of the appellant No.1 Basantlal is devoid of merits and deserves to be dismissed, the appeal is hereby dismissed. The conviction of the appellant Basantlal and order of sentence passed by learned trial Court is hereby affirmed. The appeal of appellant No.2 Vinod is partly allowed and he is sentenced to undergo one year rigorous imprisonment and fined Rs.1,000/-, in default he shall undergo one month rigorous imprisonment. The appellant Vinod is already undergone his jail sentence. He is directed to deposit the fine amount within six weeks from today. After deposit the fine amount, his bail bond stands discharged. The appellant Basantlal is on bail, he is directed to surrender forthwith before the trial Court to undergo remaining part of jail sentence. Otherwise, learned trial Court shall do needful to send him to jail undergo remaining part of jail sentence.

Appeal of A. No.1 dismissed.

I.L.R. [2009] M. P., 1435

APPELLATE CRIMINAL

Before Mr. Justice S.K. Gangele

28 April, 2009*

KARU @ SAMAR SINGH

Vs.

STATE OF M.P.

... Appellant

... Respondent

Penal Code (45 of 1860), Sections 366 & 376 - Rape - Appreciation of evidence - Conviction based on sole testimony of prosecutrix - Reliability - Prosecutrix making major omission and contradictions in her statements before the Court - She went to the Court for getting affidavit notarised and

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signing marriage papers - She nowhere disclosing her acts to be under threat to her life - Doctor opined she was habitual to sexual intercourse - Held - It is not justifiable to convict the appellant on the basis of sole evidence of the prosecutrix - Evidence of prosecutrix is not of that quality on which the conviction could be sustained solely on the basis of her testimony. (Paras 7 & 15)

दण्ड संहिता (1860 का 45), धाराएँ 366 व 376 - बलात्संग - साक्ष्य का अधिमूल्यन - दोषसिद्धि एकमात्र अभियोक्त्री के परिसाक्ष्य पर आधारित - विश्वसनीयता - अभियोक्त्री ने न्यायालय के समक्ष अपने बयानों में मुख्य लोप और खण्डन किये - वह न्यायालय में शपथ पत्र को नोटरीकृत करवाने गयी और विवाह के कागजातों पर हस्ताक्षर किये - उसने यह कहीं भी प्रकट नहीं किया कि उसका कार्य उसके जीवन की धमकी देकर कराया गया - चिकित्सक ने राय दी कि वह मैथुन की अभ्यस्थ थी - अभिनिर्धारित - यह न्यायसंगत नहीं है कि अपीलार्थी को अभियोक्त्री के एकमात्र साक्ष्य के आधार पर दोषसिद्ध किया जाए - अभियोक्त्री की साक्ष्य इस कोटि की नहीं है जिस पर एकमात्र रूप से उसके परिसाक्ष्य के आधार पर दोषसिद्धि कायम रखी जा सके।

S.K. Shrivastava, for the appellant as amicus curiae.

Mukund Bhardwaj, P.P., for the respondent/State.

J U D G M E N T

S.K. GANGELE, J. :- This Jail Appeal has been filed by the appellant under Section 374 of Cr.P.C., against the judgment dated 3.6.2005, passed by Shri Rameshwar G. Kothe, the Third Additional Sessions Judge, Gwalior in Sessions Trial No.33/2005, whereby the learned trial court convicted the appellant under Sections 366 of IPC and sentenced to undergo 5 years R.I. with fine of Rs.1000/- and also convicted the appellant under Section 376(1) of IPC and awarded a sentence of R.I. 10 years with fine of Rs.5000/- with default stipulations. All the above sentences have been directed to run concurrently.

2. As per the prosecution story, on 28.09.2004 at about 8:15 p.m in the night, the appellant abducted the prosecutrix from village Sumawali Aam Road, Police Station Behat. It is alleged that the appellant had sexual intercourse with the prosecutrix and took her to various places such as Behat and Gadroli. In all these places, he committed rape on the prosecutrix. Thereafter, on the next date, the appellant-accused took her via Badagaon to Mou District Bhind by truck, where he was arrested.

3. On 3.10.2004, a report of the incident was lodged at Police Station, Behat, District Gwalior. The prosecutrix was recovered and thereafter she was medically examined. The Police recorded statements of various witnesses and filed charge sheet. Trial Court framed charges against the appellant alongwith two other accused persons under Sections 366 and 376(1) of IPC. The appellant, in his statement, denied the charges. After recording the evidence trial Court found that the offence is proved against the appellant under Sections 366 and 376(1) of IPC and awarded him a sentence of 5 years and 10 years RI respectively with fine of Rs.1000/- and

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Rs.5000/- on each count, whereas the other two accused persons have been acquitted from the offence.

4. Learned counsel for the appellant has submitted that the trial Court has committed an error in convicting the appellant under Sections 366 and 376(1) of IPC. The conviction of the appellant is based on the sole testimony of prosecutrix, however, that testimony is not reliable. In support of his contentions, learned counsel relied on the following judgments:-

(i) AIR 2001 Supreme Court 3049 in the matter of *Dilip and Another Vs. State of M.P.*;

(ii) AIR 2003 Supreme Court 2136 in the matter of *Sudhansu Sekhar Sahoo Vs. State of Orissa* and;

(iii) 2007 (6) Supreme Court Cases 465 in the matter of *Narayan Alias Naran Vs. State of Rajasthan*.

5. Contrary to this learned Public Prosecutor has submitted that there is sufficient evidence against the appellant for his conviction and there is no illegality or irregularity in the impugned judgment warranting interference, hence, appeal is liable to be dismissed.

6. The marg was lodged at the Police Station Behat, District Gwalior on 6.10.2004 by Chandrabhan Singh. It has been mentioned in the marg that one Rajendra, S/o Vijay Singh Baghel, resident of Sumawali, Police Station Behat, District Gwalior has lodged a report with regard to missing of Kallo @ Kalabati. On the aforesaid information, a report was registered on marg and after inquiry it was found that Harishchand and Keshav @ Bhindi had forcibly abducted Kallo @ Kalabati and they took her to Gadroli and thereafter to Hanuman Mandir.

7. Prosecutrix (P.W.1) in her evidence deposed that six months before, she had been going to her in-law's house from Morar Bus Stand along with her nephew Parmal. When Parmal went to drink water, appellant Samar Singh came to her and took her forcibly to his village in a Jeep. There were no other persons in the Jeep along with the appellant. At this stage, the prosecutrix was declared hostile by the Public Prosecutor. She in her deposition contradicted her statement given to the police under Section 161 Cr.P.C. that Harishchand and Keshav @ Bhindi were in the Jeep. The aforesaid facts have been stated by the prosecutrix in her statement recorded under Section 161 of Cr.P.C.. She further stated that appellant Karu @ Samar Singh proposed her for marriage and thereafter he took her to village Madaiya, situated near Bhind. He married with her and thereafter committed rape with her. He had also taken to the prosecutrix to Bhind Court for the purpose of marriage. She admitted that she had affixed her thumb impression on certain papers and after a period of 8 days, the police recovered her from the house of relative of the appellant. Thereafter, she was medically examined. In her statement under Section 161 of Cr.P.C., she stated that on 28.9.2004, she had been going to

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her in-law's house along with her nephew Parmal and when Parmal went to market, she sat into a Jeep, which had been stationed there. Co-accused Harishchand and Keshav @ Bhindi had also been sitting along with her in the Jeep. They threatened her and did not permit her to get down at Sumawali. She further stated in her statement that all the three persons took her to Gadroli and at Gadroli in the night Keshab @ Bhindi committed sexual intercourse with her and thereafter on 29.9.2004, she reached at Baba Mandir on a motorbike of Samar Singh along with Bhindi and thereafter on 30.9.2004, she came to Tapriya in a dumper truck and thereafter the accused Karu @ Samar Singh took her by a bus to his sister's house where he kept her and committed rape with her. Thereafter she was recovered by the Police from the village Madaiya. It is clear from the statement of the prosecutrix under Section 161 of Cr.P.C. that she has made major omissions and contradictions in her statement before the Court.

8. Parmal (P.W.2) in his deposition before the Court stated that he along with his Aunt (Prosecutrix) came to Baradari Chouraha and thereafter he went to the market for purchasing some articles. When he returned back from the market, his Aunt (Prosecutrix) was not there. Rajendra Singh (P.W.3), who is the elder brother of the husband of the prosecutrix also stated the same facts in his deposition before the Court that his son Parmal had been accompanying the prosecutrix to leave her to her parent's house and on the way when he had gone to market and when he returned back he found that the prosecutrix was not there. Nihal Singh (P.W.4), father of the prosecutrix also stated the fact that he sent Parmal to take back to the prosecutrix to his house and from Baradari Chourah, the prosecutrix had been missing. At this stage, he has been declared hostile. The driver of the Jeep also did not support the prosecution. The other witnesses also did not support the prosecution story.

9. Dr. Alaka Jain (P.W.9) in her deposition stated that she was posted as Assistant Surgeon at Kamla Raja Hospital and she examined the prosecutrix on 10.10.2004, there was no external or internal injury over the body of the prosecutrix including on her private part. According to the doctor, the prosecutrix was habitual for sexual intercourse. No redness or tenderness was seen over vagina of prosecutrix. From the evidence on record of the case, it is clear that the conviction of the appellant has been based on the sole evidence of the prosecutrix.

10. The Hon'ble Supreme Court in the case of *Sudhansu Sekhar Sahoo Vs. State of Orissa*, reported in AIR 2003 Supreme Court 2136, relying various earlier judgments of the Hon'ble Supreme Court, has held as under with regard to conviction on the basis of sole testimony of the prosecutrix for sexual offence :-

"11. It is true that the sole testimony of the victim of a sexual offence can be a basis for conviction provided it is safe, reliable and worthy of acceptance. The Court had occasion, in many cases, to consider the nature

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of evidence required when the conviction mainly based on the testimony of the victim of the sexual offence.

12. In *Balwant Singh and others v. State of Punjab* (1987) 2 SCC 27, the victim was a 19 years old student and the allegation was that when she was on her way to the college, three accused persons forcibly took her away in a car to the canal bank where she was subjected to sexual intercourse by the accused. She fell unconscious and later she was found lying in a state of unconsciousness under a Banyan tree by her father. There was no eye-witness. On medical examination, her hymen was found torn and there were reddish abrasions on her breast. The police investigated the case and the case was reported to be cancelled. The victim filed a private complaint and the Magistrate committed the accused persons for trial to the Court of Session. The Sessions Judge convicted the accused persons and this Court confirmed the conviction. This Court held that both the learned Additional Sessions Judge and the High Court have believed the evidence of the prosecutrix and her father and in their opinion there is no reason why their evidence should not be believed and the conviction was thus solely based on the evidence of the prosecution.

13. In *Rafiq v. State of U.P.* (1980) 4 SCC 262, a middle aged bal sewika in a village welfare organisation was raped by the appellant around 2.30 a.m. when she was sleeping in a girls' school. On the next day, she reported the matter to the mukhya sewika of the village. The counsel for the accused contended that there was absence of corroboration of the testimony of the prosecutrix and that there was absence of injuries on the person of the woman and so the conviction was unsustainable. But this plea was rejected and this Court held :

"The facts and circumstances often vary from case to case, the crime situation and the myriad psychic factors, social conditions and people's life styles may fluctuate, and so, rules of prudence relevant in one fact situation may be inept in another. We cannot accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some standards of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law but a guidance of prudence under given circumstances."

14. In *Krishan Lal v. State of Haryana* (1860) 3 SCC 159, the victim was sleeping with her mother and other children outside her house on a hot night and the two accused persons carried her away to a nearby godown

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under intimidation and allegedly committed rape on the young woman. In the morning, the mother of the victim found blood on the daughter's salwar and thereupon she narrated the criminal assault of the accused on the previous night. The counsel for the accused urged that the evidence of the prosecutrix, without substantial corroboration, was inadequate to rest a conviction under S. 376, I.P.C. This plea was rejected and it was held by this Court as under :

"We must bear in mind human, psychology and behavioural probability when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarkable set of facts or clearest motives were made out? The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value. To forsake these vital considerations and go by the obsolescent demands for substantial corroboration is to sacrifice common sense in favour of an artificial concoction called 'Judicial' probability. Indeed, the Court loses its credibility if it rebels against realism. The law Court is not an unnatural world."

15. In *State of Maharashtra v. Chandraprakash Kewalchand Jain* (1990) 1 SCC 550, a girl eloped with a 25 years old young man. They went to Bombay and got married. Thereafter they came to a place near Nagpur and checked in a lodge. The local Police Sub-Inspector came to know that the couple was staying in the said lodge and he took them to the police station where the husband was beaten up and the wife was threatened. The Sub-Inspector registered a case against the husband alleging that he was found misbehaving on a public street and put him in the lock-up. The girl was left in a hotel. It was alleged that the Sub-Inspector visited the girl's room and committed rape on her. In that case, this Court elaborately considered the question whether conviction can be based on the sole testimony of the victim of the sexual offence and held:.

"Is it essential that evidence of prosecutrix should be corroborated in material particulars before the Court bases a conviction on her testimony? Does the rule of prudence demand that in all cases save the rarest of rare the Court should look for corroboration before acting on the evidence of the prosecutrix. . .

A prosecutrix of a sex offence cannot be put on par with accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it

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is corroborated in material particulars. She is undoubtedly a competent witness under S. 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to S. 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix, it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness."

16. In *State of U.P. v. Lekh Raj*, (2000) 1 SCC 247, this Court held that "the hypertechnicalities or figment of imagination should not be allowed to divest the Court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth."

In *State of Rajasthan v. N. K.*, (2000) 5 SCC 30, this Court held:

"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted

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without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the Court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony."

17. It is well settled that in rape cases the conviction can be solely based on the evidence of the victim provided such evidence inspires confidence in the mind to the Court. The victim is not treated as accomplice, but could only be characterised as injured witness. It is also reasonable to assume that no woman would falsely implicate a person in sexual offence as the honour and prestige of that woman also would be at stake. However, the evidence of the prosecution shall be cogent and convincing and if there is any supporting material likely to be available, then the rule of prudence requires that evidence of the victim may be supported by such corroborative material."

11. The Hon'ble Supreme Court in the case of *Dilip and Another Vs. State of M.P.*, reported in AIR 2001 Supreme Court 3049, has further held as under :-

"In the instant case the gang rape is alleged to have been committed at about 2 p.m. in house of prosecutrix situated in a populated village by the side of the main road where people were moving on account of Holi festival. The prosecutrix alleged to have raised hue and cry to the extent she could and yet none was attracted to the place of the incident. The prosecutrix is said to have sustained injuries, also bled from her private parts staining her body as also the clothes which she was wearing. This part of the story, is not only not corroborated by the medical evidence, is rather belied thereby. The presence of blood-stains is not confirmed by forensic science laboratory or by the doctors who examined the prosecutrix. Her own maternal aunt to whom the story of sexual assault has been narrated by the prosecutrix gives a version which does not tally with the version of the prosecutrix as given in the court. In the circumstances, the truthfulness of the version of the prosecutrix that any sexual assault as alleged was committed on her cannot be accepted in view of the fact that her narration of the incident becomes basically infirm on account of being contradicted by the statement of her own aunt and medical evidence and the report of forensic science laboratory. Since the testimony of the prosecutrix cannot be relied upon, the accused in the circumstances would be entitled to acquittal."

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12. The Hon'ble Supreme Court further in the case of *Narayan alias Naran Vs. State of Rajasthan*, reported in (2007) 6 Supreme Court Cases 465, has considered the evidence of the prosecutrix and held as under :-

"11. In the cross-examination the prosecutrix (PW 3) stated that she boarded the trolley at about 5 o' clock in the evening and by 7 o' clock they reached Singhpur Village. There were number of villages between Singhpur and Akodiya. It is also required to appreciate that she stated in her evidence that even after the accused committed rape on her she sat in the tractor happily. It is not stated by her in her evidence that she raised any hue and cry even while passing through the number of villages. In the first information report (Ext.P-5) she stated that the accused committed rape on her thrice but in the evidence she stated that the accused committed rape on her only twice and not thrice. According to her the rape was committed on her on kankar (rough way). She did not state that she offered any resistance though she was physically very strong. Medical report (Ext. P-1) says that there were no injuries on the body of the prosecutrix (PW 3). There were no injuries on her private part. It is ultimately opined that "no definite opinion can be given regarding rape, however, she is habitual to sexual intercourse". In the circumstances, is it possible to believe that the prosecutrix (PW 3) has been subjected to rape twice by the accused as alleged ? In the first information report (Ext. P-5) it is stated that the prosecutrix (PW 3) has been subjected to rape by the accused thrice but in her evidence she stated that she had been subjected to rape only twice. The accused even according to the prosecutrix (PW 3) was driving the tractor from Singhpur to Bharkiya crossing through a number of villages. It is not stated by the prosecutrix (PW 3) that she made any attempt to get down from the tractor at any point of time. On the other hand, it is stated by her that she sat in the tractor happily."

13. The Hon'ble Supreme Court further in the case of *Ramdas and others Vs. State of Maharashtra*, reported in (2007) 2 Supreme Court Cases 170, has held as under with regard to sustainability of conviction in a case of rape on the basis of sole testimony of the prosecutrix :-

"23. It is no doubt true that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality that may be sufficient to sustain

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an order of conviction solely on the basis of her testimony. In the instant case we do not find her evidence to be of such quality."

14. In the present case, the prosecutrix in her statement under Section 161 of Cr.P.C. before the Police stated that when she sat in the Jeep, two persons, namely, Harishchand and Keshav @ Bhindi had been sitting in the Jeep and they threatened her and took her to Gadroli and thereafter they committed rape one by one with her. Thereafter she went to the place of Baba Mandir on the motorcycle of Samar Singh, the present appellant. Hence, as per the statement of the prosecutrix under Section 161 of Cr.P.C., the appellant Samar Singh first came at Gadroli and thereafter the prosecutrix went to Tapariya and then the appellant proposed her for marriage. However, in her deposition before the Court, she did not mention the names of other two accused persons, namely, Harishchand and Keshav @ Bhindi and only made allegations against the appellant Samar Singh and stated that in the Jeep only the appellant was sitting and thereafter he did not permit her to get down at Sumawali and he took her to Gadroli. She further stated that the appellant proposed her for marriage. Thereafter he took her to village Madaiya near Bhind and kept her at Madaiya. She further stated that the appellant took her for marriage at District Court Bhind and she also affixed her thumb impressions on some papers and some proceedings were undertaken with regard to marriage at District Court and after a period of 8 days, the police recovered her from the house of sister of the appellant.

15. From the evidence of the prosecutrix, it is clear that the prosecutrix went along with appellant in a Jeep and thereafter they proceeded to Bhind by bus. She further admitted in her evidence that there were passengers in the bus but she did not tell anybody in the bus neither she made any hue and cry at that moment. The reasons put forth for the aforesaid act by the prosecutrix is that the appellant threatened her to kill her. She further stated that she stayed with the appellant at the residence of his sister and thereafter she went to District Court Bhind and she met with an Advocate, where her photograph was taken out and thereafter she affixed her thumb impressions on some papers for court marriage. She further stated that she was in District Court Bhind for near about one hour and the Advocate also told her about marriage. In the Court also, she did not tell anybody about threat. She voluntarily signed the marriage papers. Her affidavit was notarised by the Notary. Furthermore, as per the evidence of doctor, who examined the prosecutrix, there was no external or internal injury on the body of the prosecutrix and there was no reddishness or tenderness was found over vagina. The hymen was old ruptured and as per the statement of the doctor, the prosecutrix was habitual to sexual intercourse. Looking to the aforesaid evidence of the prosecutrix, in my opinion, as per the principle of law laid down by the Hon'ble Supreme Court, it is not justifiable to convict the appellant on the basis of sole evidence of the prosecutrix. The evidence of prosecutrix is not of that quality on

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which the conviction could be sustained solely on the basis of testimony of the prosecutrix.

16. Consequently, appeal of the appellant is allowed. The judgment dated 3.6.2005, passed by the Third Additional Sessions Judge, Gwalior in Sessions Trial No.33/2005, is hereby set aside. The appellant is hereby acquitted from the charges framed against him by the trial Court. The appellant is in jail. He be set at liberty forthwith, if not required in any other case. Appeal is allowed.

17. This Court appreciate Shri S.K. Shrivastava, who has been appointed as Amicus Curaie, prepared, argued the case on behalf of the appellant very well and assisted the Court ably with sense of responsibility.

Appeal allowed.

I.L.R. [2009] M. P., 1445

CRIMINAL REVISION

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

7 May, 2008*

MADHU SONKAR (SMT.)

... Applicant

Vs.

STATE OF M.P. & ors.

... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 - Scope of Revision - Interference - Where material evidence has been overlooked by trial Court, interference can be made in exceptional cases - However, where findings lead to acquittal do not suffer from infirmity and another view on the prosecution was possible, an evidence will not be sufficient ground to warrant interference. (Para 12)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 - पुनरीक्षण का विषयक्षेत्र - हस्तक्षेप - जहाँ विचारण न्यायालय द्वारा तात्त्विक साक्ष्य को अनदेखा कर दिया गया है, वहाँ आपवादिक मामलों में हस्तक्षेप किया जा सकता है - तथापि जहाँ दोषमुक्ति के निष्कर्ष दुर्बलता से ग्रस्त नहीं हैं और अभियोजन पर दूसरा दृष्टिकोण संभव है, वहाँ साक्ष्य हस्तक्षेप करने के लिए पर्याप्त आधार नहीं होगी।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 463 - Apply to Courts of appeal, reference and revision. (Para 14)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 463 - अपील, निर्देश और पुनरीक्षण न्यायालयों को लागू होती है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 164 - Confessional statement - Taking statement of accused on oath prohibited. (Para 15)

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ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 — संस्वीकृति कथन — शपथ पर अभियुक्त का कथन लेना निषिद्ध है।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 463 - Non-compliance fatal. (Para 17)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 463 — अनुपालन घातक है।

E. Criminal Procedure Code, 1973 (2 of 1974), Section 164 - Recording of statement of accused - Non-consideration of the same merely on the ground that some police personnels were standing outside the Court - Approach of Court not correct - Court ought to independently examine the kind of threat or pressure on the accused/witness - Even if endorsement of certificate by Magistrate below statement is not in proper form, it does not necessarily mean that any threat was given to witness. (Paras 25 & 26)

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 — अभियुक्त का कथन अभिलिखित करना — उसे केवल इस आधार पर विचार में न लेना कि कुछ पुलिस कर्मचारी न्यायालय के बाहर खड़े हुए थे — न्यायालय का दृष्टिकोण उचित नहीं। — न्यायालय को स्वतंत्र रूप से अभियुक्त/साक्षी पर भय या दबाव के प्रकार की जाँच करनी चाहिए — यद्यपि मजिस्ट्रेट द्वारा कथन के नीचे किया गया प्रमाण पत्र का पृष्ठान्कन उचित प्ररूप में नहीं है, तथापि इसका अनिवार्य रूप से यह अर्थ नहीं होता कि साक्षी को कोई धमकी दी गयी थी।

F. Criminal Procedure Code, 1973 (2 of 1974), Section 164(3) - Failure to comply with Section 164(3) will not make the confession inadmissible in evidence. (Para 26)

च. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164(3) — धारा 164(3) का अनुपालन करने में विफलता संस्वीकृति को साक्ष्य में अग्रह नहीं बनायेगी।

G. Criminal Procedure Code, 1973 (2 of 1974), Section 164 - Warning - It is necessary to warn accused that it was not necessary for him to make statement and it could used against him - If warning is not given, such confession cannot be acted upon. (Para 26)

छ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 — चेतावनी — अभियुक्त को यह चेतावनी देना आवश्यक है कि उसके लिए यह आवश्यक नहीं है कि कथन करे और यह उसके विरुद्ध प्रयुक्त नहीं किया जा सकता — यदि चेतावनी नहीं दी गई है, तो ऐसी संस्वीकृति पर कोई कार्यवाही नहीं की जा सकती।

H. Criminal Procedure Code, 1973 (2 of 1974), Section 164 - Confessional statement - Confessional statement against co-accused can be used as corroborative evidence - It can be made even during trial and evidence already recorded may be used to corroborate it. (Para 27)

ज. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 — संस्वीकृति कथन

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- सह-अभियुक्त के विरुद्ध संस्वीकृति कथन संप्रोषक साक्ष्य के रूप में प्रयुक्त किया जा सकता है
- यह विचारण के दौरान भी किया जा सकता है और पूर्व में अभिलिखित साक्ष्य इसकी सम्पुष्टि करने के लिए प्रयुक्त की जा सकती है।

Cases referred :

2004 AIR SCW 2325, (2005) 4 SCC 292, (2005) 4 SCC 294, AIR 1962 SC 1788, AIR 1989 SC 1415, AIR 1984 SC 1591, 2005(2) MPLJ 37, 2003(3) MPLJ 84, AIR 2002 SC 2907, 2004(1) MPLJ 45, AIR 1999 SC 3845, AIR 2007 SC 420, (2005) 11 SCC 600, 1980 CrLJ 171, 1976 CrLJ 96, AIR 1979 SC 108, 1936 PC 253, AIR 1964 SC 358, AIR 1972 SC 2077, AIR 1963 SC 1094, AIR 1939 Cal 610, AIR 1977 SC 1579, AIR 1954 SC 462, 1965 SCJ 500, AIR 1968 SC 1270, AIR 2000 SC 1589, AIR 1960 SC 490, AIR 1991 SC 1356, AIR 2004 SC 3559, AIR 2006 SC 1656, AIR 1954 SC 692, AIR 1974 SC 284, AIR 1976 SC 2488, AIR 1996 SC 3471, AIR 2001 SC 2430.

Manish Datt, for the applicant.

Surendra Singh with Manish Mishra, for the respondent No.3.

Ahadullah Usmani & Amanullah Usmani, for the respondent No.2.

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

ORDER

The Order of the Court was delivered by **ARUN MISHRA, J.** :—The Revision has been preferred by the widow of the deceased Raju Sonkar aggrieved by judgment dated 9.12.2000 passed by Addl. Sessions Judge, Jabalpur in S.T. No. 601/98 thereby acquitting the accused/respondents Shamim Ahmad and Kailash Sonkar for commission of offence under section 302, 307 and 120-B of IPC.

2. The prosecution case briefly stated is that on 12.2.1998 at about 7.30 am when Raju Sonkar started his car after putting the key, there was bomb blast, Raju Sonkar wanted to go to the School to leave his son Sameer, daughter Medha and sister's son Shailu Sonkar. On hearing the noise of bomb blast wife of the deceased Raju Sonkar came and found smoke in the Maruti car, Raju Sonkar could not come out of driving seat whereas Sameer, Medha and Shailu Sonkar could come out of the car. Raju Sonkar was taken out of the car and was taken to Victoria Hospital for treatment. Dr. A.K. Jain (PW-14) medically examined injuries of Raju Sonkar and submitted report (P-45). Raju Sonkar died due to the injuries during the course of treatment. Shailu @ Shailendra (PW-19) lodged report (P-48) on the basis of which offence was registered at P.S. Omti, after death of Raju Sonkar marg (P-50) was registered, inquest (P-8) was done, autopsy was performed by Dr. Pramod Shrivastava (PW-2), report (P-52) was submitted. Pieces of bomb, blood stained and control soil shirt etc. were seized as per seizure memo (P-11).

3. Confessional statement (P-59) of accused Shamim was recorded under section 164 of Cr.P.C. by Addl. Chief Judicial Magistrate Smt. Radha Sonkar

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(PW-39) on 18.8.1998 on the basis of which Shamim was arrested as per memo (P-62) at 6.00pm next day on 19.8.98 thereafter Shamim retracted the confession by submitting an application (D-4). During the course of investigation statement of Hari Narayan (PW-11) was recorded on 7.11.1998. Kailash Sonkar was also arrested as per arrest memo (P-65) on 5.10.1998. Certain articles, diary, gupti, Katta, telephone wire etc. were seized from the house of the accused Kailash Sonkar as per seizure memo (P-6). With respect to repair of car bills, vouchers, receipts (P-13 to P-42) were seized as per memo (P-43), other documents relating to car name, job card etc. (P-53, P-54 and P-55) were also seized. Articles were sent from the hospital as per memo (P-58) in the sealed packet. Sealed articles were sent to Forensic Science Laboratory, the reports (P-66, P-68 and P-69) were submitted.

4. Accused Shamim was charged for commission of offence under section 302 and 307 of IPC and accused Kailash Sonkar was charged for commission of offence under section 120-B, read with section 302 and 307 IPC.

5. The accused abjured the guilt and contended that they have been falsely implicated in the case. Accused Shamim in addition took defence that police had detained him from 5.8.98, kept him in the custody and he used to be ill treated, repeatedly Police made inquiry from him who fitted the bomb in the car of the deceased and due to the pressure of the police and threat of administering the electric shock he had made confessional statement (P-59) before the Addl. Chief Judicial Magistrate. It was not voluntary confession. His statement made in retraction application (D-4) was correct, he had not fitted the bomb in the car of the deceased Raju Sonkar on being asked by accused Kailash Sonkar, he was simply a motor mechanic and was not even knowing the work of electric wiring.

Kailash Sonkar took the defence that he has been falsely implicated by the police in the case. He had made a public agitation in the year 1993 against Rakshpal Yadav for beating Raju Khatique who used to reside in the locality, he was killed by the police in the custody, since he was the pioneer of the agitation, he had been falsely implicated by the police in the instant case. He had also filed a private complaint against the Police station officer in charge Jaggi and Rakshpal Singh, that was the reason he had been falsely implicated in the case by the police. He was enjoying good relationship with the deceased Raju Sonkar. Earlier there was an incident involving Raju Sonkar in which his elder brother Lakhan Sonkar had deposed, after one month of that his brother Lakhan and sister's son Anand Sonkar were murdered of which trial was pending. There was yet another litigation pending of Devraj Brush Company against Raju Sonkar and his family members, thus he was innocent, there was no motive for him to commit murder of Raju Sonkar.

6. The Trial Court has found that Raju Sonkar died due to the injuries sustained

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in the bomb blast. Bomb was fitted in his car and connected to the ignition key, as soon as he started the car there was blast, due to that Raju Sonkar died. Shailu Sonkar, his sister's son sustained injuries. Statement of Hari Narayan (PW-11) has been discarded by the court below. Earlier on 11.2.1999 the witness was declared hostile. In a revision filed before this Court it was directed that his statement should be recorded afresh, on being re-examined he has supported the prosecution case. It is also found that a sum of Rs. 24,000/- was paid by the complainant/prosecution to Hari Narayan (PW-11) to make him a witness. The money was deposited in the Bank account of Hari Narayan (PW-11) on 11.2.1999, the date on which he was initially examined in the court and was declared hostile. The confessional statement of Shamim Ahmad has been held to be inadmissible in evidence by the Trial Court on the ground that oath was administered to accused Shamim Ahmad by the Addl. Chief Judicial Magistrate. It has also been held that confessional statement could not be said to have been made voluntarily without pressure or fear. Addl. Chief Judicial Magistrate did not comply with the safeguards before recording the confessional statement of the accused. Prior information was not given to the accused that confessional statement could be used against him. The court was also kept in the dark by the Police whether Shamim was an accused or going to be a witness in the case. As there was no evidence against the accused Shamim it is unnatural that he would have admitted his guilt in a categorical manner by making confessional statement (P-59) before the Addl. Chief Judicial Magistrate. He was arrested on 19.8.1998, after his statement was recorded on 18.8.1998. After arrest when he was produced before the court he had retracted the confession by filing application (D-4). The police was present outside the court when the confessional statement was recorded, thus the facts mentioned in retraction application (D-4) have been found to be probable. The confessional statement could not have been used for the purpose of fastening the guilt, any statement made by the witness could be used for the purpose of contradiction or omission. The other evidence has also been discarded. Public agitation was launched against the police as to the investigation made in a case. It was not mentioned by Raju Sonkar in the complaint (P-61) that Kailash Sonkar did not hand over the cheques to him, thus motive was not proved. The enmity on the ground of not handing over the cheque was an after thought. Initially doubt was raised on persons of Devraj Brush Company. Both the accused have been acquitted. Dissatisfied thereby the widow Smt. Madhu Sonkar of the deceased Raju Sonkar has filed the instant criminal revision.

7. Shri Manish Datt, learned counsel appearing for petitioner has submitted that the trial was not properly conducted by the public prosecutor namely G.D. Garg (PW-6). The public prosecutor did not examine the material witnesses and was examined ultimately as defence witness, thus trial was radically defective. Intervention was made by this court in Criminal Revision No. 1142/99, in which

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an order was passed on 8.10.99 for recalling of the witnesses, it was also directed that regularly appointed public prosecutor to conduct the matter, even then Shri G.D.Garg appeared in the case. In another Cr. Revision No. 1133/00, this court directed as per order dated 19.9.2000 that matter should be conducted properly and seriously at the behest of the State by modifying the order dt. 7.7.2000, passed by Addl. Sessions Judge, Jabalpur in Sessions Trial No. 601/98, it was also directed to examine Dr. S. Sharma and Shobha Shandilya as witness of the prosecution and to proceed further in accordance with law in disposing of the sessions trial. Counsel has also submitted that police was not making fair investigation in the case, consequently a writ petition W.P. No. 1698/98 was filed, in which it was directed that if the petitioner makes a fresh representation stating all the facts to the Director General of Police within 10 days from date of order, the same shall be looked into and the decision shall be taken within six weeks therefrom which should be intimated to the petitioner. Thus, the counsel has submitted that retrial be ordered. Shri Manish Datt, has further submitted that the crucial witness in the case Hari Narayan (PW-11) was paid the money on the date on which he was examined by the prosecution in the Court i.e. on 11.2.1999, on this date a sum of Rs. 24,000/- was credited in his account as apparent from the Pass Book (Ex.D-16) proved by Aditya Pandey (DW-4) Asst. Manager, State Bank of India, Tularam Chowk, Jabalpur. As the witness turned hostile on the date on which the aforesaid amount was paid to him, it was not paid by the prosecution to the accused so as to turn him hostile but by accused Kailash Sonkar, thereafter Hari Narayan preferred W.P. No. 2237/99 before this Court in which it was stated that due to fear he was unable to make correct statement in the Court on 11.2.1999, the date on which he was declared hostile by the prosecution. It was directed in the writ petition that Hari Narayan should make such a prayer before the Trial Court itself at the first instance. Thereafter an application was filed before the Trial Court for re-examination of Hari Narayan, that was rejected on 12.7.99. Against the said order Smt. Madhu Sonkar preferred a Criminal Revision No. 1142/99 in which recall of Hari Narayan was also ordered in the special circumstances of the case. Prayer for recall of Smt. Madhu Sonkar was also allowed. Apart from that it was ordered that regularly appointed public prosecutor of experience to conduct the prosecution in such a serious case rather than an adhoc public prosecutor. The finding recorded by the Trial Court that Hari Narayan was paid the money by the prosecution/complainant is, thus, perverse and against the ordinary course of conduct. If money was paid in November as suggested by accused, it would not have been deposited on 11.2.1999 in the S.B. account of Hari Narayan (PW-11). The statement of Hari Narayan could not have been discarded merely on the ground that there was delay in recording his police statement, as police was not making fair investigation, public agitation had to be made even Chief Minister had to be approached for fair investigation. No

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explanation has been obtained of the Investigating Officer for not recording statement of Hari Narayan for several months together. In the circumstances Hari Narayan himself approached the police by way of filing an application, thereafter his statement was recorded by the police. The Investigating Officers had also been changed in the case as initial investigating officer did not investigate the case properly. Counsel has also stated that the Court below has erred in holding that the cheques were not handed over to accused Kailash Sonkar. The finding is perverse and contrary to the facts mentioned in the partition deed (P-60), in which it was mentioned that the cheques were handed over to Kailash Sonkar. The cheques had been retained by Kailash Sonkar, they were not handed over to the deceased Raju Sonkar inspite of his various demands, which resulted into the strained relationship and constituted motive for commission of offence by the accused Kailash Sonkar. The finding to the contrary recorded by the Trial Court is perverse. It is also submitted by the learned counsel that the confessional statement recorded under section 164 Cr.P.C. by the Addl. Chief Judicial Magistrate Smt. Radha Sonkar (PW-39) has been illegally held to be inadmissible by the Trial Court. Merely by the fact that oath was administered, the entire evidenciary value of confessional statement made by the accused Shamim Ahmad was not wiped out. The safeguards were duly observed before recording the confessional statement as apparent from the note at the beginning and at the end of the statement. He has also submitted that the Trial Court has accepted the statement of Investigating Officer M.K. Pachori (PW-37) that accused was interrogated on 16.8.1998 and was let off on 17.8.1998 in the evening, thus the counsel has submitted that the confessional statement recorded next day, was without any fear or pressure of the police as accused Shamim Ahmad was not in the custody and was allowed by the police to freely move, he had full liberty of having deliberation and consultation not only with the family members but he was also free to obtain legal advice before making confessional statement next day before the Court. As prosecution was launched by the police obviously police personnels were required to bring the accused Shamim Ahmad to the Court for the purpose of recording his confessional statement under section 164 Cr.P.C. as police was not sure that accused was going to make any statement before the court also. He was arrested and made an accused after he had made confessional statement before the Court. The confession was recorded by the Addl. Chief Judicial Magistrate on 18.8.1998 and arrest was made on 19.8.1998 after he has confessed the guilt before the Court. Thus the counsel has submitted that in view of the aforesaid statement of M.K. Pachori (PW-37), it could not be said that when confessional statement of accused Shamim Ahmad was recorded, he was under the threat of the police. The Counsel has further submitted that the Trial Court has erred in holding that the accused was not told by the Magistrate that statement made by him could be used against him as apparent from the bottom

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note and initial note made at the beginning of the statement under section 164 of Cr.P.C. the contrary finding recorded by the Trial Court, is incorrect. The counsel has further submitted that it was not the case of the accused that he was induced by the police to make the statement that he was going to be pardoned and was being made witness in the case. If it was the case, it should have been stated either in the retracted confessional application (D-4) or in the statement made by the accused before the Court under section 313 of Cr.P.C. The counsel has further submitted that merely by the fact that the police personnel who produced the accused in the Court, was outside the Court, it could not be said that the accused was kept in the fear of police as in each and every case it is only the police who produces the accused in the Court, thus it could not have been inferred that the accused was kept in the fear of police particularly when he was not arrested and was allowed to go home and was brought under summon to the Court for the purpose of recording his confessional statement on 18.8.1998. The summon was served on 17.8.1998, a day before his confessional statement was recorded. Mere failure to comply with the High Court Rules and subsection 5 of Section 164 could not have rendered the confession inadmissible. The confession can be made at any time. Counsel has further submitted that in case of any defect in recording of confession is curable under section 463 Cr.P.C. even retracted confession if found reliable can be made the basis of conviction for which he has relied upon several decision to be referred later. He has further submitted that the confession need not be signed as the confessional statement was admittedly made. Merely failure to obtain signatures on confessional statement, was not an illegality. He has submitted that signatures of the accused were obtained, even otherwise if signatures were not obtained, as accused had admitted that he had made confessional statement before the ACJM, that would not have vitiated the confessional statement recorded by the Addl. CJM.

Counsel has further submitted that the material aspects have been ignored and overlooked by the court, which has resulted into miscarriage of justice. Acceptance of money has been conveniently ignored and overlooked while discussing the evidenciary value of Hari Narayan (PW-11) and in later part of the judgment passing reference has been made that the version of accused appears to be proper that money was paid by the complainant/prosecution. Court has not gone into this aspect deliberately which was a material circumstance against accused and if necessary inquiry should have been made by the Trial Court into this aspect who actually paid the money which was credited into the account of witness Hari Narayan (PW-11) on the date on which he had deposed in the Court on 11.2.1999 when he did not support the case of prosecution and was declared hostile. Counsel has relied upon the decision of Apex Court in *Zahira Habibulla H. Sheikh v. State of Gujarat* - 2004 AIR SCW 2325; *Zahira Habibullah Sheikh and another - Vs. State of Gujarat and others* - 2005(4) SCC 292 and *Zahira*

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Habibullah Sheikh and another Vs. State of Gujarat and others - 2005 (4) SCC 294. Counsel has prayed that the enquiry be directed to be conducted with regard to transaction of money.

Statement of Smt. Madhu Sonkar has been illegally discarded with respect to various aspect of the case. There was motive for accused Kailash Sonkar for commission of offence, as he was retaining the cheques and his intention was not to return back the cheques to Raju Sonkar (deceased) inspite of several demands made by him. Statement of Addl. CJM Smt. Radha Sonkar has also not been appreciated. The counsel has further submitted that the other finding recorded are also perverse resulting into the miscarriage of justice in the instant case.

8. Shri Surendra Singh, learned Sr. Counsel appearing with Shri Manish Mishra on behalf of accused Kailash Sonkar has submitted that within the parameter of scope of interference in the revisional jurisdiction of this Court under section 397 and 401 of Cr.P.C. no case for interference is made out in this revision. It is only in the case of glaring defect or point of law, a flagrant miscarriage of justice or material evidence has been ignored or overlooked, that interference can be made. Mere error of judgment is not enough. In the revisional jurisdiction the Court does not ordinarily interfere. The trial was held properly. Shri G.D. Garg was appointed public prosecutor in the year 1993 and continued up to the year May, 1999 as public prosecutor. Due to change of Government Shri G.D. Garg was discontinued in May, 1999. He was asked to continue with the prosecution as per provision of Section 2(4) Cr.P.C. by Mr. Ahmad, he was authorised in writing, thus he was competent to appear and conduct the case. Trial was not conducted by incompetent person. The statement made under section 164 Cr.P.C. being a public document, it was not necessary to examine Addl. Chief Judicial Magistrate Smt. Radha Sonkar (PW-39) as such she was not examined, thus it could not be said that Shri G.D. Garg did not conduct trial properly. Dr. S. Sharma (PW-4) and Shobha Shandilya (PW-41) were not cited as witness. It was not necessary to prove the negative fact that no injuries were on the person of Shamim Ahmad when he was medically examined after recording confessional statement on 18.8.1998. It was not necessary for the prosecution to adduce the evidence to prove negative fact of absence of injury, thus it could not be said that Mr. Garg misconducted by not examining the aforesaid witnesses. The prosecution made full effort to adduce the evidence against the accused, even if there was some negligence, was overcome by re-examination of witnesses, hence no miscarriage of justice had been caused in the instant case. There was absolutely no motive for Kailash Sonkar, he was previously M.L.A. from Jabalpur and he has lost his brother and sister's son when Raju Sonkar was earlier attacked. He has also submitted that earlier a doubt was cast on other persons. He has also referred to documents (P-60) partition deed dated 1.8.97 and report (P-61) lodged by the deceased. Counsel has further submitted that accused Shamim was not arrested, oath was administered

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to him, accused Shamim Ahmad appears to have been induced to make the confessional statement by not telling him the consequences of the statement which he was going to make. Once oath was administered, the confessional statement was rendered inadmissible. Counsel has further submitted that Shamim Ahmad was examined as a witness. It appears that police was not sure whether Shamim Ahmad was going to be a witness or accused in the case. The statement (P-59) was recorded by the Magistrate under section 164 Cr.P.C. in the capacity of Shamim Ahmad being a witness in the case, later on he was arrested and made an accused on the next day. The confessional statement was inadmissible evidence as statement made by the witness, could not have been used against him except in the offence of forgery. By administering the oath accused was kept under the fear of oath. He has referred to various decisions of Supreme Court, Privy Council and High Court to be referred later. Counsel has further submitted that when a particular mode has been prescribed for recording the statement, that mode cannot be departed to and other modes are excluded. Counsel has further submitted that even if the confessional statement is held to be inadmissible as against Shamim Ahmad, it could not be used as evidence against Kailash Sonkar, it has only corroborative value. There being no evidence against the accused Kailash Sonkar, his acquittal by the Court below is proper. Conduct of a co-accused cannot be correlated with the conduct of another co-accused. The statement made by Smt. Radha Sonkar, ACJM as to recording of statement under section 164 Cr.P.C. cannot be utilized so as to prove the confession as oral evidence cannot prove it. Counsel has also submitted that Chapter 3 of Criminal Rules and Orders of the High Court Rules was not followed. He has also referred to Section 105 and 106 of the Evidence Act to contend that in the instant case burden of the accused stood discharged from the evidence on record and the circumstances projected at the time of recording the confessional statement. Shamim Ahmad was induced to make confession (P-59) under the belief that he was going to be pardoned and to be made a witness, thus the confessional statement was inadmissible under section 24 of the Evidence Act which provides that such a statement should be free of inducement, threat or promise before it is acted upon.

9. Counsel has further submitted that Hari Narayan (PW-11) has been rightly held to be unreliable witness. On 11.2.1999 when he was firstly examined in the court, he did not support the prosecution but again on 29.5.1999 when he was re-examined after the order passed by this Court, he has supported the prosecution case, money was paid to the witness by the prosecution/complainant to make him a witness. His statement under section 161 Cr.P.C. was recorded on 7.11.1998. The money was paid to witness in November, 1998, that was credited in the account of Hari Narayan on 11.2.1999, the date on which he deposed in court. As an after thought Hari Narayan filed an application for recording his statement afresh. Considering the fact that his police statement was recorded under section

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161 Cr.P.C. after nine months of the incident, witness kept quite for nine months, he has filed application to the police for recording his statement under section 161 Cr.P.C. The witness cannot be said to be reliable.

10. Shri Ahadullah Usmani and Amanullah Usmani, learned counsel appearing on behalf of respondent No. 2, Shamim Ahmad have submitted that the confessional statement has been rightly discarded by the Court below. It was recorded as statement of witness, therefore, no reliance could be placed on it. Law has been correctly applied to the facts of the instant case with respect to confession by the Court below. Confession was made under the fear/threat of the police as police was beating the accused for the last several days and accused has stated that he was kept in confinement. There was threat of administering electric shock also meted out to the accused Shamim Ahmad. The accused was kept in police station up to the time of his arrest on 19.8.1998 by the police. The confession was retracted by filing application (D-4) dated 24.8.98 proved by V.B.Shukla (DW-9), the then CJM, Jabalpur. Confessional statement (P-59) is inadmissible as it was of a witness, therefore, it was not admissible for implicating the accused Shamim Ahmad. Statement of Hari Narayan has been rejected by the Trial Court for cogent reasons as he has changed his version and contradicted his statement (D-12) recorded under section 161 Cr.P.C. It was not ascertained by ACJM before recording the confessional statement why he wanted to admit the guilt. It was also not ascertained whether he was in police custody. It was not made clear to Shamim Ahmad whether he was a witness or accused in the case. There was no evidence against the accused Shamim Ahmad, there was no reason for him to admit the guilt. It was under threat and fear of ill treatment that the confessional statement was made by the accused Shamim Ahmad. Statement was also not recorded in the form prescribed for recording the confessional statement. In the circumstances acquittal of the accused respondent Shamim Ahmad calls for no interference within the scope of interference of revisional jurisdiction of this Court.

11. Shri R.S.Patel, learned Addl. Advocate General appearing on behalf of State has submitted that confessional statement was properly recorded by the Magistrate, investigation was fairly done by the police.

12. First we come to the question of scope of interference in the revision. Shri Surendra Singh, learned Sr. Counsel has submitted that scope for interference under section 397/401 is limited. He has pressed into service decision in *K. Chinnaswamy Reddy v. State of A.P.* - AIR 1962 SC 1788 in which it has been laid down that it is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a

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flagrant miscarriage of justice. The High Court should confine itself only to the admissibility of the evidence and should not go further and appraise the evidence also. The Apex Court has further observed that where material evidence has been overlooked either by the trial court, interference can be made in exceptional cases. The cases should be of exceptional nature where High Court may justifiably interfere in the order of acquittal. Reference has also been made at Bar to decision in *Ayodhya Dube v. Ram Sumer Singh* - AIR 1981 SC 1415 when the Sessions Judge acquitted the accused by ignoring the probative value of F.I.R. and reliable testimony of eyewitnesses and without considering material evidence on record and his judgment was full of inconsistencies and consisted of faulty reasoning, the order of the High Court in revision directing retrial by setting aside acquittal was held to be justified. In *Sunil Kumar Pal v. Phota Sheikh* - AIR 1984 SC 1591 it is laid down that trial was not properly conducted by the prosecutor consequently it was held to be vitiated, acquittal of the accused was set aside.

Shri Surendra Singh, learned Sr. Counsel has also relied upon the decision of this Court rendered in *Maya Bai and another Vs. Bhajan Lal and others* - 2005(2) MPLJ 37 in which it is laid down that in the revision merely on the ground that another view on the basis of the evidence brought on record is possible and that the facts could have been examined from another perspective, judgment of acquittal cannot be overturned. Even error of law also does not vitiate the judgment unless it is shown that it has resulted in miscarriage of justice. The finding of Trial Court has to be shown to be absurd or palpably wrong. In *Govindi Vs. Dharamraj and others* - 2003(3) MPLJ 84, it has been observed by this Court that ordinarily interference is not made by the High Court in judgment of acquittal passed by the trial Court unless there has been manifest error of law or procedure. The interference with the order of acquittal is limited only to exceptional cases where it is found that the order under revision suffers from glaring illegality or has caused miscarriage of justice or when it is found that the trial Court has no jurisdiction to try the case or where the trial Court has illegally shut out the evidence which otherwise ought to have been considered or where the material evidence which clinches the issue has been overlooked. Where the findings recorded by the trial Court led to the acquittal of accused persons do not suffer from any infirmity whatsoever and another view on the prosecution was possible, an evidence will not be itself sufficient ground to warrant interference in complainant's revision against the acquittal. Reliance was placed on a decision of Apex Court in *Bindeshwari Prasad Singh v. State of Bihar* - AIR 2002 SC 2907 in which the Apex Court has laid down that if the High Court could not convert a finding of acquittal into one of the conviction directly, it could not do so indirectly by the method of ordering a re-trial. High Court will ordinarily not interfere in revision with an order of acquittal except in exceptional cases where the interest of public justice requires interference for the correction of a manifest illegality or the

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prevention of gross miscarriage of justice. For making interference in revision, there has to be perversity, acceptance or rejection of evidence and defect in procedural law in the conduct of the trial vitiating the trial itself. In *Lallu Singh Vs. Praveen Vishwakarma and others* - 2004 (1) MPLJ 45, this Court considered the scope of interference and observed that mere possibility of another view on the prosecution evidence will not, itself, be a sufficient ground to warrant interference in a complainant's revision petitioner against acquittal. The decision of Apex Court in *K. Chinnaswamy Reddy v. State of A.P.* (supra) was relied on. The Apex Court in *State of U.P. v. Udai Narayan* - AIR 1999 SC 3845 has observed that High Court could not scrutinize the evidence in revisional jurisdiction.

We have to keep in mind the principles enunciated in the aforesaid decisions while considering various submissions raised at Bar.

13. Coming to the question of confessional statement (P-59) of accused Shamim Ahmad @ Raju recorded under section 164 Cr.P.C on 18.8.1998 by ACJM Smt. Radha Sonkar (PW-39), the Trial Court has given following reasons to discard the confessional statement of accused Shamim Ahmad :-

(i) That the oath was administered to the accused, consequently statement recorded under section 164 Cr.P.C. rendered inadmissible.

(ii) Confessional statement was given under threat and pressure of the police.

(iii) It was not ascertained from the accused whether he was produced from the custody by police and why he wanted to admit the guilt.

(iv) It was necessary for the Magistrate to ascertain whether the accused was giving the statement without any inducement, threat or pressure.

(v) It was not informed by the Magistrate that statement could be used against him.

(vi) There was no evidence available against the accused, consequently making confessional statement was unnatural.

(vii) Confession was retracted by filing an application (D-4).

(viii) Police was present outside the court at the time of recording of confessional statement.

(ix) Question also arises whether Shamim Ahmad was examined as a witness at the time when his statement under section 164 Cr.P.C. was recorded, and later-on the next day of making confessional statement, he was arrested, thus his statement

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recorded as a witness was inadmissible in evidence as confessional statement as submitted by Shri Surendra Singh, learned Sr. Counsel.

(x) The question also arises for consideration what is the value of the confessional statement as against the co-accused.

14. Counsel for the parties have referred to Ss. 164, 281, 463 of the Cr.P.C. and S. 24 of the Indian Evidence Act. S. 164 Cr.P.C. empowers the Magistrate to record any confession or statement made to him in the course of an investigation under Chapter XII. Proviso make it clear that no confessional statement shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force. Subsection (2) of Section 164 Cr.P.C. cast the duty on the Magistrate to explain to the person making the confession that he is not bound to make a confession and that, if he does so, it may be used as evidence against him. The Magistrate has to ensure before confession is recorded, that the person is making it voluntarily. Subsection (4) of Section 164 Cr.P.C. provides that any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession and the Magistrate shall make a memorandum at the foot of such record to the effect mentioned therein. Subsection (5) of Section 164 is also relevant. It provides any statement (other than a confession) made under sub-section (1) shall be recorded in such manner provided for the recording of evidence and the Magistrate shall have power to administer oath to the person whose statement is so recorded. Section 164 Cr. P.C. is quoted below :-

164. (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial.

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not

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willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any Such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(signed) A.B

Magistrate".

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

Section 281 of Cr.P.C. provides for recording of examination of accused. It is provided that memorandum of the substance of the examination has to be in the language of the Court and shall be signed by the Magistrate and shall form part of the record. Once substance is recorded, it has to be read over or explained to the accused as provided in subsection (4) of Section 281 and thereafter shall be signed by the Magistrate who shall certify under his own hand that the examination was taken in his presence as provided under section 281(5). Section 281, Cr.P.C. is quoted below :-

281. Record of examination of accused.-(1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

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(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in this behalf.

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable in the language of the Court.

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.

Section 463 of Cr.P.C. provides for consequences of non compliance of provisions of Section 164 and Section 281 of Cr.P.C. Subsection (1) of Section 463 provides that if any Court finds while recording the confession that provisions of section 164 or Section 281, as the case may be, have not been complied with unfettered by the provisions of Section 19 of the Indian Evidence Act, Court is empowered to take evidence in regard to the non compliance and in case non compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement. The provision of section 463 Cr.P.C., clearly apply to the Court of appeal, reference and revision as provided in sub section 2 of section 463 of Cr.P.C. Section 463 is quoted below :-

463. Non-compliance with provisions of section 164 or section 281.-(1) If any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 281, is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872 (1 of 1872), take

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evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.

(2) The provisions of this section apply to Courts of appeal, reference and revision.

15. Sub-section (5) of Section 164 makes it clear that any statement (other than a confession) the Magistrate shall have power to administer oath to the person whose statement is so recorded, thus administering the oath to the accused is prohibited. Our view is fortified by the view taken by the Apex Court in *Babubhai Udesinh Parmar v. State of Gujarat*. - AIR 2007 SC 420, wherein the Apex Court observed that the taking of statement of an accused on oath is prohibited. However, the Apex Court has also observed that at the same time it may or may not be of much significance and proceeded to examine the value of the confessional statement made. The Apex Court has observed thus :-

10. We do not appreciate as to why oath had to be administered to the accused while recording confession. Taking of a statement of an accused on oath is prohibited. It may or may not be of much significance. But, it may assume significance when we examine that a purported deposition of accused was taken on 10.3.2003 wherein also his evidence on oath was recorded in the following terms:

"I hereby state on oath that :-

My Name	:	Babubhai
My father's name	:	Udesing Parmar
My age about	:	27 years
My occupation	:	Labour work
Village of residence	:	Native Umrav
Tadia Pura, at presence Karamsad		

Question : Have you received copy of documents of police investigation?

Answer : Yes

Question : Is the charge sheet Exh. 4 read over to you, Do you admit the offence? Or you want to proceed further the judicial proceedings?

Answer : I do not admit the offence

Question : Have you engaged private advocate for you self defence or you want to engage advocate at the cost of Government?

Answer : I have engaged free advocate"

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12. A judicial confession undoubtedly is admissible in evidence. It is a relevant fact. A judgment of conviction can also be based on a confession if it is found to be truthful, deliberate and voluntary and if clearly proved. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged on the basis of the entire prosecution case. [See *Bharat v. State of U.P.*, (1971) 3 SCC 950 and *Subramania Goundan v. The State of Madras*, (1958) SCR 429].

13. In *State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru* [(2005) 11 SCC 600], this Court observed:

"Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. "Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law". (vide *Taylor's Treatise on the Law of Evidence* Vo. I). However, before acting upon a confession the court must be satisfied that it was freely and voluntarily made. A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot constitute evidence against the maker of confession. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew the confession from consideration. So also the authority recording the confession - be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority. Recognizing the stark reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Indian Evidence Act has excluded the admissibility of a confession made to the police officer.

Section 164 of Cr.P.C. is a salutary provision which lays down certain precautionary rules to be followed by the Magistrate recording a confession so as to ensure the voluntariness of the confession and the accused being placed in a situation free from threat or influence of the police."

14. However, it was categorically stated that retracted

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confession must be looked upon with greater concern unless the reasons given for having made it in the first instance are on the face of them false.

The Apex Court has observed that the judicial confession is admissible in evidence relying upon the decision in *State (NCT of Delhi) v. Navjot Sandhu alias Afasn Guru* [(2005) 11 SCC 600] in which it was observed that confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. Section 164 of Cr.P.C. is a salutary provision which lays down certain precautionary rules to be followed by the Magistrate recording a confession so as to ensure the voluntariness of the confession and the accused being placed in a situation free from threat or influence of the police. The retracted confession must be looked upon with greater concern unless the reasons given for having made it in the first instance are on the face of them false. The court must give sufficient time to an accused to ponder over as to whether he would make confession or not.

16. In *Philips v. State of Karnataka* - 1980 Cri.L.J. 171, the Karnataka High Court opined that there is no provision for administering oath to an accused who is making confessional statement before the Magistrate. Administering of oath will be contrary to provision of Section 281 and the statement lost its evidenciary value. The accused should not be made to feel that he is bound down to particular statement; and if he later stated something contrary to that, he would be incurring the wrath of law. In *State Vs. Suram Singh* - 1976 Cri.L.J.96, the Jammu & Kashmir High Court held that a statement recorded under Section 164 would be inadmissible in evidence as made under compulsion of oath. In *Brijbasi Lal Shrivastava v. State of Madhya Pradesh* - AIR 1979 SC 1080, the Apex Court observed that the officer who had taken the statement of the appellant shows that he had administered an oath to the appellant before taking his statement although he was not empowered to administer any oath. This circumstance by itself would amount to a concealed threat, because if the statement was found to be false the appellant may have entertained a genuine belief that he might be prosecuted. On merit also the statement was not found to be reliable. The Apex Court has laid down thus :-

10. The evidence of P.W. 10 the officer who had taken the statement of the appellant shows that he had administered an oath to the appellant before taking his statement although he was not empowered to administer any oath. This circumstance by itself would amount to a concealed threat, because if the statement was found to be false the appellant may have entertained a genuine belief that he might be prosecuted. Secondly, it appears from the judgment of Special Criminal Case No. 2 of 1966 that the charge with respect to two items mentioned in this very document, viz.,

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the item relating to misappropriation of Rs. 43 and Rs. 20 had been disbelieved and the prosecution case regarding the same rejected. Thus, the veracity of the document Ex. P-12 was shaken to a very great extent. There can be no doubt that the judgment of the Special Judge in Spl. Criminal Case No. 2 of 1966 would be admissible to show what was the issue in question in that case and the decision thereof. As the appellant had been acquitted of the charge relating to these two items, we are not in a position to attach much importance to the document Ex. P-12 against the appellant with respect to the item of Rs. 500, particularly when the appellant had definitely pleaded that the statement was not his voluntary statement but was taken by P.W. 10 under duress. Such a statement was, therefore, clearly inadmissible under Section 24 of the Evidence Act. But that apart, even if the statement is admissible having regard to the circumstances mentioned above, its probative value is precious little. Thus, the documents Exs. P-12 and D-7 have to be excluded from consideration for the reasons given above.

The Apex Court has also observed that even if the statement is admissible having regard to the circumstances mentioned above, its probative value is precious little and it was excluded from consideration for the various reasons mentioned in above-quoted Para - 10.

17. In *Nazir Ahmad Vs. Emperor* - 1936 P.C. 253, it was laid down that whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applied is that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. The oral evidence tendered by Magistrate was held to be inadmissible. If oral evidence be allowed in such a case all the precautions and safeguards laid down by Ss. 164 and 364 would be of such trifling value as to be almost idle.

18. The Apex Court in *State of Uttar Pradesh Vs. Singhara Singh and others* - AIR 1964 SC 358 has referred to decision of *Nazir Ahmad Vs. Emperor* (supra) and observed that where a second class Magistrate not specially empowered by the State Government to record a statement or confession under S. 164 Cr.P.C. has purported to record a confession of the accused under S. 164 his oral evidence to prove the confession will be inadmissible. The principle that where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that the other methods of performance are necessarily forbidden.

19. In *Nika Ram Vs. The State of Himachal Pradesh* - AIR 1972 SC 2077, it

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was held that the Magistrate who recorded confession was second class Magistrate and was not specially empowered in that behalf, thus the record of confession was inadmissible in evidence at the trial.

20. It is apparent from the aforesaid exposition of law in the aforesaid decisions that administering of oath to an accused is prohibited. However, at the same time the Apex Court has not laid down in *Babubhai Udesinh Parmar v. State of Gujarat* (supra) and *Brijbasi Lal Shrivastava v. State of Madhya Pradesh* (supra) that if oath is administered, statement will be rendered wholly inadmissible. Considering the provisions of Section 463 of Cr.P.C., it is apparent that if any Court before which a confession or other statement is made evidence against an accused person is recorded, or purporting to be recorded under section 164 or section 281, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, take evidence in regard to such non-compliance, and may, if satisfied that "such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement". The provisions of Section 463(1) makes it clear that non compliance of the provision is fatal in case it has caused injury to the accused in his defence on merit. Though there was non compliance in the instant case inasmuch as oath was administered, it was violative of Section 164(5) of Cr.P.C., it may not be fatal. The evidenciary value of such confessional statement is required to be considered and Court is required to find that such non compliance has injured the accused in his defence on merits and whether he duly made statement recorded. In our opinion, such statement may be admitted in case it has not caused prejudice on merit in the facts of the case to the accused. In the instant case accused Shamim had retracted the confession (P-59) by way of filing application (D-4), after 6 days it was recorded He never felt bound down by oath which was administered wrongly to him and oath has to be simply ignored. The administering the oath simplicitor cannot be said to have injured the accused in his defence on merit in the instant case. We disagree with the finding recorded by the court below that due to administering of the oath the confessional statement (P-59) was rendered inadmissible. We respectfully disagree with the view expressed in *Philips v. State of Karnataka* (supra) by Karnataka High Court and *State Vs. Suram Singh* - (supra) by Jammu & Kashmir High Court. In our opinion it has to be seen whether administering of the oath has injured the accused in his defence on merit of a case.

21. Coming to the question that confessional statement was made under threat and pressure of the police as found by the court below. In the instant case the Trial Court has found in Para-41 that accused Shamim Ahmad prior to 16.8.1998 was called to the police station several times for the purpose of interrogation, he was interrogated on 16.8.1998 in the night and remained at police station on 17.8.98 also till the evening, he remained in the police custody and went to the house in

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the evening of 17.8.98 but before that he had made admission to the police about his guilt, thus after leaving him, police had put supervision on him and police personnel brought accused Shamim Ahmad to the court on 18.8.1998. The part of the statement of M.K. Pachori (PW-37) has not been disbelieved by the court below that accused was let off in the evening of 17.8.1998 and was permitted to go home whereas his confessional statement was recorded on 18.8.1998 by Addl. CJM. The summon was also served on 17.8.1998 as required by the court on the accused Shamim Ahmad to be present before the Court for giving the statement under section 164 Cr.P.C. on 18.8.98 as stated by M.K. Pachori (PW-37). He has deposed in Para-4 of his statement that application was filed before the ACJM. It is stated by R.L. Mishra (PW-33) in para 20 of his deposition. In case accused was let-off in the evening of 17.8.98 as stated by M.K. Pachori (PW-37) and summon was served on him on 17.8.1998 to make statement under section 164 Cr.P.C. before the Court on 18.8.98 as stated by R.L. Mishra (PW-33), would indicate that accused was not in the police custody after evening of 17.8.1998 though he was kept under surveillance. He was free to make consultation and deliberation with his family members and was also free to obtain legal opinion, if any, if he so desired before making any confessional statement before the Magistrate. Consequently, the finding recorded by the Court below that accused was under threat or pressure of the police, would not be correct. We deem it appropriate to refer the case of the accused as it has been suggested in the cross examination of the witnesses that accused was not let-off on 17.8.1998 and was detained at the police station till his confessional statement was recorded on 18.8.1998 and his formal arrest was made next day on 19.8.1998, this aspect has not been gone into by the Trial Court in proper perspective. On the one hand statement of M.K. Pachori (PW-37) has also been relied upon. It was necessary to determine whether there was any threat or pressure of the police to find out whether accused was under continuous custody w.e.f. 5.8.98 till formal arrest on 19.8.1998 as claimed by him and suggested in the cross examination of aforesaid witnesses R.K. Mishra (PW-33) and M.K. Pachori (PW-37) and as stated by the accused in the statement under section 313 of Cr.P.C. It was necessary to consider this question whether accused was in fact let off on 17.8.98 and came from his house as stated by M.K. Pachori (PW-37), thus the finding recorded by the Trial Court on the aforesaid aspect cannot be said to be proper. In case accused was let off, it would have bearing on the question whether he was kept under threat or pressure by the police as he had considerable time to think-over before making confessional statement before the Magistrate. This aspect requires to be gone into afresh by the Trial Court as the Trial Court has not properly considered the defence of the accused while recording the finding of fear and pressure.

22. The Court below has also discarded the confessional statement on the ground that it was not ascertained by the Magistrate from the accused whether he was

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produced from the custody and why he wanted to admit the guilt connected question is whether accused made the statement under inducement, threat or pressure. A reading of statement (Ex.P-59) makes it clear that accused was warned that he was not bound to make any statement, inquiry was made from him whether he wanted to make statement voluntarily and as per the duty enjoined upon the Magistrate under section 164(4), the bottom note was added by the Magistrate that Shamim Ahmad was told by the Magistrate that he was not bound to make confessional statement and in case he makes any confession, it could be used against him. The Magistrate has also recorded her satisfaction that confessional statement was made voluntarily in her presence and was admitted to be correct by Shamim Ahmad and his entire statement was correctly recorded. Thus the statutory duty cast upon the Magistrate was complied with in the instant case. The Magistrate has added the bottom note as mandatory under sub section (4) of section 164, it was also signed by the accused as stated by Smt. Radha Sonkar, ACJM also that accused had put his signatures on portion A to A on each page, thus submission of Shri A. Usmani, learned counsel appearing on behalf of accused Shamim Ahmad that signatures of the accused were not obtained on the confessional statement, is factually incorrect. Even if the signatures would not have been obtained, as making of statement by accused is not disputed, it would not have been a case of an illegality but merely an irregularity in the facts of the case. While the the finding recorded by the Court below that it was not ascertained by the Magistrate whether accused was making statement without fear, pressure or inducement, the bottom note has been ignored in which it has been mentioned as well as in the note at the commencement of the confessional statement by the Magistrate that it was ascertained from the accused whether he was making statement voluntarily and he was told of the consequences. When we consider statement of Smt. Radha Sonkar (PW-39) ACJM, though it was not necessary to examine her, nonetheless she was examined, she has stated in Para-4 of her deposition that accused was initially told that he was not bound to make any statement and in case he makes any statement, it could be used against him. He was given time to think over and thereafter also he was again told by the Magistrate as to consequences of making the statement and only thereafter his statement under section 164 Cr.P.C. was recorded. She has further stated in Para-9 that one hour time was given to think-over to accused Shamim Ahmad. It is also apparent from the statement of R.L.Mishra (PW-33), that summon was allegedly served on accused Shamim Ahmad on 17.8.1998 a day before making statement to the Magistrate. In the facts of the instant case it is also clear that accused knew it very well that confession was going to be recorded by the Magistrate. He came to the court, he was resident of same place Jabalpur, thus he was not misled in the facts of the instant case as to his capacity of Smt. Radha Sonkar that she was Addl. CJM, empowered to record the statement under section 164, on summons,

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it is mentioned that before Judicial Magistrate statement has to be recorded. No doubt about it that Magistrate did not ascertain whether he was in the custody of the police, thus the question whether accused was in the police custody or was let off a day before, was material question and it ought to have been gone into by the Trial Court on the basis of evidence on record. Merely by not ascertaining the fact whether accused was in custody or not by Magistrate, was not fatal, trial court ought to have considered the question on the basis of other evidence on record. The method and manner in which application (D-12) was filed, it was apparent that police was not sure that Shamim Ahmad was going to make confessional statement before the Magistrate, nonetheless he ultimately made it. Whether he made it under threat or pressure, is the question which assumes significance. In case he was in custody and was ill treated as claimed by him, there may be justification to give a finding that accused was kept under the threat or pressure.

23. Coming to the question whether accused was induced by the police that he was going to be pardoned and going to be a witness in the case against accused Kailash Sonkar, but this is not the statement made by Shamim Ahmad in his retracted confession (D-4) or in the statement made under section 313 Cr.P.C. nor it has been suggested in the cross examination of any of the Investigating Officer's R.L. Mishra (PW-33) or M.K. Pachori (PW-37) that any assurance was given to the accused as suggested by the learned Sr. counsel. When fact is in the knowledge of the accused, Section 106 of the Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. No doubt it is clear that section 24 of the Evidence Act provides that a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Merely by the fact that in the application (D-12) it was not clearly mentioned that whether Shamim Ahmad was going to be a witness or an accused in the case, it could not be inferred that an inducement or promise was made to him. An inducement or promise has to proceed from a person in authority who made such an inducement or promise is not on record, it is not the defence taken by the accused, the Court has also to find that what kind of inducement or promise or threat was given, proceedings from a person in authority was sufficient to give, was reasonably sufficient for suggesting that by making it, he would gain any advantage or avoid any evil of a temporal nature. Merely by the fact that the Magistrate while recording confession referred Shamim Ahmad in the beginning

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as a witness by that itself it could not be said that any inducement was made to the accused Shamim Ahmad to make the statement before the Court to the effect that he was going to be pardoned after making statement and was going to be witness against co accused Kailash Sonkar. No categorical finding has been recorded that any inducement was given or promise was meted out to the accused Shamim Ahmad by any person in authority that he was going to be pardoned in the case and was going to be a witness in the capacity of approver as against Kailash Sonkar. Though we have discussed the merit of the submission as made by Shri Surendra Singh, learned Sr. counsel. Since this aspect has not been gone into by Trial Court, we leave this question open to the Trial Court to be examined afresh, in case there is any evidence on record we leave open the question to be examined by the Trial Court unfettered by any observation made by us in the order. We have examined the case only with a view to do justice to the submission made by the learned Sr. Counsel. He has relied upon the decision of Apex Court in *Pyarelal Bhargava v. The State of Rajasthan* - AIR 1963 SC 1094 wherein the Apex Court has laid down that the crucial word in section 24 is the expression "appears". The appropriate meaning of the word "appears" is seems, it imports a lesser degree of probability than proof. The standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed. Even so, the laxity of proof permitted does not warrant a court's opinion based on pure surmise. A prima facie opinion based on evidence and circumstances may be adopted as the standard laid down. It is not possible nor advisable to lay down an inflexible standard for guidance of courts, for in the ultimate analysis it is the court which is called upon to exclude a confession by holding in the circumstances of a particular case that the confession was not made voluntarily. The Apex Court has also emphasized that threat etc. must proceed from person in authority and the threat etc. must cause reasonable belief in mind of confessing accused that he would get advantage etc. The Trial Court has not probed into the aforesaid aspect as to person in authority who gave inducement or promise to be pardoned or to make accused Shamim Ahmad an approver, we leave the question at that to be examined afresh by the Trial Court. Counsel has also referred to decision of Calcutta High Court in *Mohsena Khatun and another v. Emperor* - AIR 1939 Calcutta 610 laying down that it is the duty of the Judge to satisfy himself that confession is not made owing to inducement or threats. Whether there is such inducement, is to be ascertained from circumstances. Since we have left the question open to be examined by the Court below at the first instance it is not for us to give any opinion on that aspect within the ken of revisional jurisdiction. We have considered the method and manner in which the finding have been recorded and whether any material evidence has been ignored or findings are perverse and relevant material has been held to be inadmissible or Court has proceeded on irrelevant consideration. We leave the question of facts to be examined afresh by the Trial Court.

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Similarly the finding of Trial Court that the Magistrate had not informed the accused that the statement could be used against him is not properly arrived at. The initial note and bottom note in the statement makes it clear that it was clearly informed by the Addl. Chief Judicial Magistrate Smt. Radha Sonkar (PW-39) that statement could be used against him. The finding is based on ignoring material evidence.

24. The reason assigned by the Trial Court that there was no evidence against the accused as such it appears that confessional statement was unnatural. In *State (NCT of Delhi) Vs. Navjot Sandhu @ Afsan Guru* - (2005) 11 SCC 600 the Apex Court has observed that confessions are considered highly reliable because no rational person would make an admission against his interest unless prompted by his "conscience to tell the truth". "Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law." Merely by the fact that there was no other evidence available by that time against the accused to make confessional statement, it could not have been inferred by the Trial Court that it was unnatural and made under fear and pressure. No such inference was called for. It should have been examined independently considering the other evidence whether accused was under fear or pressure. The course of human conduct indicates that person may admit the guilt independently without considering whether there was any other evidence against him or not, it would not be unnatural in case it was made without fear or threat/inducement or promise.

25. Another reason given by the Court in Para-41 that police was out side of the room when confessional statement of Shamim Ahmad was recorded. The case of prosecution is that accused was let-off and was brought to the Court by serving a summon for recording his statement under section 164 Cr.P.C. No doubt the cases in which the police makes investigation, accused or witness has to be brought to the Court by the police. There was nothing unusual in the case as R.L.Mishra (PW-33) has stated that summon was served on Shamim Ahmad for recording his statement under Section 164 Cr.P.C. before the Addl. CJM. Police was not present in the court and the accused was given one hour time and was asked to sit in the gallery not meant for general public for one hour. Merely by the fact that some police personnel was outside the court room, it could not have been inferred by the court below that due to aforesaid presence of police personnel outside the court room, there was any threat or pressure exerted on the accused. In case accused was brought to the court by the police personnel, it has to be examined independently what kind of threat or pressure was meted out to the accused/witness. Usually when statement under section 164 Cr.P.C. is recorded, case is at the investigation stage, it is only police personnel who are supposed to bring the accused or witness to the court for the purpose of recording the statement under section 164 Cr.P.C.

26. The Apex Court in *Dagdu and others etc., v. State of Maharashtra* -

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AIR 1977 SC 1579 has laid down that the failure to comply with Section 164 (3) Cr. P. C. or with the High Court Circulars will not render the confessions inadmissible in evidence. Relevancy and admissibility of evidence have to be determined in accordance with the provisions of the Evidence Act. In *Hem Raj Devilal v. The State of Ajmer* - AIR 1954 SC 462, the Apex Court has held that recording of a confession in jail instead of the court, where it should have been ordinarily recorded, is an irregularity. It was also held that in the circumstances of the case, the irregularity did not affect the voluntary character of the confessions. It is necessary to warn the accused as required under section 164 Cr.P.C. that it was not necessary for him to make statement and it could be used against him, in case such a warning was not given, such confession cannot be acted upon, as held by the Supreme Court in *Chinna Gowda etc. v. The State of Mysore* - 1965 SCJ 500. The Apex Court in *Ram Charan and others v. The State of U.P.* - AIR 1968 SC 1270 had laid down that even if endorsement of certificate by Magistrate below statement of witness recorded under S. 164 is not in proper form, it does not necessarily mean that any threat was given to witness or that his evidence given in Court is less believable.

27. Shri Surendra Singh, learned Sr. Counsel has also submitted that confessional statement was recorded in the capacity of witness, thereafter accused was arrested, thus the confessional statement (P-59) is not admissible. He has relied upon the decision of Apex Court in *State of T.N. v. J. Jayalalitha* - AIR 2000 SC 1589, in which the High Court has relied upon the statement of the then Chief Secretary, who was arrayed as third accused in the charge sheet, the Apex Court has observed that there is no use with the said statement attributed to the third accused on account of two reasons, firstly that the said author of the statement has already been arraigned in the case and a charge has been framed against him and secondly, on a reading of the statement we have noticed that it is exculpatory in nature, hence it was rejected. The Apex Court has laid down in Para 8 and 11 thus :-

8. Learned single Judge of the Madras High Court while affirming the said order pointed out that the entire case against the respondent is based on the statement of Shri V. Sundaram and another statement made by Shri Venkataraman, the then Chief Secretary (who is arrayed as the third accused in the charge sheet, against whom the trial Court has framed charge). The latter statement was recorded under Section 164 of the Code of Criminal Procedure (for short 'the Code'). Regarding the objections put forward by V. Sundaram in the Current File, learned single Judge noticed that Page Nos. 225 to 245 of that file remained missing at a particular point of time and the objections made by V. Sundaram were on those sheets. When there is nothing to show that those sheets were removed at the behest of respondent Jayalalitha it

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must be presumed that she had not come across those objections, according to learned single Judge of the High Court.

11. We may, at the outset, point out that there is no use with the said statement attributed to the third accused Venkata-raman on account of two reasons. First is that the said author of the statement has already been arraigned in the case and a charge has been framed against him. Second is that on a reading of the statement we have noticed that it is exculpatory in nature. Hence the said statement can only lie in store and no court can possibly treat it as evidence.

Coming to the facts of the instant case, the police had treated Shamim Ahmad as accused, but there was no evidence collected against him by that time. He was interrogated by the police and he made admission of guilt and disclosed the circumstances to the police as to his complicity and complicity of co accused in the case. Police did not arrest him as claimed by it forthwith for the very reason statement made before it was useless and that police was not sure that accused was going to make confessional statement before the Court under section 164 Cr.P.C. There is nothing to infer that Shamim Ahmad was to be treated as witness in the instant case, police wanted to ascertain whether Shamim Ahmad was going to make the statement before the Magistrate of the facts implicating him, soon thereafter he was arrested next very day i.e. on 19.8.1998, The ratio of the aforesaid decision in *J. Jailalitha* (supra) is not attracted to the instant case in which statement of third accused was recorded in the capacity of witness. Merely reference by the Magistrate in the statement (P-59) that witness was administered oath, is not sufficient to hold that he was being examined as a witness not as accused in the case. It is apparent from the entire reading of the statement that he was examined in the capacity of accused and not in the capacity of witness in the instant case. The initial note and bottom note indicate that learned Magistrate while recording the statement complied with provision under section 164 Cr.P.C. except that oath was wrongly administered which would not make statement inadmissible. Since it was not the statement of witness the Trial Court has further erred in holding that statement could only be used for the purpose of contradiction or proving the omissions, not for proving the guilt, if it was voluntarily made without inducement, threat, pressure or promise etc. and was not hit by provision of Section 24 of the Evidence Act, it could be used for proving the guilt.

28. Coming to the submission that as to the value of the confessional statement as against the co accused law is settled that it could be used as corroborative evidence. Confession of co accused can be used as corroborative evidence, however, we refrain to examine the facts in the revisional jurisdiction as that is not the function of the revisional court. It is for the Trial Court to take into consideration on the basis of the factual finding to be arrived at on various aspects

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of the case and thereafter independently it has to be considered by the Trial Court whether the confessional statement of Shamim Ahmad can be used and to what extent as against co accused Kailash Sonkar.

In *State of Delhi v. Shri Ram Lohia*- AIR 1960 SC 490 value of statement of the witness recorded under section 164 Cr.P.C. was considered: In *Hem Raj Devlal v. The State of Ajmer* (supra), it was observed by the Apex Court that a confession can be made even during a trial and the evidence already recorded may well be used to corroborate it. It has also been observed by the Apex Court that the confession has to be free from inducement or threat. The confession has to be completely free from influence of the police as held by the Apex Court in *Chinna Gowda etc. v. The State of Mysore* (supra).

29. Coming to the second fold of submission as to reliability of evidence of witness Hari Narayan. The Trial Court has considered the case from Para-20 to 36 while holding Hari Narayan to be unreliable witness. The Court below has not considered the material aspect of the case whether money was paid to the witness and by whom, in proper perspective and has made passing reference while concluding the case in Para-83 that it appears that a sum of Rs. 24,000/- was paid by the prosecution/complainant, appears to be probable. The Trial Court has completely ignored and overlooked the fact that on 11.2.1999, Hari Narayan was examined in the Court. It is apparent from the statement of his Bank account (D-16) proved by Asst. Bank Manager Aditya Pandey that a sum of Rs. 24,000/- was deposited on 11.2.1999, on the date on which he deposed in favour of accused and against the prosecution, this witness was turned hostile, thus this aspect ought to have been gone into by the Trial Court in depth in order to find out the correctness of the statement of Hari Narayan, whether he was paid the money by the accused to resile from the statement recorded under section 161 Cr.P.C. It was on the date of deposit of money and deposition in Court on 11.2.1999 that he did not support the prosecution case. It was also required to be gone into whether money was paid by the prosecution/complainant in November, 1998 for making him the witness in the case, if yes - whether the money would have been deposited on 11.2.1999. This material aspect has not been at all gone into in proper perspective by the Court below. Evidence on record has not been considered. As per the defence case money was paid to the witness, it was deposited in his Bank account, deposit was huge as compared to other transaction of several years in the pass-book, it was incumbent upon the Court to probe deeply into the aforesaid question before appreciating the statement of Hari Narayan (PW-11). Trial Court has also failed take into consideration the background of the case in which the allegation was made against the Police Officer that he was not making fair investigation, public agitation was made and several authorities including the Chief Minister had to be approached. It was also necessary to consider what explanation has been given by the Investigating Officer as to delay in recording the statement of

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Hari Narayan. Simpliciter on the basis of delay statement of witness if otherwise truthful, cannot be discarded. Whether delay was with a view to introduce falsely Hari Narayan as a witness and whether it was done as an after thought, ought to have been gone into by the Court below. It was also necessary to go into the question of exchange of money for finding out the fact whether money was paid by prosecution/complainant in November, 1998 and whether his statement made on 11.2.1999 was correct or it was made under influence of money or recorded later on on 29.5.2000 under the order of this Court, was correct. The course of justice cannot be permitted to be polluted by making payment of money to win over the witness or set up a case falsely by either party. The Apex Court has laid down that such question should be gone into by the Court in *Zahira Habibulla H. Sheikh v. State of Gujarat* - 2004 AIR SCW 2325; *Zahira Habibullah Sheikh and another - Vs. State of Gujarat and others* - 2005(4) SCC 292 and *Zahira Habibullah Sheikh and another Vs. State of Gujarat and others* - 2005 (4) SCC 294. We refrain to comment on the merit of statement of Hari Narayan as in our opinion the aforesaid aspect is necessary to be gone into before considering the reliability of his evidence. The Trial Court is also directed to make enquiry into the aforesaid aspect of payment of money, who in fact paid the money and to take appropriate steps against the persons responsible to pollute the Course of Justice and tampered with the evidence.

Shri Surendra Singh, learned Sr. Counsel has relied upon decisions of Apex Court in *"Peddireddy Subbareddi v. State of A.P - AIR 1991 SC 1356"*, *Shankarlal v. State of Rajasthan - AIR 2004 SC 3559* and *Ramreddy Rajeshkhanna Reddy v. State of Andra Pradesh - AIR 2006 SC 1656* to contend that non disclosure for nine months by Hari Narayan was enough to render him as unreliable, effect of delay has to be considered in each case, obviously delay in recording has to be taken into consideration but by that itself cannot be said to be enough to reject the entire version of the witness in case he is otherwise reliable. This is the function of the Trial Court it has to be done afresh in the light of the finding to be recorded by it on various aspect of the case including the payment of money if any. Sr. Counsel has also relied upon various decisions of Apex Court to contend that in case of non disclosure due to fear, such explanation has to be rejected, in *Bihari Singh Madho Singh v. State of Bihar - AIR 1954 SC 692*, *"Ram Pukar Thakur v. State of Bihar" - AIR 1974 SC 284*, *"State of Orissa v. Brahmananda Nanda" - AIR 1976 SC 2488*, *"Alil Mollah v. State of W.B." - AIR 1996 SC 3471* and *"State of Rajasthan v. Mani Ram" - AIR 2001 SC 2430*. We leave the question to be re-examined by the Trial Court as in the instant case as per the accused money was paid by prosecution side whereas as per complainant's counsel it was paid by the accused to Hari Narayan to win him over on the date on which he was examined initially in the Court on 11.2.1999 and was declared hostile. This aspect is required to be gone into then correctness of his

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entire statement has to be considered. The aforesaid aspect cannot be ignored and overlooked as that would have material bearing on the question which of the version is correct made on 11.2.99 or later on and, who made an attempt to tamper with the evidence. In the case there is serious allegation that money was paid to Hari Narayan as submitted by the counsel for accused as well as by the counsel for revisionist, they are levelling charge on rival party, this is quite serious matter which is required to be gone into in the instant case and thereafter reliability of version of Hari Narayan to be adjudged afresh.

30. With respect to the motive also the finding recorded is that it has not been established that cheques were handed over to accused Kailash Sonkar. It has not been disputed by Shri Surendra Singh learned Sr. Counsel appearing for Kailash Sonkar that in fact cheques were handed over to Kailash Sonkar and they were to be given back to deceased Raju Sonkar on fulfillment of certain conditions. It is apparent from (Ex.P-60) also that three cheques of amount of Rs. 3,87,220/- were handed over to Kailash Sonkar who was a mediator. It appears that there was some dispute as to handing over the cheques to the deceased, since settlement deed Ex.P-60 itself contains recital that cheques were handed over to accused Kailash Sonkar. It has not been disputed on facts and there is nothing on record to suggest that cheques were handed over by Kailash Sonkar to the deceased. In our opinion, the finding of the Trial Court on the aforesaid aspect is perverse, but what is the effect of it, we leave it to be considered afresh by the Trial Court on the basis of the finding to be recorded by it on factual aspects of the case. Statment of Smt. Madhu Sonkar and Pappu (PW-36) were also required to be considered on the aforesaid aspect of motive and dispute as to the cheques.

31. The Trial Court has also to consider whether trial was defective in any manner or any prejudice was caused by conducting of the case by Mr. G.D.Garg.

Resultantly, we set aside the judgment and remit the case to the Court below to decide it in accordance with law unfettered by any observation made by us on factual matrix of the case. This is made clear to the Trial Court that we have not given any factual finding on various aspect of case in this order. The Trial Court is free to take independent view on issues in factual matrix of the case and to decide the case in accordance with law. It would be open to the Court to record additional evidence if so required. Accused are directed to appear before the court-below on 21.7.2008. As prayed by the counsel of the accused we clarify that accused will remain on bail as before.

Order accordingly.

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I.L.R. [2009] M. P., 1476

CRIMINAL REVISION

Before Mr. Justice Ajit Singh

7 January, 2009*

AMAR SINGH

... Applicant

Vs.

STATE OF M.P.

... Non-applicant

Penal Code (45 of 1860), Section 325 - Sentence - Incident took on a sudden quarrel over collection of Mahua flowers - Nothing on record that applicant is a habitual offender - Applicant already undergone imprisonment of 4 months - Held - Applicant sentenced to period already undergone and sentence of fine affirmed - Revision partly allowed. (Para 6)

दण्ड संहिता (1860 का 45), धारा 325 - दण्डादेश - घटना महुआ के फूलों के संग्रहण पर हुए आकस्मिक झगड़े पर हुई - अभिलेख पर ऐसा कुछ नहीं कि आवेदक आदतन अपराधी है - आवेदक ने 4 माह का कारावास पूर्व में ही भोग लिया - अभिनिर्धारित - आवेदक को पूर्व में भोगे गये कारावास का दण्डादेश दिया गया और जुर्माने के दण्डादेश की पुष्टि की गई - पुनरीक्षण अंशतः मंजूर।

Ghanshyam Sharma, for the applicant.

A.L. Patel, G.A., for the non-applicant.

O R D E R

AJIT SINGH, J. :-With the consent of learned counsel for the parties, the case is finally heard.

This revision is directed against the judgment dated 1.9.2008 passed by the First Additional Sessions Judge, Mandla in Criminal Appeal No.158/2007 whereby he has dismissed the appeal confirming the conviction and sentence of the applicant as passed by the trial court.

2. The trial court convicted the applicant for an offence under Section 325 of the Indian Penal Code and sentenced to rigorous imprisonment for one year and a fine of Rs.1000/- or in default of payment of fine to further undergo rigorous imprisonment for three months.

3. The victim of the incident was father Girdhari (P.W.1) of the applicant.

4. The prosecution case that has been proved against the applicant is that on 30.3.2000 at about 6.30 a.m., he assaulted his father Girdhari (P.W.1) with a lathi. In the incident Girdhari (P.W.1) sustained a fracture on the humerus bone of his left hand. The first information report about the assault was lodged by Girdhari (P.W.1) on the same day at Police Station, Niwas, District Mandla. Girdhari (P.W.1) was medically examined by Dr.Archana Sharan (P.W.5). Ex.P3, is the injury report,

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which corroborates the evidence of Girdhari (P.W.1) regarding the injuries received by him. Ex.P4, is the X-ray plate which confirms a fracture on the left humerus bone of Girdhari (P.W.1).

5. The trial court as well as the appellate court have recorded a finding against the applicant that he caused a grievous injury to Girdhari (P.W.1). Both the courts below have given cogent reasons in support of its aforesaid conclusion. The finding to the above effect is amply borne out from the evidence and materials brought on record. The learned counsel for the applicant could not point out any illegality and perversity in the concurrent findings of the two courts below regarding conviction of the applicant under Section 325 of the Indian Penal Code. The conviction of the applicant under Section 325 of the Indian Penal Code is; therefore, hereby affirmed.

6. So far as the question of sentence is concerned, the applicant has already undergone more than four months of imprisonment. There is nothing on record to show that he is a habitual offender. The incident also took place on a sudden quarrel between the applicant and his injured father Girdhari (P.W.1) over collection of "Mahua" flowers. Taking into consideration the totality of circumstances, I am of the opinion that the interest of justice would be met by awarding a sentence for the period already undergone by the applicant. The sentence of fine is, however, affirmed. The applicant is in jail and he be released immediately, if not wanted in any other case.

7. With the above modification in the sentence, the revision is partly allowed.

Revision partly allowed.

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CRIMINAL REVISION

Before Mr. Justice S.L. Kochar

27 January, 2009*

INSTITUTE OF CHARTERED ACCOUNTANTS

OF INDIA

Vs.

VIMAL KUMAR SURANA & anr.

... Applicant

... Non-applicants

A. Chartered Accountants Act (38 of 1949), Sections 2(d), 24, 24A, 26 & 28, Criminal Procedure Code, 1973; Sections 4, 5 & 190 - Applicant lodged the report against accused alleging that he without being registered Chartered Accountant, was practicing before Income Tax and Sales Tax department as a representative of assessee, preparing reports and issuing certificates as Chartered Accountant - Police took cognizance, registered crime and filed charge sheet - Magistrate framed charges - Revisional court allowed the revision and remanded the case - Revision before High Court - Held - Prima facie case against accused u/ss. 24, 24A & 26 of the Act is

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made out - Since specific provisions are made for breach of provisions of Act, the accused can be prosecuted under specific provisions of the Act and not under provisions of I.P.C. - U/s 2(d) of the Act, complaint does not include police report - U/s 28 of the Act, Chartered Accountant's Institute or under order of council or by Central Government can file complaint - Filing of complaint under the Act by the police not proper - Revision dismissed. (Paras 9 to 12)

क. चार्टर्ड अकाउंटेंट अधिनियम (1949 का 38), धाराएँ 2(डी), 24, 24ए, 26 व 28, दण्ड प्रक्रिया संहिता, 1973, धाराएँ 4, 5 व 190 - आवेदक ने अभियुक्त के विरुद्ध रिपोर्ट दर्ज करायी कि उसने रजिस्ट्रीकृत चार्टर्ड अकाउंटेंट हुए बिना आयकर और विक्रयकर विभाग के समक्ष निर्धारित के प्रतिनिधि के रूप में कार्य किया, रिपोर्ट तैयार की और चार्टर्ड अकाउंटेंट के रूप में प्रमाण पत्र जारी किये - पुलिस ने संज्ञान लिया, अपराध पंजीबद्ध किया और आरोप पत्र पेश किया - मजिस्ट्रेट ने आरोप विरचित किये - पुनरीक्षण न्यायालय ने पुनरीक्षण मंजूर की और मामला प्रतिप्रेषित किया - उच्च न्यायालय के समक्ष पुनरीक्षण - अभिनिर्धारित - अभियुक्त के विरुद्ध अधिनियम की धारा 24, 24ए व 26 के अधीन प्रथम दृष्ट्या मामला बनता है - चूंकि अधिनियम के उपबंधों के उल्लंघन के लिए विनिर्दिष्ट उपबंध निर्मित किये गये हैं इसलिए अभियुक्त को अधिनियम के विनिर्दिष्ट उपबंधों के अधीन अभियोजित किया जा सकता है न कि भा.द.सं. के उपबंधों के अधीन - अधिनियम की धारा 2(डी) के अधीन परिवाद में पुलिस रिपोर्ट सम्मिलित नहीं है - अधिनियम की धारा 28 के अधीन चार्टर्ड अकाउंटेंट संस्थान या परिषद के आदेश के अधीन या केन्द्र सरकार द्वारा परिवाद पेश किया जा सकता है - पुलिस द्वारा अधिनियम के अधीन परिवाद पेश करना उचित नहीं - पुनरीक्षण खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 195 - Allegation that accused without being registered Chartered Accountant appeared before Income Tax, Sales Tax Authority, submitted documents as Chartered Accountant and cheated authorities - Held - Income Tax or Sales Tax department has not filed complaint - Cognizance of offence can be taken only on the complaint filed by the Income Tax / Sales Tax Authorities who are falling within category of "Court" as per provision u/s 195 - Revision dismissed. (Para 13)

खं. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195 - अभिकथन कि अभियुक्त ने रजिस्ट्रीकृत चार्टर्ड अकाउंटेंट हुए बिना आयकर, विक्रयकर प्राधिकारी के समक्ष उपस्थित हुआ, चार्टर्ड अकाउंटेंट के रूप में दस्तावेज पेश किये और प्राधिकारियों के साथ छल किया - अभिनिर्धारित - आयकर या विक्रयकर विभाग ने परिवाद पेश नहीं किया - अपराध का संज्ञान केवल आयकर/विक्रयकर प्राधिकारियों द्वारा पेश परिवाद पर लिया जा सकता है जो धारा 195 के उपबंधानुसार "न्यायालय" की श्रेणी में आते हैं - पुनरीक्षण खारिज।

Cases referred :

2002(3) Crimes 358, 1996 CrLJ 290, 1993 CrLJ 232, 1996(1) CCR 408.

Virendra Verma, for the applicant.

Vikas Jotsi, for the non-applicant No.1.

Aseem Dixit, for the non-applicant No.2.

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA Vs VIMAL KUMAR SURANA

O R D E R

S.L. KOCHAR, J. :-By this order, both the revisions are being decided because same party has filed these revisions against the same non-applicants. In Criminal Revision No. 550/04, the challenge has been made to the impugned order dated 29-10-03 passed by learned First Additional Sessions Judge, Betul in Criminal Revision No. 47/03.

2. In Criminal Revision No. 436/04, the challenge has been made to the order dated 8-12-03 passed by learned Chief Judicial Magistrate, Betul in Criminal Case No. 88/2003.

3. In brief, the facts of the case are that the applicant on authorization by Institute of Chartered Accountants lodged first information report in police station, Betul against the non-applicant no.1, alleging that non-applicant no.1, Vimal Kumar Surana is not a registered Chartered Accountant in the Institute of Chartered Accountants of India as per provisions of Chartered Accountant's Act, 1949 (for short 'the Act') and regulations framed thereunder as per provisions under Section 30 of the Act. It is said that non-applicant no.1 was practicing before Income-Tax and Sales Tax Department as a representative of assessee. He was preparing reports as Chartered Accountant and also issuing certificate. He was preparing forged documents by using seal of Chartered Accountant and therefore, committed offence punishable under Sections 419, 420, 465, 467, 468, 472 & 473 of I.P.C as well as under Sections 24 & 26 of the Act. The Betul police station took cognizance and registered Crime No. 150/01 for the above mentioned offence and after investigation, filed charge-sheet against the non-applicant no.1, Vimal Kumar Surana.

4. The learned Chief Judicial Magistrate, Betul framed charges for the above mentioned offences against the non-applicant no.1 and non-applicant no.1, filed Criminal Revision No. 47/03 against the order dated 10-3-03 and the learned Lower Revisional Court by order dated 29-10-03 remanded the case back to the learned Chief Judicial Magistrate holding in paragraph-17, that there was no sufficient material and ground for framing charges under Sections 417, 420, 468, 471 & 472 and directed the learned Chief Judicial Magistrate to hear the parties afresh for framing of charges as per provisions of the Act or under the provisions of Indian Penal Code.

5. Learned counsel for the applicant submitted that he had lodged report in police station on the basis of authorization by the counsel of Chartered Accountant as per provisions under Section 28 of the Act which reads as under:-

"28. Sanction to prosecute-No person shall be prosecuted under this Act except on a complaint made by or under the order of the Council or of the Central Government."

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6. Learned counsel has submitted that in view of the aforesaid provision, applicant was authorized to lodge FIR in police and police had rightly taken cognizance and thereafter, filed final report as per provision under section 173 Cr.P.C. It is also submitted that learned Lower Revisional Court has committed error in law while interpreting the provision under Section 28 of the Act and there is sufficient material in the charge-sheet against the non-applicant no.1 for framing charges of cheating, forgery as per provision under the Indian Penal Code and commission of breach of Section 24 and 26 of the Act.

7. On the other hand, learned counsel for non-applicant no.1 has supported the impugned order passed by Lower Revisional Court in Criminal Revision No. 47/03.

8. Having heard learned counsel for parties and after perusing the impugned order and record of the case, this court is of the view that the lower revisional court has not committed any illegality while passing the impugned order. As per provision under Section 28 of the Act, the court can take cognizance only when complaint is filed by the council or under the order of the council or the Central Government. Complaint is defined under Section 2(d) of Cr.P.C (in short ' the Code') which is reproduced herein for convenience.

***"Complaint"** - means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."*

9. In view of the aforesaid definition of complaint, it is clear that complaint does not include a police report whereas in the instant case, police filed report as per provision under Section 173 of Cr.P.C. As per provision of Section 28 of the Act, complaint can be filed before the competent court by the Chartered Accountant's Institute or under order of the counsel or by Central Government but in the instant case, no such complaint was filed in the court by the applicant. In context to this provision, provision under Section 190 of the Code is also relevant to clarify that learned Magistrate is empowered to take cognizance of any offence-

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon a police report of such facts;

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

Provision of Section 190 of Code has also clarified the position that there is difference between police report and complaint. In the instant case, the cognizance was taken by the learned Chief Judicial Magistrate on the basis of the police

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report, which is contrary to the provision of Section 28 of the Act, but this bar would apply for taking cognizance of commission of offence under Sections 24, 24(A) & 26 of "the Act". In Chapter VII of the Act, penalties are prescribed for commission of breach of provisions of Act and regulations made thereunder:-

"24. Penalty for falsely claiming to be a member, etc :-

Any person who-

- (i) not being a member of the Institute:-
 - (a) represents that he is a member of the Institute; or
 - (b) uses the designation Chartered Accountant, or
- (ii) being a member of the Institute, but not having a certificate of practice, represents that he is in practice, or practices as a chartered accountants,

shall be punishable on first conviction with fine which may extend to one thousand rupees, and on any subsequent conviction with imprisonment which may extend to six months or with fine which may extend to five thousand rupees, or with both.

24A. Penalty for using name of the Council, awarding degrees of chartered accountancy, etc:- (1) Save as otherwise provided in this Act, no person shall-

- (i) use name or a common seal which is identical with the name or the common seal of the Institute or so nearly resembles it as to deceive or as is likely to deceive the public;
- (ii) award any degree, diploma or certificate or bestow any designation which indicates or purports to indicate the position or attainment of any qualification or competence similar to that of a member of the Institute; or
- (iii) seek to regulate in any manner whatsoever the profession of chartered accountants.

2. Any person contravening the provisions of sub-section (1) shall, without prejudice to any other proceedings which may be taken against him, be punishable with fine which may extend on first conviction to one thousand rupees, and on any subsequent conviction with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

3. Nothing contained in this section shall apply to any University established by law or to any Body affiliated to the Institute.

26. Unqualified persons not to sign documents :-

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(1) No person other than a member of the Institute shall sign any document on behalf of a "[chartered accountant in practice] or a [firm of such chartered accountants] in his or its professional capacity.

(2) Any person contravening the provisions of sub-section (1) shall, without prejudice to any other proceedings which may be taken against him, be punishable with fine which may extend on first conviction to one thousand rupees and on any subsequent conviction with imprisonment which may extend to six months or with fine which may extend to five thousand rupees or with both."

10. It is well settled legal proposition that when for a commission of a particular crime there is specific enactment then the person concerned shall be prosecuted under the provisions of the Special Act and not under the provisions of Indian Penal Code. It is clear from the provisions of Sections 4 and 5 of Code which are extracted hereinunder thus:-

"4. Trial of offences under the Indian Penal Code and other laws :-

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained;

(2) All offences under other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences.

5. Saving:- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

11. There is no allegation against the non-applicant no.1, that he is not a qualified accountant or unfit for registration as per provisions of "the Act" to practice. There can't be any dispute that prima facie case for prosecution of the non-applicant no.1 is made out as per provisions under Section 24, 24A & 26 of the Act which are special provisions under the Special enactments, on the basis of allegations made by the applicant.

12. In the complaint lodged by the applicant/complainant, it is alleged that non-applicant no.1 was practicing as Chartered Accountant without his registration or certification as per provisions of the Act and rules framed thereunder, therefore,

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he has committed the offence of cheating and forgery. Since, specific provisions are made for commission of breach of provisions of the Act, the non-applicant no.1 cannot be prosecuted for the offence punishable under sections of the Indian Penal Code. This view is fortified by the judgment passed in the cases of *Mustan Patel Vs. State of West Bengal* 2002 (3)Crimes 358; *Jaheer Ahmad Vs. Ajam Khan*. 1996 Cr.L.J. 290; *Sayeed Kalim Vs. Maysoor Laxmi Bidi Works and Ors.* 1993 CR.L.J. 232 & *P.P. Chandana and Ors. Vs. State of M.P.* 1996 (Vol.1) C.CR. 408.

13. It is also argued that the applicant appeared before the Income Tax and Sales Tax Authorities under the authorization as attorney on behalf of the assessee and submitted documents as Chartered Accountant, therefore, he had cheated the authorities. In this regard, the provision under Section 195 of Cr.P.C is applicable and cognizance can be taken by the Magistrate on the basis of complaint in writing of that court or of such other court to which that court is subordinate or authorities considered as court. In the instant case, Income- Tax or Sales Tax Authority has not filed any complaint against the non-applicant no. 1. After remand of the case by the lower Revisional Court, as per impugned order dated 29-10-03, the learned Chief Judicial Magistrate, Betul has passed the order dated 8-12-03, under challenge, in Criminal Revision No. 436/04 filed by the applicant. In this order, learned Chief Judicial Magistrate has held that complaint filed by the applicant is as per provision under section 28 of the Act, therefore, cognizance on the basis of charge-sheet/ report filed by the police cannot be taken for commission of offence punishable under Sections 24, 24A & 26 of the Act. It is also held by the learned Chief Judicial Magistrate that for the offence under Section 465 of I.P.C, the cognizance can be taken only on the basis of complaint filed by the Income-Tax or Sales Tax Authorities who are falling within the category of ("Court") as per provision under Section 195 (1) (b)(ii) of the Code. This court does not find any illegality, irregularity or perversity in the order dated 8-12-03.

14. In the result, in view of the foregoing discussion, both the revision petitions are dismissed with a liberty to the applicant to file a criminal complaint as per provision under Section 28 of the Act for commission of offences U/ss 24, 24A & 26 of "the Act" and if the Income-Tax and Sales Tax authorities deem it fit, may file complaint against the non-applicant no.1, as per provision under Section 195 of Cr.P.C, before the competent court having jurisdiction. It is made clear that if any complaint is filed by the applicant or any other authority/authorities empowered as per provision under Section 195 of Cr.P.C, the observations made in this order shall not be taken into consideration and the complaint shall be decided by the concerned court in accordance with the provisions of law.

15. Both the revision petitions are hereby dismissed.

Petition dismissed.

AYYUB AHMAD Vs. STATE OF M.P.

I.L.R. [2009] M. P., 1484

CRIMINAL REVISION

Before Mrs. Justice S.R. Waghmare

30 January, 2009*

AYYUB AHMAD

... Applicant

Vs.

STATE OF M.P.

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3) & 190
- Private complaint and application u/s 156(3) filed against applicant - Magistrate directed police to investigate and register FIR - Revision - Held - Section 156(3) mandates that any Magistrate being empowered u/s 190 may order investigation - After receiving the report of investigation, two options are available to Magistrate either to register offence or not - Merely issuing process u/s 156(3) would not amount to take cognizance u/s 190 - Seeking quashment or setting-aside impugned order would be challenging an interlocutory order - Revision not maintainable - Revision dismissed.

(Paras 11 & 12)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3) व 190 – आवेदक के विरुद्ध प्राइवेट परिवाद और आवेदन अन्तर्गत धारा 156(3) पेश – मजिस्ट्रेट ने पुलिस को अन्वेषण करने और एफ.आई.आर. पंजीबद्ध करने के निदेश दिये – पुनरीक्षण – अभिनिर्धारित – धारा 156(3) यह आदेश देती है कि कोई मजिस्ट्रेट धारा 190 के अधीन सशक्त किये जाने से अन्वेषण का आदेश दे सकता है – अन्वेषण की रिपोर्ट प्राप्त करने के बाद मजिस्ट्रेट के पास दो विकल्प हैं या तो अपराध पंजीबद्ध करे या न करे – केवल धारा 156(3) के अधीन आदेशिका जारी करना धारा 190 के अधीन संज्ञान लेने की कोटि में नहीं आयेगा – आक्षेपित आदेश के अभिखण्डन या अपास्त करने की मांग करना एक अन्तर्वर्ती आदेश को चुनौती देना होगा – पुनरीक्षण पोषणीय नहीं – पुनरीक्षण खारिज।

Cases referred :

2008(2) SCC (Cri.) 692, 1998 SCC (Cri.) 1400, 2000 SCC (Cri.) 786, 2005(4) MPLJ 20, 1996 CrLJ 612, JT 2008(1) SC 240, (2006) 1 SCC 627.

Zisban Ali, for the applicant.

Girish Desai, Dy.A.G., for the non-applicant/State.

J U D G M E N T

MRS. S.R. WAGHMARE, J. :-By this revision, the petitioner has challenged the order dated 22/12/08 passed by the Additional Chief Judicial Magistrate, Indore in case no 0/08 directing the police to investigate the complainant and register the offence against the present petitioner under section 420 of the IPC.

2. Counsel for the petitioner has stated that the Learned Magistrate had erred in issuing process and the order may be recalled primarily because the complaint as such pertains to an agreement for purchase of land and if at all the complainant

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was aggrieved, he could take recourse to the Civil Court and since primarily no criminal offence was made out, hence, the police at Bhawarkuwan Police Station, the Investigating Agency of the first instant had refused to take cognizance of the same despite which the complainant went ahead and filed criminal complaint before the Learned Magistrate along with the petitioner. He also filed application under section 156(3) of the Cr.P.C. Counsel further urged that no opportunity of hearing was given to the petitioner before passing the order for investigation under section 156(3) by the Learned Magistrate and the Apex Court had time and again cautioned against the abuse of power when the discretionary power is misused without application of mind relying on *Maksud Saiyed Vs. State of Gujarat and others* [2008(2) SCC (Cri) 692]. Counsel submitted that the Apex Court had held thus :

“Magistrate ordering the police investigation under section 156(3) of the Cr.P.C without applying his mind ordered police investigation, the quashing of the proceeding by the High Court was upheld”.

3. Counsel submitted that in the said case, when the accused was a company, the liability of the Directors was in question. The Apex Court found that all the charges levelled against the company were untenable and the Magistrate had failed to re-examine whether the complaint made Directors personally liable. Stating that the summoning of the accused in criminal case being a serious matter, the application of the mind by Magistrate was essential and the exercise of jurisdiction is to be made with abundant caution. Counsel further emphasizes that the Magistrate is required to apply his mind whether to take action under section 156(3) or section 200 of the Cr.P.C. Criminal law cannot be set into motion as a matter of course. The Magistrate has to carefully scrutinize the evidence brought on record and even himself put question to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by or any of the accused.

4. Counsel stated that in the instant case, the agreement entered into between the complainant Rajkumar Agrawal and the applicant pertaining to purchase of land together and the registration was not being made. Upon enquiry, the complainant found that the land had been sold to third person and the complainant started demanding money from the applicant. Stating that the applicant had not committed any cheating as alleged; since, there was no dishonest intention at the time of signing of the agreement alleging that both the applicant as well as the complainant had together entered into purchase of the property, due to some reasons, the complainant had been mislead into believing that there was further transfer of said property by the applicant alone to third party. Counsel stated that the the police as the first investigating agency had already refused to take cognizance since apparently the transaction was such to which, civil remedy was

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available, then the Learned Magistrate ought to have kept this in his mind and permitted the applicant under section 200 of the Cr.P.C to cross-examine the complainant and the Magistrate should also have examined witnesses before taking cognizance of the complaint. Instead the Learned Magistrate has straight away directed the investigating agency i.e. the police to register the offence under section 420 of the IPC and also ordered investigation under section 156(3) of the Cr.P.C., which is not in accordance with the provisions of law.

5. Counsel has relied on several precedents namely *Pepsi Foods Ltd and another Vs. Special Judicial Magistrate and others* [1998 SCC (Cri) 1400], *Hridaya Ranjan Prasad Verma and Others Vs State of Bihar and Another* [2000 SCC (Cri) 786], *Cadbury Schweppes Beverage India Pvt. Ltd Vs State of M. P.* [2005(4) MPLJ 20 & *Ganesh Dass and others Vs. State of Kerala and another* [1996 Cri L.J. 612] whereby it has been held that if a civil remedy is available, the criminal case should not be allowed to continue and moreover, if the guilty intention is essential ingredient of the offence of cheating and where no dishonest intention was alleged in business contract and the only allegations is of deceit due to betrayal of confidence, it does not constitute an offence of cheating. The matter should not be allowed to continue in the criminal Court, since alternative remedy is available to the party. When prima facie the allegations made by the complainant did not constitute offence punishable under section 420 of the IPC, then continuing criminal proceedings against the applicant would amount to abuse of process of Court.

6. Counsel stated that in the instant case also, Learned Magistrate had transgressed his powers and directed the police to carry on investigation when actually he should have applied his judicial mind and if at all he wanted to take cognizance, he ought to have examined the complainant as well as the accused applicant. Thus, Counsel prayed for setting aside of the impugned order.

7. Shri Girish Desai, Dy. Advocate General appearing on behalf of the respondent-State has, however, put the entire controversy to rest stating that the petition was pre-mature and the applicant petitioner did not even have the locus-standi to file the present petition since the Learned Magistrate had not taken cognizance of the offence as is being made out by the applicant. Stating that it was crystal clear from the impugned order itself that the complainant Raj Kumar Agrawal had filed a private complaint against the present petitioner for offence under section 420 of the IPC before the Learned Magistrate and along with complaint, he had also filed an application under section 156(3) of the Cr.P.C along with an affidavit and other documents stating by the said application that the Bhavarkuwa police station, Indore had refused to register his complaint and the FIR could not be registered, nor did they give him any receipt regarding the report filed before the police station, then under the circumstances, Counsel for the State clearly pointed out that the Magistrate had two options before him. He

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may either take the cognizance of the private criminal complaint or he could issue process under section 156(3) of the Cr.P.C. Counsel urged that the entire principles were considered very recently by the Apex Court in the matter of *Fakruddin Ahmad Vs. State of Uttarakhanda and another* [JT 2008(1) SC 240] whereby Their Lordships were considering offences under sections 420, 467, 468, 471 of the IPC and section 138 of the Negotiable Instruments Act and private complaint was filed under the IPC and the FIR was registered. The complaint under the Act of 1881 was taken cognizance of, however, when the High Court was approached, no material was produced nor placed before the Magistrate and held that the petition for quashing the charge-sheet should not have been rejected and the matter was remitted back. Discussing the process to be undertaken under section 190, 200, 202 and 156(3) at length, the Apex Court had directed thus :

“One of the courses open to the Magistrate is that instead of exercising his discretion and taking cognizance of a cognizable offence and following the procedure laid down under section 200 or section 202 of the Code, he may order an investigation to be made by the police under section 156(3) of the Code, which the learned Magistrate did in the instance case. When such an order is made, the police is obliged to investigate the case and submit a report under section 173(2) of the Code. On receiving the police report, if the magistrate is satisfied that on the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence, he may take cognizance of the offence under section 190(1) (b) of the Code and issue process straightway to the accused. However, section 190(1) (b) of the Code does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation makes out a case against the accused. Undoubtedly, the magistrate can ignore the conclusion(s) arrived at by the investigating Officer (para 9)

The Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion in this behalf, irrespective of the view expressed by the police in their report and decide whether an offence has been made out or not. This is because the purpose of the police report under section 173(2) of the Code, which will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom is primarily to enable the Magistrate to satisfy himself whether on the basis of the report and the material referred therein, a case for cognizance offence is made out or not (para 10)”

8. Thus, Counsel for the respondent-State emphasized that taking cognizance

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under section 190 of the Cr.P.C was not defined in the Court but by taking cognizance, it also necessarily implies that the Magistrate has to apply his mind and whether the Magistrate has taken cognizance or not will depend on the circumstances of each case. It is here according to Counsel that Counsel for the petitioner is making a mistake; elaborating that the two options were available to the Magistrate since the petitioner had not filed the private complaint simpliciter and it was not the only cause of action that was required to be taken cognizance of by the Magistrate. The complainant had also moved another application under section 156(3) of the Cr.P.C, which clearly mandates that any Magistrate being empowered under section 190 of the Cr.P.C may order such an investigation as mentioned above. Primarily, therefore, considering the fact that the Officer In-charge of the police station ought to have registered the FIR, the Learned Magistrate has by the impugned order directed the registration of the offence under section 420 of the IPC and thus when investigation under section 156(3) of the Cr.P.C itself makes it imperative for the Officer In-charge to register the FIR even when the Magistrate explicitly does not say so.

9. It will be profitable to rely on *Mohd. Yousuf Vs. Afaq Jahan* [2006 (1) SCC 627] . It is also necessary that the Magistrate must take notice of the accusation and apply his mind to the allegations made in the complaint or in the police report or in the information received from a concerned other than police report. The Apex Court has held that it need little emphasis that it is only when the Magistrate applies his mind and is satisfied with the allegations if proved would constitute an offence that he decided to initiate the proceedings against the alleged offender that it can be stated that he had taken cognizance of the offence.

10. Thus, in the present case, Shri Girish Desai, Learned Dy. Advocate General on behalf of the State has pointed out that the apprehension in the mind of the present petitioner has made him to take hasty step of filing present revision by alleging that the Magistrate has already taken the cognizance when he has only ordered investigation. Merely because the Magistrate has directed registering of the FIR, should not be construed to mean taking of cognizance. Counsel stated that it was a natural corollary to the directions for investigation that the offence be registered first since prima facie, the private complaint was for offence under section 420 of the IPC against the present petitioner. Counsel thus, stated that no other elaboration was required to support the impugned order and it does not call for any interference.

11. Consequent to the above submissions, I agree with the contentions put forth by the Learned Dy. Advocate General primarily because I am of the humble opinion that merely issuing process under section 156(3) of the Cr.P.C would not amount to take cognizance under section 190 of the Cr.P.C; putting or initiating Investigating Agency into action is only the preliminary step. Two options were before the Magistrate on receiving the report from the police station after the

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investigation, whether to take the cognizance for the offence or not. In this sense, I find that seeking the quashment or setting aside of the impugned order passed under section 156(3) of the Cr.P.C would be challenging an interlocutory under the circumstances and the revision would not be maintainable. The petitioner ought to have filed an application under section 482 of the Cr.P.C, if at all he was aggrieved in this sense also.

12. Considering the controversy in the light of *Fakruddin Ahmad* (supra), I find that Learned Magistrate was perfectly justified in issuing the directions for investigation after registration of the complaint. The present petitioner would have every opportunity to represent his case; merely registering the FIR would not place the petitioner in a jeopardy, so also there are other legal remedies available to the petitioner if at all he apprehends his arrest as stated in the application for staying the arrest.

13. I find that the petition is without merit. The order of the Magistrate is impeccable and is hereby upheld and the petition is dismissed in limine.

Revision dismissed.

I.L.R. [2009] M. P., 1489

CRIMINAL REVISION

Before Mrs. Justice S.R. Waghmare

4 February, 2009*

BASU @ BASANTSINGH

... Applicant

Vs.

STATE OF M.P.

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 427 & 428 - Applicant was undergoing sentence for another offence and was convicted for offence u/s 5/14 of M.P. Security Act - In appeal against conviction under M.P. Security Act he claimed set off period under detention during investigation and trial - Rejection - Revision - Held - The words "same case" in Section 428 do not suggest that set off would be available only if the period undergone as an undertrial prisoner in connection with the same case in which he was later convicted and sentenced to a term imprisonment - Period of set off is available irrespective of whether the period of imprisonment was undergone by accused in connection with that case or any other case - Applicant entitled to set off - Revision allowed. (Paras 11 & 13)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 427 व 428 - आवेदक भिन्न अपराध के लिए दण्डादेश भुगत रहा था और म.प्र. सुरक्षा अधिनियम की धारा 5/14 के अधीन अपराध के लिए दोषसिद्ध किया गया - म.प्र. सुरक्षा अधिनियम के अधीन दोषसिद्ध के विरुद्ध अपील में उसने

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अन्वेषण और विचारण के दौरान निरोध की कालावधि मुजरा करने का दावा किया – नामंजूर – पुनरीक्षण – अभिनिर्धारित – धारा 428 में शब्द "वही मामला" यह सुझाव नहीं देता है कि मुजरा केवल तभी उपलब्ध होगा यदि उसी मामले के सम्बन्ध में विचाराधीन कैदी के रूप में भुगती गयी कालावधि जिसमें वह बाद में किसी अवधि के कारावास के लिए दोषसिद्ध और दण्डादिष्ट किया गया था – मुजरा की कालावधि उपलब्ध है इस पर विचार किये बिना कि क्या कारावास की अवधि अभियुक्त द्वारा उस मामले के सम्बन्ध में भुगती गयी या अन्य किसी मामले के सम्बन्ध में – आवेदक मुजरा का हकदार – पुनरीक्षण मंजूर।

Cases referred :

(2001) SCC 311, 1984 SCC (Cr.) 616.

Anil Ojha with Gourav Laal, for the applicant.

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

ORDER

MRS. S.R. WAGHMARE, J. :- By this revision, filed u/s 397 read with Section 401 of the Cr.P.C., the applicant Basu has challenged the order dated 12.7.2007. By the impugned order, learned Judge of the Sessions Court, Ujjain has in Criminal Appeal No. 236/2007 held that the benefit is not available to the applicant u/s 428 of the Cr.P.C. seeking set off since he was incarcerated in jail for other offence than the offence impugned in Appeal 236/07 and since it was contrary to the provisions made u/s 428 of the Cr.P.C.

2. Counsel for the applicant has stated that such an interpretation of s.428 of the Cr.P.C. is contrary to the provisions of law, since if the fact of the case concerned are considered, it would be found that the applicant is entitled to the set off and the entire period of imprisonment ordered by the Trial Court for offence u/s 5/14 of the M.P. State Security Act amounting to one year rigorous imprisonment and fine of Rs.500/- have already been undergone by the accused applicant.

3. Considering the above submissions, I find that the singular question that arises for adjudication in the present revision is whether the impugned order rejecting the application of the applicant for set off is in accordance with S. 428 of the Cr.P.C.?

4. In this light it is very essential to consider s.428 of the Cr.P.C., it reads thus:

"Period of detention undergone by the accused to be set off against the sentence of imprisonment. Whereas accused person has, on conviction been sentenced to imprisonment for a term (not being imprisonment in default of payment of fine) the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction and the liability of such persons to undergo imprisonment on such conviction shall be restricted to the remainder, if any of the term of imprisonment imposed on him."

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A bare reading of the section points two things that it refers to the period of detention undergone by the accused only during the investigation, inquiry or trial of the same case and only on such conviction, a set off is available to the accused and thus, the section envisages that the period could be adjusted and the accused would undergo only the remainder of the sentence.

5. Counsel for the applicant however, relying on *State of Maharashtra and another vs. Najakat Ali Mubarak Ali*: (2001) SCC 311 stated that the Apex Court had considered the said case and decided as to how the word same is to be interpreted. The words same case do not suggest that the set off would be available only if the period undergone as an under trial prisoner in connection with the same case in which he was later convicted and sentenced to a term of imprisonment. These words merely denote pre-sentence period of detention undergone by the accused and nothing more and the period of set off was available irrespective of whether the period of imprisonment was undergone by the accused in connection with that in case or any other case and that the Apex Court held that the period can be set off against the sentence of imprisonment imposed on conviction in that particular case. Counsel for the applicant pointed out this case has been cited and considered in the impugned judgment by the learned Judge of the lower Court. Counsel insists that wrong interpretation has been placed by the learned Judge of lower Court stating that the applicant was not entitled to set off despite the fact that the sentence has already been undergone by accused applicant.

6. Brief facts as can be elucidated from the impugned order and the submissions of the Counsel are that the applicant was undergoing sentence for another offence in the year 2005 and he was also convicted for offence u/s 5/14 of the M.P. Security Act in the year 2006 against which he has filed an appeal and stated therein that the set off was not given to him in the sentence imposed in the said matter.

7. Counsel for the respondent, on the other hand, laying stress on the word same case used in S.428 of the Cr.P.C. countered that the period of detention if any undergone by the accused during investigation, inquiry or trial of the same case can only be set off against the final judgment regarding the terms of imprisonment imposed on his conviction which is adjusted towards remainder of the terms of imprisonment, if any.

8. Counsel for the respondent has further stated that as the accused has been tried for several offences under different Codes under different Acts, the set off would not be available to him as an under trial. In the subsequent case, it could be available to him only on the first case that is prior in time. Counsel stated that the sentence would begin to run consecutively not concurrently unless directed by the Court, I find from the impugned order that this is the interpretation given by the learned Judge of the lower Court also.

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9. Considering the case of *State of Maharashtra vs. Najakat Alia* (supra); I find that the Apex Court has gone into the question of Sections 427 and 428 of the Cr.P.C. As per Justice Thomas, Judge of the Apex Court; "the section preceding Section 428, i.e. Section 427 indicates that the sentence of life imprisonment imposed on the same person in two different convictions would converge into one and thereafter it would flow through one stream alone. Even if the sentence in one of those two cases is not imprisonment convergence flow would be through the same channel. In all other cases, it is left to the court to decide whether the sentences in two different convictions should merge into one period or not. If no order is passed by the court the two sentences would run one after the other. Section 427 is intended to provide amelioration to the prisoner. A penumbra of the succeeding section can be glimpsed through the former provision."

10. Stressing that the purpose of S.428 of the Code is also for advancing amelioration to the prisoner, His Lordship stated that S.428 did not contain any indication that if the prisoner was in jail as an undertrial prisoner in a second case, the benefit could be denied to him. The ideology enshrined in s.428 was introduced for the first time only in the Code of Criminal Procedure, 1973 and statement of objects and reasons made it clear that the convicted person is given the right to reckon the period of his sentence of imprisonment from the date he was in jail as an undertrial prisoner. In other words, the period of his being in jail as an undertrial prisoner would be added as a part of the period of imprisonment to which he is sentenced. These are two requisites postulated in S.428 of the Code:

"(1) During the stage of investigation, enquiry or trial of a particular case the prisoner should have been in jail at least for a certain period.

(2) He should have been sentenced to a term of imprisonment in that case."

11. Thus, further in para 18 to 21 of the same judgment, the fact emerges that the words of the same case used u/s 428 of the Cr.P.C., are not to be understood as suggesting that the set off is allowable only if the earlier jail life was undergone by him exclusively for the case in which the sentence is imposed. The period during which the accused was in prison subsequent to the inception of a particular case, should be credited towards the period of imprisonment awarded as sentence in that particular case. It is immaterial that the prisoner was undergoing sentence of imprisonment in another case also during the said period. The words "of the same case" were used to refer to the pre-sentence period of detention undergone by him. Nothing more can be made out of the collocation of those words. It must therefore, be held that s.428 of the Code permits the accused to have the period undergone by him in jail as an undertrial prisoner set off against the period of sentence imposed on him irrespective of whether he was in jail in connection with the same case during that period."

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12. This view was taken by the Court of Full Bench of the Apex Court for overruling the judgment passed in the matter of *Raghubir Singh vs. State of Haryana*; 1984 SCC (Cr.) 616 undoubtedly the earlier view of the Apex Court in the matter of *Raghubir Singh* (supra), the Division Bench of the Apex Court had held that period elapsed in inquiry or trial in one case while undergoing sentence of imprisonment in an earlier case cannot be set off against the term of imprisonment imposed in the latter case. However, this revision has been overruled in the case of *State of Maharashtra vs. Najakat Alia* (supra) which holds the field till date. In this view of the matter the learned Judge of lower Court erred in interpreting the decision to the contrary and rejecting the prayer of set off.

13. From the impugned order it is evident that during trial of this case, the applicant was being produced from jail by production warrants thereby establishing the fact that he was undergoing imprisonment for some other offence but it was during the pendency of trial for the present case for offence u/S 5/14 of the M.P. Security Act.

14. Hence, the impugned order is set aside and it is held that the applicant Basu is entitled to set off in terms of *State of Maharashtra vs. Najakat Ali* (supra). The trial Court is directed to consider his case in accordance with law regarding the set off claimed in this petition.

15. The petition is allowed and the trial Court is directed to do the needful within three weeks from today and set the accused at liberty forthwith if not required for any other offence.

Revision allowed.

I.L.R. [2009] M. P., 1493

CRIMINAL REVISION

Before Mrs. Justice S.R. Waghmare

10 February, 2009*

AJAY KUMAR

Vs.

VIJAY KUMAR & anr.

... Applicant

... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 204 & 397 - Complaint u/ss 420 & 468 IPC filed against accused - Magistrate after satisfaction directed registration of offence u/s 420 IPC - Revisional Court allowed the revision and acquitted the accused - Revision before High Court - Held - Magistrate having taken cognizance, it was not within the jurisdiction of revisional Court to have assessed the probative value of the material before the trial Court - The mens-rea was there or not has to be decided by the trial Court and not the revisional Court - Impugned order set-aside - Revision allowed.

(Paras 12 & 13)

AJAY KUMAR Vs. VIJAY KUMAR

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 204 व 397 – अभियुक्त के विरुद्ध भा.द.सं. की धारा 420 व 468 के अन्तर्गत परिवाद पेश किया गया – मजिस्ट्रेट ने समाधान हो जाने के बाद भा.द.सं. की धारा 420 के अन्तर्गत अपराध पंजीबद्ध करने का निदेश दिया – पुनरीक्षण न्यायालय ने पुनरीक्षण मंजूर की और अभियुक्त को दोषमुक्त किया – उच्च न्यायालय के समक्ष पुनरीक्षण – अभिनिर्धारित – मजिस्ट्रेट के संज्ञान लेने के बाद विचारण न्यायालय के समक्ष की सामग्री के प्रमाणक महत्व का मूल्यांकन करने के लिए यह पुनरीक्षण न्यायालय की अधिकारिता में नहीं था – आपराधिक मन-स्थिति थी या नहीं इसका विनिश्चय विचारण न्यायालय द्वारा किया जाना चाहिए न कि पुनरीक्षण न्यायालय द्वारा – आक्षेपित आदेश अपास्त – पुनरीक्षण मंजूर।

Cases referred :

1991 MPLJ 597, 2004(4) MPLJ 1.

R.R. Chandrawade, for the applicant.

None, for the non-applicants.

J U D G M E N T

MRS. S.R. WAGHMARE, J. :- This revision has been filed by petitioner Ajay Kumar S/o Nathulal being aggrieved by order dated 03/02/04 passed by the 13th A.S.J. Indore in Criminal Revision no. 349/03 allowing the revision of respondents whereas it is important to note that another revision filed by the present petitioner Ajay kumar bearing no. 442/02 was also decided by the same order and hence, initially the petitioner had filed an application under section 482 of the Cr.P.C, but the same was converted into criminal revision under section 397 of the Cr.P.C by order by this Court on 24/06/05.

2. Be that as it may, since the revision has travelled a long route having been filed in the year 2004, it is taken up for final hearing on the ground that the petitioner has impugned only the order passed in criminal revision no. 349/03 filed by his brothers / respondents.

3. Brief facts of the prosecution case are that complainant Ajay Kumar had moved a complaint against both his brothers Vijay Kumar and Nirbhay Kumar for offence under sections 468 and 420 of the IPC, since the accused had initially entered into a compromise regarding the division of residential accommodation by allotting 1/3 of the said house to petitioner Ajay Kumar. Compromise was dated 18/03/01. It was prepared and consisted of 12 pages, which was to be produced in the Court. However, it was presented only on 09/08/01 and on the said date, the complainant was not present in the Court and alleged that page nos. 1 to 12 of the compromise deed had been changed along with map that was appended with the compromise deed and with an intention to cause loss to the complainant, in place of his 1/3 share was converted to 1/9 share in writing in the allegedly forged compromise deed and on the basis of the said allegedly forged compromise deed, a decree was obtained. On learning about the same, the complainant filed an application for setting aside the decree and looking to the criminal nature of the

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offence, also filed a complaint for offence under section 468 and 420 of the IPC. The Trial Court, considering the documents found, prima facie case made out for offence under section 420 of the IPC, however, discharged the accused from offence under section 468 of the IPC and being aggrieved, all the three brothers filed a revision before the 13th ASJ, Indore. The ASJ, Indore dismissed the revision of the present petitioner Ajay Kumar allowing the petition of his brothers and acquitted them from offence under section 420 of the IPC and hence, the present revision by complainant Ajay Kumar.

4. Counsel of the petitioner has stated that both the Courts below had failed to consider that once the Magistrate was satisfied that prima facie there was a case against the respondents and the Trial Court had registered an offence under section 420 of the IPC and directed registering of the offence, then the Revisional Court had erred in discharging the accused from the said offence and dismissing the complaint. Once, the Investigating Agency has been set into motion under section 204 of the Cr.P.C, then such order ought not to have been reviewed by the Revisional Court in revision filed by the brothers.

5. Counsel places his reliance on the judgment passed by the Learned Single Judge in the matter of *Trichinopoly Ramaswami Ardhanani and others Vs. Kripa Shankar Bhargava* [1991 M.P.L.J. 597] and *Adalat Prasad Vs. Rooplal Jindal and others* [2004(4) MPLJ page-1] stating that since the Magistrate had already issued process, it is not open for the accused to invoke section 203 of the Cr.P.C as review of the order is not contemplated and remedy lies in invoking section 482 of the Cr.P.C.

6. As already mentioned in the matter of *Adalat Prasad* (supra), Counsel stated that the Revisional Court ought to have dismissed the revision filed by the respondents brothers on this ground alone; where instead the Learned Revisional Court dismissed the revision filed by the complainant. The Counsel averred that if the Magistrate was satisfied that prima facie case was made out against the brothers under section 420 of the IPC, then the impugned order acquitting the respondents was absolutely contrary to the provisions of law and the Learned Judge ought not to have been interfered in revision by the Revisional Court.

7. Drawing my attention to para 8 of the Revisional Court's judgment in the matter of *Adalat Prasad* (supra), Counsel pointed out that it was held that section 204 of the Cr.P.C mandates that once the proceedings before the Magistrate commences upon taking cognizance and issuance of summons to the accused and when the accused enters appearance in response to the summons, the Magistrate has to take proceedings under Chapter XX of the Code. It was further held that the need to try the accused arises only when there was an allegation in the complaint that the accused has committed the crime, the Magistrate need not hear the accused if he is satisfied with sufficient ground for proceeding with the complaint since

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obviously, this is only a preliminary stage; and the stage of hearing of the accused would only arise at the subsequent stage provided in the latter provisions of the Code. It is a matter of judicial discretion of the Magistrate. It can be varied by the Magistrate and recalled also as it was an interim order. However, Counsel urged that the Revisional Court could not have set aside the order of the Magistrate. Relying on the *Trichinopoly Ramaswami Ardhanani and others* (supra) Counsel stated that the Learned Single Judge has observed that once the Magistrate acting under section 200 of the Cr.P.C is satisfied himself about the allegations made in the complaint and evidence adduced in that behalf and the materials produced prima facie issues proceedings against persons in such cases; at this stage, the accused has no role to play and therefore, no interference ordinarily is called for in judicial discretion exercised either under section 482 of the Cr.P.C or under section 397/401 of the Cr.P.C, until and unless a glaring defect in the order impugned is demonstrated.

8. Counsel alleged that the Revisional Court merely on the ground that the deed of compromise was not required to be signed on each and every page by the respondents and merely because they did not contain the signatures, held that it could not be held that the compromise deed was a false document and had discharged the accused from offence under section 420 of the IPC.

9. Counsel contended that it was for the satisfaction of the Magistrate to come to a conclusion, whether the offence was made out or not. Prima facie it had appeared to the Magistrate that offence under section 420 of the IPC was made out and finding that a case of forgery could not be made out under section 468 of the IPC, the Magistrate had already discharged the accused from the said offence. Moreover, the Magistrate had exercised his discretion and only because of this fact stating that the revision of the complainant against this discharge for offence under section 468 of the IPC was also dismissed by the impugned order and which was contrary to the facts of the case.

10. However, since the second revision is barred under section 397 of the Cr.P.C, Counsel stated that he was not urging the same point in this revision. Counsel stated that apparently, the order passed by the Revisional Court was contrary to the provisions of law and he ought not to interfere in the order passed by Addl. Chief Judicial Magistrate, who had already taken cognizance of the offence under section 420 of the IPC against the respondents, prayed for setting aside the order impugned.

11. Although none appeared on behalf of the respondents, the dispute being between three brothers, this Court had made an attempt at re-conciliation and compromise to be worked out between the brothers but it apparently seems to have failed.

12. Considering the entire controversy in the light of *Adalat Prasad* (supra), I

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find that the impugned order deserves to be set aside. The Additional Chief Judicial Magistrate having taken cognizance, it was not within the jurisdiction of the Revisional Court to have assessed the probative value of the materials before the Trial Court. The mens-rea was there or not has to be decided by the Trial Court and not by the Revisional Court, which has clearly transgressed its jurisdiction.

13. The impugned order is thus, set aside and that of the Additional Chief Judicial Magistrate restored. However, it is made clear that the respondents shall be granted full opportunity of hearing and granted bail in accordance with law and they shall not be arrested without granting the said opportunity by the Trial Court.

14. With these observation, the revision is allowed.

C c as per rules.

Revision allowed.

I.L.R. [2009] M. P., 1497

CRIMINAL REVISION

Before Mr. Justice B.M. Gupta

19 March, 2009*

RAJMOHAN KAPOOR

... Applicant

Vs.

STATE OF M.P. & ors.

... Non-applicants

A. Essential Commodities Act (10 of 1955), Section 6-A - Confiscation of essential commodity - Held - U/s 6-A of the Act, before passing any order of confiscation, Collector has to give an option to the owner of the vehicle to pay, in lieu of its confiscation, a fine not exceeding the market price of the essential commodity sought to be carried by said vehicle and not to the price of the vehicle concerned. (Paras 6 & 7)

क. आवश्यक वस्तु अधिनियम (1955 का 10), धारा 6-ए - आवश्यक वस्तु का अधिहरण - अभिनिर्धारित - धारा 6-ए के अधीन, अधिहरण का कोई आदेश पारित करने के पूर्व कलेक्टर को वाहन के स्वामी को उसके अधिहरण के बदले में आवश्यक वस्तु, जिसका उक्त वाहन द्वारा वहन किया गया, के बाजार मूल्य से और न कि संबंधित वाहन के मूल्य से अनधिक जुर्माना अदा करने का विकल्प देना चाहिए।

B. Essential Commodities Act (10 of 1955), Section 6-B - Issue of show-cause notice before confiscation of essential commodity - Held - U/s 6-B of the Act, no order for confiscation of vehicle etc. can be passed by the Collector, if the owner of the vehicle etc. proves to the satisfaction of the Collector that vehicle etc. was used in carrying the essential commodity without his knowledge or connivance by his agent. (Paras 6)

ख. आवश्यक वस्तु अधिनियम (1955 का 10), धारा 6-बी - आवश्यक वस्तु

RAJMOHAN KAPOOR Vs. STATE OF M.P.

के राज्यसात्करण के पूर्व कारण बताओ सूचना पत्र जारी करना - अभिनिर्धारित - अधिनियम की धारा 6-बी के अधीन कलेक्टर द्वारा वाहन इत्यादि के अधिहरण का कोई आदेश पारित नहीं किया जायेगा, यदि वाहन इत्यादि का स्वामी कलेक्टर को यह समाधानपूर्वक साबित कर देता है कि वाहन इत्यादि का प्रयोग उसके अभिकर्ता द्वारा आवश्यक वस्तु को ले जाने में उसके ज्ञान अथवा मौनानुकूलता के बिना किया गया।

Cases referred :

AIR 1986 AP 82, 2007(1) MPLJ 260.

Sanjay Bahirani, for the applicants.

D.R. Sihare, P.L., for the non-applicants/State.

ORDER

B.M. GUPTA, J. :-As common point of dispute is involved, both these revisions are heard together and being disposed of by this common order.

2. Admitted facts of both the cases are as under :-

Cr. Revision No. 422/03:

On 28th December 2002, during vast checking, truck No M.P.09-D-0553 was inspected and found that it's Driver Mohd Shabbir was driving the same while using kerosene as fuel. Observing that it is breach of Section 3(1)(2) of the Order - Kerosene (Upyog Par Niyantran Evam Adhikam Keemat Niyantran) Aadesh 1993 (The Order of 1993) and punishable under Section 3/7 of Essential Commodities Act 1995 (The Act), a notice dated 31st December 02 was given to its owner Rajmohan Kapoor, the petitioner herein, as to why the truck be not confiscated. It was replied by him vide reply Dt. 31st December 2002 and admitted that during inspection, it was found that it was driven by the driver while using kerosene but in the last he has mentioned that the driver used kerosene without his knowledge and hence being first fault it may be pardoned. Considering the aforesaid reply as admission of the petitioner, vide order dated 31st December 2003, passed in Cr. Case No. 32/B-121-2002-2003, the Collector Vidisha has confiscated an amount of Rs. 25,000/- in lieu of the aforesaid truck and released the truck. Feeling aggrieved with this order, petitioner filed Cr. A. No. 19/03, which has been dismissed by the Sessions Judge Vidisha vide impugned order dated 31st July 2003. Feeling aggrieved from this order, this revision has been preferred.

Cr. Revision No. 427/03:

On 28th December 2002, during vast checking truck No. MKO-9144 was inspected and found that it's driver Harpal Singh was driving the same while using kerosene as fuel. Observing that it is breach of Section 3(1)(2) of the Order of 1993, a notice dated 31st December 02 was given to its owner Roshan Kapoor, the petitioner herein, as to why the truck be not confiscated. It was replied by him vide reply (date not mentioned) and admitted that during inspection, it was found that it was driven by the driver while using kerosene but in the last he has

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mentioned that the driver used kerosene without his knowledge and hence being first fault he may be pardoned. Considering the aforesaid reply as admission of the petitioner, vide order dated 31st December-2003, passed in Cr. Case No. 33/B-121-2002-2003, the Collector Vidisha has confiscated an amount of Rs. 25,000/- in lieu of the aforesaid truck and released the truck. Feeling aggrieved with this order, petitioner filed Cr. A. No. 18/03, which has been dismissed by the Sessions Judge Vidisha vide impugned order dated 31st July 2003. Feeling aggrieved from this order, this revision has been preferred.

3. Shri Bahirani learned counsel appearing for the petitioners has assailed the impugned orders on two counts :

(A) That, the Collector has confiscated an amount of Rs. 25,000/- from each of the petitioners in lieu of truck and not in lieu of the price of the essential commodity concerned, while as provided by Section 6-A (1) of the Essential Commodities Act, at the time of confiscation. Collector shall give an option to the owner to pay a fine not exceeding the market price at the date of seizure of essential commodity, by such vehicle, then the vehicle will not be confiscated. In these cases no such option has been given but directly in lieu of the amount of truck aforementioned amount has been confiscated. He has placed reliance on a Division Bench decision of High Court of Andhra Pradesh in *G. Subbarama Naidu Vs. Joint Collector, Chittoor* - AIR 1986 ANDHRA PRADESH 82 and orders passed by other Single Benches of this Court in *Ashraf Khan Vs. State of M.P.* In Cr. Revision No. 184/02 & *Rayees Khan Vs. State of M.P.* - 2007 (1) MPLJ 260.

(B) That, the petitioners can not be held responsible for such confiscation, unless it is established that they themselves committed the breach or if the same has been committed by their agent, it was committed with their connivance or knowledge. In present cases, no such facts have been established.

4. Shri D.R. Sihare, for the State has countered the contentions of Shri Bahirani and has submitted that drivers were the agents of the petitioners and their act has been admitted by the petitioners by their reply of notice dated 31st December 2002. Petitioners gave reply after seeking information from their drivers. With regard to another contention, Shri Sihare has submitted that vehicle is required to be confiscated and not commodity as per the provisions of Section 6 of the Essential Commodities Act.

5. For disposal of the controversy existing between the rival parties, perusal of the reply of notice dt. 31.12.2002 admittedly given by the petitioners to the Collector and also the relevant provisions of Section 6-A and 6-B of the Essential Commodities Act will be required. It is admitted by both the parties that reply of notice in both the cases is word by word same, hence main part of reply given in one case is reproduced hereinbelow :-

“निवेदन है कि प्रार्थी दक कमांक एम. के. ओ. 9144 का मालिक है, प्रार्थी के दक

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को दिनांक 28.12.02 को खाद्य विभाग विदिशा द्वारा ईंधन जांच कर जप्त किया गया जो मुझे स्वीकार है । वाहन चालक द्वारा वाहन में ईंधन में केरोसिन डाल दिया होगा जो खाद्य विभाग द्वारा जांच में केरोसिन पाया गया । जांच में केरोसिन की पुष्टि हुई है जो मुझे स्वीकार है ।”

निवेदन है कि प्रार्थी के जानकारी बगैर केरोसिन का इस्तेमाल किया गया है प्रथम गलती होने से क्षमा योग्य है । कृपया त्रुटि को क्षमा कर वाहन जप्ती से मुक्त करने का कष्ट करें ।

The relevant provisions of Section 6-A and 6-B are as under :-

6-A. Confiscation of essential commodity.- (1) Where any essential commodity is seized in pursuance of an order made under section 3 in relation thereof, a report of such seizure shall, without unreasonable delay, be made to the Collector of the district or the Presidency town in which such essential commodity is seized and whether or not a prosecution is instituted for the contravention of such order, the Collector may, if he thinks it expedient so to do, direct the essential commodity so seized to be produced for inspection before him, and if he is satisfied that there has been a contravention of the order may order confiscation of-

- (a) the essential commodity so seized;
- (b) any package, covering or receptacle in which such essential commodity is found; and
- (c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity;

Provided that without prejudice to any action which may be taken under any other provision of this Act, no foodgrains or edible oilseeds seized in pursuance of an order made under Section 3 in relation thereto from a producer shall, be confiscated under this section:

Provided further that in case of any animal, vehicle, vessel or other conveyance used for carriage of goods or passengers for hire, the owner of such animal, vehicle, vessel or other conveyance shall be given an option to pay in lieu of its confiscation: a fine not exceeding the market price at the date of seizure of the essential commodity sought to be carried by such animal, vehicle, vessel or other conveyance.

(2) & (3).....”

6-B. Issue of show- cause notice before confiscation of essential commodity, etc.

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(1).....

(2) Without prejudice to the provisions of sub-section (1) no order confiscating any animal, vehicles, vessel or other conveyance shall be made under Sec.6-A if the owner of the animal, vehicle, vessel or other conveyance proves to the satisfaction of the Collector that it was used in carrying the essential commodity without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the animal, vehicle, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use.

(3).....”

6. On perusal of the reply, it is specifically mentioned in para 2 that the driver used the kerosene as fuel in the truck without the knowledge of the petitioner/s. In the first paragraph, factual aspect has been admitted, that, during inspection use of kerosene as fuel in the truck was detected by the inspecting team. The effect of cumulative reading of both the paragraphs of the reply, does indicate that petitioner/s have admitted their knowledge or connivance in regard to use of kerosene as fuel in the trucks by their drivers, but at the same time, the petitioners are specifically denying their knowledge. It is true that this fact is required to be proved by the owner as mentioned in Sub Section 2 of Section 6B of the Act. In the factual circumstances admittedly the trucks were checked and seized from the possession of the drivers and not in possession of the owners and vide their reply the owners are specifically denying their knowledge, nothing more is required from the owners for this purpose. Hence attributing the admission of the guilt at the part of the petitioners can not be accepted. In their statements dt.28.12.2002 both the drivers; Mohd Shabbir and Haipal Singh stated that on credit card they obtained diesel to be filled in the tank of the truck from the petrol pump, but at the time of checking the kerosene was found to be used as fuel in the truck. They also did not attribute any knowledge to the petitioners with regard to the alleged act. It is true that driver Harpal Singh (relating to petitioner Roshan Kapoor) has stated that usually the fuel is being taken by the owner, but at the same time he has stated that when the truck was in his possession, he obtained the diesel from the petrol pump on 26.12.2002. Thus, it appears that whatever the fuel was taken for that truck by driver Harpal Singh, was found at the time of checking. Hence for this act of Harpal Singh, the connivance of his owner can not be accepted. As observed by the another Single Bench in the case of *Rayees Khan* (supra), and also as it appears from sub section (2) of Section 6-B of the Act, unless the act alleged is done by the owner himself or by his agent, or with his connivance or knowledge, he can not be held responsible. It is true that driver is the agent of the owner, but if without the knowledge/ permission or connivance and behind his back, he misuses the authority given to him, even then the owner can not be

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held responsible, unless it is established that the agent was authorized by the owner for that purpose.

7. On perusal of the second proviso appended to sub section (1) of Section 6-A of the Act, it is abundantly clear, that the owner of such vehicle shall be given an option to pay, in lieu of its confiscation; a fine not exceeding the market price at the date of seizure of the essential commodity sought to be carried by said vehicle and if the option is accepted by the owner, then of course the seizure of the vehicle will not be required. Similar view has been taken in the cases of *G. Subbarama Naidu and Ashraf Khan* (supra). On perusal of the impugned orders passed by the Collector, it appears that he has not given such option to the petitioners, instead he has given an order to confiscate Rs.25,000/- from the amount of price of the seized vehicle, i.e. the trucks in these cases, which is erroneous. The relevant words of the orders are reproduced hereinbelow :-

“अतः जप्त वाहन की राशि से 25000 /- (रुपये पच्चीस हजार) शासनहित में राजसात कर अनावेदक का वाहन जप्ती से मुक्त किया जाता है।”

8. In view of both the counts, the revisions deserve to be allowed, while setting aside the impugned orders. Consequently, both the revisions are allowed and impugned orders are set aside. If the amount is deposited, the same shall be returned back to the petitioners.

Revision allowed.

I.L.R. [2009] M. P., 1502

CRIMINAL REVISION

Before Mrs. Justice S.R. Waghmare

20 March, 2009*

MUZAFAR ALI

... Applicant

Vs.

CENTRAL NARCOTIC BUREAU, NEEMUCH

... Non-applicant

Narcotics Drugs and Psychotropic Substances Rules, 1985, Rule 2(c)
- Application for re-examination of drugs sample at different laboratory - Rejection - Revision - Held - Rule 2(c) defines Chemical Examiner - Authorized Government Laboratory of Opium & Alkaloid Works has given report - Adequate provisions have been made under the Act - General provisions of Cr.P.C. for re-examination would not be necessary to call in aid - Application not maintainable - Application filed after five years of incident when sample may not be in proper condition - More so, allowing the application would lead to spate in litigation by similarly situated accused - Rejection of application proper - Revision dismissed. (Paras 12, 14 to 16)

स्वापक औषधि और मनःप्रभावी पदार्थ नियम, 1985, नियम 2(सी) - औषधि के

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नमूने की भिन्न प्रयोगशाला में पुनः जाँच कराने के लिए आवेदन - नमंजूर - पुनरीक्षण - अभिनिर्धारित - नियम 2(सी) रासायनिक परीक्षक को परिभाषित करता है - प्राधिकृत शासकीय अफीम और एल्केलॉयड वर्क्स प्रयोगशाला ने रिपोर्ट दी - अधिनियम के अधीन पर्याप्त उपबंध किये गये हैं - पुनः जाँच के लिए द.प्र.सं. के सामान्य उपबंधों की सहायता लेना आवश्यक नहीं होगा - आवेदन पोषणीय नहीं - आवेदन घटना के पाँच वर्ष बाद पेश किया गया जब नमूना उचित अवस्था में नहीं हो सकता है - इसके अतिरिक्त आवेदन मंजूर करना समान परिस्थितियों वाले अभियुक्त द्वारा वादों में वृद्धि करेगा - आवेदन की खारिजी उचित - पुनरीक्षण खारिज।

Case referred :

2004(2) EFR 81.

Sanjay Sharma, for the applicant.*G.S. Chouhan, G.A.*, for the non-applicant.**ORDER**

MRS. S.R. WAGHMARE, J. :- By the present petition, petitioner has challenged order dated 15.1.2009 passed by the Special Judge, N.D.P.S. Act, Neemuch in Case-No. 10/2005 rejecting the application of the petitioner for submitting the sample a second time for the analysis to the Forensic Laboratory.

2. Counsel for the petitioner has submitted that the Central Narcotic Bureau received information on the date of incident i.e. 19.4.2004 that some narcotic substance has been illegally smuggled by the petitioner and there was half kg. of smack heroin concealed in his house whereupon the house was raided and one of the room inside the house a small iron box was found to contain a blue polythene bag having a powder which was seized and on testing with the departmental-kit, the product was verified and it was found to be heroin weighing 140 gms. out of which two samples of 5 gms. each were prepared and the articles were marked as A-B and further search was conducted of the house whereupon a steel pot in the kitchen was found with soiled water containing opium which was also tested and found to contain heroin dissolved in the water and thereafter 547 gms. were filled in two cans, out of which 50 gms. each were prepared and marked as B and sent to Forensic Laboratory for examination. The rest of the water was also sent for chemical analysis to Government Opium & Alkaloid Factory at Neemuch and F.S.L. report (Ex.P/29) was obtained. Thereafter the investigation was launched and trial was commenced. During the trial the accused petitioner filed an application for re-analysis stating that the earlier report was suspicious and under Section 52-A of the N.D.P.S. Act, the sample should be sent to a different laboratory for investigation and the application was rejected by the impugned order and hence the present petition.

3. Counsel for the petitioner further averred that it was a ground for grievance which ought not to be refused to the accused petitioner and even if there was an

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absence of specific provision, request should have been allowed. For this purpose, Counsel relied on *Amar Singh vs. State of Punjab*; 2004(2) E.F.R.81 whereby the Court had directed to send the sample for re-analysis. Counsel has also cited the other un-reported decisions of this Court to bolster his submissions, which are as follows:

1. Cr. R. No. 214/1998 : *Dr. T. Ahmed vs. State of M.P.*
2. Cr. R. No. 153/2002 : *Santosh vs. State of M.P.*
3. Cr. R. No. 949/2005 : *Raju @ Rajesh vs. State of M.P.*
4. Cr. R. No. 1013/2005 : *Mohammad Naeem vs. State of M.P.*
5. M. Cr. C. No. 6464/07 : *Shahnawaz vs. State of M.P.*
6. Cr. R. No. 397/2005 : *Umar Khan vs. State of M.P.*
7. Cr. R. No. 905/2007 : *Raju @ Jitendra vs. State of M.P.*

4. Thus, the Counsel has stated that the petitioner had a right to get the sample re-examined as he was not satisfied with the first report and doubted its veracity. Thus, in the light of the above decisions, Counsel contended that the petitioner has right to send the sample for re-analysis under Section 243 and under Section 311 of the Cr.P.C. and after obtaining the report, the petitioner can always call the expert for examination in the Court.

5. Counsel for the respondent Central Narcotic Bureau, on the other hand, has fully supported the order of the Court below stating that the revision petition itself is not maintainable as the petitioner has filed the present revision against an interlocutory order and consequently there was no such provisions under the Act to permit the second examination of the sample of seized contraband merely because the petitioner was not satisfied with the first report. Counsel for the respondent has relied on 2009 S.A.R. (Criminal) 88: *Sami Ullaha vs. Superintendent, Narcotic Central Bureau*.

6. The Apex Court considered the contentions in para 8 of the judgment as follows:-

“The learned Counsel would contend that unlike the provisions of Section 13 (3) of the Prevention of Food Adulteration Act, 1954, no provision exists in the Act for sending one sample to one laboratory and the second to another laboratory”.

7. So also the High Court as well as the trial Court had in the said case observed that there was no provision in the Act for sending the sample to another laboratory and thus Counsel for the respondent in the present case reiterated that the prayer coming at the fag end of the trial was also another important ground for rejection of the application and petition is therefore, not maintainable on the grounds of inordinate delay also. Hence, Counsel prayed for dismissal of the revision.

8. However, on considering the above submissions and the impugned order, I

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find that first of all the application has been filed by the Counsel for the accused during the final hearing of the case almost after 20 minutes of submissions as observed by the learned Judge in the order impugned, despite which the Trial Court considered the said application and found that there was no provision in the Act for second examination by Chemical Analyst and therefore, properly rejected the application. The Trial Court erred however, in granting time for obtaining order from a Superior Court.

9. From the objection raised by the Counsel for the respondent on the basis of *Sami Ullaha* (supra) I find that the Apex Court has not given any categorical finding regarding the fact that there was no provisions under the Act or Rules for sending the sample for re-examination. The Apex Court has held that since there were two contradictory views of the report which were possible then the effect of it must be gone into only at the trial and if two views are possible, the view which leans toward of the accused must be favoured.

10. However, the Apex Court did not direct the Trial Court to send the sample for re-examination thereby clinching the issue that the veracity of the report can be questioned in Trial Court and may not be relied on but there is no provision for sending the sample for re-examination again.

11. Considering the fact that the provisions of the Criminal Procedure Code of 1973 expressly or by necessary implication have not been excluded by the N.D.P.S. Act; it is a self contained code and a special Act meant of special nature of offence, then it would not be necessary to call in aid the general provisions of the Criminal Procedure Code unless no provision had been made for the chemical examination of the sample and its report to be supplied to the accused.

The Central Government in exercise of its power conferred upon it under Section 9 read with Section 76 of the Act made the Rules. "Chemical Examiner" has been defined in Rule 2(c) of the Rules to mean "the Chemical Examiner or Deputy Chief Chemist or Shift Chemist or Assistant Chemical Examiner, Government Opium & Alkaloid Works, Neemuch or, as the case may be, Ghazipur".

12. The authorized Government Laboratory of Opium and Alkaloid Works at Neemuch, in the present case, has given its report in accordance with the provision of law and the veracity of the report could be examined by calling the expert for examination but the provisions of the N.D.P.S. Act do not provide for second examination or re-examination of samples by other authority.

13. I find that submissions of the Counsel for the petitioner are supported by a catina of cases whereby permission has been granted to the accused since it is of utmost importance that the accused must be given adequate opportunity to defend himself and since it is a question of affording proper opportunity to the accused petitioner to lead evidence in his defence the application should have been allowed by the lower Court and the impugned order was then set aside.

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14. In my humble opinion the interpretation of the term 'adequate opportunity' should be considered within the four corners of the provisions of law, importing any interpretation is not permissible purely on the ground that it is the intention of the legislation that is required to be seen. Adequate provisions have been made under the Act as already stated above. The Chemical Examiner has been defined in Rule 2(c) of the Rules to mean "the Chemical Examiner of Government Opium & Alkaloid Works, Neemuch as in the present case. It is nowhere the petitioner's case that the copy of the report of the Chemical Analyst was not provided to him. If at all he disagreed with the same, he should have examined the Chemical Analyst.

15. Similarly the important fact that cannot be marginalized or blinked away is the fact that the application was made during the final hearing of the case. Besides not being maintainable under the provisions of law, it seems to be a ploy to protract proceedings. The incident is of date 19.4.2004 and the samples may not be in proper condition for analysis in the year 2009 and the Apex Court has cautioned that unwarranted sympathy causes prejudice to the other side, the Trial court under these circumstances should have proceeded with the case instead of adjourning it.

16. Moreover allowing the application despite there being no provision under the Act would also lead to spate in litigation by similarly situated accused and which cannot be allowed under the circumstances.

17. In the light of the above, I concur with Trial Court regarding the rejection of the application for second examination filed by the petitioner. The petition is thus, devoid of merit and is dismissed as such. The Trial Court shall proceed in accordance with law and decide the matter as expeditiously as possible.

Revision dismissed.

I.L.R. [2009] M. P., 1506

CRIMINAL REVISION

Before Mr. Justice B.M. Gupta

31 March, 2009*

MADHUSUDAN BHARDWAJ & ors

Vs.

MAMTA BHARDWAJ

.... Applicants

.... Non-applicant

Protection of Women from Domestic Violence Act (43 of 2005), Sections 12 & 28, Protection of Women from Domestic Violence Rules 2006, Rule 6(5), Criminal Procedure Code, 1973, Section 125 - Application to Magistrate - Procedure - As provided by Section 28(1) of the Act r/w Rule 6(5), the application u/s 12 of the Act shall be dealt with and the order enforced

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in the same manner as laid down u/s 125 of Cr.P.C., for which providing opportunity of leading their evidence to the parties is required.

(Para 9-D)

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 12 व 28, घरेलू हिंसा से महिलाओं का संरक्षण नियम, 2006, नियम 6(5), दण्ड प्रक्रिया संहिता, 1973, धारा 125 – मजिस्ट्रेट को आवेदन – प्रक्रिया – जैसा कि अधिनियम की धारा 28(1) सहपठित नियम 6(5) द्वारा उपबंधित किया गया है, अधिनियम की धारा 12 के अधीन आवेदन उसी तरह निपटाया जायेगा और आदेश उसी तरीके से प्रवर्तित किया जाएगा जैसा कि द. प्र.सं. की धारा 125 के अधीन अधिकथित किया गया है, जिसके लिए पक्षकारों को उनकी साक्ष्य पेश करने का अवसर दिया जाना अपेक्षित है।

Cases referred :

1975 CrLJ 656, 1977 CrLJ 2072, 2005 CrLJ 1455.

Prashant Sharma, for the applicants.

Vishal Mishra & Smt. Sudha Dwivedi, for the non-applicant.

ORDER

B.M. GUPTA, J. :- Feeling aggrieved with an order dated 6/9/2007 passed by 4th Additional Sessions Judge, Gwalior in Criminal Appeal No. 164/07, this revision has been preferred by all the three petitioners. Vide impugned order, the learned Judge has affirmed an order dated 9/7/2007 passed by Judicial Magistrate First Class, Gwalior in criminal case No. 5279/2007, whereby the learned Magistrate has partly allowed an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the "Act") filed by respondent-Mamta Bhardwaj, the wife of the petitioner No. 1-Madhusudan Bhardwaj and has- (1) restrained the petitioners not to create any domestic violence with the respondent, (2) directed the petitioners to permit the respondent to share her residence in family house or in alternate, petitioner No.1 to arrange suitable house of the same status for her, (3) directed the petitioners to execute their bonds of Rs. 10,000/- (Rs. Ten Thousand Only) each for a condition not to create domestic violence with the respondent, and (4) directed the petitioners to pay Rs. 10,000/- as compensation to the respondent in lieu of the cruelty played by them on her. Vide impugned order, the prayer of providing stri dhan to the respondent has been negated.

2. The facts of the case, in brief, are that respondent has filed aforesaid application dated 17/5/2007 in the Court of learned Magistrate mentioning therein that she is wife of the petitioner No.1. Petitioner No.2 is her sister-in-law (Nanad) and petitioner No.3 is her mother-in-law. Respondent was married with the petitioner No.1 on 2/6/2006. After marriage, she started living with the petitioner No.1 in his family house situated at 3-Saraswati Nagar, University Road, Thatipur, Gwalior. In the same house petitioner No.2 and 3 are also living. Petitioner No.2 is living alongwith her two minor children. Petitioner No 2 has been deserted

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by her husband. On account of her desertion, she is jealous of happy family life of respondent and petitioner No.1. After marriage, on demand of Rs. 5,00,000/- and a car, the behaviour of the petitioners was cruel with the respondent. She was usually beaten by them. When the cruelty could not be tolerated by the respondent, she lodged a criminal case No. 26/2007 against the petitioners under Section 498-A of IPC. On 1/4/2007 petitioners left the respondent in the aforesaid family house and left the house after locking the rooms along with jewelery and valuables on the pretext that they are going to attend some marriage in the relationship. Thereafter, on 16/4/2007 at 11:00 PM petitioners No.1 and 2 along with two unknown persons came and uttered filthy abuses to the respondent. They gave a threat to the respondent to leave the house else she will be killed. She informed about it to Superintendent of Police. On 26/4/2007 at about 6:40 PM when respondent was alone at the family house, all the three petitioners came, started beating to the respondent and forcibly deserted her from the house. At about 8:00 PM on the same day she lodged FIR at University Police Station, which was registered at Crime No. 57/2007. Again she was beaten by petitioners No.2 and 3 at the family house. At the time of desertion petitioners kept all stri dhan of the respondent amounting to Rs. 13,74,500/-with them.

3. Vide reply, all the allegations, except the fact of marriage, have been denied by the petitioner No.1. It was further mentioned in the reply that false allegations have been made on behalf of the respondent to cast aspersion on the pious relationship of brother and sister. On the ground of false allegation petitioners were to be arrested. The relation of wife and husband has become dead and now there is no possibility of living together. On account of the cruelty played by the respondent, the petitioner No. 1 has been compelled to live separately from his family house. The respondent brought antisocial elements at the family residence of the petitioners for the purpose of hooliganism. In these circumstances, petitioner No.1 has been compelled to file a petition for divorce, which is pending.

4. Shri Prashant Sharma, learned counsel appearing on behalf of the petitioners, has assailed the impugned order mainly on the ground, that without providing an opportunity of leading evidence, merely on the allegations mentioned in the application and hearing the oral arguments, the impugned order has been passed. In absence of the appropriate opportunity of hearing including opportunity of leading evidence, the impugned order is bad in law and deserves to be set aside. In support, he has drawn attention at Section 28 of the Act and Rule 6 (5) of the Protection of Women from Domestic Violence Rules, 2006 (hereinafter referred to as the "Rules") and has submitted that the procedure for disposal of an application under Section 125 of Cr.P.C. ought to have been adopted by the learned Magistrate. Although the learned Magistrate is at liberty for laying down its own procedure under Sub-section (2) of Section 28 of the Act for disposal of such application,

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but not by excluding the procedure as laid down in sub-section (1) of Section 28 of the Act and sub-rule (5) of Rule 6 of the Rules, which provides same procedure as is applicable to applications under Section 125 of Cr.P.C. Applications under Section 125 of Cr.P.C. cannot be disposed of without providing opportunity of leading evidence. In support, he has drawn attention at the order of, Allahabad High Court in *Het Ram v. Smt. Ram Kunwari*, 1975 Cri.L.J. 656, Karnataka High Court in *Sankarasetty Pompanna v. State of Karnataka and another*, 1977 Cri.L.J. 2072, and *Gujarat High Court in Pendiya Sureshkumar Ramarao v. Sompally Arunbindu and another*, 2005 Cri.L.J. 1455.

5. Shri Vishal Mishra and Smt. Sudha Dwivedi, learned counsel appearing on behalf of the respondent have countered the aforementioned submissions of Shri Sharma. While drawing attention at Sections 18 and 28 (2) of the Act and Rule 15 (6) of the Rules, it has been submitted that protection orders can be passed only after providing an opportunity of being heard. The Magistrate is at liberty for laying down its own procedure for disposal of such application. He has also submitted that copy of Adam check report, medical report, news paper-clippings and CD were produced by the respondent along with her application. Those documents are sufficient evidence on which a Magistrate can become satisfied and issue a protection order. There is no requirement of providing an opportunity to the parties particularly the petitioners herein, to lead oral evidence in such cases. Although it is argued on behalf of the respondents that the CD was watched by the trial Court as well as by the Appellate Court in the open Court in the present of both the parties, but the same has not been admitted on behalf of the petitioners and none of the proceedings of both the Courts is indicative of this fact.

6. For appreciating the rival contentions, the procedure as adopted by the learned Magistrate is required to be seen at a glance, which has been mentioned in brief as under:-

17/05/2007: Project officer (Pariyojana Adhikari) Smt. Anju Shrivastava appeared alongwith respondent No.2 before the learned Magistrate and filed an application under Section 12 of the Act supported by her affidavit along with one application of the same nature prepared by Project Officer on the information of the respondent and some documents, on which case No. 5279/2007 was registered. Notices to the petitioners were issued through the same Project Officer for 21/5/2007.

21/5/2007: Shri Prashant Sharma, learned counsel appeared on behalf of the petitioners. Petitioners were directed to execute bail bond for their regular presence in the Court. They sought time to file reply. Time was given and the case was fixed for 4/6/2007. On the same day an oral prayer was made on behalf of the respondent to pass an interim order, but the same was negated on the ground that no application for the purpose has been filed.

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4/6/2007: Reply was filed on behalf of the petitioner No. 1. On demand, 2-3 days' time was given to both the parties for settlement. Case was fixed for 8/6/2007.

21/6/2007: One application for interim relief under Section 23 (ii) dated 4/6/2007 was filed on behalf of the respondent.

22/6/2007: Some documents were filed on behalf of the petitioners. Arguments heard, which could not be completed.

23/6/2007: Arguments heard. Case fixed for orders on 30/6/2007. On the same day an application for interim relief filed on 21/6/2007 on behalf of the respondent, was dismissed as not pressed on behalf of the respondent, as the case was already fixed for final arguments.

28/6/2007: Before 30/6/2007 an application for early hearing was filed on behalf of the petitioner No.1 and filed some documents. Some documents were also filed on behalf of the respondent along with a CD.

30/6/2007: Final order could not be passed as watching of CD was felt necessary, hence, case was adjourned for 9/7/2007 for orders.

9/7/2007: Final order was passed.

7. To conclude the controversy between the parties perusal of relevant part of the provisions of Sections 18 and 28 of the Act and Rule 6 (4) & (5) of the Rules along with the relevant part of the provisions of Section 126 of Cr.P.C. is required. (As provided by Rule 6(5) of the Rules, the procedure prescribed for disposal of an application under Section 125 of Cr.P.C. shall be applied for disposing of an application under Section 12 of the Act. On perusal of Section 125 of Cr.P.C., it provides the provision for maintenance of wives, children and parents, but procedure for disposal of such application has been given in Section 126 of Cr.P.C. Hence, instead of Section 125 of Cr.P.C., perusal of the procedure as prescribed in Section 126 of Cr.P.C. for disposal of an application under Section 125 of Cr.P.C. is required. The same have been reproduced hereinbelow:-

Section 18. Protection Orders.- The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from-(a) to (g).....

Section 28. Procedure.- (1) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) Nothing in sub-section (1) shall prevent the court from

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laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23.

Rule 6. Application to the Magistrate.- (1) Every application of the aggrieved person under section 12 shall be in Form II or as nearly as possible thereto.

(2) & (3).....

(4) The affidavit to be filed under sub-section (2) of section 23 shall be filed in Form III.

(5) The applications under section 12 shall be dealt with and the orders enforced in the same manner laid down under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974).

Section 126 Cr.P.C. Procedure.- (1).....

(2) All evidence to such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made. or, when his personal attendance is dispensed with in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases: Provided that & (3).....

(Emphasis supplied)

8-A. It is true that nowhere in the Act any direction with regard to receiving or recording of evidence of the parties has specifically been mentioned. While inserting the provision with regard to procedure, sub-section (1) of Section 28 of the Act a general and wide mandate has been given that all the proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 of the Act (including Section 12 of the Act also) shall be governed by the provisions of Code of Criminal Procedure, 1973. The word 'shall' gives a mandate that the procedure as laid down in Cr.P.C. shall have to be followed. It is also true that in Cr.P.C. for various type of cases different procedures have been mentioned e.g. in; (1) Chapter VIII, which deals with security for keeping the peace and for good behaviour, (2) Chapter IX, which deals with order for maintenance of wives, children and parents, (3) Chapter X, which deals with maintenance of public order and tranquility, and (4) Chapter XVIII to Chapter XXI/A, which provide different procedures for trial of different offences. But, at the same time the Legislature in its wisdom has inserted Section 37 in the Act vesting powers with the Central Government to make Rules for carrying out different provisions of the Act. Sub-section (2) of Section 37 indicates that the Rule making power of the Central Government is very wide, in which it is provided that- in particular and without prejudice to the generality of the foregoing powers, such Rules may provide for all or any of the following matters, namely, (a) to (m)..

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8-B. Thus, although in clause (a) to (1) some subjects have been enumerated on which the Rules may be framed by the Central Government, but at the same time it is also mentioned that this illustration of the subjects will not prejudice the generality of the powers given to the Central Government for framing Rules to carry out the provisions of the Act. This intention of the Legislature is further visible by perusing clause (m) which provides that rules may be framed on any other matter which has to be, or may be, prescribed. Under Section 37 of the Act, the Rules are framed which have been published in the Gazette of India, Extra., Pt. II, Sec. 3(i), dated 17th October, 2006, vide G.S.R. No. 644(E), dated 17th October, 2006. Thus, these Rules framed by the Central Government are having statutory force and shall require to be given effect to. Although vide sub-section (3) of Section 37 of the Act the parliament can amend or disagree with the Rules, yet unless such amendment or disagreement comes in existence, the operation of these Rules will remain in force and have to be effective. Perhaps considering the ambiguous situation, that in section 28(1) of the Act the Legislature has given a mandate to follow the procedure as laid down in Cr.P.C., but the same has not been clarified as to what procedure will be adopted in dealing with the application under Section 12 of the Act, the Rule 6 (5) has been framed. It appears that now the ambiguity has been removed by Rule 6(5) in further mandatory words by mentioning, that the application under Section 12 shall be dealt with and order enforced in the same manner as laid down under Section 125 of Cr.P.C.

8-C. As observed by the three different Benches of High Court in aforementioned orders in the case of *Het Ram* (supra), *Sankarasetty Pompanna* (supra) and *Pendiyala Sureshkumar Ramarao* (supra) without providing opportunity of leading evidence such application cannot be disposed of. Similar is the procedure required to be adopted to deal with an application under Section 12 of the Act to comply the direction under Section 28(1) of the Act read with Rule 6(5) of the Rules.

8-D. In view of the aforementioned mandate, the learned Magistrate was required to comply with the provisions of this sub-rule read with Section 28(1) of the Act and was required to follow the procedure as laid down in the Code of Criminal Procedure for the application under Section 125 of Cr.P.C. Admittedly, that has not been followed. On this ground, the impugned order appears erroneous.

9-A. It is also true, that sub-section (2) of Section 28 provides, that nothing in sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under Section 12 of the Act. By cumulative reading of Section 28 sub-sections (1) and (2) of the Act and Rule 6 (5) of the Rules, it appears that sub-section (2) of Section 28 of the Act appears to have been enacted looking to the peculiar nature of the Act and also the existence of aforementioned ambiguity with regard to the provision of Section 28(1) of the Act, but now that ambiguity has been removed by the Central Government under its powers given by Section 37 of the Act.

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9-B. Apart from the above, the arguments advanced on behalf of the respondent that merely by perusing the aforementioned documents viz. Adam check report, medical report, news paper clippings along with CD and also hearing of the arguments, the final order could have been passed. It neither appears in accordance with the intention of the Legislature nor practicable for a judicial forum, because there may be cases in which documents of the rival parties on record and arguments advanced by the parties in support thereof, may be contradictory on disputed facts. In such circumstances it may become difficult for a Magistrate to conclude that the stand of which of the parties is truthful. To overcome such ambiguous situation, the theory of leading evidence on oath, providing opportunity to cross examine the witnesses of opposite party, has been followed since very long time and has also been tested on the touchstone of the principles of natural justice. On such evidence, the submissions of rival parties can be evaluated by a Magistrate for coming to a right conclusion. That may help him to conclude the controversy in justified manner. Without coming to a certain and justified conclusion, passing a protection order under Section 18 of the Act in favour of the applicant may some times cause injustice to the opposite party/ respondent who may be not at fault, but in reality a victim of the misdeed or misbehaviour of the applicant. That is not and cannot be the intention, of the Legislature in enacting the Act. No doubt the intention of the Legislature behind enacting the Act is to provide more protection to the rights of women guaranteed under the Constitution who are victims of violence of any kind within the family and for matters connected therewith or incidental therewith. It is clear that the Act has been enacted for safeguarding the rights of a woman guaranteed under the Constitution and to provide protection against her victimization from domestic violence, interpretation of the provisions keeping this pious principle in mind is required. However, this principle cannot be accepted that in domestic violence always a woman is a victim or suffer party. There may be cases where by misusing the sympathetic and favourable attitude of the society or law framers, male partners may be harassed and thereafter if Court of law gives a second push to the male partner, it may cause disorder in the society. In my considered opinion, at the time of administering such laws the Courts are required to be vigilant enough in deciding the dispute as to which part of the family is a victim of the domestic violence. In view of this also, passing orders merely on the basis of the documents, without their formal proof and upon hearing the arguments has not been permitted by the law and in judicial process it ought not to be permitted and leaning attitude towards one party of the lis is required to be avoided.

9-C. The submission on behalf of the respondent, that prescribing procedure by Central Government through framing Rules is beyond its powers, as in clause (a) to (m) this subject is not covered. To some extent it may compel to give a second thought, but on deep consideration it does not deserve favour. The reasons behind are (1) that, as already mentioned the language of Section 37 is indicative

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that the subjects enumerated are not exhaustive but inclusive. These subjects are without prejudicing the generality of Rule making powers and also under clause (m), such a rule could have been framed, (2) that, the rule has been favoured under the given authority of rule making and unless it is annulled or amended by parliament or declared ultra-vires by a competent legal forum, its existence shall be forceful, and (3) that, framing of such a rule is based on necessity, to give effect to the mandatory provisions of Section 28 (1) of the Act, by which the provisions of the Act can be carried out in a justified manner. In absence of this rule there was a felt difficulty, as to in what manner the mandate of section 28(1) ought to be complied with. Hence, the submission cannot be sustained.

9-D. As argued, it is true that the opening words of the Section 18 are that- 'the Magistrate may, after giving the aggrieved person and respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place pass a protection order in favour of the aggrieved person and prohibit the respondent from.....'. On perusal, two things are required before passing an order in favour of the aggrieved person; (1) opportunity of hearing to the parties, and (2) on being prima facie satisfied with regard to happening of the domestic violence or likely to happen thereof. For being prima facie satisfied some material is required. As observed hereinabove and as provided in Rule 6(5) evidence is required as the same is required for disposal of an application under Section 125 of Cr.P.C. It cannot be accepted that only upon providing an opportunity of hearing such orders are required to be passed.

10. In view of all, as discussed hereinabove, for disposal of the application filed by the respondent, adopting the procedure as laid down for disposing of an application under Section 125 of Cr.P.C. was required. Admittedly, the same has not been followed by the learned Magistrate. Hence, the order deserves to be set aside.

11. Consequently the revision is allowed. The impugned order is set aside. The case is remanded back to the Court of Magistrate with a direction to take steps, as observed hereinabove, without any delay. The learned Magistrate will be at liberty to pass interim orders in accordance with law if requested and deemed fit by him under Section 23 and other provisions of the Act.

Revision allowed.

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CRIMINAL REVISION

Before Mr. Justice S.K. Gangele

9 April, 2009*

GYANENDRA TRIPATHI

... Applicant

Vs.

STATE OF M.P. & ors.

... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 - Criminal Revision - Criminal revision filed by co-accused dismissed by Court without considering facts and by making general observation - Held - Said order has no binding effect. (Para 16)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 - दाण्डिक पुनरीक्षण - सह-अभियुक्त द्वारा पेश दाण्डिक पुनरीक्षण न्यायालय द्वारा तथ्यों को विचार में लिये बिना और साधारण प्रेक्षण करते हुए खारिज की गई - अभिनिर्धारित - कथित आदेश कोई बंधनकारी प्रभाव नहीं रखता है।

B. Penal Code (45 of 1860), Sections 420, 120-B, 467, 468 & 471 - Civil or Criminal Dispute - Criminal prosecution should not be used as an instrument of harassment - Tendency is growing to convert purely civil disputes into criminal cases - Charges quashed. (Para 17)

ख. दण्ड संहिता (1860 का 45), धाराएँ 420, 120-बी, 467, 468 व 471 - सिविल या दाण्डिक विवाद - दाण्डिक अभियोजन को तंग करने के साधन के रूप में प्रयुक्त नहीं किया जाना चाहिए - शुद्ध रूप से सिविल विवादों को दाण्डिक मामलों में परिवर्तित करने की प्रवृत्ति बढ़ रही है - आरोप अभिखण्डित।

Cases referred :

(2007) 7 SCC 373, AIR 1992 SC 604, AIR 1965 SC 430, AIR 2008 SC 251, (2007) 5 SCC 403, (2007) 10 SCC 82, AIR 2008 SC 2187, (2008) 10 SC 69, (2006) 6 SCC 736.

Prashant Sharma, for the applicant.

D.R. Sihare, P.P., for the non-applicant No.1/State.

Pawan Vijayvargiya, for the non-applicant No.2.

ORDER

S.K. GANGELE, J. :- Petitioner has filed this revision petition against framing of charges vide order dated 15.10.2008 passed in Sessions Trial No. 119/08 by First Additional Sessions Judge, Gwalior.

2. On 11.09.1989 M/s Mangaldeep, a partnership Firm, had been granted cash credit (Hypothecation Limit) of Rupees Five Lacs and term loan of Rs. Two

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Lacs by United Commercial Bank. Mr. Keshav Das Agarwal, who was proprietor of the Proprietorship Firm, M/s Mangaldeep, created equitable mortgage of his residential house and one Ratanlal Jain executed guarantee agreement to secure the credit facility. On 20.07.1990 a draft letter of deposit of title deeds from the mortgagor was written by Keshav Das Agarwal in favour of Manager, United Commercial Bank, High Court Road, Gwalior. In the aforesaid letter it has been mentioned that premises No.37/342 situated at Deedwana Oli, Lashkar, was mortgaged as equitable mortgage for repayment of all advances made to M/s Mangaldeep, a partnership firm. Subsequently Rupees Two lacs has been sanctioned as hypothecation (Pledge) and on 13.03.1991 Mr. Keshavdas Agarwal requested for ad-hoc Cash Credit limit of Rupees One lac. Thereafter the Bank further sanctioned a cash credit limit. When Mr. Keshavdas Agarwal failed to regularize the account, the Bank issued a legal notice on 18.12.1993 for regularization of the account. Thereafter, the Bank filed a suit for recovery of an amount of Rs.54,88,851/- before the District Judge, Gwalior in the year 1996. After constitution of Debt Recovery Tribunal under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the aforesaid civil suit was transferred to Debt Recovery Tribunal, Jabalpur (for short, the DRT) and it was registered as Transfer Application No. 875/1999. The DRT vide judgment dated 15.10.2004 allowed the suit filed by the Bank and further ordered that defendants No. 1 to 7, Mr. Keshavdas Agarwal, M/s Mangaldeep, M/s Fitwell Tailors, Mr. Padamchand Jain, Mr. Mahaveer Prasad Jain, Mr. Rajendra Kumar Jain, and Mr. Sardar Gurmeet Singh shall jointly and severally pay to the plaintiff-Bank a sum of Rs.54,88,852/- along with costs. The Tribunal also awarded interest at the contractual rate from 10.12.94 till its realization. Against the aforesaid judgment an appeal was filed before the Appellate Tribunal. The appeal was time barred, hence an application for condonation of delay filed in appeal. It was directed by the Appellate Tribunal to deposit 30 % amount of the decree passed by the DRT. The Defendants did not comply the order, hence the appeal was dismissed. Thereafter, a writ petition was filed before this Court. It was registered as Writ Petition No. 1505/06 and disposed of vide order dated 26.09.2007 with a direction to the Appellate Tribunal to restore its file, the review application, and the Appellate Tribunal was further directed to consider the review application afresh and proceed to decide the appeal in accordance with law. Up to the decision of appeal this Court granted stay of recovery from the appellants.

3. In the mean while Mr. Amit Kumar Agarwal, who is son of Mr. Keshavdas Agarwal and was minor at the relevant time, filed a civil suit for partition. The Civil Suit was registered as Civil Suit No.15-A/94 before the Sixth Additional District Judge, Gwalior. In the aforesaid Civil Suit Mr. Keshavdas Agarwal son of Brijbhushan, Mr. Atul Agarwal son of Mr. Keshavdas Agarwal and Smt. Manju Agarwal wife of Mr. Keshavdas Agarwal had been added as defendants. The

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Additional District Judge, Gwalior vide judgment and decree dated 13th October 1999 decreed the suit and granted a decree of partition holding that the plaintiff is entitled 1/4th share in the suit property. It has further been mentioned in the judgment and decree that if defendant No.1 had taken any loan on the basis of the suit property then the plaintiff would not be liable for payment of the aforesaid loan. In pursuance to the aforesaid judgment and decree a final decree of partition was passed by the Court and by the aforesaid decree the house registered with the Municipal Corporation, Gwalior, as House No.37/42, situated at Deedwana Oli, Lashkar, Gwalior, has been partitioned and as per the aforesaid partition decree Mr. Atul Kumar has been given ground floor of the house, which was shown in blue lines in the map. Similarly, Amit Kumar has been given basement floor of the house, which was marked in red lines in the map and Smt. Manju Agarwal has been given first floor of the house, which was shown in yellow lines in the map. The aforesaid final partition decree was passed on 03.05.2000 and consequently a registered partition deed was also executed between the parties.

4. In pursuance to the judgment and decree of the DRT the Bank filed recovery proceedings before the Recovery Officer (DRT), Jabalpur in T.A. EXN 18/04. In the aforesaid proceedings the petitioner filed an affidavit for fixing auction of the mortgaged house. At that time the petitioner was posted as Senior Branch Manager, United Bank, Gwalior Branch, Gwalior. In the aforesaid affidavit it has been mentioned that the Debt Recovery Tribunal issued a Recovery Certificate in favour of the Bank and subsequently the bank issued a demand notice for payment of the amount due and the defendants failed to pay the dues to the Bank and the defendants mortgaged the house with the Bank, which was mentioned in the affidavit as under :-

"DESCRIPTION OF THE PROPERTY

Building (Commercial cum residential) Municipal Corporation
No.105, Halka No.7, Survey No. 41/429 & 37/342 Ward No. 43,
Deedwana Oli, Sarafa Bazar, Gwalior

Basement	:	Hall with Stair Case
Ground Floor	:	Built up Area 127.22 Sqm. Approx.
1st Floor	:	Built up Area 2100.43 Sqm. Approx.
II nd Floor	:	Built up Area 79.59 sqm. Approx.
North	:	House of other
South	:	Sarafa Bazar Main Road
West	:	Narrow Dirty Lane
East	:	Vishal Electronic Shop."

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5. The Advocate, Mr. Surendra Prakash Goyal, also issued a Search report of the property and it was mentioned in the report that the house was not transferred by Mr. Keshavdas Agarwal and the mortgage, which was in favour of the Bank, was as per law. After filing the aforesaid affidavit by the petitioners, Mr. Atul Agarwal and Mr. Amit Agarwal submitted a complaint to the Station House Officer, Huzrat Kotwali, Lashkar, Gwalior. It has been mentioned in the complaint that the house in question is a Hindu joint family property of the complainants. Complainants received the aforesaid house in partition in compliance of a decree dated 03.05.2000 passed in Civil Suit No. 15-A/94 and the petitioner and Mr. Surendra Prakash Goyal on entering into a conspiracy received a forged search report and submitted a false affidavit before the Recovery Officer, Jabalpur in order to gain benefit. They further stated that the petitioner had the knowledge that the aforesaid house had been partitioned in a partition decree. Hence, the petitioner committed criminal conspiracy. The complainants requested Station House Officer to register an offence under sections 192, 193, 194, 195, 197, 120-B, 409, 415 and 420 IPC. The Police registered the FIR on the basis of the aforesaid complaint against the petitioner, Mr. S.P. Goyal, Advocate and Mr. Ashok Agarwal under sections 193, 196, 197, 420, 465, 471 IPC vide Crime No. 65/06. Subsequently, a charge sheet has also been filed before the Court. On the basis of the aforesaid charge sheet First Additional Sessions Judge, Gwalior framed charges against the petitioner under sections 420, 120-B, 467, 468 and 471 IPC.

6. Learned counsel for the petitioner has submitted that the petitioner has not committed any offence. The petitioner is the officer of the Bank and he has submitted an affidavit before the Recovery Officer of the Debt Recovery Tribunal with regard to mortgage of the house by the father of the complainants and the house was mortgaged by the father as a security for taking loan, hence the charges are liable to be quashed. In support of his contentions learned counsel relied upon the judgments of the Hon'ble Supreme Court in the case of *Vir Prakash Sharmav. Anil Kumar Agarwal and another*, reported in 2007 (7) SCC 373 and in the case of *State of Haryana and others v. Ch. Bhajan Lal and others*, reported in AIR 1992 SC 604. Contrary to this, learned counsel for respondents No. 2 and 3 has submitted that the petitioner has deliberately filed a false affidavit before the Recovery Officer, DRT, hence he committed the crime. The object of filing the affidavit was to help the bank in recovery of the debt by auctioning the house of the respondents No. 2 and 3. Learned counsel further submitted that another co-accused, Mr. Ashok Kumar Agarwal filed a criminal revision before this Court, which was registered as Criminal Revision No. 806/2006 against framing of charges and that revision has been dismissed by this Court vide order dated 05.01.2009, hence the present revision is also liable to be dismissed.

7. From the facts of the case, it is clear that initially the Partnership firm, M/s Mangaldeep had taken a loan from United Commercial Bank on 11.09.1989. Mr.

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Keshavdas Agarwal was the Proprietor of the said firm. In the aforesaid loan transaction Mr. Keshavdas Agarwal executed a mortgage deed in favour of the Bank. By the aforesaid mortgage deed Mr. Keshavdas Agarwal had created an equitable mortgage of House No. 37/42 of Deedwana Oli, Lashkar, Gwalior. At the time of creating equitable mortgage Mr. G.D. Kukreja, Advocate, submitted his search report to the Branch Manager, United Commercial Bank, High Court Branch, Gwalior. It is dated 02.06.1989. In the aforesaid search report it has been mentioned that Mr. Keshavdas Agarwal was the owner of the house and his name was also recorded in the revenue record as owner. It has further been mentioned in the aforesaid search report that earlier the property was of the ownership of Joint Hindu Family and partition of the Joint Hindu Family property was effected between the members of the Hindu Joint family on 21.10.1979. A Partition deed was also executed between the family members on 08.02.1980 and the property in question came into share of Mr. Keshavdas Agarwal. Mr. Keshavdas Agarwal also filed a civil suit, which was registered as C.S. No.9A/2000 in the Court of First Addl. District Judge, Gwalior. The suit was decreed vide judgment and decree dated 14.08.1980 and the house was registered in the name of Mr. Keshavdas Agarwal. Subsequently, a Civil Suit was filed before the District Judge Gwalior, which was registered as Civil Suit No.15-A/94 and transferred to Additional District Judge, Gwalior, which was filed in the name of Mr. Amit Agarwal, who was minor at the relevant time, hence it was filed by Mr. Keshavdas Agarwal, and Mr. Keshavdas Agarwal, Mr. Atul Agarwal and Smt. Manju Agarwal, had been shown as defendants. Thereafter, a partition decree was obtained and consequently the house was partitioned between Mr. Amit Agarwal, Mr. Keshavdas Agarwal, Mr. Atul Agarwal and Smt. Manju Agarwal. One of the condition in the decree was that if defendant No.1, Mr. Keshavdas Agarwal, had taken any loan on the basis of the property in question then the plaintiff would not be liable to re-pay the loan. It is clear from the facts of the case that Mr. Keshavdas Agarwal filed the suit in order to get rid of the debt of equitable mortgage, which was executed by him in favour of the Bank for obtaining the loan. Mr. Keshavdas Agarwal had knowledge that an amount of near about Rupees twelve lacs at that time had been due over the firm, which was a Proprietorship Firm and the Bank also issued a notice to this effect in the year 1993 and the house was mortgaged as equitable mortgage with the Bank. The Debt Recovery Tribunal passed a decree in favour of the Bank with regard to recovery of the said loan amount by judgment dated 15.10.2004 passed in Transfer Application No.875/1999. The Tribunal has also dealt with the argument, advanced on behalf of Mr. Keshavdas Agarwal, that the mortgaged house was a property of Hindu Joint family and it was partitioned, hence the equitable mortgage created by Mr. Keshavdas Agarwal be not accepted. The aforesaid argument was rejected by the Tribunal in para-21 of the judgment. The Tribunal recorded the relevant findings, which reads as under :-

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"21. So far as the contention as regard the HUF property is concerned, from the perusal of Exh. P-23(B) which is search report in respect of the property submitted by Def. No. 1 alongwith their application for credit facilities, it appears that as per the search report, the said property came in the share of Def. No.2, Keshav Das Agrawal and for that a Civil Suit was also filed and as per the order of First Additional District Judge, a decree was passed in terms of Memorandum of Partition and was registered according to Registration Act. Alongwith the Search report, Memo of partition and certified copy of decree passed by the Additional District Judge is also enclosed as Exh.P23 (D). Def. No.2 has executed Memo of deposit of title (Exh. P-23) in which it is clearly mentioned that the property is mortgaged for Mangaldeep and sister concern, and this Memo of deposit of title is duly signed by Def. No. 2. The plaintiff bank through their witnesses have proved these documents. On the other hand, the defendants have failed to prove that the mortgaged property is of HUF. The plaintiff bank has also proved that def. No. 2 has deposited the title deed to create equitable mortgage. As such, it cannot be said that def. No. 2 has not mortgaged his property. The defendant could not get any advantage from the citations relied by them. As such, the contention in respect of equitable mortgage made by the defendants cannot be accepted."

8. Thereafter, the petitioner filed an affidavit before the Debt Recovery Tribunal mentioning the fact that Mr. Keshavdas Agarwal had executed an equitable mortgage of the house with the Bank and the complainants lodged an FIR in the police station mentioning the fact that the petitioner and Mr. S.P. Goyal, Advocate, committed offence under various sections of the Indian Penal Code in filing the aforesaid affidavit. In consequence thereof the trial Court framed charges against the petitioner under sections 420, 120-B, 467, 468 and 471 IPC.

9. Section 58 of the Transfer of Properties Act, 1882, defines the words "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed", which reads as under :-

"58...(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment d of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and

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the instrument (if any) by which the transfer is effected is called a mortgage-deed."

10. The Hon'ble Supreme Court in the case of *K.J. Nathan v. S.V. Maruthi Rao and others*, reported in AIR 1965 SC 430, has held as under, with regard to equitable mortgage :-

"Though such a mortgage is often described as an equitable mortgage, there is an essential distinction between an equitable mortgage as understood in English law and the mortgage by deposit of title deeds recognised under the Transfer of Property Act in India. In England an equitable mortgage can be created either (1) by actual deposit of title-deeds, in which case parol evidence is admissible to show the meaning of the deposit and the extent of the security created, or (2) if there be no deposit of title-deeds, then by a memorandum in writing, purporting to create a security for money advanced. In either case it does not operate as an actual conveyance though it is enforceable in equity; whereas under the Transfer of Property Act a mortgage by deposit of title deeds is one of the modes of creating a legal mortgage where under there will transfer of interest in the property mortgaged to the mortgagee."

11. From the above principle of law it is clear that Mr. Keshavdas Agarwal had created an equitable mortgage of the house and he was the owner of the house at the relevant time, in securing the loan. In such circumstances, the Bank has a right to recover the loan amount from the mortgaged property. That has also been decided by the Debt Recovery Tribunal. Mr. Keshavdas Agarwal held the property as trustee after creation of equitable mortgage and it was his duty to keep the mortgaged property as it is. Contrary to this, Mr. Keshavdas Agarwal filed a suit, when the present complainant was a minor, and obtained a decree of partition of the property, with an object to defeat the mortgage deed so that the loan amount, which he had obtained as Proprietor of the Firm M/s Mangaldeep, could not be secured by the Bank from the mortgaged property..

12. Hon'ble the Supreme Court in the case of *Inder Mohan Goswami and another v. State of Uttaranchal and others*, reported in AIR 2008 SC 251, has held as under with regard to Sections 420, 120-B and 467-IPC :-

"40. Firstly, we shall deal with the section 420 IPC. Cheating is defined in section 415 IPC and is punishable under section 420 IPC. section 415 is set out below :-

"415. Cheating .- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall

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retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.

Explanation .- A dishonest concealment of facts is a deception within the meaning of this section."

Section 415 IPC thus requires -

1. deception of any person.

2.(a) fraudulently or dishonestly inducing that person -

(i) to deliver any property to any person : or

(ii) to consent that any person shall retain any property;
or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

41. On a reading of the aforesaid section, it is manifest that in the definition there are two separate classes of acts which the person deceived may be induced to do. In the first class of acts he may be induced fraudulently or dishonestly to deliver property to any person. The second class of acts is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but need not be fraudulent or dishonest. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one can not presume that he all along had a culpable intention to break the promise from the beginning.

42. We shall now deal with the ingredients of section 467 IPC. Section 467 IPC reads as under :-

"467. Forgery of valuable security, will etc. - Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver

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any money, moveable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property or valuable security, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

43. The following ingredients are essential for commission of the offence under section 467 IPC :

1. the document in question so forged;
2. the accused who forged it,
3. the document is one of the kinds enumerated in the aforementioned section.

The basic ingredients of offence under Section 467 are altogether missing even in the allegations of the FIR against the appellants. Therefore, by no stretch of the imagination, the appellants can be legally prosecuted for an offence under Section 467 IPC."

Sections 468 and 471 of the Indian Penal Code, reads as under :-

"468. Forgery for the purpose of cheating .- Whoever commits forgery, intending that the document or electronic record forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

"471. Using as genuine a forged document or electronic record. - Whoever fraudulently or dishonestly uses as genuine any document or electronic record which he knows or has reason to believe to be a forged document or electronic record, shall be punished in the same manner as if he had forged such document or electronic record."

13. From the afore-quoted sections and the judgment of the Hon'ble Supreme Court, it is clear that the petitioner has not committed any offence. He has simply submitted an affidavit to the effect that Mr. Keshavdas Agarwal had mortgaged the house in favour of the Bank at the time of securing the loan and the afore said loan could be recovered from the mortgaged property. No document has been fabricated by the petitioner.

14. Hon'ble the Supreme Court in *Soma Chakravarty v. State Through CBI*, reported in (2007) 5 SCC 403 has held as under with regard to consideration by the Court at the time of framing charges :-

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"10. It may be mentioned that the settled legal position, as mentioned in the above decisions, is that if on the basis of material on record the court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial."

"19. Some of the questions, however, which have been raised by the appellant are of some importance and it may be necessary to deal therewith. The learned trial Judge, it appears, did not properly apply its mind in regard to the different categories of the accused while framing charges. It ought to have been done. Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the court must come to a prima facie finding that there exist some materials therefor or held to be sufficient for framing charges."

15. From the above principle of law laid down by Hon'ble the Supreme Court, it is clear that no ingredients have been found made out against the petitioner for the charges framed by the trial Judge under various sections of the Indian Penal Code against the petitioner.

16. With regard to the arguments advanced by learned counsel for respondents No. 2 and 3 that the criminal revision of one of the co-accused has been dismissed by the Court could not be accepted because in the order passed by this Court in the criminal revision filed by one of the co-accused. This Court has passed the following order :-

"Being aggrieved by the order dated 15/10/08 passed by Ist ASJ, Gwalior in ST.No.199/08 whereby the charge has been framed against the petitioner U/s 420, 120-B, 467, 468 and 471 of IPC, the present petition has been filed.

Learned counsel for petitioner argued at length and submit that the petitioner was valuer who has valued the property owned by father of the complainant. It is submitted that there is no

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evidence against the petitioner on the basis of which petitioner can be convicted. It is submitted that in the facts and circumstances of the case learned Court below committed error in framing the charges against the petitioner. Learned counsel prayed that the revision petition be allowed and impugned order be set aside.

Learned counsel for respondent & complainant supports the order passed by the learned Court below and submits that no illegality has been committed by the learned Court below which can be corrected by this Court while exercising revisional jurisdiction.

In the matter of *Suresh Alias Pappu Bhudharmal Kalani Vs. State of Maharashtra*, Reported in (2001) 3 SCC 703, wherein the Hon'ble Apex Court has observed as under :-

At the stage of framing of the charge the court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to leave to a conviction. The Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused. Each case depends upon its particular facts and circumstances and sometimes even a remote link between the activities of an accused and the facts of the case may justify a reasonable inference warranting a judicial finding that there is ground for presuming that an accused has committed the offence or at least to presume that the question of his being directly or indirectly involved in the commission of such offence is not to be ruled out."

Keeping in view the aforesaid position of law and the facts and circumstances of the case, this Court is of the view that no case is made out for interference at the stage of charge. Hence, petition stands dismissed."

However, this Court has not considered the facts of the case and only the general observations have been made by the Court. Hon'ble the Supreme Court in *Sumtibai and others v. Paras Finance Co. Regd. Partnership Firm Beawer (Raj.) Through Mankanwar (Smt.) w/o Parasmal Chordia (Dead) and others*, reported in (2007) 10 SCC 82, has held as under, with regard to binding nature of the order:-

"10. As observed by this Court in *State of Orissa v. Sudhansu*

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Shekhar Misra (AIR 1968 SC 647) vide para 13 : (AIR pp.651-52)

"13. ... A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, L.C. said in *Quinn v. Leathem*, 1901 AC 495 : (1900-03) All ER Rep 1 (HL) :

'Now before discussing the case of *Allen v. Flood*, 19=898 AC 1 : (1895-99) All ER Rep 52 (HL) and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

11. In *Ambica Quarry Works v. State of Gujarat*, (1987) 1 SCC 213, vide para 18 this Court observed : (SCC p. 221)

"18. ... The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."

12. In *Bhavnagar University v. Palitana Sugar Mill (P) Ltd.* (2003) 2 SCC 111, vide para 59 this Court observed : (SCC p. 130)

"59. ... It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

13. As held in *Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani*, (2004) 8 SCC 579 : AIR 2004 SC 4778, a decision cannot be relied on without disclosing the factual situation. In the same judgment this Court also observed : (SCC pp. 584-85, paras 9-12)

"9. Courts should not place reliance on decisions without

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discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton*, 1951 AC 737 (HL) (AC at p. 761) Lord MacDermott observed : (All ER p. 14 C-D)

'The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge,...

10. In *Home Office v. Dorset Yacht Co.*, 1970 AC 1004 : (1970) 2 WLR 1140; (1970) 2 All ER 294 (HL) (All ER p. 297 g-h) Lord Reid said, 'Lord Atkin's speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances'. Megarry, J. in *Shepherd Homes Ltd v. Sandham* (No. 2), (1971) 1 WLR 1062 observed : 'One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament'. And, in *Herrington v. British Railways Board*, 1972 AC 877 : (1972) 2 WLR 537 (HL), Lord Morris said : (All ER p. 761c).

'There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.'

11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus :

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'Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.'

'Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.' "

The Hon. Apex Court in *Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas and another*, reported in AIR 2008 SC 2187) has held as under :-

"The judgment of a Court, it is trite, should not be interpreted as a statute. The meaning of the words used in a judgment must be found out on the backdrop of the act of each case. The Court while passing a judgment cannot take away the right of the successful party indirectly which it cannot do directly. An observation made by a superior Court is not binding. What would be binding is the ratio of the decision. Such a decision must be arrived at upon entering into the merit of the issues involved in the case."

The Hon'ble Apex court in *Lalliram and another v. State of Madhya Pradesh*, reported in (2008) 10 SCC 69), has further held as under :-

"12. As rightly contended by learned counsel for the appellants, a decision has to be considered in the background of the factual scenario. In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence. In *Aman Kumar case*, (2004) 4 SCC 379 : 2004 SCC (Cri) 1266, it was observed that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than the injured witness. In the latter case there is injury in the physical form while in the former both physical as well as psychological and emotional. However, if the court finds it difficult to accept the version of a prosecutrix on the face value, it may search for evidence direct or circumstantial."

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Hence, the arguments advanced by the learned counsel for respondents No. 2 and 3 could not be accepted.

17. After going through the facts of the case this Court has gathered an impression that Mr. Keshavdas Agarwal has deliberately filed the suit for partition in order to get rid from the mortgage which he had created in favour of the Bank for the purpose of receipt of the loan. The Intention was to defeat the recovery of the loan and he himself, on behalf of his minor son, filed the suit and obtained decree for partition. Thereafter, the complainants lodged an FIR before the Police and on the basis of the aforesaid FIR police registered a criminal case and subsequently the trial Court framed charges against the petitioner, who had been working at the relevant time as Branch Manager of the Bank. The trial Court completely ignored the facts of the case and mechanically framed charges against the petitioner. The police also did not consider the legal position of execution of equitable mortgage and the judgment passed by the Debt Recovery Tribunal and filed the charge sheet against the petitioner. From the above actions this Court came to the conclusion that an innocent person has been suffering or rather prosecuted due to negligent act of the prosecution agency, the police and subsequently the trial Judge, which has resulted the prosecution of an innocent person. The aforesaid act has defeated the concept of rule of law. Hon'ble the Supreme Court in the case of *Inder Mohan Goswami and another v. State of Uttaranchal and others*, reported in AIR 2008 SC 251, has cautioned the Courts that a criminal prosecution is not used as an instrument of harassment. The Hon'ble Court has held as under :-

"45. The court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressure the accused. On analysis of the aforementioned cases, we are of the opinion that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. Inherent jurisdiction of the High Courts under Section 482 Cr.P.C. though wide has to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the Statute itself and in the aforementioned cases. In view of the settled legal position, the impugned judgment cannot be sustained. "

Hon'ble the Supreme Court in *Indian Oil Corpn. v. NEPC India Ltd. and others*, reported in (2006) 6 SCC 736, has observed as under with regard to growing tendency in business circles to convert purely civil disputes into criminal cases and the duty of the Courts :-

"13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes

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into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. In *G. Sagar Suri v. State of UP*, (2000) 2 SCC 636, observed : (SCC p.643, para 8)

"It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecution and harassment of innocent parties, is to exercise their power under Section 250 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may. "

18. The criminal revision is allowed. The charges framed against the petitioner vide order dated 15.10.2008 passed in Sessions Trial No. 199/08 by First Additional Sessions Judge, Gwalior, are hereby quashed.

No order as to cost.

Revision allowed.

SANJEEV MEENA Vs. STATE OF M.P.

I.L.R. [2009] M. P., 1531

MISCELLANEOUS CRIMINAL CASE

Before Mrs. Justice Indrani Datta

18 March, 2009*

SANJEEV MEENA

... Applicant

Vs.

STATE OF M.P. & anr.

... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 427(2) - Sentence on offender already sentenced for another offence - A person already undergoing a sentence of imprisonment for life - Subsequently, sentenced to imprisonment for a term or imprisonment for life - There is no requirement for any direction of the Court as subsequent sentence will automatically run concurrently with previous sentence. (Para 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 427(2) - किसी अन्य अपराध के लिए पूर्व में दण्डादिष्ट अपराधी को दण्डादेश - कोई व्यक्ति पूर्व से आजीवन कारावास का दण्डादेश भुगत रहा हो - उसे बाद में किसी अवधि के कारावास या आजीवन कारावास के दण्डादेश से दण्डित किया गया - तब न्यायालय के किसी निदेश की आवश्यकता नहीं है क्योंकि पश्चात्पूर्वी दण्डादेश स्वतः पूर्ववर्ती दण्डादेश के साथ-साथ चलेगा।

Cases referred :

2007 CrLJ 763, ILR [2007] MP 1835.

A.K. Jain, for the applicant.

Ku. Kalpana Chauhan, P.P., for the non-applicant No.1/State.

ORDER

MRS. INDRANI DATTA, J. :- Petitioner has filed this petition under Section 482 of Code of Criminal Procedure praying for a direction that the sentence passed against him in Cr. appeal no.44 of 2008 by Sessions Judge, Guna by which, his appeal against judgment passed by JMFC Raghogarh convicting him under section 224 of IPC and sentencing him for two years Rigorous Imprisonment and to pay fine of Rs.1000/- was dismissed on the ground of limitation. That sentence is to run concurrently with the sentence of life imprisonment awarded to him in Sessions trial no.321 of 2005 by ASJ, Chachoda on 29.11.2006.

2. In Sessions trial no.321 of 2005, petitioner was convicted for offence under Section 302 of IPC and sentenced to life imprisonment with some fine vide judgment dated 29.11.2006 and then petitioner was convicted on 24.3.2007 by the Court of JMFC Raghogarh under Section 224 of IPC and sentenced to undergo Two years Rigorous Imprisonment and to pay fine of Rs.1000/-. Appeal was preferred against judgment of conviction and sentence of JMFC, Raghogarh which was dismissed on the ground of limitation.

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3. Learned counsel for the petitioner submits that in view of the -provisions of section 427 of Cr.P.C, petitioner who was convicted under section 302 of IPC on 29.11.2006 and was sentenced to Rigorous Imprisonment for life has to undergo that sentence first and subsequent sentence awarded by JMFC under Section 224 of IPC on 24.3.2007 may commence after expiry of previous sentence. Therefore, it is essential for securing the ends of justice, that the sentences imposed upon him in both the cases be directed to run concurrently.

4. Learned counsel for the State opposed the submission made by learned counsel for the petitioner and prayed that the petition deserves to be dismissed.

5. Perused the documents filed on record.

6. Section 427 of Code of Criminal Procedure reads as follows :

“427 : (1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence:

Provided that where as person who has been sentenced to imprisonment by an order under s 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence”.

From bare perusal of Section 427 of the Code, it appears that there are two different situations. As per Section 427 (1), when a person already undergoing sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or to imprisonment for life, then his second sentence shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that subsequent sentence shall run concurrently with such previous sentence. In that condition, the accused has to take permission of the Court that subsequent sentence imposed upon him, shall run concurrently with his previous sentence..

7. Hon'ble Apex Court in para 11 of the case of *Kudva Vs. State of Andhra Pradesh* (2007 Cri.LJ 763) has held as under :

“11. However, in this case, the provision of Section 427 of

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the Code was not invoked in the original cases or in the appeals. A separate application was filed before the High Court after the special leave petitions were dismissed. Such an application, in our opinion, was not maintainable. The High Court could not have exercised its inherent jurisdiction in a case of this nature as it had not exercised such jurisdiction while passing the judgment in appeal. Section 482 of the Code was, therefore, not an appropriate remedy having regard to the fact that neither the Trial Judge, nor the High Court while passing the judgments of conviction and sentence indicated that the sentences passed against the appellant in both the cases shall run concurrently or Section 427 would be attracted. The said provision, therefore, could not be applied in a separate and independent proceeding by the High Court. The appeal being devoid of any merit is dismissed".

In the light of above legal proposition, it is apparent that in above situation the prayer to the effect that subsequent sentence passed on subsequent conviction is to run concurrently with previous sentence, is to be made before the concerned Court or before the appellate Court as observed by bench of this Court in *Kamal Singh Vs. State of M.P.* ILR (2007) M.P 1835.

8. So far as Sub Section 2 of Section 427 of Code is concerned, the situation is different here. From bare perusal of Sub Section 2, it is apparent that when a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment *for a term* or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence. In that situation, there is no requirement for any direction of the Court as subsequent sentence will automatically run concurrently with previous sentence.

9. Taking into consideration the facts and circumstances of the present case, in the light of above legal proposition as present petitioner was convicted under Section 302 of Indian Penal Code and sentenced to life imprisonment vide order dated 29.11.2006 in Sessions Trial No.321 of 2005 and then in Cr. appeal no.44 of 2008 vide order dated 19.2.2008 under Section 224 of Indian Penal Code and sentenced to undergo Two years Rigorous Imprisonment, therefore, as per provisions of Section 427 (2) of Code subsequent sentence shall run concurrently with the previous sentence.

10. With the above direction, this petition stands disposed of.

Petition disposed of.

ABDUL RAUF Vs. STATE OF M.P.

I.L.R. [2009] M. P., 1534

MISCELLANEOUS CRIMINAL CASE*Before Mr. Justice N.K. Mody*

24 March, 2009*

ABDUL RAUF

... Applicant

Vs.

STATE OF M.P. & ors.

... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 319 - Proceeding under M.P. Excise Act for illegal transportation of liquor initiated against non-applicants - Application for impleading applicant alleging that he was in charge and posted at the distillery and has issued permit - Application allowed - Order challenged - Held - Order of impleading applicant as accused is passed after 9 years of offence - Trial court allowed the application on the ground of role of applicant appears to be doubtful - Not enough for impleading a person as accused who is none else but the witness of the prosecution - Order set-aside. (Paras 9 & 10)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319— अनावेदकों के विरुद्ध शराब के अवैध परिवहन के लिए म.प्र. आबकारी अधिनियम के अन्तर्गत कार्यवाही प्रारम्भ की गई— आवेदक को पक्षकार बनाने के लिए आवेदन यह अभिकथन करते हुए पेश किया गया कि वह प्रभारी था और डिस्टिलरी में पदस्थ था एवं परमिट जारी किया— आवेदन मंजूर— आदेश को चुनौती— अभिनिर्धारित— आवेदक को अभियुक्त के रूप में पक्षकार बनाने का आदेश अपराध के 9 वर्ष बाद पारित किया गया— विचारण न्यायालय ने आवेदन इस आधार पर मंजूर किया कि आवेदक का आचरण शंकास्पद प्रतीत होता है— किसी व्यक्ति को अभियुक्त के रूप में पक्षकार बनाने के लिए पर्याप्त नहीं जो और कोई नहीं बल्कि अभियोजन साक्षी है— आदेश अपास्त।

Cases referred :

1998(II) MPWN 85, AIR 2000 SC 1127.

Z.A. Khan with Dinesh Singh, for the applicant.

C.R. Karnik, Dy.G.A., for the non-applicant No.1/State.

ORDER

N.K. Mody, J. :-BEING aggrieved by the order dated 16.06.2005 passed by Judicial Magistrate First Class, Badnagar, District Ujjain in Criminal Case No. 190/1996 whereby the application filed by Respondent No.2 - Jasbeersingh under Section 319 of the Code of Criminal Procedure ["Code" hereafter] for impleading the petitioner as an accused was allowed, the present petition under Section 482 of the Code has been filed.

2. Short facts of the case are that Respondents No.2 to 4 were prosecuted by the Respondent No. 1 for an offence punishable under section 34 of the M. P. Excise Act wherein the allegation against the Respondents No.2 to 4 was

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that Respondents No.2 to 4 were transporting the liquor in a Metador bearing Registration No.MP-09/K-3941. Respondents No.2 to 4 were charge-sheeted by the Respondent No. 1 for an offence punishable under Section 34 of the M. P. Excise Act. In the charge-sheet it was alleged that the liquor was being transported illegally from the distillery and was not being carried through the fixed route as per permit.

3. During the course of the trial, an application was filed by the Respondent No.2 - Jasbeersingh under Section 319 of the Code for impleading the petitioner as co-accused because the petitioner was in-charge and was posted at the aforesaid distillery on deputation and has issued the permit and the liquor pouches was being carried on the basis of permit. The application was contested. The application was allowed against which the present petition has been filed.

4. Learned Senior Counsel for the petitioner submits that the impugned order passed by the learned Court below is illegal, incorrect and deserves to be quashed. It is submitted that the alleged offence is of the year 1996 while the application for impleading the petitioner as co-accused was filed some-where in the year 2005 i.e. after lapse of 9 years. The second contention of the learned Senior Counsel for the petitioner is that the petitioner was the listed witness of the prosecution. It is submitted that upon the request of an accused, a witness of the case of the prosecution cannot be impleaded as co-accused. For this contention reliance is placed on a decision of this Court in the matter of *Kamla Bai (Smt) v/s State of M.P.*, reported in 1998 II M.P.W.N. 85, wherein a material witness was called as an accused, this Court has held that it amounts to misuse of process of the Court.

5. Learned Senior Counsel for the petitioner also submits that for allowing an application under Section 319 of the Code it is not enough that the person for whom the prayer is made to be impleaded as accused may be involved in the offence. It is submitted that the Court has to come to a definite opinion that the person is involved in the offence. For this contention reliance is placed on a decision of the apex Court in the matter of *Michael Machado and another v/s Central Bureau of Investigation and another*, reported in AIR 2000 SC 1127, wherein it is held :-

“The Court must have reasonable satisfaction from the evidence already collected regarding two aspects while invoking power under S. 319 to proceed against other persons appearing to be guilty of offence. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused. But even then, what is conferred on the Court is only a discretion as could be

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discerned from the words "the Court may proceed against such person". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the Court should turn against another person whenever it comes across evidence connecting that another person also with the offence. Judicial exercise is called for keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the Court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the Court to proceed against other person.

The Court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4); that proceedings in respect of newly added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be re-commenced from the beginning of the trial; summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite a large in number the Court must seriously consider whether the objects sought to be achieved by such exercise is worth wasting the whole labour already undertaken. Unless the Court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned we would say that the Court should refrain from adopting such a course of action."

6. It is submitted that in the facts and circumstances of the case the petition filed by the petitioner be allowed and the impugned order passed by the learned Court below be set-aside.

7. Shri C.R.Karnik, learned Deputy Govt. Advocate for the Respondent No.1 State submits that the learned Court was of the view that the petitioner is also involved in the offence, therefore, the learned Court below has allowed the application and no illegality has been committed in allowing the application. It is submitted that the petition filed by the petitioner be set-aside.

8. Sub-section (1) of Section 319 of the Code of Criminal Procedure reads as under :-

"319. Power to proceed against other persons appearing

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to be guilty of offence.—(1)Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.”

9. From perusal of the record it appears that the alleged offence is dated 11/06/96 while the impugned order to implead the petitioner as accused is dated 16/06/05 i.e. after 9 years. From perusal of the impugned order it appears that the Court has come to the conclusion that the all of the petitioner appears to be doubtful, which is not enough for impleading a person as accused who is none else but the witness to the prosecution.

10. In the facts and circumstances of the case petition filed by the petitioner is allowed and the impugned order passed by the learned Court below is set aside with a direction to dispose of the case pending before it at the earliest within a period of six months.

11. With the aforesaid observations, petition stands disposed of.

Petition disposed of.

I.L.R. [2009] M. P., 1537

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice A.P. Shrivastava

17 April, 2009*

PRAHLAD SINGH

Vs.

STATE OF M.P.

... Applicant

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 362 & 482, Penal Code, 1860, Sections 68 & 69 - Inherent powers of High Court - Can the Court after pronouncing the final judgment alter, reopen or modify it in exercise of inherent powers for extending the time for deposit of the fine amount - Held -Stipulated period to deposit the amount of fine in a final order can not be extended with the aid of Section 482 of Cr.P.C. - Appropriate remedy is to avail the provision of Section 68 of I.P.C. (Paras 19 & 21)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 362 व 482, दण्ड संहिता, 1860, धाराएँ 68 व 69 — उच्च न्यायालय की अन्तर्निहित शक्तियाँ — क्या न्यायालय अंतिम निर्णय सुनाये जाने के बाद जुर्माना राशि जमा करने के लिए समय बढ़ाने के लिए अन्तर्निहित शक्तियों के प्रयोग में उसे परिवर्तित, पुनर्विचारित या उपांतरित कर सकता है — अभिनिर्धारित — अंतिम आदेश में जुर्माने की राशि जमा करने के लिए नियत अवधि द.प्र.सं. की धारा 482 की सहायता

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से नहीं बढ़ायी जा सकती – समुचित उपचार भा.द.सं. की धारा 68 के उपबंध का उपयोग करना है।

Cases referred :

1990(I) MPWN SN 84, MCrc No.2190/2009 and MCrc No.2097/2009 decided on 09.04.2009, 1973 JIJ 526, AIR 2002 SC 387, AIR 1972 SC 1295, AIR 1977 SC 2433, 2006(3) AIR SCW 2330, AIR 1981 SC 736, AIR 1981 SC 1385, 2008(3) JIJ 374, 2008 AIR SCW 6911, (2001) 1 SCC 169, AIR 1962 SC 1208, 1992 (3) CRIMES 185, 1986 CrLJ 617.

Vilas Tikhe, for the applicant.

D.R. Sihare, P.P., for the non-applicant/State.

ORDER

A.P. SHRIVASTAVA, J. :-MCrc No. 7260/08 [*Prahlad Singh Vs. State of M.P.*], MCrc No. 6707/08 [*Makhan Das Vs. State of M.P.*], MCrc No. 5879/08 [*Bhagwan Singh & Others Vs. State of M.P.*], MCrc No. 6760/08 [*Sabba & others Vs. State of M.P.*] are being disposed of by this common order as the point for consideration in all these Miscellaneous Criminal Cases are the same. The point for consideration is that whether the period for payment of amount of fine, ordered in judgment in an appeal, can be extended by this court in view of Section 482 Cr.P.C.?

2. The facts of the case, in nutshell, are as under:

In MCrc No 7260/08 [Criminal Appeal No-497/2001], petitioner Prahlad Singh has been convicted under Section 324 of IPC and sentenced to the period already undergone by him with an imposition of fine amount of Rs.3,000/-. It has further been directed that he shall surrender before the trial court to deposit the amount of fine within a period of three weeks from the date of receipt of the copy of the judgment with default stipulation.

In MCrc No 6707/08 [Criminal Appeal No-434/2002], petitioner Makhan Das has been convicted under Section 323 read with section 34 of IPC and sentenced to the period already undergone by him with an enhancement of fine from Rs.500/- to 1,000/-. He is further directed to deposit the amount of fine within a period of three weeks from the date of receipt of certified copy of the judgment with default stipulation.

In MCrc No 5879/08 [Criminal Appeal No.110/2000], petitioner Bhagwan Singh has been convicted under Sections 451, 323 & 426 of IPC and sentenced to the period already undergone by him but the amount of fine to the tune of Rs. 1,000/- has been imposed under Section 323 of IPC; amount of fine to the tune of Rs. 500/- has been imposed under Section 426 of IPC while the amount of fine as awarded by learned trial Court under Section 451 of IPC has been enhanced from Rs. 100/- to Rs. 500/-. The rest of the petitioners have been

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convicted under section 323 read with Section 34 of IPC and they have also been sentenced to the period already undergone by them but the amount of fine has been imposed to the tune of Rs. 1,000/- each with default stipulations. They have directed to deposit the amount of fine before the trial court within a period of 15 days from the receipt of this judgment.

In Merc No-6760/08 [Criminal Appeal No-355/99], the petitioner no.2 Ramdayal has been convicted under section 326 of IPC and was sentenced to the period already undergone by him but the amount of fine has been enhanced from Rs.5,000/- to 7,000/-. The rest of the petitioners have been convicted under Sections 148 and 324 of IPC and sentenced to the period already undergone by them but the amount of fine has been enhanced under section 324 of IPC from Rs.2,000/- to Rs.3,000/- with default stipulations. The conviction and sentence of all the petitioners under Section 148 of IPC have been maintained. It has further been directed that the amount of fine be deposited before the trial court within a period of one month from this judgment.

3. On behalf of the petitioners, petitions under Section 482 of Code of Criminal Procedure, 1974 have been filed and it is submitted that they could not deposit the amount of fine as directed by this court and prayer was made to extend the period for payment of amount of fine.

4. On behalf of the State, the applications have been opposed on the ground that in view of Section 362 of Cr.P.C., time cannot be extended with the aid of Section 482 of Cr.P.C.

5. Counsel for the petitioners submit that this court has inherent powers to extend the period for payment of fine and in support of their contention, they cited some decisions of this court as well as of the Apex Court. They relied on *Madiya Vs. State of M.P.* reported in 1990 (1) M.P. Weekly Notes SN 84 in which it was held that time fixed for depositing amount of fine may be extended exercising inherent powers. They further filed some photocopies of the certified copies of the order dated 08.04.09 passed in Merc No-2190/09 [*Bablu @ Vikram Singh Vs. The State of M.P.*], the order dated 09.04.09 Merc 2106/09 [*Bhaiyalal Vs. The State of M.P.*] and the order dated 09.04.09 Merc No-2097/09 [*Vishan Gir Vs. The State of M.P.*].

6. Counsel for the petitioners also relied on *Shyam Bihari Vs State of Madhya Pradesh* reported in 1973 J.L.J 526 in which the object and the scope of Section 561-A of Cr.P.C. 1898 was discussed and it was observed as under:

"it is now well settled that Section 561-A of the Code of Criminal Procedure confers no new powers on the High Court. It merely safeguards all pre-existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice. The sections provide that those powers

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which the Court inherently possesses shall be preserved lest it be considered that the only powers possessed by the Court are those expressly conferred by the Code and that no inherent powers had survived the passing of the Code.”

7. Counsel for the petitioners also relied on a decision of the Apex Court rendered in the case of *Mahendra Singh and others v. State of Bihar* reported in AIR 2002 SC 387 in which the appellants stood convicted under section 324, IPC and were sentenced to imprisonment for 6 months. On appeal, the High Court maintained the conviction but reduced the sentence to period already undergone and directed to pay fine of Rs.500/-, in default to further undergo imprisonment R.I. for 3 months. During the period prescribed for payment of fine, the accused could not deposit the amount in question. Accused filed an application for extension of time by invoking jurisdiction under section 482, Cr. P. C. That application having been rejected by the High Court, it was dismissed thrice and then the matter went to the Apex Court. The Apex Court observed that there cannot be any dispute that the accused were not entitled to file so many applications before the High Court invoking jurisdiction under Section 482. But having regard to the facts and circumstances of the present case, and in view of the statement that the accused were ill-advised to file number of applications before the High Court. The Apex Court allowed the appeal and granted a month's time from to make the deposit of fine, as directed by the High Court.

8. Apart from the above, some citations were also filed which are *Isher Das, v. The State of Punjab* reported in AIR 1972 SC 1295, *Yash Pal Mital, v. The State of Punjab* reported in AIR 1977 SC 2433 and *Minu Kumari & Anr. Vs. State of Bihar*, reported in 2006 (3) AIR SCW 2330 but the facts of these cases are different and therefore will not be helpful to the petitioners.

9. Counsel for the State also relied on a decision of the Apex Court rendered in the case of *Smt Sooraj Devi v. Pyare Lal and another* reported in AIR 1981 SC 736 in which it is held as under:

4. The sole question before us is whether the High Court was right in refusing to entertain Criminal Miscellaneous Application No. 5127 of 1978, on the ground that it had no power to review its order dated 1st September, 1973. Section 362 of the Code of Criminal Procedure declares:

“Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”

He also relied on *Naresh and others v. State of U.P.* reported in AIR 1981 SC 1385 but the facts of this case are different and therefore will not be helpful him.

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10. The legal question which is involved is that whether after passing a judgment or final order by the court, the matter can be reopened, altered or modified with the aid of inherent powers of the Court under Section 482 of Cr.P.C?

11. Now, I would like to quote the relevant provisions of Section 362 and 482 of Cr.P.C. which are as under:

362. Court not to alter judgment.- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.

482. Saving of inherent powers of High Court.- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse the process of any Court or otherwise to secure the ends of justice.

12. In the case of *Sunita Jain V. PawanKumr Jain and others* reported in 2008(3) J.L.J. 374, the Apex Court considered the provisions of Section 362 and 482 of Cr.P.C. and observed that it is clear that a Court cannot alter or review its judgment or final order after it is signed except to correct clerical or arithmetical error. The scheme of the Code, in our judgment, is clear that as a general rule, as soon as the judgment is pronounced or order is made by a Court, it becomes functus officio (ceases to have control over the case) and has no power to review, override, alter or interfere with it.

13. In case of *State Represented by D.S.P., S.B.C.I.D., Chennai Vs. K.V. Rajendran & Ors* reported in 2008 AIR SCW 6911 while discussing the scope of Section 362 and 482 of Cr.P.C., the Apex Court has observed that Section 482 enables the High Court to make such order as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The inherent powers, however, as much as controlled by principle and precedent as are its express powers by statutes. If a matter is covered by an express letter of law, the Court cannot give a go-by to the statutory provisions and instead evolve a new provision in the garb of inherent jurisdiction. Section 362 prohibits re-opening of a final order except in the cases of clerical or arithmetical errors. Such being the position power under Section 482 cannot be exercised to reopen or alter an order disposing of a petition decided on merits.

14. In the case of *Hari Singh Mann Vs. Harbhajan Singh Bajwa & Others* (2001) 1 SCC 169, it was observed by the Apex Court that "There is no provision in the Code of Criminal Procedure authorizing the High Court to review its judgment passed either in exercise of its appellate or revisional or original criminal jurisdiction.

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Such a power cannot be exercised with the aid or under the cloak of Section 482 of the Code. Section 362, Cr.P.C. has extended the bar of review not only to judgment but also to the final orders other than the judgment. Section 362 is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said court in the absence of statutory provision becomes *functus officio* and is disentitled to entertain a fresh prayer for the same relief unless the former order is set aside by a Court of competent jurisdiction in a manner prescribed 'by law. The court becomes *functus officio* the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or an arithmetical error."

15. It is observed by the Apex Court in *Smt Sooraj Devi* (supra) that the inherent power of the Court cannot be exercised for doing that which is specifically prohibited by the Code. It is true that the prohibition in Section 362 against the Court altering or reviewing its judgment is subject to what is "otherwise provided by this Code or by any other law for the time being in force". In this regard, in para 5 of the judgment, it is observed by the Apex Court that the appellant points out that he invoked the inherent power of the High Court saved by Section 482 of the Code and that notwithstanding the prohibition imposed by Section 362 the High Court had power to grant relief. Now it is well settled that the inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code. Further, the Apex Court also relied on *Sankatha Singh v. State of U. P.* AIR 1962 SC 1208.

16. It is true that the prohibition in Section 362 against the Court altering or reviewing its judgment is subject to what is "otherwise provided by this Code or by any other law for the time being in force". Those words, however, refer to those provisions only where the Court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the Court is not contemplated by the saving provision contained in Section 362 and, therefore, the attempt to invoke that power can be of no avail.

17. Now, I will examine whether the petitioners can avail the alternative remedy. Section 68 and 69 of the Indian Penal Code deals with the imprisonment to terminate on payment of fine and the termination of imprisonment on payment of proportional part of fine. Section 68 of the Indian Penal Code lays down as under:

"68. Imprisonment to terminate on payment of fine.-

The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

69. Termination of imprisonment on payment of proportional part of fine.- If, before the expiration of the term

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of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate."

18. On similar circumstances of the case, the Madras High Court in the case of *Chinnaparaju Vs. State* reported in 1992(3) Crimes 185 deals the matter in the light of Section 68 and 69 of the Indian Penal Code. In that case, the petitioner convicted and sentenced to pay a fine of Rs.10,000/- in default to undergo 18 months R.I. Three months' time allowed for payment of fine. Petitioner failed to pay fine and was arrested and committed to undergo default sentence. Application filed before Sessions Court to receive fine amount and order for release of accused. Application returned on the ground petitioner/accused had failed to deposit fine within the period allowed to him. The Madras High Court also held that it appears that learned Sessions Judge was under a mistaken impression that once a time limit have been fixed by the High Court for payment of the fine, it is not legitimately permissible for the petitioner-accused to remit the fine amount, after the expiry of the time limit but before the expiration of the terms of imprisonment fixed in default of payment and pray for the termination of the sentence on payment of fine. If the time limit had been set by this court for payment of fine and the fine amount is not paid within the time so fixed, then it goes without saying that the petitioner-accused has to either surrender before the Court or the prosecuting agency will be in a position to arrest him and produce before Court for his detention in prison for undergoing the default sentence. Ultimately, the Sessions Court was to receive the amount if deposited by the accused-appellant and terminate his sentence.

19. The Allahabad High Court in *Ram Lakhan and others v. The State* reported in 1986 Cri.LJ. 617 has discussed the matter when the amount has not been deposited within the stipulated time as directed by the Court accused is to be taken into custody at once -Imprisonment terminates u/S-68, I.P.C. only after accused is taken into custody. The court held that it is clarified that after the applicants have surrendered themselves in Court to serve out the sentence of imprisonment on default of payment of fine, they will be released as soon as the amount of fine is deposited and their imprisonment, as aforesaid, shall terminate under S. 68, I.P.C. It was also observed that in case of default in payment of fine accused not obeying specific directions as to making payment and postponing payment without surrendering into court. Accused is guilty of abuse of process of court -Extension of time to make payment cannot be granted with the aid of Section 482 Cr.P.C.

20. Some citations submitted by the learned counsel for the petitioners in the court however in those judgments the provisions of Section 362 and Section 68 of IPC have not been brought to the notice of the concerning Bench and looking

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to the views expressed by the Apex Court as discussed above, there is no need to refer the matter by way of reference to a larger Bench.

21. In view of the above discussion, it is made clear here that the period to deposit the amount of fine cannot be extended by this Court and the petitioners can avail the remedy of provisions of Section 68 of IPC. Therefore, it is directed that the petitioners shall surrender before the court and if the fine amount is paid into the court, the mandate of law, as had been provided under Section 68 of the Indian Penal Code is to operate and the imprisonment, in default of payment of fine, has to terminate on the payment of the fine amount into the concerning Court.

22. With such observation, these petitions are disposed of accordingly. A copy of this order be kept in all the connected petitions.

Petition disposed of.
