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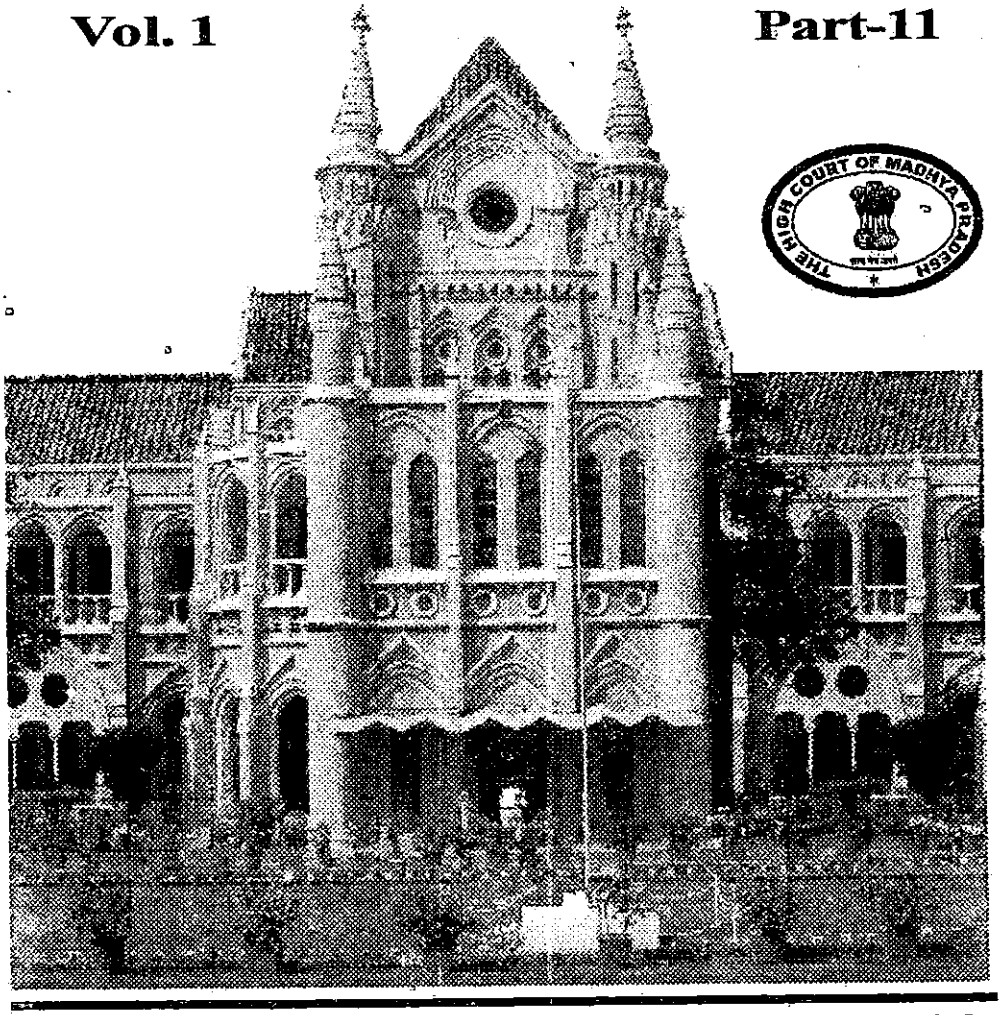

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APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate **Shri Piyush Mathur** on his appointment as Judge of the High Court of Madhya Pradesh. **Shri Piyush Mathur** took oath of the High Office on 14th of October, 2009.

JUSTICE PIYUSH MATHUR

Born on 12th of March 1960 at Shajapur in the family of Advocates. Passed B.A. (Hons.) in 1980 and LL.B (Gold Medalist) in 1983. Practiced as an Advocate for 25 years. Six years Experience of conducting Original Civil Matters and variety of Criminal Trials in District Court and Revenue Matters, two year work experience of appearing in Constitutional and Appellate Litigation at the Supreme Court of India, Currently practicing as an Arguing Counsel on Constitution & Appellate side before the Indore Bench of High Court of Madhya Pradesh. Worked as Additional Standing counsel for Union of India (Bhabha Atomic Research Centre/Centre for Advance Technology, Indore) in Large Number of Cases and Land Acquisition Appeals before the High Court of Madhya Pradesh. Was Government Advocate for the State of M.P. for a period of three year from 1995 to 1998. Was counsel for the Local & Corporate Bodies as a - Bhabha Atomic Research Centre, Indore, Housing & Urban Development Corporation, M.P. State Election Commission, M.P. Housing Board, M.P. Board of Secondary Education, M.P. Electricity Board, M.P. State Warehousing & Logistics Corporation, Ujjain & Dewas Development Authority etc. Before the Administrative Tribunal in Large number of Service Dispute & National & State Consumer Commission in Consumer Litigation. Adequate Experience of dealing matters concerning Army Officers Service Dispute (including delicacies of the Court Martial Proceedings). Appeared in a Judicial Commission of Inquiry (1986) relating to Communal Riots, involving Death of a Sub-Inspector (Police) & incidents of Arson, Loot and fire at Shajapur (M.P.). Worked as Special Public Prosecutor for State of M.P. in a famous Criminal Trial of Sadhvi Ritumbhara. Was Member, Supreme Court Bar Association, New Delhi, Life Member, High Court Bar Association, Indore and Ex-Joint Secretary, High Court Bar Association at Indore. Involved actively in Chamber Practice also, with the assistance of Five Qualified Junior Advocates, having exposure to the Computers.

Elevated as Additional Judge of the Madhya Pradesh High Court on 14/10/2009.

We wish his Lordship a successful tenure on the Bench.

Madhya Pradesh in the case of Sadhvi Ritambhara. Besides the professional achievements Your Lordship also had the capacity and ability to lead the legal fraternity and you worked as member of Supreme Court Bar Association, Life member of High Court Bar Association and ex. Joint Secretary of High Court Bar Association, Indore.

As regards the Educational qualifications your Lordships acquired B.A. (Hons.) in 1980 and LL.B. with Gold Medal in -1983.

I feel privilege in offering this ovation to Justice Piyush Mathur and hope he will prove worthy of the assignment and will be a great assets to this Institution.

I, on behalf of State Govt, Law Officers and My own behalf congratulate Justice Piyush Mathur on his elevation as an Additional Judge and wish him a successful tenure as Judge of this Court.

On behalf of Central Government Shri Radhelal Gupta, Asstt. Solicitor General of India, welcomed the Judge. He said :–

Before this august gathering I have this honor of introducing that legal personality who has traversed a long but illuminating and illustrious career in this profession- My Lords Hon'ble Justice Piyush Mathur.

My Lords were born on 12th March, 1960. Born in a family of lawyers, my Lords had the occasion of picking the noble qualities of this profession from his father Late Shri K.N. Mathur and grandfather Late Shri M.M.L. Mathur. My lords Hon'ble Justice Piyush Mathur epitomizes an old adage that the beauty of legal profession is that its top slot always remains undefined. At same time there is always an opportunity for defining it in a new manner, form and expression for any lawyer. This is what precisely what various stalwarts of legal profession like Late Shri YS Dharmadhikari; Late Shri VS Dabir Ji, Late Sardar Rajendra Singh Ji did when they practiced as a lawyer.

My Lords Hon'ble Justice Mathur has also defined the top slot in a new form and expression. As a student he stood out as Gold medalist in LLB degree course from Vikram University. His mettle was also acknowledged through a national scholarship award from Vikram University.

As a young lawyer, after putting in just a few years of practice, he was crowned with the coveted posts of counsel of Union of India; his legal acumen was brilliantly displayed when he represented Union in bunch of 120 land acquisition cases. Besides he also demonstrated his remarkable expertise in issues pertaining to urban administration, elections; higher education; intricate tax and excise matters as a counsel for various government and semi government entities.

I am greatly thankful to Hon'ble Chief Justice and judges constituting the collegiums for recommending such an appointment of a deserving judge to this constitutional office.

Lastly on behalf of the Union of India and all my colleagues adorning the

office of Central Government as Law officers and for myself I heartily congratulate Hon'ble Justice Piyush Mathur on his appointment and extend my wishes for a successful tenure ahead.

I would like to sum up in the following words of the renowned social anthropologist: Plato,

"A. Judge should not be young; he should have learnt to know evil; not from his soul but from late and long observance of nature of evil; the knowledge, which he uses should be his guide and not his personal experience, he should be one who conceives quickly but judges equally slowly."

On behalf of Senior Advocates, Shri Rajendra Tiwari, Senior Advocate' while felicitating the New Judge, said :–

Sun has risen today with great splendor to give a scintillating glow to a new face in the justice dispensation system of this State with the oath of office having been administered on your, Lordship Mr.Justice Piyush Mathur.

You are well known to us, that is the fraternity of lawyers of M.P. Being a member of this fraternity, while felicitating you as a Judge of this High Court, I can strongly say that your appointment to this august office is not only jammy but also fully Justified.

My Lord, I have seen you working as a lawyer at Indore and have had occasions to associate myself with you in cases. Your Lordship evinced the qualities of a seasoned lawyer, dealing with legal problems of the case in a composed and dedicated manner. Your self-confidence qua your convictions has been illustrious and emulative. Your qualities ultimately brought you this great honour.

Your Lordship belong to a family of lawyers. Your grandfather and father were both lawyers of great repute. As a student of law you demonstrated your devotion to the study of law and consequently earned the first position in L.LB. so as to be embellished with a gold medal by the Vikram University.

You have by now experience of a quarter century as a member of the legal profession. You have maintained, as a lawyer, high traditions of this noble profession by subscribing to the rules of etiquette. This is what counts in the life of a lawyer and speaks high of him.

My Lord, dispensation of justice is an attribute of God. It is said that blessed are those on whom this celestial assignment has fallen. Far more blessed are those who acquit themselves of this assignment with dignity and honour. With your experience as a lawyer and the qualities that your Lordship have richly. I have no doubt that your Lordship will not only be discharging your judicial function within the four corners of law but also with equity and compassion. I say so because suffering humanity in this country needs a special consideration with compassion and equity while administering law and justice.

Being elder, may I take this opportunity, My Lord, to express a brief note on what is expected of a Judge by the community of lawyers. A Judge should not be in a hurry to deal with the case. Though it is said 'Justice Delayed is Justice Denied', but it is equally true that 'Justice Hurried is Justice buried'. A Judge should, therefore, hear patiently, consider the points raised anxiously and deliver the judgment impartially.

Lawyers, though they appear before the Court in order to advance and project the cause of their clients, but, being officers of the Court they are always conscious of the law applicable to the case. They are not dissatisfied if they lose a case. They are dissatisfied if they are not fully heard and treated well in the Court during the proceedings. I have confidence that no lawyer will return from your Lordship's Court dissatisfied for these reasons.

My Lord, Jefferson has said "We hold these truths to be self-evident, that men are created equal; that they are endowed by their creator with inalienable rights; and that among these are life, liberty and the pursuit of happiness". A Judge has, therefore, to be always conscious of protecting life in its all pervasive sense, liberty with all its attributes and pursuit of happiness which makes a human life wholesome.

With these words I, on behalf of the Senior Council and all Senior Advocates and on my own behalf felicitate your Lordship on this great occasion of your induction as a Judge in the High Court with a prayer to the Almighty that he may bestow upon you all his favours so as to enable you to achieve the greatness of a Judge during your tenure of Judgeship.

Thanking You.

Shri Anil Khare, President, M. P. High Court Bar Association, Jabalpur, while felicitating the new Judge, said :–

On this momentous occasion of the elevation of Hon'ble Justice Shri Piyush Mathur as Judge of Madhya Pradesh High Court, I consider it my proud privilege to rise on behalf of M.P. High Court Bar Association and also on my own behalf to accord a very warm and a cordial welcome to you.

The elevation of My Lord brings jubilation within the legal fraternity on account of your rich experience at the bar as an eminent lawyer. On one hand My Lord Justice Shri Piyush Mathur celeberates the jubilation while on the other hand he has been conferred with an onerous task of preserving and protecting the Constitution of India and the rule of law. It would not be out of place to mention that the first meeting of the constituent assembly was held on 9.12.1946 which continued for a period of 2 years 11 months and 17 days gave us the sacred document i.e the Constitution of India on 26.11.49.

The appointment of My Lord Justice Shri Piyush Mathur fulfills the expectations in respect of the appointment of judges as was expressed by the then Chief Justice of India Shri R.C.Lahoti in his speech on the occasion of the

law day in the year 2004. I quote the words of the then chief justice Shri R.C. Lahoti which were as follows " the criteria for appointment of the judge whether from the bar or from the service should be character, merit and integrity . It is because of his character that one commands respect in the society. Credibility of the institution is held high if those who compose it are respected in their own right and not because of the institution. A lawyer's merit is to be judged not by the volume of his practice but by his knowledge of law. Merit without integrity is dangerous for the judiciary their can not be a slightest of compromise on integrity, those with questionable or doubtful integrity should not be appointed as judges, and procedure for screening the judges for appointment must ensure that no wrong person passes through the filter".

The elevation of My Lord justice Piyush Mathur fulfills the expectations expressed through the words of the then Chief justice Shri R..C. Lahoti.

But I stand here amidst an emotional tumult ...what is justice? The echoes of judgments in the corridors, a concrete statute, the substantiality of oratory, a highly hailed concept of civilizations or just an innocent thought!!! I do not know the reason but my heart catches my finger and shows the world to my eyes....Justice is a concept but injustice a reality. Justice is felt while injustice followed the human history. So different, so contrary yet so cognate. The heart, where will to overpower is fostered, guardians the feeling of friendship. I visualize the phenomenon of Brocken Spectre where the shadow of mountains is cast upon the clouds. Metaphysical in imagination but truly real in reality. The infallibility of humans is unquestionable but the alchemy of a judge prescribes to rise above the ordinary to sublime, anxiety to imperturbability, perplexity to reason, translucent to transparent, enigma to simplicity, arrogance to modesty and above all unjust to just.

The professional profile of My lord justice Shri Piyush Mathur has already been read by my earlier speakers. To put it briefly I will say that he was born in the purple of advocacy on 12 .3.1960, he started his carrier in legal profession before the Indore bench of this court in the year 1991 . The grand father of my lord and his father lt. Shri K.N.Mathur were the practicing lawyers of Shajapur . My lord was awarded gold medal in LL.B by the Vikram University . He was the counsel of various organizations. My lord was also a government advocate for the State of M.P. from 1995 to 1998.

The Madhya Pradesh High Court Bar Association has high expectations from my lord as judge of this prestigious high court. Mark Twain has said that "all you need in your life is ignorance and confidence and success is sure." The words of mark twain may not stand to be correct for a judge judges are meant to act as humble interpreters of law, not to pose as emperors who adjudicate a whim. We need faceless impassive judges, compassionate but disciplined and acknowledge the supremacy and independence of judiciary. It is said that a good lawyer make a good judges, good judges make good judgment. The courts are decorated with good judges and good lawyers together but not the other alone. What is a word without the letters and letters, if not a word. The judiciary and the

bar are the wheels of the same chariot. The cooperation of the bar in fulfilling your duties would always be our privilege and you would not find the members of the bar failing in their duties. We all wish that judgments that shall be rendered by the Ho'ble Shri Justice Piyush Mathur, be written not in ink but in wisdom and prudence.

With these words I on behalf of the Madhya Pradesh High Court Bar Association and also on my behalf warmly welcome you, hope for a bright and successful tenure with all the goodness of the almighty to be showered upon you and believe that 'FIAT JUSTITIAE RUAT CAELUM' ie Justice shall be done though heavens may fall.

Shri R. P. Agrawal, President, High Court Advocates' Bar Association, Jabalpur, while felicitating the new Judge, said :–

It is my proud privilege to congratulate Mr Justice Piyush Mathur, who hitherto before belonged to the lawyers community, on his elevation as an Additional Judge of this High Court. My Lord was born on 12th of March 1960. He was enrolled as an Advocate on 17.2.1984 in the rolls of the State Bar Council, M.P. My Lord has the experience of conducting Civil and Criminal matters on the original side for a number of years. After gaining knowledge and experience of working in the trial Courts my Lord started practicing regularly in the High Court of M. P. Bench at Indore.

My Lord comes from family of lawyers. My Lord's grandfather Late MML Mathur and My Lord's father Late K.N. Mathur were also leading lawyers at Shajapur. My Lord obtained his B.A. (Hons.) Degree in 1980 and LLB Degree in 1983. My Lord is a Gold Medalist having been awarded Gold Medal in LLB by Vikram University. My Lord was also awarded National Scholarship by Vikram University. My Lord was closely Associated with Shri A.M. Mathur, Sr. Advocate and Former Advocate General of the State of M.P. and Shri S.K.. Kulsheshtra, Forme; Judge of this Court. My Lord has been the Standing Counsel for Bhabha Atomic Research Centre, Central Administrative Tribunal Indore, Housing & Urban Development Corporation, M.P. Housing Board, M.P. Board of Secondary Education, M.P. Electricity Board, M.P. Warehousing & Logistics Corporation, Ujjain Development Authority, Dewas Development Authority, several Municipal Corporations & Municipal Councils, Mandi Samiti and Town Improvement Trust as well as Companies and Business houses. My Lord also worked as Additional Standing Counsel for Union of India and appeared in large number of cases relating to Land Acquisition Appeals in the High Court. My Lord has also handled cases of Army Officers and has rich experience in Service matters.

My Lord within a very short span of his practice at Indore, earned a name and fame for himself and established himself as one of the leading lawyers of the Indore Bench of this High Court and figured in almost all important cases.

My Lord is fully aware, that this High Court enjoys the legacy of imminent and great Judges. I am sure, My Lord would also bring glory to this institution by

sheer dint of his merits. Elevation to this August office provides an opportunity to serve the cause of humanity within the four corners of the law. The Society is interwoven with diversities where the fight between haves and haves not is continuing unabated. The cause of down trodden people should be the upper most concern, so that the haves not are not deprived of getting justice.

My Lord has a long way to go and I am sure he would bring name and fame to this institution.

I, on behalf of High Court Advocates' Bar Association, and my own behalf wish a very successful tenure.

Shri Rameshwar Neekhara, President M. P. State Bar Council, while felicitating the new Judge, said :–

'सर्वप्रथम मैं नवनियुक्त माननीय न्यायाधिपति श्री जस्टिस पीयूष माथुर के पदभार ग्रहण करने के इस अवसर पर उन्हें अपनी ओर से, मध्य प्रदेश राज्य अधिवक्ता परिषद की ओर से, एवं प्रदेश के सभी अधिवक्ताओं की ओर से हार्दिक बधाई देते हुये उनका गर्मजोशी से स्वागत करता हूँ।

माननीय श्री जस्टिस पीयूष माथुर जी :–

हिंदी की एक सर्वमान्य कहावत है "होनहार बिरवन के होत चीकने पात" आपके संदर्भ में यह कहावत स्वाभाविक रुप से लागू होती है। शाजापुर में आपके दादा श्री एम. एम. एल. माथुर एवं पिता श्री के. एन. माथुर न केवल विधि व्यवसाय से जुड़े थे वरन ख्यातिलब्ध अधिवक्ता के रुप में समाज में प्रतिष्ठित थे, और इसी परिवार की तीसरी पीढ़ी के रुप में आपने भी विधि व्यवसाय को अपना कार्यक्षेत्र चुना। विद्यार्थी जीवन में ही आपने अपनी तीक्ष्ण, मेधा और बुद्धिकौशल का परिचय दिया और एल एल. बी. में विक्रम विश्वविद्यालय से गोल्ड मेडल भी प्राप्त किया। विद्याअध्ययन के दौरान आपको नेशनल स्कालरशिप भी प्राप्त हुई।

17, फरवरी 1984 को आपने मध्य प्रदेश राज्य अधिवक्ता परिषद से अधिवक्ता के रुप में नामांकन कराया और इंदौर को अपना कार्य क्षेत्र चुनते हुये अथक परिश्रम उद्यमिता और बुद्धि कौशल के बल पर स्वयं को एक प्रतिष्ठित अधिवक्ता के रुप में स्थापित किया। विधि व्यवसाय की अवधि में आप भारत सरकार के अतिरिक्त स्थायी अधिवक्ता होने के साथ ही भाभा सेन्टर फार एडवांस टेक्नोलॉजी, मध्य प्रदेश शासन के शासकीय अधिवक्ता, हाउस एण्ड डेवलपमेन्ट कार्पोरेशन, मध्य प्रदेश राज्य निर्वाचन आयोग, म.प्र. हाउसिंग बोर्ड, म.प्र. सेकेन्डरी ऐजुकेशन बोर्ड, म.प्र. विद्युत मंडल सहित अनेक संस्था के स्थायी अधिवक्ता भी नियुक्त किये गये। इसके अतिरिक्त मियूनिसिपल कार्पोरेशन, टाउन इम्प्रूमेंट ट्रस्ट सहित अनेक कंपनियों के स्थायी अधिवक्ता नियुक्त किये गये। उच्च न्यायालय, केन्द्रीय प्रशानिक अभिकरण, राज्य उपभोक्ता फोरम सहित अनेक न्यायालयों में आपने जटिल कानूनी प्रश्नों से भरे मुकदमों में आपने अपने पक्षकारों की ओर से सफल पैरवी की। आपके दीर्घ अनुभव, कानून की विभिन्न विधाओं में गहरे ज्ञान से आज प्रदेश का अधिवक्ता वर्ग इसलिये गौरान्वित हुआ है, क्योंकि एक न्यायाधिपति के रुप में अब आपकी प्रतिभा और ज्ञान प्रदेश में सभी अधिवक्ता एवं पक्षकारों को समान रुप से प्राप्त हो सकेगा। न केवल एक विधि वेत्ता वरन एक बहुमूल्य प्रतिभा संपन्न बुद्धिजीवी के रुप में सामाजिक स्तर पर फैली विसंगतियों से आप भलीभांति परिचित है। आम

आदमी भी समाज में हर स्तर पर हताशा, अपमान, उपेक्षा और अन्याय का सामना कर रहा है, और इसमें अगर उसे अपने दुखों से निवारण हेतु अगर उसे आशा की कोई किरण नजर आती है, तो वह हमारी न्यायिक व्यवस्था है। समाज में जो कुछ घटित हो रहा है उसका प्रभाव हमारी न्यायिक व्यवस्था पर भी समान रुप से पड़ रहा है। अनेक जगह हमारी न्यायिक व्यवस्था भी प्रतिकूलता का सामना कर रही है। इसमें भी बिलम्ब हो रहा है, और इन सभी का निराकरण किया जाना आवश्यक है। लोक अदालत और विधिक सेवा के माध्यमों से शीघ्र, सस्ते और सुलभ न्याय की कल्पना में ग्राम न्यायालयों की एक नयी कड़ी जुड़ने से समाज लाभान्वित होने की संभावनायें बढ़ी है, तथापि उच्च स्तर पर विवादों के निराकरण में अभी भी वह अपेक्षित गतिशीलता उपलब्ध नहीं है। आप जैसी विलक्षण प्रतिभा के धनी न्यायाधिपतियों के नियुक्त होने से इस प्रकार की समस्याओं के निराकरण के मार्ग प्रशस्त होंगे। इस हेतु मैं आशान्वित हूं।

आपके शपथग्रहण करने के इस अवसर पर इन्हीं शुभकामनाओं के साथ आपके सफल कार्यकाल की मंगल कामना करता हूं और अपेक्षा करता हूं कि आप उत्रोत्तर नये आयामों को स्पर्श करेंगे।

मैं पुनः मध्य प्रदेश राज्य अधिवक्ता परिषद की ओर से, एवं प्रदेश के सभी अधिवक्ताओं की ओर से आपके पदभार ग्रहण करने के इस अवसर पर आपको शुभकामनायें देता हूं।

Reply to Ovation by Hon'ble Shri Justice Piyush Mathur :-

When I Look at the Sky, in search of the shadow of Almighty God, I see the Fountain of Blessings incessantly flowing downwards on the Earth, upon those who seek to perform their duties with humility and sacred purity. As a firm believer of God I strongly believe in the prescription of the Holy Sacrament of the Godliness, in the entire Life Span of Humanity.

May We call the almighty God by any Name and give any Shape & Colour to its Holiness, the Light of its Bright Rays guides us throughout the journey, in quest for searching the Truth in Life and seeking Justice as Good Children of God.

The Almighty God has bestowed upon Me, an entirely New Responsibility of Administering Justice and bringing Harmony in the Sour Relationship of Litigants. I hope and trust, the almighty God, would give Me "Insight and Foresight" to perform this Pious and Noble Duty.

I am fortunate to have deeply connected with a variety of Individuals in My Life and I am proud to be their humble Friend, Relative and Colleague, as they all had bestowed their utmost support and confidence in Me, during the periods and moments of adversity and joy in My Life. On this occasion of Changing Robes, I express My greatest Regards to My Reverend Teachers and Gurus, My Older Relatives and Colleagues and Love to My Dear Friends, without whom I would not have lived the Life so Naturally, as I could do, while sharing My Accomplishments and Sorrows with All of them.

I Hope and Trust that in performing this New Assignment, My Dear Friends, Relatives and Fellow Lawyers would extend their fullest Support to Me and Guide

Me throughout My journey as a Judge, while presently enjoying and celebrating this moment as "Our Collective Achievement".

My Parents had taught 'Me many things in Life and the foremost amongst them was' to be "Impartial to All" and "Kind to the Weak" as they always believed that "All Men and Women are Born Free and are Equal". I hope their Blessings from Heaven would always strengthen Confidence in Me, in treading on the Path shown by Them to Me and the Generation of their Times, in finding the True meaning of Life.

The System of "Administration of Justice" is passing through a Challenging Time and the Citizens of the Country have Great Hopes and Expectations from The judiciary, of bringing about the Stalemate in Order. I would make sincere Endeavour of coming closer to the Expectation of My Countrymen and would keep the Flag of justice furling with Glory.

I express My Gratitude for the kindness bestowed upon Me, by the Hon'ble Chief justice and the Hon'ble judges of the Collegiam of the Supreme Court and the Madhya Pradesh High Court and am Thankful to all those Great Personalities, who have Contributed in Critical Development of My Personality & Professional Life.

I am Thankful to all the Hon'ble Speakers, who have placed Me in high Esteem Today, although I feel humbled in sharing with You All, that I am not worthy of such Adoration.

My Heartiest Thanks to Each One of You, who has spared His Valuable Time for Witnessing this Moment, by Attending My 'Swearing In' Ceremony Today.

Thank You Very Much.

Jai Hind.

Short Note
(47)

S.L. Kochar &
Mrs. Manjusha P. Namjoshi, JJ

DEVENDRA SINGH @ PAPPU
Vs.
STATE OF M.P.

Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Sections 3, 7 & 8 - ***Murder*** *- Circumstantial evidence - Appellant's wife met with homicidal death - Appellant was present with deceased in his house and took her to hospital - Appellant had given false intimation to police about consumption of poisonous substance by deceased - Appellant was having doubt on the character of deceased and also ill treating her - No explanation that how the deceased met a homicidal death - All these circumstances sufficient to bring home the guilt of appellant beyond reasonable doubt - Conviction u/s 302 IPC maintained - Appeal dismissed.*

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धाराएँ 3, 7 व 8 – हत्या – परिस्थितिजन्य साक्ष्य – अपीलार्थी की पत्नी की मानवघाती मृत्यु हुई – अपीलार्थी मृतक के साथ उसके घर में मौजूद था और उसे अस्पताल ले गया – अपीलार्थी ने पुलिस को मृतक द्वारा विषाक्त पदार्थ सेवन करने के बारे में मिथ्या सूचना दी – अपीलार्थी को मृतक के चरित्र पर संदेह था और उसके साथ दुर्व्यवहार भी करता था – कोई स्पष्टीकरण नही कि मृतक की मानवघाती मृत्यु कैसे हुई – ये सभी परिस्थितियाँ अपीलार्थी का दोष युक्तियुक्त शंका से परे सिद्ध करने के लिए पर्याप्त – भा.द.सं. की धारा 302 के अन्तर्गत दोषसिद्धि कायम – अपील खारिज।

Cases referred :

(2007) 3 SCC (Cri) 728.

Jai Singh with *Rajesh Chouhan,* for the appellant.
L.L. Sharma, G.A., for the respondent/State.

***Cr.A. No.412/2003 (Indore), D/- 17 July, 2009.**

Short Note
(48)

A.K. Shrivastava, J

MANIRAM
Vs.
HARIKISHAN & ors.

Limitation Act (9 of 1908), Article 142 - *Suit for possession must be brought within 12 years of dispossession - Plaintiff failed to file any document in order to demonstrate his possession within 12 years of filing of suit - Date of dispossession is also not disclosed - On the contrary, revenue record showing possession of defendant - Held - Suit barred by limitation - Appeal allowed.*

परिसीमा अधिनियम (1908 का 9), अनुच्छेद 142 – कब्जे का वाद बेकब्जा होने से 12 वर्ष के भीतर लाया जाना चाहिए – वादी वाद पेश करने के 12 वर्ष के भीतर अपने कब्जे को प्रदर्शित करने के लिए कोई दस्तावेज पेश करने में असफल रहा – बेकब्जा होने की तारीख भी प्रकट नही की गई – इसके प्रतिकूल राजस्व अभिलेख प्रतिवादी का कब्जा दर्शाता है – अभिनिर्धारित – वाद परिसीमा वर्जित – अपील मंजूर।

Dinesh Maheshwari, for the appellant.
P.M. Jain, for the respondent Nos.3 & 4.
Deepak Rawal, G.A., for the respondent No.10 (Formal Party).
None, for other respondents, though served.

***S.A. No.155/1994 (Indore), D/- 23 July, 2009.**

Short Note
(49)

Abhay M. Naik, J

NAGAR PANCHAYAT, ARON
Vs.
SHANTI BAI & ors.

Land Revenue Code, M.P. (20 of 1959), Sections 107 & 257 - *Suit challenging order effecting correction in revenue map - Revenue officers named in S. 107 alone are competent to take action in respect of correction in the revenue map - Jurisdiction of Civil Court excluded u/s 257 - Suit rightly held not maintainable - Appeal dismissed. (2006) 5 SCC 720, 2002(2) MPHT 459 (ref.)*

"Sub-section (5) of Section 107 of M.P. Land Revenue Code, 1959 confers jurisdiction on the Settlement Officer and the Collector as the case may be to prepare or revise the map. Accordingly, Collector, Guna is not found to have acted beyond jurisdiction in directing for rectification of the mistake by making corrections vide his order. Since power to prepare or revise the map is vested in the Settlement Officer or Collector as the case may be, it alone has a power/jurisdiction to decide the objection and no civil Court shall have jurisdicxtion to nullify the order made in exercise of power under Section 107 of M.P. Lande Revenue Code. Section 257 of M.P. Land Revenue Code excludes the jurisdiction of civil Court in such matter because revenue officers named in Section 107 alone are competent to take action in respect of correction in the revenue map. In view of the pleadings, it is clear that the plaintiff has sought relief contrary to the existing revenue record and has challenged the order effecting thereby correction in the map which was made in exercise of exclusive power by virtue of Sub-section (5) of Section 107 of M.P. Land Revenue Code. This being so, the suit is held rightly as not maintainable. I may successfully derive strength on this point from

Apex Court decision in the case of *Devinder Singh and Others V. State of Haryana and Another* (2006) 5 SCC 720 and this Court decision in the case of *Shivnath Prasad Shrivastava and Others V. Board of Revenue of M.P., Gwalior and Others*, 2002(2) MPHT 459. Accordingly, substantial question of law is decided against the appellant. The appeal is found to have no substance and the same is hereby dismissed, however without order as to costs."

भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 107 व 257 – राजस्व नक्शे में सुधार करने के आदेश को चुनौती देते हुए वाद – सिर्फ धारा 107 में नामित राजस्व अधिकारी राजस्व नक्शे में सुधार के संबंध में कार्यवाही करने के लिए सक्षम हैं – सिविल न्यायालय की अधिकारिता धारा 257 के अन्तर्गत अपवर्जित – दावा पोषणीय न होना उचित रूप से अभिनिर्धारित – अपील खारिज। (2006) 5 SCC 720, 2002(2) MPHT 459 (संदर्भित).

S.K. Shrivastava, for the appellant.
K.N. Gupta with *Prakhar Dengula,* for the respondent Nos.1 to 5.
V.S. Chaturvedii, G.A., for the respondent No.6/State.

***S.A. No.30/2006 (Gwalior), D/- 30 June, 2009.**

Short Note
(50)

Arun Mishra &
Mrs. Sushma Shrivastava, JJ

R.S. AVTAR SINGH & CO. (M/S)
Vs.
VINDYACHAL AIR PRODUCTS PVT. LTD. & anr.

A. Micro, Small and Medium Enterprises Development Act (27 of 2006), Section 19 - ***Application for setting-aside decree, award or order - Deposit of 75% of the amount in terms of decree, award or as the case may be, in the manner directed by such Court, is mandatory pre-condition to entertain such application.***

क. सूक्ष्म, लघु और मध्यम उद्यम विकास अधिनियम (2006 का 27), धारा 19 – डिक्री, अधिनिर्णय या आदेश को अपास्त करने के लिए आवेदन – ऐसे आवेदन को ग्रहण करने के लिए ऐसे न्यायालय द्वारा निदेशित ढंग से डिक्री, अधिनिर्णय या यथास्थिति के निबंधनों के अनुसार 75% धनराशि जमा करना आज्ञापक पूर्व शर्त है।

B. Micro, Small and Medium Enterprises Development Act (27 of 2006), Section 19 - *The words used in S. 19* ***"in the manner directed by the Court"*** *cannot be interpreted so as to dilute the very requirement of deposit of 75% amount itself.*

ख. सूक्ष्म, लघु और मध्यम उद्यम विकास अधिनियम (2006 का 27), धारा 19 – धारा 19 में प्रयुक्त शब्द "न्यायालय द्वारा निदेशित ढंग से" का ऐसा निर्वचन नही किया जा सकता जो स्वमेव 75% धनराशि जमा करने की अति आवश्यकता को कम करे।

C. Micro, Small and Medium Enterprises Development Act (27 of 2006), Section 19 Proviso - *Proviso to S. 19 empowers the Court to pass appropriate order with respect to disbursement of the amount to the supplier on conditions as it considers reasonable under the circumstances of the case to impose - Considering the proviso 50% of the amount is ordered to be disbursed to respondent No.1 remaining amount 25% shall be invested in the fixed deposit to be disbursed in terms of final decision.*

ग. सूक्ष्म, लघु और मध्यम उद्यम विकास अधिनियम (2006 का 27), धारा 19 परन्तुक – धारा 19 का परन्तुक न्यायालय को, ऐसी शर्तों पर जो वह मामले की परिस्थितियों में आधिरोपित करना युक्तियुक्त विचारित करे, आपूर्तिकर्ता को धनराशि के संवितरण के सम्बन्ध में समुचित आदेश पारित करने के लिए सशक्त करता है – परिस्थितियों पर विचार कर 50% धनराशि प्रत्यर्थी क्र. 1 को संवितरित करने का आदेश दिया गया और शेष 25% धनराशि अंतिम विनिश्चय के निबंधनों के अनुसार संवितरित की जाने के लिए सावधि जमा में निवेशित की जाए।

Vivek Rusia, for the petitioner.
Shashank Shekhar, for the respondent No.1.
P.N. Dubey, Dy.A.G., for the respondent No.2.

***W.P. No.1602/2009 (Jabalpur), D/- 17 February, 2009.**

Short Note
(51)

R.S. Jha, J

SIYARAM
Vs.
STATE OF M.P.

Prisoners' Release on Probation Act, M.P. (16 of 1954), Section 9, Prisoners' Release on Probation Rules, M.P 1964, Rule 2 - *Consideration for release* - *Held - The manner of commission of offence is a relevant consideration - In the instant case, petitioners along with others committed brutal and preplanned murder with lethal weapons in broad day light - Not entitled for release on licence under the provisions of the Act and rules - No perversity or material irregularity found in rejecting the application of the petitioners for releasing on probation. (2007) 10 SCC 799, (2003) 6 SCC 144 (ref.)*

बंदियों का परिवीक्षा पर छोड़ा जाना अधिनियम, म.प्र. (1954 का 16), धारा 9 बंदियों का परिवीक्षा पर छोड़ा जाना नियम, म.प्र. 1964, नियम 2 – छोड़े जाने के लिए विचार करना – अभिनिर्धारित – अपराध कारित करने का ढंग एक सुसंगत विचार है – वर्तमान मामले में, याचियों ने अन्यों के साथ दिनदहाड़े घातक आयुधों से नृशंस और पूर्वनियोजित हत्या की – अधिनियम और नियमों के उपबंधों के अन्तर्गत लायसेंस पर छोड़े जाने के हकदार नही – याचियों का परिवीक्षा पर छोड़े जाने का आवेदन नामंजूर करने में कोई विपर्यस्तता या तात्विक अनियमितता नही पायी गयी। (2007) 10 SCC 799, (2003) 6 SCC 144 (संदर्भित)

D.D. Bhargava, for the petitioners.
Samdarshi Tiwari, G.A., for the respondents/State.

***W.P. No.4257/2008 (Jabalpur), D/- 1 September, 2009.**

Short Note
(52)

U.C. Maheshwari, J

STATE OF M.P.
Vs.
SANTOSH KUMAR & anr.

Penal Code (45 of 1860), Section 498-A - ***Cruelty - Illicit relations*** - *Illicit relations with another women being first wife alive, could not be treated to be the act of cruelty - Wife also could not state any specific act of cruelty or harassment - Particulars like date, place and time of incident also not stated - Mere vague allegations of demanding some articles could not deemed that any such demand was ever made - Acquittal of respondents proper - Leave refused. 2003 CrLJ 4708. (ref.)*

दण्ड संहिता (1860 का 45), धारा 498–ए – क्रूरता – अवैध सम्बन्ध – प्रथम पत्नी के जीवित रहते हुए अन्य स्त्री से अवैध सम्बन्ध क्रूरता का कृत्य होना नही माना जा सकता था – पत्नी भी क्रूरता या तंग करने का कोई विनिर्दिष्ट कृत्य कथित नही कर सकी – विशिष्टियाँ जैसे कि घटना की तारीख, स्थान और समय का भी कथन नही किया गया – केवल कुछ वस्तुओं की माँग करने के अस्पष्ट अभिकथन से यह नही समझा जा सका कि ऐसी कोई माँग कभी की गई – प्रत्यर्थियों की दोषमुक्ति उचित – अनुमति से इंकार किया गया। 2003 CrLJ 4708 (संदर्भित)

T.K. Modh, Dy.A.G., for the appellant.
None, for the respondents.

***Cr.A. No.469/2001 (Jabalpur), D/- 9 July, 2009.**

RAMRAJSINGH Vs. STATE OF M.P.

I.L.R. [2009] M. P., 3035

SUPREME COURT OF INDIA

Before Mr. Justice Dr. Arijit Pasayat, Mr. Justice Lokeshwar Singh Panta & Mr. Justice P. Sathasivam

15 April, 2009*

RAMRAJSINGH ... Appellant

Vs.

STATE OF M.P. & anr. ... Respondents

Negotiable Instruments Act (26 of 1881), Sections 138 & 141 - ***Dishonour of cheque - Appellant was General Manager of the Company and was held vicariously liable for Company for the offence u/s 138 - Conviction challenged - Held - No specific role attributed to him in the complaint - No notice was given to him - No evidence that at the relevant time appellant was in charge and responsible for the conduct of the business of the Company - Conviction & sentence set-aside - Appeal allowed.*** (Paras 9 to 11)

परक्राम्य लिखत अधिनियम (1881 का 26), धाराएँ 138 व 141 – चैक का अनादरण – अपीलार्थी कम्पनी का प्रबंध निदेशक था और धारा 138 के अन्तर्गत अपराध के लिए कम्पनी के लिए प्रतिनिधिक रूप से दायी ठहराया गया – दोषसिद्धि को चुनौती – अभिनिर्धारित – परिवाद में उस पर उपारोपित कोई विनिर्दिष्ट भूमिका नही – उसे कोई सूचनापत्र नही दिया गया – कोई साक्ष्य नही कि सुसंगत समय पर अपीलार्थी कम्पनी के कारोबार के संचालन के लिए भारसाधक और उत्तरदायी था – दोषसिद्धि और दण्डादेश अपास्त – अपील मंजूर।

Cases referred :

(2007) 4 SCC 70, (2007) 9 SCC 481.

J U D G M E N T

The Judgment of the Court was delivered by **Dr. Arijit Pasayat, J. :–** Challenge in this appeal is to the judgment of a learned Single Judge of the Madhya Pradesh High Court, Indore Bench, dismissing the revision application filed by the appellant questioning his conviction for an offence relating to Section 138 of the Negotiable Instruments Act, 1881 (in short the 'Act').

2. Respondent No.2-complainant was dealing in the business of transportation. The appellant was the General Manager of J.K. Utility Division of J.K. Synthetics Ltd. whereas the absconding accused Anup Chaturvedi was the Finance Manager. Both were working under the Managing Director Manoj Kumar Mathur. The non-applicant and the co-accused Anup Chaturvedi placed order No.U/QMR/Coal 96028 dated 7.8.1996 with one Vinayak Coal Corporation. In pursuance of this order, the coal was transported by Maruti Road Carrier, Indore which is owned by the appellant. The transportation charges of Rs.9,45,000/- were paid through four cheques. All the four cheques were given to the appellant by the co-accused.

*Cr.A. No.1103/2003.

3. As per the information given by the co-accused to the appellant, the appellant placed the cheques before the Bank for encashment but the same were dishonored. All the cheques were issued on Bank of Rajasthan Branch Jhalawad. The cheques were returned dishonoured with the endorsement of 'Stop Payment'. On 28.11.1996, a registered notice was sent to the Company which was served by "Registered Acknowledgment Due" on 6.12.1996. Even thereafter payments were not made. Therefore, the complaint was filed by respondent No.2 against the appellant and co-accused Anup Chaturvedi and Manoj Mathur and the case was proceeded against the appellant and absconding accused Anup Chaturvedi.

4. Respondent No.2 had stated in the complaint that appellant was working in the company. The order of transportation was placed by him, the material was received by him and the cheques were given to him by the appellant and co-accused Anup Chaturvedi. Out of four cheques, the complaint in regard to the cheque amount of Rs.2,00,000/- dated 12.9.1996 was not pressed because a separate complaint was filed for dishonour of this cheque.

5. The learned Judicial Magistrate, First Class, Indore, found the appellant guilty and the appeal was dismissed by learned Additional Sessions Judge, Indore. Both the courts found the appellant guilty. The appellant's stand was that he was not in charge and responsible for the conduct of the business of the company and, therefore, he should not have been held guilty. The cheques were not signed by him and a notice under Section 138 proviso (b) of the Act was not given in his name. The High Court did not accept the stand and dismissed the revision application.

6. Learned counsel for the appellant submitted that there is no evidence that the appellant was in charge and responsible for the conduct of the business of the company. A notice was not given to him. There was no specific role attributed to him in the complaint petition. Therefore, the conviction as recorded cannot be maintained.

7. Learned counsel for respondent No.2-complainant supported the judgment of the High Court.

8. It appears that the accused No.3 (Manoj Mathur) was discharged.

9. In *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr.* (2007(4) SCC 70) it was inter-alia observed held as follows:

> "16. Section 141 of the Act does not say that a Director of a company shall automatically be vicariously liable for commission of an offence on behalf of the Company. What is necessary is that sufficient averments should be made to show that the person who is sought to be proceeded against on the premise of his being vicariously liable for commission of an offence by the Company

must be in charge and shall also be responsible to the Company for the conduct of its business.

xx xx xx

20. The liability of a Director must be determined on the date on which the offence is committed. Only because Respondent 1 herein was a party to a purported resolution dated 15-2-1995 by itself does not lead to an inference that she was actively associated with the management of the affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not associate themselves in the management of the day-to-day affairs of the Company and, thus, are not responsible for the conduct of the business of the Company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was in charge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefor must be satisfied.

10. In *N.K. Wahi v. Shekhar Singh and Ors.* (2007 (9) SCC 481) it was observed as follows:

"6. Chapter XVII has been incorporated under the Act with effect from 1.4.1989. In certain contingencies referred to under Section 138 of the Act on the cheques being dishonored a new offence as such had been created. But to take care of the offences purported to have been committed provisions of sub-section (1) to Section 141 of the Act come into play. It reads as under:-

"141 - Offence by companies - (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence."

7. This provision clearly shows that so far as the companies are concerned if any offence is committed by it then every person who is a

Director or employee of the company is not liable. Only such person would be held liable if at the time when offence is committed he was in charge and was responsible to the company for the conduct of the business of the company as well as the company. Merely being a Director of the company in the absence of above factors will not make him liable.

8. To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are incharge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable.

9. Section 138 of the Act reads as under:-

"138. Dishonour of cheque for insufficiency, etc., of funds in the account -

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another persons from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an arrangement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both."

10. In order to bring application of Section 138 the complaint must show:

1 That Cheque was issued;

2. The same was presented;

3. It was dishonored on presentation;

4. A notice in terms of the provisions was served on the person sought to be made liable;

5. Despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice.

11. Section 141 of the Act in terms postulates constructive liability of the Directors of the company or other persons responsible for its conduct or the business of the company.

xx xx xx

13. In *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another* (2007 (4) SCC 70) it was, inter-alia, held as follows:-

"18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

19. In view of the above discussion, our answers to the questions posed in the reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and

responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141".

14. The matter was again considered in *Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhya and Anr.* (2006 (9) SCALE 212) and *Saroj Kumar Poddar v. State (NCT of Delhi) and Anr.* (JT 2007 (2) SC 233). It was, inter -alia, held as follows:

"....Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted...."

11. When the factual background of the present case is considered in the light of the principles referred to in *Neeta Bhalla and N.K. Wahi cases* (supra), the inevitable conclusion is that the appeal is bound to succeed. The conviction as recorded cannot be maintained. The appeal is allowed.

Appeal allowed.

BAIJNATH Vs. STATE OF M.P.

I.L.R. [2009] M. P., 3041

SUPREME COURT OF INDIA

Before Mr. Justice Harjit Singh Bedi & Mr. Justice J.M. Panchal

6 August, 2009*

BAIJNATH & anr. ... Appellants

Vs.

STATE OF M.P. ... Respondent

A. **Evidence Act (1 of 1872), Section 3 - *Witness - Principles dealing with appreciation of evidence in criminal matter - Law discussed.*** (Para 5)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्षी – दाण्डिक मामले में साक्ष्य के अधिमूल्यन से सम्बन्धित सिद्धांत – विधि की विवेचना की गई.

B. **Evidence Act (1 of 1872), Section 6 - *Res gestae - Eye witness PW-4 informed PW-3 about the incident who further informed Kotwar PW-2, who lodged the FIR - Evidence of PW-4 corroborated by PW-3 & PW-2 - Statement of PW-3 is admissible as res gestae evidence.*** (Para 7)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 6 – सम्बन्धित तथ्य और कार्य (रेस जेस्टे) – प्रत्यक्षदर्शी साक्षी असा–4 ने घटना के बारे में असा–3 को सूचित किया जिसने कोटवार असा–2 को सूचित किया जिसने एफ.आई.आर. दर्ज करायी – असा–4 के साक्ष्य की असा–3 व असा–2 द्वारा सम्पुष्टि की गयी – असा–3 का कथन सम्बन्धित तथ्य और कार्य (रेस जेस्टे) के साक्ष्य के रूप में ग्राह्य है।

ORDER

The prosecution story is as under :

On 19th October, 1990 Manohar, the deceased had beaten one Ramesh who had abused him a day earlier. On account of this incident, the three accused, viz., Baijnath, Devi Singh and Saligram had developed feelings of hostility towards him. At about 10.00 A.M. as Manohar was taking his bath at the village well known as `Jhiriya Wala Kuan' the three accused reached there armed with an axe, a knife and a sword respectively and attacked him killing him on the spot. Sahodra Bai-PW.4 who had gone to the well to draw water, saw the incident and ran away to inform Amol Singh-PW.3, the uncle of the deceased, as to what had transpired. Amol Singh-PW.3 then called Kotwal Kudau-PW.2 and asked him to report the matter to the police. An FIR was accordingly lodged at 12.00 noon. After registration of the case the Investigating Officer, Bhalenbdra Shekhar Tiwari-PW.19 reached the place of incident, made the necessary inquiries and sent the dead body for the post-mortem examination. He also recovered the brass pitcher and rope belonging to Sahodra Bai and a bucket and lota belonging to Manohar which were being used by him for taking a bath. An axe was also recovered at the instance of Baijnath, a knife at the instance of Devi Singh and a sword at the

*Cr.A. No.1206/2007

instance of Saligram. The first two weapons viz., the axe and the knife were sent for chemical examination to the FSL, Sagar and were found to be stained with human blood. On the completion of investigation the accused were charged under Section 302/34 of the IPC and were brought to trial before the Court of Sessions. The prosecution examined 19 witnesses in all including Sahodra Bai-PW.4, Dharmendra Singh-PW.5 and Ratan Singh-PW.6 as eye witnesses of the incident. In their statement under Section 313 of the Code of Criminal Procedure the accused denied all the allegations levelled against them and pleaded false implication at the instance of Amol Singh. They also produced DW-1, the father of PW-5 Dharmendra Singh in support of their case in an attempt to disprove the presence of Dharmendra Singh and Ratan Singh at the time of incident.

2. The trial court on an appreciation of the evidence held that the FIR had not been lodged at the police station but at the place of incident and that in any case the statement made by PW-2 Kotwal Kudrau could not be said to be an FIR under Section 154 of Cr.P.C. The Court further held that the statements of the eye-witnesses did not inspire confidence as they contained material differences inter- se and as there appeared to be no apparent motive for the murder and an attempt had been made to rope in Saligram, created a suspicion about the veracity of the witness account. The trial court accordingly acquitted the accused. The State, thereupon filed an appeal against acquittal which was allowed qua Baij Nath and Devi Singh but dismissed qua Saligram. It is in these circumstances that the matter is before us at the instance of the two accused who have been convicted.

3. Mr. Rajiv Shankar Dwivedi, the learned counsel for the appellants, has first and foremost pointed out that in the event that the trial court on an appreciation of evidence had acquitted all the accused, there was no reason whatsoever for the High Court to have taken a different view on the same evidence unless the findings of the trial court could be said to be perverse. In this behalf, he has placed reliance on *Ganesh Bhavan Patel and Another Vs. State of Maharashtra* [AIR 1979 SC 135]. It has also been submitted that the material discrepancies which had been highlighted by the trial court with regard to the evidence of the eye-witnesses as to the number of injuries on the person of the deceased clearly spelt out that the eye-witnesses had not seen the incident. He has finally pleaded that PW.4 was the most material but as her evidence was not inspiring conviction should not have been recorded on her statement.

4. Ms. Vibha Datta Makhija, the learned counsel for the State has, however, supported the judgment of the High Court and submitted that the evidence of Dharmendra Singh and Ratan Singh was credible but there was no reason whatsoever to disregard the testimony of PW-4 who had absolutely no animus against the accused and no reason to foist a false case on them. She has also pointed out that PW-4 had conveyed the information with regard to the incident to

Roop Singh-PW.1 and Amol Singh-PW.3 and as these two witnesses had affirmed the same in their statements, the evidence of these witnesses was admissible as res gestae evidence under Section 6 of the Evidence Act, 1872. In this connection, she has placed reliance upon *Sukhar Vs. State of U.P.* [(1999) 9 SCC 507]; and *Gentela Vijayavardhan Rao Vs. State of A.P.* [1996 (6) SCC 241].

5. We have given very careful consideration to the matter, more particularly, as we are dealing with a judgment of reversal. It is true that the trial court has given certain findings with respect to the evidence which had led to the acquittal, but we are of the opinion that some of the findings recorded by the trial court were unjustified and unrealistic. The broad principles dealing with appreciation of evidence in a criminal matter have been laid down in *Bhoginbhai Hirjibhai vs. State of Gujarat* [AIR 1983 SC 753,] and we respectfully reproduce the same :-

".....Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious :-

1. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

2. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

3. The powers of observations differ from person to person. What one may notice another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

4. By and large people cannot accurately recall a conversation and reproduce the very words used by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

5. In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make every precise or reliable estimates in such matters. Again it depends on the time-sense of individuals which varies from person to person.

6. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

7. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross- examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub- conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him perhaps it is a sort of psychological defence mechanism activated on the spur of the moment.

8. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore, cannot be annexed with undue importance. More so, when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses.

6. It is undoubtedly true that an accused is entitled to draw support with regard to his case from discrepancies or flaws in the prosecution evidence. Human fallibility, however cannot be ignored as highlighted by this Court hereinabove. Witnesses, cannot be, and should not be, expected to recall with complete precision as to what had happened more particularly (as in this case) of a sudden attack. On the contrary, an attempt by a witness to recapitulate every moment during the incident, or the evidence of several witnesses giving parrot like statements, could smack of tutoring.

7. We have examined the ocular evidence in the light of the arguments raised by the learned counsel for the parties and the principles aforestated. We find absolutely no reason whatsoever to disregard the evidence of PW-4. She has deposed that she had gone to the well at about 9.00 or 10.00 A.M. to draw water and for that purpose, had taken a brass utensil and a rope and it was at that time that she had seen Devi Singh and Baijnath causing injuries to Manohar. She further stated that she had left the utensil and rope behind in panic and rushed to the house of Amol Singh to tell him as to what had happened. Significantly the rope and brass utensil, and the bucket used by Manohar for taking a bath were recovered from the spot by the Investigating officer. We find from the cross examination of PW-4 that there was not even the slightest suggestion as to whether she bore any animosity towards the accused or that she had any reason to involve them in a false case. It is significant that it was on the information given by PW-4 that made Amol Singh further informed Kotwal Kudaun about the incident, who then went to the police station and lodged the report. We also find that the statement of Pw-4 is corroborated by Amol Singh and Roop Singh. Anmol Singh PW-3 stated that she had come running to him in panic and told him that Manohar had been killed by the accused and it was on this information that he had made arrangement to send the information to the police. We find in this background the statement of PW-3 is admissible as res gestae evidence. In *Sukhar's case* (supra) it has been observed :-

"Section 6 of the Evidence Act is an exception to the general rule; whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provision of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter ..."

8. Likewise in *Gentela Vijayvardhan Rao's case* (supra) this Court held:-

"The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognized in English law. The essence of the doctrine is that a fact which, though not in an issue, is so connected with the fact in issue 'as to form part of the same transaction' that it becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae".

9. It will be seen that PW-4 had made her statement to Amol Singh within a few minutes of the incident and can, therefore, be taken as good evidence.

10. *Ganesh Bhavan Patel's* case undoubtedly postulates that interference should not be made by the High Court in an acquittal appeal save in exceptional circumstances and if two views are possible on the evidence and the Trial Court has taken the one in favour of the accused, no interference is called for.

11. In the light of what has been observed hereinabove, we find that the trial court was completely in error in disbelieving the evidence of PW-4 as supported by the res gestae evidence of PW-3 and the High Court was justified on a re-appreciation of the evidence in setting aside the judgment of the Trial Court. With these observations, we dismiss the appeal.

Appeal dismissed.

I.L.R. [2009] M. P., 3046

WRIT APPEAL

Before Mr. Justice S. Samvatsar & Mr. Justice A.P. Shrivastava

21 August, 2009*

AMOLAK SINGH CHHABRA ... Appellant

Vs.

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

Service Law - ***Departmental Promotion Committee - Powers of judicial review by High Court*** - *Can the High Court reassess the findings of the Departmental Promotion Committee - Held - No - Normally, High Court or the Tribunal should not sit as an appellate court over the decision of the selection committee and should not take the task of selection on itself by considering the fitness of the candidates unless there are mala fides or the selection is arbitrary.* (Para 25)

सेवा विधि – विभागीय पदोन्नति समिति – उच्च न्यायालय द्वारा न्यायिक पुनर्विलोकन की शक्तियाँ – क्या उच्च न्यायालय विभागीय पदोन्नति समिति के निष्कर्षों को पुनर्निर्धारित कर सकता है – अभिनिर्धारित – नहीं – सामान्यतः उच्च न्यायालय या अधिकरण को चयन समिति के विनिश्चय पर विचार करते समय अपीलीय न्यायालय की तरह कार्य नही करना चाहिए और अभ्यर्थियों की उपयुक्तता पर विचार कर चयन का कार्य स्वयं नही करना चाहिए जब तक कि चयन मनमाना या असद्भावपूर्ण न हो।

Cases referred :

(2007) 14 SCC 641, (2009) 4 SCC 753, AIR 1987 SC 1889, (1993) 1 SCC 17, (1997) 4 SCC 424, (1997) 4 SCC 575, (1990) 1 SCC 305, (2002) 9 SCC 765.

K.N. Gupta with *M.P.S. Raghuvanshi,* for the appellant.

P.N. Gupta, G.A., for the respondent Nos.1 & 2 / State.

Ravindra Kumar Shrivastava, V.K. Bhardwaj with *Anand V. Bhardwaj & Nandita Dubey,* for the respondent No.3.

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 [respondent no.3 in the writ petition no.3584/08(s)] assailing the judgment dated 15.05.09 passed by the learned Single Judge of this Court whereby the writ petition filed by suresh Chandra Pandey i.e. the respondent no.3 before this Court is allowed.

2. Brief facts of the case are that petitioner Suresh Chandra Pandey was appointed as District Excise Officer on 12.08.83 while Amolak Singh Chhabra, appellant before this court and who was joined as respondent no.3 before the writ court was appointed on the same post on 22.03.88. Thus, admittedly, the Suresh Chandra Pandey was senior to Amolak Singh Chhabra in the cadre of District

*W.A. No.222/2009 (Gwalior)

Excise Officer. 3. In the year 2002, a Departmental Promotion Committee was held for considering the cases of District Excise Officers for promotion to the post of Assistant Commissioner (Excise). The Departmental Promotion Committee after considering the cases of Suresh Chandra Pandey and Amolak Singh Chhabra promoted them to the post of Assistant Commissioner (Excise). The petitioner Suresh Chandra Pandey being senior to the present appellant Amolak Singh Chhabra was placed at serial no.1 while the name of Amolak Singh Chhabra was at serial no.3. This shows that the petitioner Suresh Chandra Pandey continued to be the senior to Amolak Singh Chhabra in the cadre of Assistant Commissioner (Excise).

4. The Departmental Promotion Committee again met in the year 2006 for considering the cases for promotion from the post of Assistant Commissioner (Excise) to the post of Deputy Commissioner (Excise). There is no dispute that the criteria for promotion to the post of Deputy Commissioner (Excise) is merit-cum-seniority. The Departmental Promotion Committee, after considering the cases of petitioner Suresh Chandra Pandey & the appellant Amolak Singh Chhabra, placed Amolak Singh Chhabra at serial no.1 in the merit list while Suresh Chandra Pandey was placed at serial no.1 in the wait-list. The selection committee after considering the ACRs of Amolak Singh Chhabra allotted 20 marks while the selection committee allotted 14 marks to the petitioner Suresh Chandra Pandey.

5. Before the Departmental Promotion Committee was held, a challan was filed against the Amolak Singh Chhabra in the Ratlam Court on 28.03.06. In view of the fact that Amolak Singh Chhabra was facing criminal proceedings, the result of the DPC in respect of Amolak Singh Chhabra was kept in sealed cover and Suresh Chandra Pandey, the petitioner, was promoted to the post of Deputy Commissioner (Excise) vide order dated 26.05.06 Annexure P-4. From perusal of the said order, it is clear that the petitioner was promoted on officiating basis.

6. The criminal proceedings initiated against Amolak Singh Chhabra came to an end and he was discharged by the Criminal Court vide order dated 30.10.06 on the ground that the Government has not granted any sanction to prosecute him under Section 197 of code of Criminal Procedure. Subsequently, by order dated 12.11.07, the Government refused to grant sanction to prosecute Amolak Singh Chhabra and thus he was acquitted of the criminal case.

7. In spite of his discharge from criminal case, the sealed cover of Amolak Singh Chhabra was not opened. Hence, he filed a writ petition before this Court bearing no.W.P. 469/08(s). This writ petition was allowed by this court on 01.05.08 and the Single Judge of this Court after hearing the writ petition directed to open the sealed cover and give effect to the same. This order was challenged by Suresh Chandra Pandey by filing writ appeal bearing no.W.A.364/08 which was decided on 24.07.08 vide Ex.P-16.

8. The main contention of the petitioner i.e. Suresh Chandra Pandey in the aforesaid writ petition was that he was necessary party in the writ petition filed by Amolak Singh Chhabra .and the writ petition was filed without impleading him as a party. This argument was negatived by the Division Bench of this Court by holding that Amolak Singh Chhabra had filed the writ petition only for the relief of opening of the sealed cover and giving effect to it. Thus, Suresh Chandra Pandey was not a necessary party in the said petition. In para 12 of its judgment, the Division Bench after referring the order dated 26.05.06 whereby Suresh Chandra Pandey was promoted has held that the said order is an order promoting Suresh Chandra Pandey on officiating basis and therefore he has no right to hold the post. In such circumstances, the question of impleading him a party does not arise. This judgment has attained finality as the same was not assailed before the Apex Court.

9. After the judgment of the Division Bench, the sealed cover was opened on 24.07.08 and consequently by order dated 30.07.08 it was decided by the State Government to promote Amolak Singh Chhabra to the post of Deputy Commissioner (Excise) and as a consequence of the promotion of Amolak Singh Chhabra reverted Suresh Chandra Pandey to the post of Assistant Commissioner (Excise). This order was challenged by Suresh Chandra Pandey by filing writ petition bearing W.P. No.3584/08 (s). The said writ petition is allowed by the impugned judgment. Hence, this appeal.

10. The contention of Shri. K.N. Gupta, Senior Counsel appearing alongwith Shri. MPS Raghuvanshi, Advocate, is that the Writ Court has committed grave error in interfering in the assessment of the departmental promotion committee. According to him, the High Court cannot sit as an appellate court over the assessment of the DPC and set aside the same. On the other hand, Shri. Ravindra Shrivastava, Senior Counsel, appearing alongwith Smt. Nandita Dubey, Advocate, supported the judgment and contended that the assessment of the DPC was apparently arbitrary and therefore, the writ court has rightly interfered with the same after perusing the original ACRs and allowed the writ petition filed by Suresh Chandra Pandey.

11. In the present case, the service conditions of the petitioner and the respondent are governed by the rules namely Madhya Pradesh Public Services (Promotion) Rules, 2002. As per Rule 7, the criteria for promotion from the post of Assistant Commissioner (Excise) to the post of Deputy Commissioner (Excise) is merit-cum-seniority.

12. Sub-rule 5 of Rule 7 further provides that the meeting of the Departmental Promotion/Screening Committee shall be held every year and shall consider the suitability of the public servant to the vancancy. Sub-rule 6 further provides that the DPC shall assess the suitability of the public servants for promotion on the

basis of their service record and with particular reference to the Annual Confidential Reports (ACRs) for 5 preceding years. The sub-rule 7 further provides that when one or more ACRs are not available for any reason for the relevant period, the Departmental Promotion/Screening Committee shall consider the ACRs of the years preceding the period in question.

13. In the present case, the Departmental promotion Committee was held in the year 2006 and therefore, the relevant years start from 2001 to 2005 The Departmental Promotion Committee found that Suresh Chandra Pandey was graded as very good during all the five years. So far as Amolak Singh Chhabra is concerned, he was graded outstanding for four years i.e, for the year 00-01, 01-02, 02-03 and 03-04. So far as year 2005 is concerned, it appears from the ACR that during this year two persons i.e. O.P. Rawat who was an I.A.S. was Excise Commissioner has graded him outstanding while Alka Sirohi who was Excise Commissioner from 01.04.05 to 27.12.05 has graded him "Very Good"., As per the norms set up by the Departmental Promotion Committee, for every outstanding years the candidate was entitled for getting four marks. In the present case, Amolak Singh Chhabra was awarded four marks for all the five years and thus, his total came to 20 while petitioner Suresh Chandra Pandey was graded as "Very Good" in the last five years was awarded 14 marks. As per the norms set up by the Departmental Promotion Committee, the persons acquiring marks from 14-19 were to be graded as very good and the persons acquiring 20 marks were to be graded as outstanding. The Departmental Promotion Committee found Amolak Singh Chhabra outstanding and therefore recommended for his promotion.

14. The writ court found that out of five years Amolak Singh Chhabra was graded outstanding and was rightly awarded four marks for each of the year. However, for the year 2005, the writ court found that if he should have been granted three marks as his gradation for the part of that year was very good and part of the year was outstanding and thus, he should have been alloted 19 marks instead of 20 marks and if in case he was allotted 19 marks he would have been graded as "Very Good" i.e. in the same category to which Suresh Chandra Pandey was placed and hence Suresh Chandra Pandey being a senior should have been promoted.

15. The question in the present case is whether the Writ Court should have interfered in the grading of the Departmental Promotion Committee in such a manner? The scope of judicial review in DPC in such matters has been considered by the Apex Court.

16. The Apex Court in the case of *Union Of India and another Vs. S.K. Goel and others* reported in (2007) 14 SCC 641 has considered the scope of judicial review under Article 226 of the Constitution of India in DPC proceedings and held that ordinarily DPC proceedings should not be interfered by the courts of

law unless such DPC meetings are conducted illegally or in gross-violation of the standing Government instructions or there is mis-grading of confidential reports.

17. In another judgment i.e. *Dilip Kumar Garg and another Vs. State of Uttar Pradesh and others* reported in 2009 (4) SCC 753 while dealing with the scope of interference in the Departmental Promotion Committee, the Apex Court has held that the Courts must respect the decision of the administrative authorities who have experience in administration and should not interfere readily with the administrative decisions unless there is clear violation of some constitutional provision or statute.

18. The Apex Court in the case of *State Bank of India and others Vs. Mohd. Mynuddin* reported in AIR 1987 SC 1889 has held in para 5 that whenever promotion to a higher post is to be made on the basis of merit no officer can claim promotion to the higher post as a matter of right by virtue of seniority alone with effect from the date on which his juniors are promoted. It is not sufficient that in his confidential reports it is recorded that his services are 'satisfactory'. An officer may be capable of discharging the duties of the post of held by him satisfactorily but he may not be fit for the higher post. Before any such promotion can be effected it is the duty of the management to consider the case of the officer concerned on the basis of the relevant materials. If promotion has been denied arbitrarily or without any reason ordinarily the Court can issue a direction to the management to consider the case of the officer concerned for promotion but it cannot issue a direction to promote the officer concerned to the higher post without giving opportunity to the management to consider the question of promotion. There is good reason for taking this view. The Court is not by its very nature competent to appreciate the abilities, qualities or attributes necessary for the task, office or duty of every kind of post in the modern world and it would be hazardous for it to undertake the responsibility of assessing whether a person is fit for being promoted to a higher post which is to be filled up by selection. The duties of such posts may need skills of different kinds - scientific, technical, financial, industrial, commercial, administrative, educational etc. The methods of evaluation of the abilities or the competence of persons to be selected for such posts have also become now-a-days very much refined and sophisticated and such evaluation should, therefore, in the public interest ordinarily be left to be done by the individual or a committee consisting of persons who have the knowledge of the requirements of a given post to be nominated by the employer. Of course, the process of selection adopted by them should always be honest and fair. It is only when the process of selection is vitiated on the ground of bias, mala fides or any other similar vitiating circumstance other considerations will arise.

19. The another judgment on this point is in case of *Indian Airlines Corporation Vs. Capt. K.C. Shukla and others* reported in (1993) 1 SCC 17 in which the Apex Court has held that the High Court was anxious to be fair and just to those

others who had been selected by reducing the interview percentage then working out proportionally the marks obtained by respondent on ACR evaluation and interview and directing to promote him as by this method he would secure the minimum required cannot be accepted as proper exercise of jurisdiction under Article 226 of the Constitution of India. Adjusting equities in exercise of extraordinary jurisdiction is one thing but assuming the role of selection committee is another. The Court cannot substitute its opinion and devise its own method of evaluating fitness of a candidate for a particular post. Not that it is powerless to do so and in a case where after removing the illegal part it is found that the officer was not promoted or selected contrary to law it can issue necessary direction. For instance a candidate denied selection because of certain entries in his character roll which either could not be taken into account or had been illegally considered because they had been expunged the Court would be within jurisdiction to issue necessary direction. But it would be going too far if the Court itself evaluates fitness or otherwise of a candidate, as in this case.

20. Thus, in the aforesaid case, the Apex Court has laid down that the High Court cannot, in exercise of powers under Article 226 of the Constitution of India, sit as a appellate court over the decision of the selection committee and interfere in the same.

21. In the case of *State of Bihar and others Vs. Bateshwar Sharma* reported in (1997) 4 SCC 424, the Apex Court has again considered the scope of judicial review and held that the view taken by the High Court is palpably illegal for the reason that once the DPC had found that the respondent was unfit for promotion up to a date, the only course that requires to be adopted by the High Court was to remit the matter to the Government for constitution of the DPC to consider respondent's fitness for promotion in the later period. In that event, the DPC would go into the merits afresh and find out whether the respondent would be fit for promotion. If he would be found to be fit and recommendation is made in that behalf, the Government would appoint him on regular basis and he would give him necessary seniority. The DPC is the only competent authority to decide the merits.

22. In the case of *Durga Devi and another Vs. State of H.P. and others* reported in (1997) 4 SCC 575, the Apex Court has held that the Tribunal fell in error in arrogating to itself the power to judge the comparative merits of the candidates and consider the fitness and suitability for appointment. That was the function of the Selection Committee. The order of the Tribunal under the circumstances cannot be sustained.

23. In the case of *Dalpat Abasaheb Solunke Vs. Dr. B.S. Mahajan* reported in (1990) 1 SCC 305, the Apex Court has held as under:

> "...It is needless to emphasize that it is not the function of the court to hear appeals over the decisions of the Selection

Committees and to scrutinize the relative merits of the candidates. Whether a candidate it fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant statutes. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so-called comparative merits of the candidates as assessed by the court, the High Court went wrong and exceeded its jurisdiction

24. In the case of *Joginder Singh and Others Vs.Roshan Lal and others* reported in (2002) 9 SCC 765, the Apex court has held that the High court in exercise of its jurisdiction under Article 226 of the constitution is not supposed to act as an Appellate Authority over the decision of the Departmental Selection Committee. If the Committee has been properly constituted, as in this case, and the post is advertised and a selection process known to law which is fair to all, is followed, then the High Court could have no jurisdiction to go into a question whether the Departmental Selection Committee conducted the test properly or not when there is no allegation of mala fides or bias against any member of the Committee.

25. Thus, the gist of the principle laid down by the Apex Court, in various cases, is that normally High Court or the Tribunal should not sit as an appellate court over the decision of the selection committee and should not take the task of selection on itself by considering the fitness of the candidates unless there are mala fides or the selection is arbitrary. In the present case, the petitioner was graded "Very Good" for all the five years and thus he was rightly awarded 14 marks by the Departmental Promotion Committee. This position is not at all disputed by the petitioner himself. The only contention of the petitioner is that the respondent Amolak Singh Chhabra should have also been graded as "Very Good" and not "Outstanding" and he should have also been awarded 19 marks. The Single Judge was of the view that instead of 20 marks he should have been awarded 19 marks.

26. The question is whether this exercise can be done by the High court in exercise of powers under Article 226 of the Constitution of India. In the present case, there are no allegations of mala fides. So far as the service record is concerned, it is undisputed that Amolak Singh Chhabra secured "Outstanding" grading in first four years. As far as the last year is concerned, for part of the

year during which Shri. O.P. Rawat was the accepting authority, he was graded as "Outstanding" while for the remaining part of the year he was graded as "Very Good" by Alka Sirohi, the another accepting authority. Thus, he was awarded "Outstanding " for more than four years' period and awarded "Very Good" for the part of the year. Considering the overall scenario, if the DPC had graded him as "Outstanding" for the entire five years then it cannot be said that the said action of the DPC was arbitrary particularly when as per Circular No.3-18/2001/1/3/1 dated 11.06.02 and memo of the same number dated 12.06.02, the DPC has power to increase one mark to any of the candidates. This power is exercised by the DPC and awarded him 20 marks which cannot be said to be arbitrary.

27. In such a situation, the learned Judge has certainly exceeded in its jurisdiction in interfering in the grading of the petitioner and holding that instead of 20 marks, 19 marks should have been awarded to Amolak Singh Chhabra and in such circumstances the impugned order cannot be sustained in the eyes of law and hence, the same is set aside.

28. Resultantly, the appeal stands allowed and the petition filed by Suresh Chandra Pandey stands dismissed with no order as to costs.

Appeal allowed.

I.L.R. [2009] M. P., 3053
WRIT APPEAL
Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta
8 September, 2009*

SOUTH EASTERN COALFIELDS LTD. & ors. ... Appellants
Vs.
NIJAMUDDIN & anr. ... Respondents

A. Service Law - ***Correction of Date of Birth - At the fag end of the career - Permissibility*** - *Held - Not permissible - But, once the employer took up the claim and on the basis of mark-sheet of Board of Secondary Education placed by employee referred the matter to the Age Determination Committee, employer is estopped to raise a plea that there has been belated approach by the employee - It is a somersault which has to be taken exception to - The same is not permissible.* (Para 12)

क. सेवा विधि – जन्म तिथि का सुधार – कार्यकाल के अंतिम छोर पर – अनुज्ञेयता – अभिनिर्धारित – अनुज्ञेय नही – किन्तु जब एक बार नियोक्ता ने दावा ग्रहण कर लिया और कर्मचारी द्वारा लगायी गयी माध्यमिक शिक्षा मण्डल की अंकसूची के आधार पर मामला आयु अवधारण समिति के पास भेज दिया, तो नियोक्ता यह अभिवचन उठाने से विबंधित है कि कर्मचारी द्वारा विलम्ब से निवेदन किया गया है – यह एक कायापलट है जिसे उसके अपवाद में लेना होगा – यह अनुज्ञेय नही है।

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*W.A. No.1183/2008 (Jabalpur)

B. Service Law - *Judicial Review - Decision of the Age Determination Committee - Order passed by the authorities suffers from procedural irregularity - Procedural irregularity would include where relevant factors have not been considered - Age Determination Committee has not considered at all mark-sheet of Board of Secondary Education - Held - An error has crept in the decision of the Committee as it has ignored the mark-sheet of Board of Secondary Education which reflects the date of birth.* (Para 16)

ख. सेवा विधि – न्यायिक पुनर्विलोकन – आयु अवधारण समिति का विनिश्चय – प्राधिकारियों द्वारा पारित आदेश प्रक्रियात्मक अनियमितता से ग्रस्त – प्रक्रियात्मक अनियमितता वहाँ सम्मिलित होगी जहाँ सुसंगत कारकों पर विचार नही किया गया है – आयु अवधारण समिति ने माध्यमिक शिक्षा मण्डल की अंकसूची पर किसी भी ढंग से विचार नही किया – अभिनिर्धारित – समिति के विनिश्चय में त्रुटि है क्योंकि उसने माध्यमिक शिक्षा मण्डल की अंकसूची की उपेक्षा की है जो जन्म तिथि को प्रकट करती है।

Cases referred :

(2005) 12 SCC 201, (1995) 4 SCC 172, (2003) 6 SCC 483, (1993) 2 SCC 162, 1994 Supp (1) SCC 155, (1994) 6 SCC 302, (1997) 5 SCC 181, (2005) 6 SCC 49, AIR 1989 SC 997, (2005) 10 SCC 84, (2001) 2 SCC 386, (1995) 6 SCC 749, (1997) 7 SCC 463.

P.S. Nair with *Shishir Dixit,* for the appellants.

S.P. Tripathi, for the respondent No.1.

Naman Nagrath & Mourya, for the respondent No.2.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** :–In this intra-court appeal preferred under Section 2(1) of the M.P. Uchcha Nayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005, the legal sustainability of the order dated 12.8.2008 passed in Writ Petition No.17742/2006 has been called in question.

2. Sans unnecessary details, the facts which are necessitous to be unfurled are that the respondent was appointed on 6.7.1974 and at the time of entering into service his age was recorded as 29 years in his service register. In the year 2003, on the basis of the mark-sheet of the High School Examination certificate and other documents brought on record, the present appellants undertook an exercise of verification of the date of birth of the writ petitioner. The respondent produced the mark-sheet and other documents from the Board of Secondary Education and the same were got verified by the authorities from the Board which were found to be genuine. Because of the aforesaid situation, the matter was referred to the Age Determination Committee which, by its decision dated 22.6.2005

and 27.6.2005, assessed the age of the respondent as 57 and half years as on 22.6.2005 by its communication dated 28.6.2005. Eventually, the respondent was superannuated w.e.f. 31.12.2007 by order dated 31.8.2007. The said order was assailed before the learned single Judge on the foundation that there had been erroneous determination of the age on the basis of the entry in the Form–B Register despite the fact that authoritative and sanguine documents were available as per the Implementation Instruction No.76. It was urged that it was incumbent on the part of the Age Determination Committee to have determined the age on the basis of the said documents but, as it is vivid, the age has been arbitrarily assessed the age to be 57 years and half as on 22.6.2005.

3. The stand and stance of the respondent were combatted by the present appellant contending that in Form B register there was a declaration by the employee that he was 29 years of age in the year 1974 and, therefore, the contention that the date of birth should be recorded as 23.11.1953 was absolutely misconceived. That apart, it was resisted on the ground that the respondent sought correction of his date of birth at the fag end of his service career and in view of the decision rendered in *Coal India Ltd. and another v. Ardhendu Bikas Bhattacharjee and others,* (2005) 12 SCC 201, it was impermissible.

4. The learned single Judge analysed the facts and expressed the view that the employer and its functionaries themselves had noticed the discrepancy and referred the matter to the Age Determination Committee; that the marksheet obtained from the Board of Secondary Education was to be given credence under the scheme of Implementation Instruction No.76; that the Age Determination Committee committed error in its assessment; and that the petitioner was entitled to continue up to sixty years of age treating his date of birth as 23.11.1953. Being of this view, he directed the respondent-authorities to correct the date of birth of the petitioner and permit him to continue in service till the age of superannuation and extend him all consequential benefits which he has been deprived of as a result of the illegal order of superannuation.

5. We have heard Mr. P.S. Nair, learned senior counsel along with Mr. Shishir Jain, for the appellants; Mr. S.P. Tripathi, learned counsel for the respondent No.1 and Mr. Naman Nagrath and Mr. Mourya, learned counsel for the respondent No.2.

6. Mr. Nair, learned senior counsel assailing the order passed by the learned single Judge submitted that when there is a categorical mention about the age of the petitioner in the 'Form B' Register and that was the earliest document in point of time and further the Age Determination Committee had determined the age on the basis of X-ray report, the same should have been accepted. It is proponed by him that the learned single Judge has fallen into error by not accepting the submission of the employer that the writ petitioner had raised a dispute at the fag

end of his career which is not permissible. It is also urged that once the Age Determination Committee has determined the age, the same should have been treated as final being beyond assail.

7. Mr. S.P. Tripathi, learned counsel appearing for the respondent No.1 submitted that the order passed by the learned single Judge cannot be found fault with as there has been appropriate and apposite analysis of the facts and the same is founded on the Implementation Instruction No.76. It is canvassed by him that once the appellants had themselves sent the matter to the Age Determination Committee, they cannot take a somersault and advance a plea that the respondent could not have raised the dispute as regards his date of birth towards the fag end of his career.

8. First we shall deal with the facet whether the writ petition should have been thrown overboard on the ground that the dispute as regards the date of birth has been raised at the fag end of career. In *Ardhendu Bikas Bhattacharjee and Others* (supra), the Apex Court has held as follows:

> *"....It is well settled that an employee will not be permitted to apply for change of date of birth at the fag end of his service career. In the instant case we do not know on what basis after 38 years the Secondary Education Board in Bangladesh corrected the matriculation certificate. This is essentially a question of fact, and in any case the High Court ought not to have exercised its writ jurisdiction to determine the real date of birth...."*

9. In *Burn Standard Co. Ltd. v. Dinabandhu Majumdar,* (1995) 4 SCC 172, it has been ruled thus:

> *"Entertainment by High Courts of writ applications made by employees of the Government or its instrumentalities at the fag end of their services and when they are due for retirement from their services, in our view, is unwarranted. It would be so for the reason that no employee can claim a right to correction of birth date and entertainment of such writ applications for correction of dates of birth of some employees of Government or its instrumentalities will mar the chances of promotion of his juniors and prove to be an undue encouragement to the other employees to make similar applications at the fag end of their service careers with the sole object of preventing their retirements when due. Extraordinary nature of the jurisdiction vested in the High Courts under Article 226 of the Constitution in our considered view, is not meant to make employees of Government or its*

instrumentalities to continue in service beyond the period of their entitlement according to dates of birth accepted by their employers, placing reliance on the so-called newly found material. The fact that an employee of Government or its instrumentality who will be in service for over decades, with no objection whatsoever raised as to his date of birth accepted by the employer as correct, when all of a sudden comes forward towards the fag end of his service career with a writ application before the High Court seeking correction of his date of birth in his Service Record, the very conduct of non-raising of an objection in the matter by the employee, in our view, should be a sufficient reason for the High Court, not to entertain such applications on grounds of acquiescence, undue delay and laches. Moreover, discretionary jurisdiction of the High Court can never be said to have been reasonably and judicially exercised if it entertains such writ application, for no employee, who had grievance as to his date of birth in his 'Service and Leave Record' could have genuinely waited till the fag end of his service career to get it corrected by availing of the extraordinary jurisdiction of a High Court. Therefore, we have no hesitation, in holding, that ordinarily High Courts should not, in exercise of its discretionary writ jurisdiction, entertain a writ application/petition filed by an employee of the Government or its instrumentality, towards the fag end of his service, seeking correction of his date of birth entered in his 'Service and Leave Record' or Service Register with the avowed object of continuing in service beyond the normal period of his retirement.."

10. In *State of U.P. and Others v. Gulaichi* (SMT), (2003) 6 SCC 483, a two-Judge Bench of the Apex Court after referring to the decisions rendered in *Union of India v. Harnam Singh,* (1993) 2 SCC 162, Secy and *Commr., Home Deptt. v. R. Kirubakaran,* 1994 Supp (1) SCC 155, *State of Tamil Nadu v. T.V. Venugopalan,* (1994) 6 SCC 302 and *State of Orissa v. Ramanath Patnaik,* (1997) 5 SCC 181 expressed the view that the application for correction of date of birth cannot be entertained at the end of service career. Their Lordships reiterated the principles which have been laid down in *R. Kirubakaran* wherein it has been held as follows:

"This Court has repeatedly pointed out that correction of the date of birth of public servant is permissible, but that should not be done in a casual manner. Any such order must be passed on materials produced by the public servant from which the

irresistible conclusion follows that the date of birth recorded in the service book was incorrect. While disposing of any such application, the Court or the Tribunal, has first to examine, whether the application has been made within the prescribed period under some rule or administrative order. If there is no rule or order prescribing any period, then the Court or Tribunal has to examine, why such application was not made within a reasonable time after joining the service."

11. In *State of U.P. and Another v. Shiv Narain Upadhyaya,* (2005) 6 SCC 49, their Lordships have held as under:

"As such, unless a clear case on the basis of clinching materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the Court or the Tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the Court or the Tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time."

(Emphasis supplied)

12. The principles that have been laid down in the aforesaid decisions clearly enunciate that an employee cannot raise a dispute with regard to his date of birth and claim it otherwise towards the fag end of his service career.. But, a significant one, in the case at hand, the factual expose' is quite different. The appellant-employer undertook an exercise in the year 2003 and referred the matter to the Age Determination Committee, which recorded a finding. Once the employer took up the claim and on the basis of the documents placed by the respondent referred the matter to the Age Determination Committee it is estopped to raise a plea that there has been belated approach by the respondent. It is a somersault which has to be taken exception to. The same is not permissible and accordingly, on facts, we repel the submission of Mr. Nair, learned senior counsel for the appellant, on this score.

13. The second aspect which we intend to advert to is whether the decision of the Age Determination Committee is final and is not subject to the judicial review

by a writ court. In this context, we think it apposite to refer to the decision rendered in *State of U.P. v. Dharmander Prasad Singh,* AIR 1989 SC 997 wherein the Apex Court has laid down the parameters of judicial review :-

> *"However, Judicial review under Article 226 cannot be converted into appeal. Judicial review is directed, not against the decision, but is confined to the examination of the decision-making process. In Chief Constable of the North Wales Police v. Evans, (1982) 1 W.L.R. 1155 refers to the merits-legality distinction in judicial review. Lord Hailsham said:*
>
> *"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the Court."*
>
> *Lord Brightman observed :*
>
> *".....Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made..."*
>
> *And held that it would be an error to think :*
>
> *".....that the Court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself."*
>
> *When the issue raised in judicial review is whether a decision is vitiated by taking into account irrelevant, or neglecting to take into account of relevant, factors or is so manifestly unreasonable that no reasonable authority, entrusted with the power in question could reasonably have made such a decision, the judicial review of the decision-making process includes examination, as a matter of law, of the relevance of the factors."*

14. In *Damoh Panna Sagar Rural Regional Bank and Another v. Munna Lal Jain,* (2005) 10 SCC 84, a two-Judge Bench of the Apex Court ruled thus:

> *"10. Lord Greene said in 1948 in the famous Wednesbury case that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other of the following conditions was satisfied, namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the*

decision was one which no reasonable person could have taken. These principles were consistently followed in the UK and in India to judge the validity of administrative action. It is equally well known that in 1983, Lord Diplock in Council for Civil Services Union v. Minister of Civil Service (called the CCSU case) summarized the principles of judicial review of administrative action as based upon one or other of the following viz., illegality, procedural irregularity and irrationality. He, however, opined that "proportionality" was a "future possibility"."

Thereafter their Lordships, referred to the decisions in *Om Kumar v. Union of India,* (2001) 2 SCC 386, *B.C. Chaturvedi v. Union of India,* (1995) 6 SCC 749, *Union of India v. G. Ganayutham,* (1997) 7 SCC 463 and number of other decisions and eventually expressed the view as follows:

"14. The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the Wednesbury's case (supra) the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision."

15. We have referred to these decisions only to highlight that when the order passed by the authorities suffers from procedural irregularity, it is legally vulnerable. The said procedural irregularity would include where relevant factors have not been considered. In the case at hand, the Age Determination Committee has not addressed at all with regard to the relevance of the mark sheet issued by the Board of Secondary Education while determining the age. It is worth noting that the consideration of mark sheet and such other documents do find mention in the Implementation Instruction No.76. In this context, we may profitably reproduce the relevant portion of the Implementation Instruction No.76:

"(B) <u>Review/determination of date of birth in respect of existing employees</u>.

(i) (a) In the case of the existing employees Matriculation Certificate or Higher Secondary Certificate issued by the Universities or Board or Middle pass certificate issued by the Board of Education and/or Department of Public Instructions

and admit cards issued by the aforesaid Bodies should be treated as correct provided they were issued by the said Universities/Board/Institutions prior to the date of employment."

As is evincible the said facet has not been adverted to at all by the Age Determination Committee. Thus, indubitably, the relevant factors have not been considered and when relevant factors have not been considered, the decision of the Age Determination Committee is irrefragably subject to judicial review as the decision making process is legally unsustainable. At this juncture, it is worth noting that keeping in view the stance of the appellants, we got the documents produced by the writ petitioner before the employer verified by the Board of Secondary Education and an affidavit has been filed by the competent authority of the Board of Secondary Education stating that the documents are absolutely genuine.

16. In view of the aforesaid premises, we are of the considered opinion that an error has crept in the decision of the Age Determination Committee as it has ignored the mark sheet issued by the Board of Secondary Education which reflects the date of birth and, therefore, we concur with the view expressed by the learned single Judge.

17. Ex consequenti, the writ appeal, being sans substratum, stands dismissed. There shall be no order as to costs.

Appeal dismissed.

I.L.R. [2009] M. P., 3061
CONTEMPT CASE
Before Mr. Justice Rajendra Menon
6 November, 2009*

HORILAL ... Applicant
Vs.
BHAJANLAL ... Non-applicant

Contempt of Courts Act (70 of 1971), Section 12, Constitution, Article 215 - *Maintainability of Contempt Petition for execution of a decree passed by competent civil Court - Held - Not maintainable - When the Code of Civil Procedure provides for instituting a proceeding for execution of the judgment & decree, then a contempt application under Article 215 of Constitution r/w S. 12 of Act is not maintainable as the statute provides for a mechanism for execution of the decree passed.* (Para 3)

न्यायालय अवमान अधिनियम (1971 का 70), धारा 12, संविधान, अनुच्छेद 215 – सक्षम सिविल न्यायालय द्वारा पारित डिक्री के निष्पादन के लिए अवमानना याचिका

*Contempt Case No.1047/2009 (Jabalpur)

की पोषणीयता – अभिनिर्धारित – पोषणीय नही – जब सिविल प्रक्रिया संहिता निर्णय व डिक्री के निष्पादन के लिए कार्यवाही संस्थित करने का उपबंध करती है तब संविधान के अनुच्छेद 215 सहपठित अधिनियम की धारा 12 के अन्तर्गत आवेदन पोषणीय नही है क्योंकि कानून पारित डिक्री के निष्पादन की रीति का उपबंध करता है।

Cases referred :

(2000) 4 SCC 400.

S.K. Dwivedi, for the applicant.

ORDER

RAJENDRA MENON, J. :–This application has been filed for initiating action for contempt on the grounds of disobedience of order passed in MCC No.529/2009, an application under Section 151 of Code of Civil Procedure.

2. A suit for eviction was filed by the present applicant on the grounds contemplated under Section 12 (1) (a), (b) and (f) of the M.P. Accommodation Control Act, 1961. The suit has been decreed by the Trial Court, First Appellate Court and Second Appellate Court, After dismissal of the Second Appeal No.113 of 2005 by judgment dated 17.3.2009 by this Court, an application under Section 151 was filed by the respondent seeking some time to vacate the suit premises. Even though, time granted in MCC No.529/2009 for vacation of the suit premises has lapsed, the suit premises have not been vacated in accordance to the decree granted. Hence, this application has been filed for initiating actions for contempt.

3. Applicant wants execution of a decree passed by the Trial Court and affirmed by the First Appellate Court and Second Appellate Court.

4. Decree has been passed by a competent court having jurisdiction and therefore proceedings for execution under the Code of civil Procedure can be filed before the Court. When decree and judgment passed can be executed in accordance to the law, this contempt petition is not maintainable. When the Code of Civil Procedure provides for instituting a proceeding for execution of the judgment and decree, then a contempt application under Article 215 read with Section 12 of Contempt of Court Act is not maintainable as the Statute provides for a mechanism for Execution of the decree passed. In the case of *R.N.Dey and others Vs. Bhagyabati Pramanik and others* 2000(4) SCC Page-400, it is held as under:

> "7. We may reiterate that the weapon of contempt is not to be used in abundance or misused. Normally, it cannot be used for execution of the decree or implementation of an order for which alternative remedy in law is provided for. Discretion given to the Court is to be exercised for maintenance of the Court's dignity and majesty of law.....
>
> 8. Further, the decree-holder, who does not take steps to execute

the decree in accordance with the procedure prescribed by law, should not be encouraged to invoke contempt jurisdiction of the Court for non-satisfaction of the money decree. In land acquisition cases when a decree is passed the State is in the position of a judgment-debtor and hence the Court should not normally lend help to a party who refuses to take legally-provided steps for executing the decree. At any rate, the Court should be slow to haul up officers of the Government for contempt for non-satisfaction of such money decree."

5. In view of the aforesaid, I am of the considered view that contempt proceedings cannot be initiated in the matter, where the statutory provision as contemplated under the Code of Civil Procedure permits the petitioner to seek execution of the order.

6. Accordingly, no case is made out for initiating action for contempt. In case petitioner is aggrieved, he can seek execution of the decree in accordance to the law.

7. Application is accordingly, dismissed.

Petition dismissed.

I.L.R. [2009] M. P., 3063
ELECTION PETITION
Before Mr. Justice R.C. Mishra
5 February, 2009*

RAJKUMAR PATEL ... Petitioner
Vs.
SHIVRAJ SINGH CHAUHAN ... Respondent

A. **Civil Procedure Code (5 of 1908), Order 17 Rule 1, *Proviso* -** *Interpreted in the light of Salem Advocate Bar's case (2005) 6 SCC 344 - The question as to grant of further adjournment to the party, who has already been able to get hearing of the trial adjourned on three occasions, would always depend upon the facts and circumstances of each case - In other words, the process of judicial interpretation has not made the proviso totally redundant, otiose and nugatory.* (Para 4)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 17 नियम 1, परन्तुक – सालेम एडवोकेट बार के मामले (2005) 6 एससीसी 344 के प्रकाश में निर्वचन किया गया – पक्षकार, जो पहिले से तीन अवसरों पर विचारण की सुनवाई को स्थगित करा पाने योग्य रह चुका है, को अतिरिक्त स्थगन दिये जाने संबंधी प्रश्न सदा ही प्रत्येक मामले के तथ्यों और परिस्थितियों पर निर्भर होगा – अन्य शब्दों में, न्यायिक निर्वचन की प्रक्रिया ने परन्तुक को पूर्णतः अनावश्यक, बेकार और निरर्थक नही बनाया है।

*Election Petition No.1/2006 (Jabalpur)

B. Representation of the People Act (43 of 1951), Section 87, Civil Procedure Code, 1908, Order 17 - *It is well settled - The provisions of Order 17 of the Code are applicable to an election petition.* (Para 5)

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 87, सिविल प्रक्रिया संहिता, 1908, आदेश 17 – यह सुस्थापित है – संहिता के आदेश 17 के उपबंध निर्वाचन याचिका को भी लागू हैं।

C. Civil Procedure Code (5 of 1908), Order 17 Rule 1 - *In election petition application of adjournment supported by medical certificate - Held - Application not supported by affidavit - Name of author of the certificate is not ascertainable and overwriting in the date of commencement of ailment - Trial had to be adjourned at the request of the petitioner on five earlier dates of hearing - It has led to a ridiculous result as the evidence of the petitioner is yet to be recorded in election trial whereas, in the meanwhile, a fresh election to the Legislative Assembly has already been held - Application rejected.* (Paras 6 & 7)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 17 नियम 1 – निर्वाचन याचिका में चिकित्सीय प्रमाणपत्र से समर्थित स्थगन का आवेदन – अभिनिर्धारित – आवेदन शपथपत्र द्वारा समर्थित नही – प्रमाणपत्र के लेखक का नाम अभिनिश्चय योग्य नही है और बीमारी के प्रारम्भ होने की तारीख में अधिलेखन – सुनवाई की पूर्ववर्ती पाँच तारीखों पर याची के निवेदन पर विचारण स्थगित किया जाना था – इसने हास्यास्पद परिणाम का नेतृत्व किया है क्योंकि निर्वाचन विचारण में अभी याची की साक्ष्य अभिलिखित की जाना है जबकि इसी बीच में विधान सभा का नया निर्वाचन किया जा चुका है – आवेदन खारिज।

D. Civil Procedure Code (5 of 1908), Order 17 Rule 2 - ***Procedure if the parties failed to appear on the day fixed*** - *In election petition on the previous date of hearing last opportunity was given to the petitioner for recording of his evidence - However, he has not been able to make out an extreme case for grant of further adjournment - Consequently, the election petition dismissed under Order 17 Rule 2 of the Code for want of evidence.* (Paras 8 & 9)

घ. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 17 नियम 2 – यदि पक्षकार नियत दिन पर उपसंजात होने में असफल रहते हैं तो प्रक्रिया – निर्वाचन याचिका में सुनवाई की पूर्ववर्ती तारीख पर याची को अपनी साक्ष्य अभिलिखित कराने के लिए अंतिम अवसर दिया गया – तथापि, वह आगे स्थगन प्रदान किये जाने के लिए आत्यंतिक मामला समझाने में समर्थ नही हुआ – परिणामस्वरूप, निर्वाचन याचिका साक्ष्य के अभाव में संहिता के आदेश 17 नियम 2 के अन्तर्गत खारिज।

Cases referred:

AIR 2002 SC 2436, (2005) 6 SCC 344, (2007) 6 SCC 420, AIR 1984 SC 135.

Manoj Sharma, for the petitioner.

Ravish Agrawal with *Arpan J. Pawar*, for the respondent.

ORDER

R.C. MISHRA, J. :–Heard on I.A. No.2/2009, that has been moved for grant of adjournment on the ground that the petitioner is not medically fit to give evidence. In support thereof, a certificate, issued on behalf of Chirayu Health and Medicare (P) Ltd., Bhopal, to the effect that the petitioner is suffering from disc-prolapse has been filed.

2. Opposing the prayer vehemently, the learned Senior Counsel has submitted that it is yet another attempt to protract the election trial. According to him, he has credible information that the petitioner was seen roaming in Bhopal yesterday only. Placing reliance on a decision of the Apex Court in *Mohandas vs. Ghisia Bai* AIR 2002 SC 2436, he has emphatically contended that the petition deserves to be dismissed under Order XVII Rule 2 of the Civil Procedure Code (for brevity 'the Code'), in view of petitioner's failure to enter into the witness box even after obtaining a series of adjournments for the purpose during the period commencing from 10.09.2007.

3. In response, learned counsel for the petitioner has urged that the proviso to Rule 1 of Order XVII of the Code, though inserted with a view to placing restriction on grant of more than three adjournments, has already been construed as directory in nature. He is further of the view that an adjournment should not be refused where the cause is beyond the control of the party. To buttress the contention, attention has been invited to the under-mentioned observations made by the Apex Court in *Salem Advocate Bar Assn. v. Union of India* (2005) 6 SCC 344 -

> "The proviso to Order XVII, Rule 1 and Order XVII, Rule 2 have to be read together. So read, Order XVII does not forbid grant of adjournment where the circumstances are beyond the control of the party. In such a case, there is no restriction on number of adjournments to be granted. It cannot be said that even if the circumstances are beyond the control of a party, after having obtained third adjournment, no further adjournment would be granted. There may be cases beyond the control of a party despite the party having obtained three adjournments. For instance, a party may be suddenly hospitalized on account of some serious ailment or there may be serious accident or some act of God leading to devastation. It cannot be said that though circumstances may be beyond the control of a party, further adjournment cannot be granted because of restriction of three adjournments as provided in proviso to Order XVII, Rule 1"

4. But, the fact of the matter is that by taking note of the guideline, this Court has already granted more than three adjournments to the petitioner for examining himself. Nevertheless, as explained in *Salem Advocate Bar's case* (supra), the question as to grant of further adjournment to the party, who has already been

able to get hearing of the trial adjourned on three occasions, would always depend upon the facts and circumstances of each case. In other words, the process of judicial interpretation has not made the proviso totally redundant, otiose and nugatory. This view is fortified by a subsequent three Judge Bench decision of the Supreme Court in *R.N. Jadi & Brothers vs. Subhashchandra,* (2007) 6 SCC 420. The principle, as stated by P.K. Balasubramanyan, J. in the following words, though relating to proviso to Order VIII Rule 1, is squarely applicable to the proviso to Order XVII Rule 1 of the Code -

> "It would be proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional cases, will the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts. The lament of Lord Denning in *Allen v. Sir Alfred McAlpine & Sons* (1968) 2 QB 229 that law's delays have been intolerable and last so long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?

5. It has not been seriously disputed that the provisions of Order XVII of the Code are applicable to an Election Petition. The law on the point is also well settled. For this, reference may be made to the decision of the Apex Court in *P. Nalla Thampy Thera, Dr. vs. B.L. Shanker* AIR 1984 SC 135. The relevant observations are reproduced as under –

> "It, therefore, follows that the Code is applicable in disposing of an election petition when the election petitioner does not appear or take steps to prosecute the election petition. Dismissal of an election petition for default of appearance of the petitioner under the provisions of either 0. IX or 0. XVII of the Code would, therefore, be valid and would not be open to challenge on the ground that these provisions providing for dismissal of the election Petition for default do not apply".

6. Adverting to the merits of the prayer, it may be observed that the application of adjournment is not supported by affidavit of the petitioner or the treating doctor. It has also not been clarified as to whether the petitioner was admitted to the hospital for treatment. The name of author of the certificate is also not ascertainable and there is an apparent overwriting in the date of commencement of ailment.

7. This election petition was filed as early as on 26.06.2006 inter alia on the ground of corrupt practices. Although, the issues were framed on 13.11.2006 yet, for variety of reasons, the first date for recording of petitioner's evidence could be fixed on 10.09.2007. As indicated already, the trial had to be adjourned at his

request on that day as well as on five subsequent days of hearing. This, in essence, has led to a ridiculous result as the evidence of the petitioner is yet to be recorded in this election trial whereas, in the meanwhile, a fresh election to the Legislative Assembly has already been held.

8. In the light of these facts and circumstances, on the previous date of hearing, last opportunity was given to the petitioner for the purpose. However, he has not been able to make out an extreme case for grant of further adjournment as contemplated in *Salem Advocate Bar's case* (above). The I.A., therefore, stands rejected.

9. Consequently, the election petition is dismissed, under Order XVII Rule 2 of the Code, for want of evidence. The petitioner shall bear his own cost as well as that of the respondent.

10. Copies of this order be sent to the Election Commission as well as to the Speaker of the State Legislature.

Petition dismissed.

I.L.R. [2009] M. P., 3067

WRIT PETITION

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

19 March, 2009*

MANITA JAIWAR (SMT.) ... Petitioner

Vs.

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

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 40 - *SDO ordering the removal of Sarpanch including disqualification to contest the election - Enquiry conducted by CEO on complaint was not bipartite - No opportunity to cross-examine witnesses afforded - In the proceedings u/s 40 of the Adhiniyam, none of the witnesses including complainant whose statements were recorded by the Inquiry Officer, were examined - Opportunity to cross-examine witnesses and to adduce evidence was also not afforded - No due and proper enquiry was conducted by the SDO - Denial of fair hearing resulted in serious prejudice to petitioner - Case remitted to SDO - Petition allowed.* (Paras 5, 7 & 9)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 40 – एस.डी.ओ. ने चुनाव लड़ने से निरर्हता के साथ सरपंच को हटाने का आदेश दिया – सी.ई.ओ. द्वारा शिकायत पर से की गई जाँच उभयपक्षी नही थी – साक्षियों की प्रतिपरीक्षा करने का कोई अवसर नही दिया गया – अधिनियम की धारा 40 के अन्तर्गत कार्यवाहियों में परिवादी सहित किसी भी साक्षी जिनके जाँच अधिकारी द्वारा कथन अभिलिखित किये गये, की परीक्षा नही की गयी – साक्षियों की

*W.P. No.6147/2007 (Jabalpur)

प्रतिपरीक्षा करने और साक्ष्य पेश करने का भी अवसर नही दिया गया – एस.डी.ओ. द्वारा कोई सम्यक् और उचित जाँच नही की गई – ऋजु सुनवाई से इंकारी के परिणामस्वरूप याची को गंभीर पूर्वाग्रह हुआ – मामला एस.डी.ओ. को भेजा गया – याचिका मंजूर।

Cases referred :

1999 (2) MPLJ 722, 2004 (4) MPLJ 6, 2003 (2) MPLJ 112.

Sharad Verma, for the petitioner.
Ashok Agrawal, G.A., for the respondent Nos.1 to 3.
Praveen Dubey, for the respondent No.5.
Shreyas Pandit, for the intervenor.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–The petitioner in the instant writ petition has assailed the order (P-3) passed by SDO on 6.12.2006, order (P-4) dated 29.1.2007 passed by Collector, District - Balaghat and order (P-9) dated 5.5.2007 passed by Commissioner, Jabalpur Division, Jabalpur, in the matter of removal of the petitioner from the post of Sarpanch of Gram Panchayat Hatta District Balaghat.

2. The removal of the petitioner has been ordered from the post of Sarpanch on having been found guilty of the charges levelled against her in the show cause notice (P-1) dated 16.5.2006. A complaint dated 27.3.2006 was received which was referred for enquiry to the Chief Executive Officer, Janpad Panchat, Balaghat, who after conducting enquiry submitted a report on 13.4.2006. In the report petitioner was found guilty of financial irregularities. On the basis of aforesaid report, show cause notice 16.5.2006 was issued, reply thereto was submitted before SDO, who is the competent authority. During the course of the proceedings under section 40 of M.P. Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as 'the Adhiniyam of 1993), the statement of Enquiry Officer had been recorded by the SDO, opportunity of cross-examination was afforded to the petitioner on the Enquiry Officer, Enquiry Officer was cross-examined also. Thereafter, the impugned order (P-3) has been passed by the SDO ordering removal of the petitioner on having been found guilty of financial irregularities. The order was unsuccessfully assailed before the Collector and the Commissioner in the appeal and the revision, respectively. Dissatisfied with the proceedings and the orders, the instant writ petition has been preferred.

3. Shri Sharad Verma, learned counsel appearing for the petitioner has assailed the orders mainly on the ground that the report submitted by the Enquiry Officer was relied upon which was not during the course of the proceedings under section 40 of the Adhiniyam of 1993. During the course of enquiry which was conducted by the CEO, statements of certain witnesses were recorded. It was not bipartite enquiry. Opportunity of cross-examination was not afforded to the petitioner, consequently the cross examination of the Enquiry Officer was of no avail as the

witnesses were required to be examined and thereafter opportunity of cross-examination was required to be afforded as envisaged under section 40 of the Adhiniyam of 1993. Basic principles of natural justice has not been observed and the petitioner has been held guilty of financial irregularities without affording opportunity to cross-examine the witnesses, thus, proceedings are liable to be quashed.

4. Learned counsel appearing for respondents have supported the orders. They have submitted that enquiry was conducted by the CEO and CEO has been examined so as to prove the documents which were collected during the course of enquiry by him, consequently there is no infirmity in the proceedings.

5. After hearing the learned counsel for the parties, it is clear that in the instant case fair procedure has not been adopted. Proceedings under section 40 of the Adhiniyam of 1993 was initiated by issuance of show cause notice dated 16.5.2006 by the SDO. No doubt about it that earlier a complaint was filed on 27.3.2006 in which the enquiry was conducted by the CEO but that was not bipartite and regular enquiry. Statements of certain witnesses were recorded, which have formed the basis of removal of the petitioner from the post of Sarpanch. Admittedly opportunity of cross-examination was not afforded to the petitioner on the witnesses who were examined by the CEO, Janpad Panchayat, Balaghat while conducting the enquiry into the complaint dated 27.3.2006. In the proceedings under section 40 of the Adhiniyam, 1993 none of the witnesses whose statements were recorded by the Enquiry Officer, were examined. Opportunity of cross-examination was also not afforded to the petitioner. Even complainant was not examined. Opportunity to adduce the evidence was also not afforded to the petitioner.

6. This Court in *Kailash Kumar Parmanand Dangi Vs. State of M.P. and others* - 1999(2) MPLJ 722 has held that in such matters the enquiry held behind the back of Sarpanch, cannot be relied upon. The following discussion has been made by this Court :-

> 14. In the present case there was not total violation of the principles of natural justice as a show cause notice was given and the reply of the petitioner obtained. But keeping in view the facts of the case certain facets of natural justice as stated above were not complied with resulting in prejudice to the petitioner. He was not permitted to adduce his own evidence to rebut the material collected against him. The charges were such which could be proved or disproved by evidence in the inquiry. One of the main charges was the distribution of pattas to those who were not landless and a conclusion on this point could be reached after recording evidence and after seeing the list supplied by the Tehsildar

or the B.D.O. The prescribed authority in the impugned order has not dealt with this aspect. Similarly the charges regarding negligence in the maintenance of garden, supply of water, drainage and information regarding the meeting of the Gram Sabha could be decided on the basis of evidence and not merely relying upon a preliminary inquiry report. The basic fault in the impugned order is that an inquiry held by the B.D.O. behind the back of the petitioner has been held to be a valid 'inquiry' under section 40 of the Act and he has been packed up on the basis of that inquiry without even supplying a copy of the same to the petitioner, and without affording him an opportunity to lead his own evidence even when he repeatedly asked for the same. This was denial of fair hearing resulting in serious prejudice to the petitioner. The action of removal and disqualification has to be struck down as there has been a failure of justice. The guilty must be punished but the finding of guilt has to be arrived after fair hearing which was denied in this case. In *Ballabhdas vs. State of M.P.,* 1998(2) JLJ 303, it has been observed by this Court that a full fledged enquiry is provided under section 40 of the Act. It contemplates 'due enquiry'. As observed in *Delhi Transport Corporation vs. DTC Mazdoor Congress,* AIR 1991 SC 101 right to fair treatment is an essential inbuilt of natural justice which is an integral part of the guarantee of equality assured by Article 14 of the Constitution of India. The concept of reasonableness and non-arbitrariness pervades the entire constitutional spectrum and is a golden thread which runs through the whole fabric of the Constitution.

In *Rajendra Singh Raghuvanshi Vs. State of M.P. and others* - 2004(4) MPLJ 6, this Court has laid down that copy of the enquiry report has to be furnished. In *Mango Bai Vs. State of M.P. and others* - 2003(2) MPLJ 112, this Court has laid down thus :-

9. Principles of natural justice are required to be observed before ordering removal of Sarpanch under section 40 of Act in *Kailash vs.State of M.P.,* 1999(2) MPLJ 722 = 1999 (2) JLJ 280 esteemed brother S.P. Khare, J. considered the question and held that removal of Sarpanch under section 40 is a serious matter when he is removed and further disqualified for six years to be elected under the Act. It is not sufficient to give a mere lip-service to the requirement of law. It is true that it is not specifically provided in section 40 that principles of natural justice should be 'followed while holding' an enquiry but it is implicit in this provision that the office-bearer who is sought to be removed will be given a fair

hearing. This Court held that the words "after such inquiry as it may deem fit to make" in the main part of section 40(1) of the Act would mean an inquiry which is held inthe presence of the office-bearer and not behind his back. He should be allowed to inspect the documents which are to be relied upon against him and he should have the right to adduce his own evidence. These are the important facets of an inquiry to be held in conformity with the principles of natural justice. It is not the subjective choice of the prescribed authority to get an inquiry held of any kind. It does not envisage a secret enquiry or a preliminary enquiry alone. That is made only for collection of evidence andat that stage there is no participation of the person against whom the action is sought to be taken. The words "as it may deem fit" have to be construed objectively and would mean an inquiry depending upon the facts and circumstances of each case. Some of the facts of the inquiry may be excluded if the facts are not very much in dispute or there are other circumstances to dispense with them. But the office bearer has a right of fair hearing. "You must hear the person who is going to suffer". That is a duty which lies upon every one who decides anything. There is, however, some flexibility depending upon the subject-matter. Similar is the law laid down by this court in *Raja Rai Singh vs. State of M.P. and others*, 2001 (4) MPLJ 364 = 2000 (2) JLJ 242.

10. Secret enquiry or preliminary enquiry alone is not enough. Collection of evidence is required and participation of person against whom the action is sought to be taken. Ordersheets of the SDO's file indicates that by parte enquiry was not held at all nor was directed. Panchayat Inspector conducted the exparte enquiry. Report of which not supplied. Thereafter an incompetent authority, SDM considered the report and recommended the removal and order dated 31-3-1999 mentioned that Prescribed Authority i.e. SDO was in agreement with the view of the SDM and has passed the order on 31-3-1999 itself. Whereas it was incumbent upon the SDO to receive the reply and to apply independent mind after holding an enquiry. All these requirements have been flagrantly violated in the instant case. Considering the serious nature of charges levelled against the petitioner she ought to have been given due and proper opportunity.

7. Considering the aforesaid decisions of this Court, the procedure adopted and on going through the file of the SDO which has been produced, it cannot be said that due and proper enquiry was conducted by the SDO before ordering the

removal of the petitioner from the post of Sarpanch including disqualification to contest the election, it carries civil consequences. Consequently, the impugned orders (P-3), (P-4) and (P-5) cannot be permitted to prevail, they are hereby quashed. Case is remitted back to the SDO to deal with the case in the light of the aforesaid discussion made by this Court. The SDO shall examine the witnesses and afford an opportunity to the petitioner to cross-examine the witnesses. Copy of report of Enquiry Officer shall also be supplied to the petitioner, if it is to be utilized. Petitioner shall be given opportunity of adducing the evidence as against the charges levelled against her and thereafter, a reasoned and considered decision has to be rendered by the SDO in accordance with law. Let enquiry be conducted in accordance with law within a period of four months.

8. It is submitted by Shri Praveen Dubey, learned counsel appearing for respondent No. 5 that once the petitioner has been found guilty of financial irregularities, at least petitioner may be restrained from exercising the financial power. We refrain to comment on the aforesaid aspect, however, petitioner has to continue as Sarpanch. The question whether financial power has to be exercised by the petitioner or not during the pendency of proceedings, may be considered by the SDO, who is the competent authority.

9. Resultantly, the writ petition is allowed. Impugned orders (P-3), (P-4) and (P-5), passed by SDO, Collector and Commissioner, respectively, are hereby quashed. No costs.

Petition allowed.

I.L.R. [2009] M. P., 3072
WRIT PETITION
Before Mr. Justice R.S. Jha
24 March, 2009*

RUKSANA BEGUM SIDDIQUI ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Civil Services (Pension) Rules, M.P. 1976, Rule 42(1)(a) - ***Permissibility*** **-** ***Withdrawal of application for voluntary retirement after expiry of period of notice - Held - No relationship of employer-employee continued or existed between them subsequent thereto - Withdrawal not permissible.*** (Para 8)

क. सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 42(1)(ए) – अनुज्ञेयता – सूचना की कालावधि की समाप्ति के बाद स्वैच्छिक सेवानिवृत्ति का आवेदन वापस लेना – अभिनिर्धारित – तत्पश्चात् उनके बीच नियोक्ता और कर्मचारी का कोई सम्बन्ध जारी अथवा विद्यमान नही रहता – वापस लेना अनुज्ञेय नही।

*W.P. No.8226/2006(S) (Jabalpur)

B. Civil Services (Pension) Rules, M.P. 1976, Rule 42(1)(a) - *Services rendered by teacher after the expiry of the period of notice and withdrawal of application for voluntary retirement - Effect - Held - Work taken by Principal subsequent to the date of voluntary retirement without taking any permission from the Competent Authority would be at the risk and cost of the Principal himself, who was not competent to either accept the application for voluntary retirement or extend the period of voluntary retirement - Teacher stood voluntarily retired w.e.f. expiry of period of notice - Petition dismissed.* (Paras 7, 8 & 12)

ख. सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 42(1)(ए) – अध्यापक द्वारा सूचना की कालावधि की समाप्ति के बाद सेवाएँ देना और स्वैच्छिक सेवानिवृत्ति का आवेदन वापस लेना – प्रभाव – अभिनिर्धारित – प्राचार्य द्वारा सक्षम प्राधिकारी से कोई अनुमति लिये बिना स्वैच्छिक सेवानिवृत्ति की तारीख के पश्चात् लिया गया कार्य प्राचार्य के स्वयं के जोखिम और कीमत पर होगा जो स्वैच्छिक सेवानिवृत्ति का आवेदन स्वीकार करने या स्वैच्छिक सेवानिवृत्ति की कालावधि आगे बढ़ाने के लिए सक्षम नही था – अध्यापक सूचनापत्र की कालावधि समाप्त होने से स्वैच्छिक रूप से सेवानिवृत्ति हो गया – याचिका खारिज।

Cases referred :

1999(1) JLJ 169, 1985 MPLJ 229, W.P. No.4382/2006(S) decided on 29.01.2007, AIR 1987 SC 2345, AIR 2000 SC 2473, AIR 2002 SC 1341.

R.K. Verma, for the petitioner.

G.P. Singh, G.A., for the respondents.

ORDER

R.S. JHA, J. :–The petitioner has filed this petition being aggrieved by communications dated 2.6.2006 and 3.6.2006 whereby she has been informed that her application seeking voluntary retirement with effect from 30.4.2006 has been accepted and consequently she has been voluntarily retired.

2. The case of the petitioner, before this Court, is that the petitioner, who at the relevant time was working as an Assistant Teacher and was posted at Govt. Boys Middle School (Urdu), Gohalpur, submitted an application on 29.3.2006 seeking voluntary retirement with effect from 30.4.2006. Thereafter the petitioner was directed by the authorities to submit the application in the prescribed Statutory Form 28 under the M.P. Civil Services (Pension) Rules, 1976 (hereinafter referred to as 'the Service Rules') and, accordingly, the petitioner by Annexure P-2 submitted her application for voluntary retirement in the prescribed form under the Service Rules stating therein that she desires to retire from Government Service with effect from 30.4.2006 under Rule 42(1)(a) of the Service Rules. It is stated that thereafter on 16.5.2006 an order was issued by the Block Resource Co-ordinator, Jabalpur sending the petitioner for training and this led to a change of mind on the part of the petitioner prompting her to file an application on 18.5.2006

seeking withdrawal of her voluntary retirement. It is stated that respondent no.2 totally ignored the application seeking withdrawal of voluntary retirement of the petitioner and on 27.5.2006 and 1.6.2006 sought submission of the proposal for voluntary retirement of the petitioner from the Principal of the petitioner's school and thereafter communicated the impugned order dated 3.6.2006 to the petitioner to the effect that her voluntary retirement had been accepted with effect from 30.4.2006 and that she should consider herself to have been deemed to be relieved from service with effect from that date.

3. It is submitted by the learned counsel for the petitioner that once the authority sends the petitioner for training, subsequent to the lapse of the period of notice mentioned in her notice for voluntary retirement, by order dated 16.5.2006, the relationship of employer and employee, between the petitioner and the respondent, continued and in such circumstances the respondent no.2 could not have accepted the petitioner's application for voluntary retirement on 30.4.2006 specifically in view of the fact that the petitioner had withdrawn her application for voluntary retirement by communication dated 18.5.2006. It is further submitted that as the petitioner even subsequent to 30.4.2006 attended her school and her pay slips were also prepared by the concerned school, the relationship of employer and employee continued and as such the respondent authority could not have voluntarily retired the petitioner from service w.e.f. 30.4.2006.

4. The respondents, per contra, submits that the petitioner submitted her application for voluntary retirement in accordance with Rule 42(1)(a) of the Service Rules, in the statutory Form 28 prescribed therein wherein she gave notice to the effect that she would stand voluntarily retired from Government Service w.e.f. 30.4.2006. In such circumstances, the voluntary retirement of the petitioner comes into effect automatically on the lapse of the period mentioned in the notice for voluntary retirement in the statutory form in accordance with Rule 42 of the Service Rules and communication of acceptance or rejection in such cases has no meaning. It is further stated that the respondent no.2 authority by communication dated 1/2.6.2006 clearly informed the Principal of the concerned school that the petitioner's voluntary retirement had come into effect w.e.f. 30.4.2006 and in such circumstances it could not have been withdrawn subsequently and that in case the Principal had permitted the petitioner to perform her duties even subsequent to 30.4.2006 without obtaining any permission from the District Education Officer, the work taken from the petitioner was at the risk and cost of the Principal himself. In such circumstances, it is submitted that the contention of the petitioner deserves to be rejected and the petition deserves to be dismissed as no fault can be found with the communication dated 3.6.2006.

5. I have heard the learned counsel for the parties at length. The relevant rules governing voluntary retirement, i.e. Rule 42 of the Service Rules reads as under:-

"42. Retirement on completion of 15/20 years qualifying service:

(1)(a) Government servant may retire at any time after completing 15 years qualifying service, by giving a notice in form 28 to the appointing authority at least [one month] before the date on which he wishes to retire or on payment by him of pay and allowances for the period of [one month] or for the period by which the notice actually given by him falls short of [one month].

Provided that ....xxx xxx xxx

(2) A Government servant who has elected to retire under clause (a) of sub-rule (1) and has given the necessary intimation to that effect to the appointing authority, shall be precluded from withdrawing his election subsequently except with the specific approval of such authority on consideration of the circumstances of the case to withdraw the notice given by him;

Provided that the request for withdrawal shall be prior to the intended date of his retirement.

(3) Where the notice of retirement has been served by appointing authority on the Government servant, it may be withdrawn, if so desired for adequate reasons, provided that the Government servant concerned is agreeable."

6. The statutory Form 28 in which the application for voluntary retirement is to be submitted is prescribed under the Service Rules itself and is in the following terms:-

FORM 28
[See rule 42(i)(a)]

To, ...
.....
.....

Whereas, I have completed [15/20 years] qualifying service and now desire to retire from Government service under clause (a) of sub-rule (1) of rule 42 of the M.P. Civil Services (Pension) Rules, 1976, with effect from..... a notice whereof is hereby given accordingly.

OR

Whereas, I have completed [15/20 years] qualifying service and now desire to retire from Government service under clause (a) of sub-rule (i) of rule 42 of the M.P. Civil Services (Pension) Rules, 1976, with effect from..... a notice whereof is hereby given accordingly;

And whereas the period of this notice falls short of .....days, the pay and allowances for the days aforesaid have been credited under challan No..... dated ..... A copy whereof is enclosed herewith.

OR

Whereas, I have completed [15/20 years] qualifying service and now desire to retire from Government service under clause (a) of sub-rule (i) of rule 42 of the M.P. Civil Services (Pension) Rules, 1976, forthwith, that is to say from..... a notice whereof is hereby given accordingly;

The pay and allowances for [one month] have been credited under challan No..... dated..... a copy whereof is enclosed; in lieu of [one month] notice as required by the said clause.

Dated..... Signature and designation of the Government servant.

7. A conjoint reading of the aforesaid makes it clear that an employee has a right to voluntarily retire from service from a particular date and for that purpose a notice period is prescribed in the Service Rules. It is also clear that an application for voluntary retirement once submitted by the petitioner cannot be withdrawn subsequent to the lapse of the notice period and that if the employee seeks to withdraw the application for voluntary retirement he/she must necessarily do so within the notice period after seeking permission from the Government.

8. In the instant case the petitioner submitted the application for voluntary retirement w.e.f. 30.4.2006 and as per the provisions of Rule 42 of the Service Rules and the form prescribed thereunder, her voluntary retirement became effective w.e.f. 30.4.2006. In such circumstances, the subsequent attempt of the petitioner to withdraw her voluntary retirement by filing an application on 18.5.2006 without seeking permission of the Government and applying for the same within the notice period does not in any manner effect or protract the coming into effect of the voluntary retirement of the petitioner w.e.f. 30.4.2006. It is also clear from Annexure P-5 that the competent authority had informed the Principal that the petitioner's voluntary retirement had already come into effect from 30.4.2006 and that any work taken by the Principal from the petitioner subsequent to that date without taking any permission from the competent authority respondent no.2 would be at the risk and cost of the Principal himself who was not competent to either accept the application for voluntary retirement or extend the period of voluntary retirement and in such circumstances I am of the considered opinion that as the petitioner stood voluntarily retired w.e.f. 30.4.2006 no relationship of employer- employee continued or existed between the petitioner and the respondent subsequent thereto and if the Principal on his own had permitted the petitioner to work in the school, such act on his part would not confer any right on the petitioner to claim that the employer had continued the relationship of employer and employee

or that the application for voluntary retirement had not been accepted or had not become effective from 30.4.2006. It is also apparent that the order dated 16.5.2006, by which the petitioner was sought to be sent on training, was also issued without the approval, acceptance or knowledge of the competent authority by the District Resource Co-ordinator who had no power or authority to take any action in respect of the petitioner nor did he have any knowledge of the fact that the petitioner had already submitted an application for voluntary retirement.

9. A Division Bench of this Court, in the case of *Narayan Prasad vs. Hon'ble District and Sessions Judge, Ratlam and others,* 1999 (1) JLJ 169, while dealing with the provisions of Rule 42(1)(a) and Form 28 of the Service Rules has held, that a notice for voluntary retirement does not require any acceptance by the appointing authority and that the notice comes into effect automatically after expiry of the period of three months and the relationship of master and servant comes to an end on completion of the notice period by the unilateral act of the Government servant, in the following terms in paras 8 to 11 :-

> "8. Rule 42(1)(a) of the M.P. Civil Services Pension Rules, 1976 provides that a Government servant may retire at any time after completing 20 years qualifying service by giving a notice in form No.28 to the appointing authority at least three months before the date on which he wishes to retire. The appellant had completed 20 years of qualifying service. His application dated 23.5.1995 (Annexure A 12) specifically mentioned that he should be given voluntary retirement from 23.8.1995. Thus, this application fulfilled the requirements of Rule 52(1)(a) and form No.28. It is not material that the notice was not in the prescribed form. The substance is to be preferred to the form.
>
> 9. A perusal of Rule 42(1)(a) shows that no reasons are required to be given in the notice seeking voluntary retirement. It is the volition and choice of the Government servant to seek voluntary retirement after completing 20 years of service by giving three months notice. This notice comes into operation after the expiry of the period of three months automatically. The relationship of master and servant comes to an end on completion of the notice period by the unilateral act of the Government servant. Such a notice does not require any acceptance by the appointing authority. The volition act of the Government servant bring an end to the "binding knot".
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> 10. The decision of this Court in *Indra Prakash v. State of M.P.* (1985 JLJ 504 – 1985 MPLJ 229) has taken the same view. It was held that a Government servant who has completed 20

years qualifying service has an absolute and indefeasible right to retire at any date of his choice. The notice of voluntary retirement does not require any order or acceptance by the appointing authority.

11. Rule 42(2) further provides that a Government servant who has elected to retire under this rule and has given the necessary intimation to that effect to the appointing authority, shall be precluded from withdrawing his selection subsequently except with the specific approval of such authority on consideration of the circumstances of the case to withdraw the notice given by him. Thus, the notice of voluntary retirement cannot be withdrawn as of right. The rule puts an embargo on the right of the Government servant to do so. Then it carves out an exception. That exception gives a discretion to the notice of voluntary retirement. That discretion is to be exercised "on consideration of the circumstances of the case". The appointing authority has to apply his mind objectively and take into account the facts and circumstances of the case. The discretion must be exercised rationally and reasonably as laid down by the Supreme Court in *Balram Gupta's case* (supra) while dealing with similar rule in Central Civil Services (Pension) Rules, 1972. On the facts of that case the Supreme Court found that there was no valid reason for withholding the withdrawal. But in the present case the appropriate reasons have been given for refusing the withdrawal."

10. The Division Bench has approved the Single Bench judgment of this Court in the case of *Indra Prakash vs. State of M.P.*, 1985 MPLJ 229, and both these judgments have subsequently been followed in W.P No.4382/2006(S) decided on 29.1.2007 by the Indore Bench of this Court. I am respectfully bound by the interpretations of the Rules given by the Division Bench of this Court in the case of *Narayan Prasad* (supra) which squarely applies to the case of the petitioner.

11. Though the petitioner has relied upon the judgments of the Supreme Court in the cases of *Balram Gupta v. Union of India and another*, AIR 1987 SC 2354, and *Shambhu Murari Sinha v. Project and Development India Ltd., and another*, AIR 2000 SC 2473 / AIR 2002 SC 1341, I am of the considered opinion that in view of the interpretations to Rule 42 of the M.P. Service Rules, given by the Division Bench of this Court by which I am bound, the judgments relied upon by the petitioner do not render any assistance to her as Rule 42 of the M.P. Service Rules was not the subject matter in the aforesaid decisions of the Supreme Court and as the rule position in the M.P Service Rules is quite different.

12. In such circumstances, I do not find any merit in the petition nor do I find

any infirmity in the impugned order dated 1/2.6.2006 or the communication dated 3.6.2006 warranting interference by this Court in the present petition.

13. Consequently, the petition, filed by the petitioner, being meritless is accordingly dismissed. In the peculiar facts and circumstances of the case there shall be no order as to the costs.

Petition dismissed.

I.L.R. [2009] M. P., 3079
WRIT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta
29 June, 2009*

G.V. PRATAP REDDY ... Petitioner
Vs.
M.P. RURAL ROAD DEVELOPMENT AUTHORITY, BHOPAL & ors. ... Respondents

Constitution, Article 226 - *Bank guarantee - Bank guarantee was liable to be encashed against any loss or damage caused to or suffered or would be caused to or suffered by reason of any breach of contract - Department failed to intimate the Bank any loss or damage caused to or suffered or would be caused to or suffered by department by reason of any breach of contract - Held - Condition of Bank guarantee while directing Bank to encash remained uncomplied - Department not entitled to encash Bank guarantee - Petition allowed.* (Paras 8, 13 & 14)

संविधान, अनुच्छेद 226 – बैंक गारंटी – संविदा के किसी भंग के कारण कारित या उठायी गयी या कारित होने वाली या उठाये जाने वाली किसी हानि या क्षति के विरुद्ध बैंक गारंटी भुनाने योग्य थी – विभाग संविदा के किसी भंग के कारण विभाग को कारित या उठायी गयी या कारित होने वाली या उठाये जाने वाली किसी हानि या क्षति बैंक को सूचित करने में विफल रहा – अभिनिर्धारित – बैंक गारंटी की शर्त बैंक को भुनाने का निदेश देते समय अपालित रही – विभाग बैंक गारंटी को भुनाने का हकदार नही – याचिका मंजूर।

Cases referred :

(1999) 8 SCC 436, AIR 1991 Orrisa 314, (2007) 8 SCC 110, (2008) 1 SCC 544, W.P. No.11022/2008 decided on 30.04.2009.

V.R. Rao with *S.R. Rao,* for the petitioner.
Rajendra Shrivastava, for the respondents.

ORDER

The Order of the Court was delivered by **R.K. Gupta, J. :**–The petitioner entered into an agreement for construction/up-gradation and maintenance of rural road under Pradhan Mantri Sadak Yojna, Sehore,

*W.P. No.10030/2008 (Jabalpur)

Package of M.P.-3519, Sehore with the M.P. Rural Road Development Authority (for short "the Authority"), a public undertaking. The work under the contract could not be completed in time. The competent authority of the respondents' Authority issued a notice dated 20.06.2008 to show cause why the contract should not be rescinded. The same was issued despite recommendation for inspection and being granted further time up to 30.6.2008. On 26.7.2008 the petitioner vide letter dated 10.7.2008 apprised the Chief Executive Officer of the Authority about the reasons for the delay and also sought payment of Rs.47,35,000/- on account of work done by him. Despite the said communication the General Manager, third respondent herein, rescinded the contract taking recourse to clause 52 of the same. Though the petitioner had not incurred the ineligibility to face the said consequence. As pleaded, the petitioner raised a dispute under Clause 24 before the Chief Executive Officer who concurred with the view taken by the General Manager of the respondents' Authority. Various other facts have been asserted how the petitioner is not to be blamed for the delay but the officers of the Authority. After rescinding of the contract the General Manager vide letter dated 11-8-2008 sent a fax to the petitioner to deposit a sum of Rs.114.57 Lacs within fifteen days from the date of issuance of the letter, failing which action would be taken to encash the Bank Guarantee/FDRs submitted by him against the work under Package No.3519.

2. It is urged by the petitioner that the bank guarantee is a conditional bank guarantee, therefore, such a bank guarantee could not have been directed to be encashed by the respondents until conditions stipulated in the bank guarantee are satisfied. For the purposes of said proposition, the petitioner has relied upon the judgment passed by the Apex Court in *Hindustan Construction Ltd. v. State of Bihar and others* with *State of Bihar and others v. Hindustan Construction Co. Ltd.*, 1999 (8) SCC 436.

3. The respondents along with their return have filed a letter dated 21.8.2008 (Annexure R/1) from the office of the Project General Manager, M.P. Rural Road Development Authority. This is the letter addressed to the Branch Manager, State Bank of Hyderabad whereby it is stated that the bank guarantee issued in favour of the authority be encashed and accordingly the amount of Rs.34,64,000.00 by demand draft be paid. The letter dated 21.8.2008 was followed by a subsequent reminder dated 26.8.2008 (Annexure R/2). The respondents have also filed the bank guarantee on record.

4. It is contended on behalf of the respondents that the bank guarantee has to be encashed because of non performance of the contract which is clear from the letter dated 11.8.2008, document No.6 filed along with the petition. It is contended that since the contract stands rescinded the respondents have the legal authority to encash the bank guarantee.

5. To appreciate the rival submission we have to appreciate the nature of the bank guarantee whether it is conditional or unconditional. We have already noticed that the bank guarantee has been filed on record by the respondents and the relevant conditions of the bank guarantee are as follows:

> "We State Bank of Hyderabad, Industrial Finance Branch, Panjagutta, Hyderabad (Name of Bank) of India (Name of Country) do hereby undertake to pay Authority an amount not exceeding Rs. 34,64,000/- (Rupees Thirty Four Lakhs Sixty Four Thousand Only) against any loss or damage caused to or suffered or would be caused to or suffered by the Authority by reason of any breach by the said contractor of any terms of conditions contained in the said agreement.
>
> WE State Bank of Hyderabad, Industrial Finance Branch, Panjagutta, Hyderabad (Name of Bank) of India (Name of Country) do hereby undertake to pay the amount due and payable under this guarantee without any demur merely on a demand from the Authority stating that the amount claimed is due by way of loss or damage caused to or suffered by the Authority by reason of any breach by said Contractor of any of the terms or conditions contained in the said agreement or by reason of the Contractor's failure to perform the said agreement. Any such demand made on the bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs.34,64,000/- (Rupees Thirty four Lakhs sixty Four Thousand only)."

6. On the basis of the aforesaid two conditions it is clear that the bank guarantee is a conditional one and bank was required to encash the bank guarantee only if the intimation is given by the department stating that the amount claimed is due by way of loss or damage caused to or suffered by reason of any breach by said Contractor of any of the terms or conditions contained in the said agreement or by reason of the Contractor's failure to perform the said agreement. It is also clear that the bank has undertaken to pay an amount not exceeding Rs.34,64,000/- against any loss or damage caused to or suffered or would be caused to or suffered by any authority by reason of any breach by the said contractor of any of the terms or conditions contained in the said agreement.

7. In this context, it will be appropriate to refer to the letter issued by the authority to the bank on 21.8.2008 (Annexure R/1), which reads as under:-

> "The work under Package No.MP3519 vide agreement No.5/ PMGSY/06 dated 01.11.06 was awarded to Shri G V Pratap Reddy,

Contractor, Hyderabad. At the time of agreement the above contractor submitted BG No.8652 dated 31.10.06 for rs.3464000.00 as performance security (photocopy enclosed) which is valid upto 30.10.2009. The contractor failed to achieve the progress of work and complete the work within the stipulated time even after granting sufficient extended period. In the interest of government work department taken action to rescind the contract and to complete the balance work by fixing another agency.

In view of the above department is bound to recover the penalty for non completion of the awarded work from the contractor hence it is necessary to encash the above bank guarantee submitted by the contractor as performance security. The original bank guarantee for Rs.3464000.00 is being sent through special messenger for encashing the same. Please arrange to send the amount by demand draft in favour of MPRRDA, Bhopal payable at Bhopal."

8. It will be also appropriate to refer to the reminder issued by the authority to the bank on 26.8.2008. Nothing is stated in the said letter about the loss or damage suffered by the department. This letter also does not say that the agreement has been terminated because of any fault on the part of the petitioner. The contents of the letter dated 26.8.2008 are reproduced as under:-

"Please refer this office above letter vide which it was intimated to you for encashment of bank guarantee No.8652 dated 31.10.06 for Rs.3464000.00 against performance security issued on request of Shri G.V. Pratap Reddy, Contractor Hydrabad in favour of MPRRDA.

Shri Ashutosh Shukla, Sub Engineer of this office is directed to your branch alongwith original Bank Guarantee No.8652 dated 31.10.06 for Rs.3464000.00 duly discharged for collecting the amount after its encashment. You are requested to encash the above bank guarantee and handover the amount Rs.3464000.00 by demand draft in favour of MPRRDA Bhopal payable at Bhopal through Shri Ashutosh Shukla, Sub Engineer whose signature is attested below."

As we have referred the letter hereinabove , it is clear that the conditions of the bank guarantee while directing the bank to encash the same remains uncomplied. It is so because the conditions for bank guarantee have already been reproduced hereinabove in para-5 of the judgment. The Bank guarantee was liable to be encashed against any loss or damage caused to or suffered or would be caused to or suffered by the authority by reason of any breach of the said contractor

of any terms and conditions contained in the said agreement. There is nothing in the letter dated 21.8.2008 and the reminder dated 26.8.2008 that the M.P. Rural Roads Development authority intimated the bank for encashing the bank guarantee against any loss or damage caused to or suffered or would be caused to or suffered by the authority by reason of any breach of the said contractor of any terms and conditions contained in the said agreement. It only reflects that the contractor failed to achieve the progress of work and did not complete the work within stipulated time even after granting sufficient extended period. Thus, in the absence of any stipulation in the letter dated 21.8.2008 and also in the letter dated 26.8.2008 with reference to any loss or damage caused to or suffered or would be caused to or suffered by the authority by reason of any breach of the said contractor of any terms and conditions contained in the said agreement, the bank guarantee was not liable to be encashed.

9. The matter with regard to the law relating to the encashment of bank guarantee received consideration of the Apex court in *National Aluminium Co. Ltd. v. M/s R.S. Builders (India) Ltd. and others,* AIR 1991 ORISSA 314 wherein the Apex Court laid down a view in para-9 and 11 as under:-

> "9. From the aforesaid decisions it is clear that courts' interference in enforcing bank guarantees must be minimal. It is in the case of fraud or to prevent irretrievable injustice that Courts interfere to prevent enforcement of bank guarantees. Of course, a bank guarantee has to satisfy the conditions laid down therein before a bank can be called upon to make payment as per the guarantee. If the terms of the bank guarantee be unconditional, the bank has to pay without demur. The payment of bank guarantee cannot be made subject to the claims and counter-claims arising out of the main contract between the parties. If a bank guarantee were to state that payment shall be made notwithstanding any dispute between the parties, the bank would be obliged to do so. To determine whether a bank guarantee is conditional or unconditional, it is the document guarantee which is to be scanned.
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> 11. In view of the law noticed earlier, we would state that the aforesaid type of bank guarantee has to be regarded as independent of the contract between the parties and the same can be enforced without reference to any claim or counter-claim arising out of the main contract between the parties. It is also to be regarded as independent of the adjudication of disputes raised and proposed to be referred to arbitration. But then, the bank guarantees at hand cannot be regarded as absolutely unconditional inasmuch as the payment under guarantees is dependent upon the contractor committing default in performing any of the terms and

conditions of the contract or in the payment of any money due to the owner or in case the amount at the specified rates cannot be deducted from the running bills of the contractor by the owner towards the payment of Mobilisation Advance. As to the fulfilment of those conditions, we would state that the statement of the beneficiary would be taken as its face value unless the contractor be in a position to establish that the stand of the beneficiary is actuated by fraud, misrepresentation, deliberate suppression of material facts or the like which would give rise to special equities in favour of the contractor. So, in the absence of a case of fraud, misrepresentation, deliberate suppression of material facts or the like, to establish which a heavy onus lies on the contractor, a bank guarantee like the one at hand has to be honoured by the bank and the beneficiary cannot be restrained from enforcement. Further, decision about fraud, etc. has to be arrived at by the court approached by the contractor to restrain the beneficiary from enforcing the bank guarantee. The court cannot await for this purpose the finding of the arbitrator."

10. In view of the aforesaid situation, the relevant paras 8, 9 and 14 from the judgment passed by the Apex Court in *Hindustan Construction Ltd.* (supra) for its application in the present facts and circumstances of the case are profitably reproduced as under:-

"8. Now, a Bank Guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the Guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as for example, construction contracts, Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "Advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such Guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the "Government Advance", the Guarantee is invoked and the amount is recovered from the Bank. It is for this reason that the Courts are reluctant in granting an injunction against the invocation of Bank Guarantee, except in the case of fraud, which should be as established fraud, or where irretrievable injury was likely to be

caused to the Guarantor. This was the principle laid down by this Court in various decisions. In *U. P. Co-operative Federation Ltd. v. Singh Consultants and Engineers Pvt. Ltd.*, (1988) 1 SCC 174, the law laid down in *Bolivinter Oil SA v. Chase Manhattan Bank*, (1984) 1 All ER 351 was approved and it was held that an unconditional Bank Guarantee could be invoked in terms thereof by the person in whose favour the Bank Guarantee was given and the Courts would not grant any injunction restraining the invocation except in the case of fraud or irretrievable injury. In *Svenska Handelsbanken v. Indian Charge Chrome*, (1994) 1 SCC 502 / (1993 AIR SCW 4002 : AIR 1994 SC 626); *Larsen and Toubro Ltd. v. Maharashtra State Electricity Board*, (1995) 6 SCC 68 : (1995 AIR SCW 4134 : AIR 1996 SC 334); *Hindustan Steel Works Construction Ltd. v. G. S. Atwal and Co. (Engineers) (P) Ltd.*, (1995) 6 SCC 76 : (1995 AIR SCW 3821 : AIR 1996 SC 131); *National Thermal Power Corporation Ltd. v. Flowmore (P) Ltd.*, (1995) 4 SCC 515 : (1995 AIR SCW 430 : AIR 1996 SC 445); *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735 : (1996 AIR SCW 895 : AIR 1996 SC 2367); *Hindustan Steel Works Construction Ltd. v. Tarapore and Co.*, (1996) 5 SCC 34 : (1996 AIR SCW 2861 : AIR 1996 SC 2268) as also in *U.P. State Sugar Corporation v. Sumac International Ltd.*, (1997) 1 SCC 568 : (1997 AIR SCW 694 : AIR 1997 SC 1644 : 1997 All LJ 638), the same principle has been laid down and reiterated.

9. What is important, therefore, is that the Bank Guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the Bank Guarantee or the person on whose behalf the Guarantee was furnished. The terms of the Bank Guarantee are, therefore, extremely material. Since the Bank Guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank Guarantee; or else the invocation itself would be bad.

14 This condition clearly refers to the original contract between the HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the

"Advance Mobilization Loan", then the Bank would pay the amount due under the Guarantee to the Executive Engineer. By referring specifically to said Clause 9, the Bank has qualified its liability to pay the amount covered by the Guarantee relating to "Advance Mobilization Loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or the HCCL has misappropriated any portion of the "Advance Mobilisation Loan". It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the "Mobilisation Advance" would become payable on demand. The Bank Guarantee thus could be invoked only in the circumstances referred to in Clause 9 whenever the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the Bank Guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that Guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the single Judge, by which the defendants were restrained from invoking the Bank Guarantee."

11. Further while dealing with an application for injunction to restrain enforcement of bank guarantees the Apex Court in *Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Co.*, (2007) 8 SCC 110 came to hold in paras 10 and 14, thus:-

"10 The law relating to grant or refusal to grant injunction in the matter of invocation of a bank guarantee or a letter of credit is now well settled by a plethora of decisions not only of this Court but also of the different High Courts in India. In *U.P. State Sagar Corpn. V. Sumac International Ltd.* this court considered its various earlier decisions. IN this decision, the principle that has been laid down clearly on the enforcement of a bank guarantee or a letter of credit is that in respect of a bank guarantee or a letter of credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly this Court held that the courts should be slow in granting an order of injunction to restrain the realization of such a bank guarantee. It has also been held by this Court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of bank guarantees or letters of credit.

However, this court made two exceptions for grant of an order of injunction to restrain the enforcement of a bank guarantee or a letter of credit; (i) fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.

14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit :-

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned."

12. In this context, it would further be profitable to refer to the decision of the Apex Court in *Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd.*, (2008) 1 SCC 544. The relevant paragraphs 12, 13, 14, 22 and 23 from the said decision are reproduced as under:-

"12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof.

The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In *BSES Ltd. v. Fenner India Ltd.* this Court held: (SCC pp. 733-34, para 10)

"10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in *U.P. State Sugar Corpn. v. Sumac International Ltd.* (hereinafter '*U.P. State Sugar Corpn.*') this Court, correctly declared that the law was 'settled'."

13. In *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.*4 this Court summarised the principles for grant of refusal to grant of injunction to restrain the enforcement of a bank guarantee or a letter of credit in the following manner: (SCC pp. 117-18, para 14)

"14. ... (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and

the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

14. In *Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd.*5 this Court observed: (SCC p. 471b-d).

"If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered into between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one." (Paras 22 and 28)
(emphasis supplied)

22. In the present case the amended clause does not refer to any of the clauses specifically as such but on the other hand the Bank had undertaken responsibility to pay any sum or sums within the guaranteed limit upon receipt of written demand from the Company. The operative portion of the bank guarantee furnished by the Bank does not refer to any of the conditions for payment under the bank guarantee. It is true that the bank guarantee furnished makes a reference to the principal agreement between the parties in its preamble. Mere fact that the bank guarantee refers to the principal agreement in the preamble of the deed of guarantee does not make the guarantee furnished by the Bank to

be a conditional one unless any particular clause of the agreement has been made part of the deed of guarantee.

23. The recitals in the preamble in the deed of guarantee do not control the operative part of the deed. After careful analysis of the terms of the guarantee we find the guarantee to be an unconditional one. The appellant, therefore, cannot be allowed to raise any dispute and prevent the respondent from encashing the bank guarantee."

13. According to us, the law laid down by the Apex Court as aforesaid has the full application in the present case. We have also taken a similar view in the case of *Sigma Construction v. M.P. Rural Road Development Authority & others*, W.P. No.11022/2008 decided on 30.4.2009 wherein similar question in relation to encashment of bank guarantee was involved and we held that if the department has not written anything to the bank while directing the bank to encash the bank guarantee, the bank guarantee cannot be invoked. It is not stated that the contractor has failed to perform the work contract then in absence of any such reference resulting into loss or damage caused or to be caused, the bank is not under a legal obligation to encash the bank guarantee. We also held that the bank guarantee was not entitled to be invoked. The facts and circumstances of the present case are also similar to the case already decided by this Court in *Sigma Construction* (supra).

14. In view of the aforesaid, we set aside the order dated 21.8.2008 (Annexure R/1) and reminder dated 26.8.2008 (Annexure R/2) and we further hold that the respondents are not entitled to invoke the bank guarantee No.8652 dated 31.10.2006 as mentioned in Annexure R/3. Accordingly, the present petition stands allowed. There shall be no order as to costs.

Petition allowed.

I.L.R. [2009] M. P., 3090
WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice P.K. Jaiswal
22 July, 2009*

ASHOK KUMAR PATEL ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Rajya Suraksha Adhiniyam, M.P., 1990 (4 of 1991), Section 5(b) ***- Removal of person about to commit offence - Externment - Ingredients when not attracted - Held - If a person was engaged in commission of offence or in abetment of an offence of type mentioned in S. 5(b), several years or***

*W.P. No.1180/2009 (Jabalpur)

several months back, there cannot be any reasonable ground for believing that the person is engaged or is about to be engaged in commission of such offence. (Para 8)

क. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 5(बी) – अपराध करने के बारे में व्यक्ति को हटाया जाना – निष्कासन – संघटक कब आकृष्ट नही होते – अभिनिर्धारित – यदि कोई व्यक्ति कई वर्षों और कई माह पूर्व अपराध करने में या धारा 5(बी) में उल्लिखित प्रकार के अपराध के दुष्प्रेरण में लगा हुआ था, तो यह विश्वास करने के लिए कोई युक्तियुक्त आधार नही हो सकता है कि ऐसे अपराध को किये जाने में व्यक्ति को लगाया गया है या लगाया जाने वाला है।

B. Rajya Suraksha Adhiniyam, M.P., 1990 (4 of 1991), Section 5(b) - ***Removal of person about to commit offence - Externment - Ingredients when not attracted*** - *In absence of any existence of material to show that witnesses are not coming forward by a reason of apprehension to danger to their person or property to give evidence against the concerned person in respect of alleged offences, an order u/s 5(b) of the Act cannot be passed by District Magistrate by merely repeating the language of S. 5(b) of the Act.* (Para 11)

ख. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 5(बी) – अपराध करने के बारे में व्यक्ति को हटाया जाना – निष्कासन – संघटक कब आकृष्ट नही होते – यह दर्शित करने वाली सामग्री के किसी अस्तित्व के अभाव में कि साक्षी उनके शरीर या सम्पत्ति को खतरे की आशंका के कारण संबंधित व्यक्ति के विरुद्ध कथित अपराधों के सम्बन्ध में साक्ष्य देने के लिए आगे नही बढ़ रहे हैं, जिला मजिस्ट्रेट द्वारा केवल अधिनियम की धारा 5(बी) की भाषा को दोहराकर अधिनियम की धारा 5(बी) के अधीन आदेश पारित नही किया जा सकता।

Cases referred :

AIR 1973 SC 630, AIR 1989 SC 1304, AIR 2005 SC 2080, AIR 1952 SC 221.

Sanjay Patel, for the petitioner.

Vivek Awasthy, G.A., for the respondents.

ORDER

The Order of the Court was delivered by **A.K. Patnaik, C. J.** :–In this writ petition under Article 226 of the Constitution, the petitioner has challenged the orders passed against him for externment-under the State Security Act, 1990 (for short 'the Act of 1990'), by the District Magistrate Rewa, and the appellate order of the Commissioner, Rewa Division, rejecting the appeal of the petitioner against the order of externment.

2. The relevant facts briefly are that the Superintendent of Police, District Rewa (M.P.), submitted a report dated 31.10.2008 to the District Magistrate, District Rewa, about the criminal activities of the petitioner. In the report, the Inspector of Hanumana Police Station, District Rewa, had given the details of the chain of criminal offences alleged to have been committed by the petitioner from

1995 to 2008 and had made a request that an externment order be passed against the petitioner in exercise of powers under Sections 3 & 4 of the Act of 1990. The District Magistrate then issued a notice dated 31. 10.2008 to the petitioner to show cause why a proceeding for order of externment from District Rewa as also the districts touching the revenue limits of adjacent districts, namely, Sidhi, Shahdol, Satna, Umariya and Anuppur should not be initiated against him, and asked the petitioner to submit his reply on 11.11.2008. The petitioner appeared before the District Magistrate on 11.11.2008 and prayed for time to submit his reply and the District Magistrate fixed the case for reply to 12.11.2008. The petitioner submitted his reply on 12.11.2008 denying that he had committed offences alleged in the show cause notice. The petitioner also stated in his reply that he was a candidate contesting the Vidhan Sabha Election from Mauganj Constituency No.71, and if, a proceeding for externment is initiated against him, he cannot contest the election. The District Magistrate heard the counsel for the petitioner on 12.11.2008 and posted the case for orders to 18.11.2008, and on 18.11.2008 passed the impugned order in Criminal Case No.227/08 directing externment of the petitioner from District Rewa as also the districts touching the revenue limits of adjacent districts, namely, Sidhi, Shahdol, Satna, Umariya and Anuppur for a period of one year. Aggrieved, the petitioner preferred an appeal under Section 9 of the Act of 1990, before the Commissioner, Rewa Division, but by order dated 13.01.2009, the Commissioner dismissed the appeal.

3. Mr. Sanjay Patel, learned counsel for the petitioner submitted that there was no material before the District Magistrate for passing the order of externment under Section 5(b) of the Act of 1990. He submitted that Section 5(b) of the Act of 1990, makes it clear that there must be reasonably grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapter XII, XIV or XVII or under Sections 506 or 509 of the Indian Penal code, 1860, or in abetment of any such offence, but the show cause notice and the order passed by the District Magistrate under Section 5(b) would show that offences alleged to have been committed mostly of the years 1995 to 2007, have been mentioned. He submitted that therefore there was no satisfaction whatsoever of the District Magistrate that the petitioner is engaged or is about to be engaged in the ,commission of offences. He also submitted that all the six cases mentioned in the show cause notice and the order of the District Magistrate are pending before the trial Court and in not a single case, the petitioner has been convicted. He further submitted that Section 8(1) of the Act of 1990 provides that before an order under Section 5 is passed against any person, the District Magistrate shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them. He submitted that the materials in support of the allegations, such as the statement of

S.H.O. referred to in the order sheet, on the basis of which the externment order was passed, was not furnished to the petitioner. He further submitted under Section 8(3) of the Act of 1990 also provides that the person against whom the order is proposed to be passed, will be given an opportunity to examine witnesses, but no such opportunity was given to the petitioner because the case was fixed on 11.11.2008 and the reply was filed by the petitioner on 12.11.2008 and the case was closed on 12.11.2008. He submitted that this is therefore a fit case in which the impugned orders passed by the District Magistrate and the Commissioner should be quashed for contravention of different provisions of the Act of 1990.

4. Mr. Vivek Awasthy, learned Govt. Advocate, appearing for the respondents submitted that the order passed by the District Magistrate would show that the petitioner has committed a series of offences right from the year 1995 to 2008, on account of which the District Magistrate had to pass the order of externment under section 5(b) of the Act of 1990. He submitted that Section 8(1) of the Act of 1990 is very clear that the District Magistrate shall inform the person in writing of the general nature of the material allegations against him and is not required to disclose materials on the basis of which the material allegations are made. In support of this submission, he cited the decision of the Supreme Court in *Pandharinath Shridhar Vs. Dy. Commissioner of Police, State of Maharashtra* (AIR 1973 SC 630) in which paramateria provisions of Section 56 of Bombay police Act were interpreted and it was held that only the general nature of material allegations against whom the order of externment is proposed to be passed are to be furnished to the person concerned and not the full particulars on the basis of which the allegations are made. He submitted that a similar view has been taken by the Supreme Court in *State of Maharashtra and another vs, Salem Hasan Khan* (AIR 1989 SC 1304). He further submitted that in a recent decision in *State of N.C.T. of Delhi and another vs. Sanjeev alias Bitttoo* (AIR 2005 SC 2080), the Supreme Court has also taken a view that sufficiency of material to pass an externment order under Section 47 of the Delhi Police Act, cannot be gone into by the Court while exercising the power of judicial review.

5. Section 5 of the Act of 1990 under which the order of externment has been passed is quoted herein below :-

> "5. **Removal of persons about to commit offence.-** whenever it appears to the District Magistrate-
>
> (a) that the movements or acts of any person are causing or calculated to cause alarm, danger or harm to person or property; or
>
> (b) that there are reasonably grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence or an offence punishable

under Chapter XII, XVI or XVII or under Section 506 or 509 of the Indian Penal Code, 1860 (45 of 1860) or in the abetment of any such offence, and when in the opinion of the District Magistrate witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property; or

(c) that an outbreak of epidemic disease is likely to result from the continued residence of an immigrant;

the District Magistrate, may by an order in writing duly served on him or by beat of drum or otherwise as the District Magistrate thinks fit, direct such person or immigrant-

(a) so as to conduct himself as shall seem necessary in order to prevent violence and alarm or the outbreak or spread of such disease; or

(b) to remove himself outside the district or any part thereof or such area and any district or districts or any part thereof, contiguous thereto by such route within such time as the District Magistrate may specify and not to enter or return to the said district or part thereof or such area and such contiguous districts, or part thereof, as the case may be, from which he was directed to remove himself."

6. A plain reading of section 5(b) of the Act of 1990 quoted above, would show that for passing an order of extermment against a person, two conditions must be satisfied :

(i) There are reasonable grounds for believing that a person is engaged or is about to be engaged in commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII or under Section 506 or 509 of the Indian Penal Code, 1860 or in the abetment of any such offence; and

(ii) In the opinion of the District Magistrate, witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property.

7. In *State of N.C.T. of Delhi and another vs. Sanjeev alias Bittoo* (supra), the Supreme Court had the occasion to interpret Section 47 of the Bombay Police Act, 1978, which contains provisions similar to Section 5 of the Act of 1990 and has referred to these essential conditions for passing an order under Section 47 of the Delhi Police Act in para 10 of the judgment as reported in the AIR thus :-

"Section 47 consists of two parts. First part relates to that satisfaction of the Commissioner of Police or any authorised officer reaching a conclusion that movement or act of any person are causing alarm and danger to person or property or that there are reasonable grounds for believing that such person is engaged or is about to be engaged in commission of enumerated offences or in the abetment of any such offence or is so desperate and dangerous as to render his being at large hazardous to the community. Opinion of the concerned officer has to be formed that witnesses are not willing to come forward in public to give evidence against such person by reason of apprehension on their part as regards safety of person or property. After these. opinions are formed on the basis of materials forming foundation therefore the Commissioner can pass an order adopting any of the available options as provided in the provision itself. The three options are (1) to direct such person to so conduct himself as deemed necessary in order to prevent violence and alarm or (2) to direct him to remove himself outside any part of Delhi or (3) to remove himself outside whole of Delhi."

8. The expression "is engaged or is about to be engaged" in the commission of offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII or under Section 506 or 509 of the Indian Penal Code, 1860 or in the abetment of any such offence, shows that the commission of the offence or the abetment of such offence by the person must have a very close proximity to the date on which the order is proposed to be passed under Section 5(b) of the Act of 1990. Hence, if a person was engaged in the commission of offence or in abetment of an offence of the type mentioned in Section 5(b), several years or several months back, there cannot be any reasonable ground for believing that the person is engaged or is about to be engaged in the commission of such offence.

9. We will therefore have to examine the impugned order dated 18.11.2008 passed by the District Magistrate, under Section 5(b) of the Act of 1990 to find out whether the petitioner was engaged in the commission of an offence or was about to be engaged in the commission of an offence mentioned in Section 5(b) of the Act of 1990, or in the abetment of such offence, which was very close in proximity to 18.11.2008 when the impugned order of externment was passed. The first offence mentioned is alleged to have been committed by the petitioner on 9.4.1995 when the petitioner and his other associates forcibly took possession of 'Mahuwa' of Tilakdhari Tripathi, son of Indramani Tripathi and collected the same, and crime No.46/95 under Sections 447 and 379 of the Indian Penal Code was registered and the petitioner was arrested and produced before the Court. The second offence is alleged to have been committed by the petitioner on 14.3.2007

when the petitioner is alleged to have written a letter to Shivshankar Tripathi, son of Tilakdhari Tripathi, giving threats regarding construction of new building of Shiksha Guarantee School, and Crime No.42/2007 under Sections 353, 294,506 read with Section 34 of the Indian Penal Code has been registered and a challan has been filed in the Court in Case No.729/2008. The third act which has been mentioned in the impugned order is not an offence alleged to have been committed but a prohibitory proceeding No.22/2007 under Sections 107 and 116(3) of the Code of Criminal Procedure instituted against the petitioner on 9.4.2007 and the petitioner has been produced in Court. The fourth offence alleged to have been committed by the petitioner is in July 2008 when the petitioner along with 6 or 7 others is alleged to have caused hindrance in government work during the election of Palak Shikshak Sangh and created disturbances in election work' and committed 'Marpeet' on the basis of which Crime No.216/2008 for offences under Sections 253, 294, 323, 325 and 506-B read with Section 34 of Indian Penal Code has been registered. In our considered opinion, these offences alleged to have been committed by the petitioner in the years,1995 to 2007, cannot be the foundation of an order under section 5(b) of the Act of 1990 as the alleged offences have no proximity at all to the order of externment passed on 18.11.2008. Even, the offence alleged to have been committed by the petitioner along with 6 or 7 other persons in July 2008, cannot constitute a reasonable ground to believe on 18.11.2008 that the petitioner is engaged or is about to be engaged in offence mentioned in Section 5(b) of the Act of 1990.

10. The second condition which must be satisfied for passing of an order of externment against a person is that in the opinion of the District Magistrate, witnesses are not willing to come forward to give evidence in public against such person by a reason of apprehension on their part as regards safety of person or property. Construing a paramateria provision in Section 27 of the City of Bombay Police Act, 1902 in *Gurbachan Singh v. The State of Bombay and another* (AIR 1952 SC 221), the Supreme Court observed :-

> "The law is certainly an extraordinary one and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitute a menace to the safety or the public residing therein."

11. In the instant case, the District Magistrate has in the impugned order only baldly stated that the list of offences registered against the petitioner reflects that he is a daring habitual criminal and because of this there is fear and terror in the public and has not recorded any clear opinion on the basis of materials, that in his opinion witnesses are not willing to come forward to give evidence in public against such person by a reason of apprehension on their part as regards safety of their person or property. In most of the cases, Challans have been filed by the Police in

Court obviously after examination of the witnesses under Section 161 of Cr.P.C. and the cases are pending in the Court. There is no reference in the order of District Magistrate that witnesses named in the Challans filed by the Police are not coming forward to give evidence against the petitioner in Court. Hence, in the absence of any existence of material to show that witnesses are not coming forward by a reason of apprehension to danger to their person or property to give evidence against the petitioner in respect of the alleged offences, an order under Section 5(b) of the Act of 1990 cannot be passed by the District Magistrate by merely repeating the language of Section 5(b) of the Act of 1990.

12. In *State of N.C.T. of Delhi and another vs, Sanjeev alias Bittu* (supra), the Supreme Court interpreting Section 47 of the Bombay Police Act, 1978, which is similarly worded as Section 5 of the Act of 1990, has held in para 25 :-

> "It is true that some material must exist but what is required is not an elaborate decision akin to a judgment. On the contrary, the order directing externment should show existence of some material warranting an order of externment. While dealing with question mere repetition of the provision would not be sufficient. Reference to be made to some material on record and if that is done the requirements of law are met. As noted above, it is not the sufficiency of material but the existence of material which is *sine qua non*."

13. The Act of 1990 certain serious restrictions on the fundamental right to freedom under Article 19(1) of the Constitution and the fundamental right to personal liberty under Article 21 of the Constitution and unless the conditions mentioned under Section 5(b) of the Act of 1990 are strictly satisfied, an order of externment, will have to be quashed by the Court. While considering a case under Section 56 of the Bombay Police Act, which also empowered the police to pass an order of externment, the Supreme Court observed in *Pandharinath Shridhar Rangnekar Vs, Dy. Commissioner of Police, State of Maharashtra* (supra) as under :-

> "It is true that the provisions of Section 56 make a serious inroad on personal liberty but such restraints have to be suffered in the larger interests of society. This court in *Gurbachan Singh V. The State of Bombay,* 1952 SCR 737= (AIR 1952 SC 221) had upheld the validity of Section 27(l) of the City of Bombay Police Act, 1902, which corresponds to Section 56 of the Act. Following that decision, the challenge to the constitutionality of Section 56 was repelled in 1956 SCR 533= (AIR 1956 SC 585). We will only add that care must be taken to ensure that the terms of Sections 56 and 59 are strictly complied with and that the slender safeguards

which those provisions offer are made available to the proposed externee."

14. We are thus of the considered opinion that the two conditions for an order of externment stated in Section 5(b) of the Act of 1990 do not exist in this case and the order passed by the District Magistrate and appellate order of the Commissioner are liable to be quashed. Since the impugned order of externment passed by the District Magistrate and the appellate order passed by the Divisional Commissioner are liable to be quashed on this ground alone, it is not necessary for us to deal with the other grounds raised by the petitioner in this writ petition. In the result, we quash the impugned order dated 18.11.2008 passed by the District Magistrate Rewa in Cr. Case No.227/08 as well as the appellate order dated 13.1.2009 passed by the Commissioner, Rewa Division.

No costs.

Order accordingly.

I.L.R. [2009] M. P., 3098
WRIT PETITION
Before Mr. Justice R.S. Garg & Mr. Justice S.K. Seth
18 August, 2009*

TIKI ENTERPRISES (M/S) & anr. ... Petitioners
Vs.
COMMISSIONER OF COMMERCIAL TAX, M.P. INDORE ... Respondent

Value Added Tax Act, M.P. (20 of 2002), Section 70 - *Whether Emulsified Bitumen would not fall under Entry No. 16 of Schedule II Part 2 appended to the Act - Held - Yes - Bitumen and Emulsified Bitumen are two different commodities in the commercial world, though use of the said articles some times may be common, but some times, even the cost of the use as would also require to be considered to vary and use of the new product which is commercially different economically to some extent.* (Para 14)

मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 70 – क्या मिश्रित डामर (emulsified bitumen) अधिनियम से संलग्न अनुसूचित II भाग 2 की प्रविष्टि क्र. 16 के अन्तर्गत नही आयेगा – अभिनिर्धारित – हाँ – वाणिज्यिक संसार में डामर (bitumen) और मिश्रित डामर (emulsified bitumen) दो भिन्न पदार्थ हैं, यद्यपि उक्त पदार्थों का उपयोग किसी समय सामान्य हो सकता है, किन्तु किसी समय अन्तर करने और नये उत्पाद जो वाणिज्यिक रूप से कुछ सीमा तक आर्थिक रूप से भिन्न है, के उपयोग के लिए उपयोग की कीमत पर भी विचार करना आवश्यक होगा।

Cases referred :
1981(47) STC 124, 1985(60) STC 213, 2000(118) STC 287, 2000(120) STC 205, 1978(42) STC 433.

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*W.P. No.5153/2009 (Indore)

P.M. Choudhary, for the petitioners.
A.S. Kutumbale, Addl.A.G. with *Anjali Jamkhedkar,* for the respondent.

ORDER

By this petition under Article 226 of the Constitution of India, the petitioner seeks to challenge correctness, validity and propriety of the order dated 02.05.2008 passed by the Commissioner, Commercial Tax, Madhya Pradesh, Indore under Section 70 of Madhya Pradesh Value Added Tax Act, 2002, (herein after referred to as "the Act" for short) wherein he has held that Emulsified Bitumen would not fall under Entry No.16 of Schedule II Part 2 appended to the Act.

2. The petitioners, who are manufacturer of 'Emulsified Bitumen', being aggrieved by the recovery of the VAT @ 12.5% made an application to the Commissioner of Commercial Tax, Madhya Pradesh, Indore that 'Emulsified Bitumen' falls under the Entry 16 Part 2 Schedule II commonly known as "Bitumen and Coal Tar", and as such, the product manufactured by the petitioners should also be taxed at rate of 4% and not @ 12.5%.

3. After hearing the parties, learned Commissioner came to the conclusion that Bitumen and Coal Tar are different then Emulsified Bitumen, and therefore, the same would not fall under Entry No.16 of Schedule II Part 2, but would fall under residuary entry.

4. Shri Choudhary, learned counsel for the petitioner, after taking us through a number of decisions and the research work, submitted that Emulsified Bitumen, being a part or product of Bitumen itself, cannot be classified under residuary Entry. It is submitted by him that use of Bitumen and Emulsified Bitumen is the same and as Emulsified Bitumen is made out of or is a product of Bitumen with no physical or chemical changes in it, the authority was not justified in holding that 'Emulsified Bitumen' would not fall under Entry No.16.

5. Shri Kutumbale, learned counsel for the State, on the other hand, submitted that Bitumen and Emulsified Bitumen are commercially different articles, though Bitumen when is mixed with emulsifier then only it starts absorbing water and is used for laying of road. The authority was justified in holding that Emulsified Bitumen would not fall under Entry No.16.

6. Undisputedly, Bitumen is a byproduct of the petroleum. It also cannot be disputed before us that Bitumen in its original form is a solid lump, which can be used for laying road or for any other purpose, after it is heated to 150°C. Undisputedly, even from the research work on which reliance is placed, it would clearly appear that when the Bitumen is heated between 150°C and 180°C at which stage, it can be mixed with other road component, such as mineral aggregate, in a method known as the application of a hot mix. Working with Bitumen at these temperatures is very dangerous, with a risk of serious burns. It also requires

costly equipment for the heating, storage and application of Bitumen, which must be performed on site. Bitumen that has been mixed with petroleum solvents is called cut-back Bitumen. The solvents, usually kerosene, play no part in the function of the binder and are costly. The solvents act to decrease the viscosity of the Bitumen making it more workable. From the research work, it would clearly appear that the Bitumen is converted into Bitumen Emulsified with the help and assistance of emulsifier and a new product comes into existence.

7. In the matter of *Chowgule & Company Private Limited Vs. Union of India and others* [1981] 47 STC 124, the Supreme Court has held that:

> "The test that is required to be applied is: does the processing of the original commodity bring into existence a commercially different and distinct commodity?"

8. In the matter of *State of Orissa Vs. Titaghur Paper Mills Company Limited* [1985] 60 STC 213, the Supreme Court observed:

> "Timber and sized and dressed logs are one and the same commercial commodity. Logs are noting more than wood cut up or sawn and would be timber. Planks beams and rafters would also be timber."

9. We are referring to these two judgments to make the things easy that basic question for application of very Entry would be that the product or byproduct of the article / commodity gets in the Entry contains the same physical and chemical quality or it changes itself and brings out as a different commodity commonly and differently known in the commercial world.

10. In the matter of *Titaghur Paper Mills' case* (supra), their Lordships had considered the question of timber, whether that obtained the sized and dressed logs, timber would not change in the basic quality. Timber would continue to be timber.

11. In the matter of *Commissioner of Sales Tax, UP Vs. Lal Kunwa Stone Crusher (P.) Limited* [2000] 118 STC 287 and *Divisional Deputy Commissioner of Sales Tax and another Vs. Bherhaghat Minereal Industries* [2000] 120 STC 205, the Supreme Court was of the opinion that entry 'stone' is wide enough to include its various forms, such as boulders, small stones, chips etc. In the said matter, the Supreme Court was of the opinion that 'stone', even after it is crushed or broken, would continue to be 'stone' though it may be named as 'boulder', "small stone", 'chips', 'gitti' etc.

12. Reliance was placed upon a judgment of the Supreme Court in the matter of *Porritts & Spencer (Asia) Limited Vs. State of Haryana* [1978] 42 STC 433, to contend that "dryer felts" which are commonly used as absorbents held to be fall in Entry known as 'textiles'. Whether, in the present case, "Emulsified Bitumen"

should also fall within the larger Entry commonly known as "Bitumen and Coal Tar"?

13. In the matter of *Porritts* (supra), the question before the Supreme Court was that "dryer felts" made out of cotton or woolen yarn by process of weaving and commonly used as absorbents of moisture, should the article fall within the Entry known as 'textile'? Their Lordships were of the opinion that "dryer felts" made out of cotton or woolen yarn by process of weaving according to the wrap and woof pattern and commonly used as absorbents of moisture in paper manufacturing units would fall within the ordinary and common parlance meaning of the word 'textiles'.

14. In the present matter, undisputedly, Bitumen if not mixed with emulsifier, then, as discussed above, its use would be difficult and dangerous. It is not in dispute before us that Bitumen in its original form would not absorb or mix with water but after emulsifier is fired upon the raw Bitumen, then it is clear that quality of absorbing or mixing in the water would come into being. The quality of a new product is changed and it is commonly and commercially known as a different commodity, then it cannot be said that the new produce would fall in original Entry. Undisputedly, Bitumen and Emulsified Bitumen are two different commodities in the commercial world, though use of the said articles some times may be common, but some times, even the cost of the use as would also require to be considered to vary and use of the new product which is commercially different economically to some extent.

15. In the present matter, in our opinion, the learned Commissioner, Commercial Tax, was justified in holding that 'Emulsified Bitumen' would not fall in Entry No.16.

16. We find no reasons to interfere in the matter. The petition is dismissed.

C.c. as per rules. *Petition dismissed.*

I.L.R. [2009] M. P., 3101
WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice P.K. Jaiswal
20 August, 2009*

TAHIR ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. National Security Act (65 of 1980), Section 3(2) - *Detention challenged on the ground that allegations against the petitioner are general in nature and no proper investigation has been done - Held - Petitioner has indulged in looting, arson, stone-pelting and as a consequence disturbed*

*W.P. No.4643/2009 (Jabalpur)

the communal harmony and has created enmity between the two communities - He has caused public disorder in the town - Acts of the petitioner have created panic in town and has put fear in general public - Members of general public do not dare to lodge a report against the petitioner - Therefore, it has become essential to initiate action against him u/s 3(2) of the Act and pass the order of detention - Petition dismissed. (Para 6)

क. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) – निरोध को इस आधार पर चुनौती कि याची के विरुद्ध अभिकथन सामान्य प्रकृति के हैं और कोई उचित अन्वेषण नही किया गया है – अभिनिर्धारित – याची लूटने, आग लगाने, पत्थर फेंकनें में आसक्त हुआ और उसके परिणामस्वरूप साम्प्रदायिक सौहार्द्र में विघ्न किया और दो समुदायों के मध्य शत्रुता पैदा की – उसने नगर में लोक अव्यवस्था कारित की – याची के कृत्यों ने नगर में आतंक पैदा किया और लोक सामान्य को भय में डाला – लोक सामान्य याची के विरुद्ध रिपोर्ट दर्ज कराने का साहस नही करते हैं – इसलिए, यह आवश्यक हो गया कि उसके विरुद्ध अधिनियम की धारा 3(2) के अन्तर्गत कार्यवाही प्रारम्भ की जाए और निरोध का आदेश पारित किया जाए – याचिका खारिज।

B. National Security Act (65 of 1980), Section 3(2) - *Detention* - *Challenged that others who participated in the communal riots have not been detained under the Act and are only facing regular trials in criminal courts and witnesses in the criminal cases against the petitioner are turned hostile - Held - These facts are not relevant for deciding whether the detention of the petitioner under the Act was necessary - DM was satisfied on the materials that it was necessary considering the active role played by the petitioner in communal riots to detain him under the Act and not to detain others who may have relatively a lesser role in the communal riots - The order of detention cannot be held to be bad.* (Para 10)

ख. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) – निरोध – निरोध को चुनौती दी गई कि अन्य व्यक्तियों, जिन्होंने साम्प्रदायिक दंगों में भाग लिया, को अधिनियम के अन्तर्गत निरुद्ध नही किया गया और वे केवल दाण्डिक न्यायालयों में नियमित विचारण का सामना कर रहे हैं और याची के विरुद्ध दाण्डिक मामलों में साक्षी पक्षद्रोही हो गये हैं – अभिनिर्धारित – ये तथ्य यह विनिश्चित करने के लिए सुसंगत नही हैं कि क्या अधिनियम के अन्तर्गत याची का निरोध आवश्यक था – जिला मजिस्ट्रेट का इस सामग्री पर समाधान हुआ कि याची द्वारा साम्प्रदायिक दंगों में निभायी गयी सक्रिय भूमिका को विचार में लेते हुए यह आवश्यक था कि अधिनियम के अन्तर्गत उसे निरुद्ध किया जाए न कि अन्य व्यक्तियों को जिनकी साम्प्रदायिक दंगों में तुलनात्मक रूप से कम भूमिका रही – निरोध का आदेश दोषपूर्ण होना अभिनिर्धारित नही किया जा सकता।

M.K. Tripathi, for the petitioner.
Vijay Kumar Shukla, Dy.A.G., for the respondents.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, C. J.** :–In this writ petition under Article 226 of the Constitution,

the petitioner has challenged the order of detention passed by the District Magistrate, Burhanpur, detaining him under Section 3(2) of the National Security Act, 1980 (for short 'the Act').

2. On 10.10.2008 there were communal riots in Burhanpur town between the Hindu and Muslim and the entire Burhanpur town was under curfew till 20.10.2008. A number of criminal cases were registered in different police stations of Burhanpur town and several persons were arrested and some of them were released on bail by the Court. The Superintendent of Police, Burhanpur, submitted a report dated 30.10.2008 to the District Magistrate, Burhanpur and pursuant to the police report dated 30.10.2008, the District Magistrate, Burhanpur, passed the impugned order dated 13.4.2009 detaining the petitioner under Section 3(2) of the Act. During the pendency of this writ petition, the petitioner was produced before the Advisory Board and the Advisory Board gave its opinion and pursuant to the opinion of the Advisory Board, the Government of Madhya Pradesh, Home Department, in exercise of powers under Section 12(1) of the Act confirmed the order of detention and directed that the period of detention of the petitioner shall continue till expiry of 12 months from the date of his detention i.e. upto 12.4.2010.

3. Mr. M.K. Tripathi, learned counsel for the petitioner, submitted that the grounds of detention served on the petitioner would show that the allegations against the petitioner are general in nature and that no proper investigation has been done into the allegations made against the petitioner. He further submitted that about 1000 persons who were involved in the communal riots in Burhanpur town during 10.10.2008 to 20.10.2008 were arrested and criminal cases were registered against them in different police stations of Burhanpur town, but most of the arrested persons have been released on bail. He submitted that witnesses in different criminal cases registered against the petitioner have also turned hostile in trials in different courts. He submitted that the detention of the petitioner pursuant to the impugned order passed by the District Magistrate, Burhanpur and the order passed by the State Government, are therefore bad and are liable to be quashed. He cited the decision of a Division Bench of this Court in *Sunil Tiwari Vs. State of Madhya Pradesh & others* (2009 {2} M.P.H.T. 297 {DB}) in support of his contentions.

4. Mr. Vijay Kumar Shukla, learned Deputy Advocate General, on the other hand, sought to sustain the order of detention passed by the District Magistrate and the order of confirmation passed by the State Government by contending that the grounds of detention' served on the petitioner would show that his detention was necessary for maintaining communal harmony and peace in Burhanpur town. He submitted that the petitioner indulged in various acts of arson and looting in different places of Burhanpur town on 10.10.2008 and played an active role in communal riots between the Hindu and Muslim and in these circumstances, the District Magistrate had no option but to pass the order of detention for maintaining

public order and peace in the locality. He submitted that the facts in *Sunil Tiwari Vs. State of Madhya Pradesh & others* (supra) cited by Mr. Tripathi are entirely different and the decision of the Division Bench of this Court in that case does not apply to the facts of the present case.

5. We have perused the English translation of the grounds of detention dated 13.4.2009 which were served on the petitioner. In paragraph 2 of the grounds of detention, the following four acts allegedly committed by the petitioner on 10.10.2008 have been narrated:

> *"(1) On 10.10.2008 you along with other miscreants broke the doors and entered into the house of the complainant Manoj son of Bhaiyalal Lakhe, a resident of Tilak Hall, Burhanpur and administered threats to him and his family to their lives, caused injuries on them and set their house on fire. On a report being lodged by him, Crime No.225/2008 was registered against you in respect of the offences punishable under Sections 148, 149, 323, 427, 452, 436 and 395 of the Indian Penal Code at the Police Station Shikarpura, Burhanpur.*
>
> *(2) On 10.10.2008 you along with other miscreants sharing common intention with common object pelted stones and set the gas cylinder on fire for causing explosion and by hatching conspiracy attempted to put irreparable damage to the complainant. On a report being lodged by the complainant, K.P. David, Station House Officer, Shikarpura,Crime No.230/ 2008,was instituted against you in respect of the offences punishable under Sections 307, 147, 148, 149,452, 395, 436 and 506-II of the Indian Penal Code at the Police Station, Shikarpura.*
>
> *(3) On 10.10.2008 you along with other accused persons sharing common intention, forcibly entered into the house of the complainant, Subhash son of Pannalal Jain, resident of behind Tilak Hall, Shah Bazar, made assault on him and set his shop on fire. Thereafter pelted stones on the house, committed riot and looted various general items, kept in the-shop and as such caused damage to the complainant to the tune of Rs. 50,000/- approximately. On his report being lodged Crime No. 232/ 2008 was registered under Sections 147, 148, 149, 436, 452 and 495 of the Indian Penal Code at the Police Station, Shikarpura.*
>
> *(4) On 10.10.2008 you along with other accomplices sharing*

common intention with the common object forcibly broke into the residential house of the complainant, Ravindra son of Ramchandra Naik, resident of in front of Tilak Hall and attacked on him, pelting stones and set his shop on fire and thereby caused loot of approximately Rs.50,000/-. On an FIR having been lodged by the complainant, Crime No.233/2008 was instituted by the Station House Officer, Shikarpura, under Sections 147, 148, 149, 436, 452, 188, 294, 506 and 395 of the Indian Penal Code."

6. The District Magistrate after narrating the aforesaid four acts alleged to have been committed by the petitioner on 10.10.2008 has stated in paragraph 3 of the grounds of detention that as a consequence of the acts of the petitioner the people of Burhanpur town are in terror and has further observed that the acts of the petitioner have created panic in Burhanpur town and has put fear in the general public and the members of general public do not dare to lodge a report against the petitioner. The District Magistrate has also stated in paragraph 4 of the grounds of detention that the aforesaid four acts of the petitioner would show that he has indulged in looting, arson, stone-pelting and as a consequence disturbed the communal harmony and has created enmity between the two communities and hence has caused public disorder in the town of Burhanpur. The District Magistrate has also stated in paragraph 5 of the grounds of detention that the alleged acts of the petitioner unless arrested by his detention are likely to disturb public peace and tranquillity in the town of Burhanpur and, therefore, it has become essential to initiate action against him under section 3(2) of the Act and pass the order of detention.

7. We have perused the judgment of the Division Bench of this court in *Sunil Tiwari Vs. State of Madhya Pradesh & others* (supra) cited by Mr. Tripathi and we find that in paragraph 6 of the judgment, the Division Bench has quoted the decision of the Supreme Court in *Victoria Fernandes vs. Lalmal Sawma & others* (AIR 1992 SC 687) in which the distinction between 'law and order' and 'public order' has been brought out. The relevant passage from the decision of the Supreme Court in *Victoria Fernandes vs. Lalmal Sawma & others*, is quoted herein below :

"The distinction between the areas of 'law and order' and 'public order' is one of degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community, which makes it prejudicial to the maintenance of the pubtic order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it would raise the problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a

particular eruption of disorder that helps distinguish it as an act affecting 'public order' from that concerning 'law and order'. The question to ask is : Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order, or does it affect merely an individual leaving the tranquillity of the society undisturbed? This question has to be faced in every case on its facts. (See : Dr. Ram Manohar Lohia.Vs. State of Bihar (1996) 2 SCR 709 = (AIR 1966 SC 740); Arun Ghosh Vs. State of West Bengal, (1970) 3 SCR 288 = (AIR 1970 SC 1228); Ram Ranjan Chatterjee Vs. State of West Bengal (1975)3 SCR 301 = (AIR 1975 SC 609); Ashok Kumar vs. Delhi Administration (1982) 2 SCC 403 = (AIR 1982 SC 1143)."

It is clear from the aforesaid decision of the Supreme Court that the question to be asked in each case is whether the acts of the detenue have led to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed and this question has to be decided in every case on its facts.

8. So far as the facts of the present case are concerned, the allegation against the petitioner in the grounds of detention extracted above is that on 10.10.2008 the petitioner along with other miscreants broke the doors and entered into the residential houses and shops of several persons and attacked the persons pelting stones on them, looted their property and money'and caused other damages for which crimes No. 225/2008, 230/2008, 232/2008 and 233/2008 have been registered under various sections including sections 147, 148, I49,307 & 395 of the Indian Penal Code. The very nature of the acts alleged to have been committed by the petitioner on 10.10.2008 particularly when there were communal riots between the Hindu and Muslim in Burhanpur town are such that the acts must have affected the even tempo of the life of community of different localities in Burhanpur town. These acts cannot be said to be only individual acts of contravention of law but are acts which have disturbed the public order.

9. In *Sunil Tiwari Vs. State of M.P. & others* (supra), the Division Bench of this Court in paragraph 5 of the judgment relying on *Lakshman Khatik Vs. The State of West Bengal* (AIR 1974 SC 1264), *Golam Hussain Vs Commissioner of Police Calcutta* (AIR 1974 SC 1336) and *Gora Vs. State of Bengal* (AIR 1975 SC 473), has also held that there must be a close proximity between the offending acts mentioned in the grounds of detention and the order of detention and there should not be too long and unexplained intervals between the offending acts and the order of detention, but no mechanical test of counting the months of the interval can be applied and it all depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short

or long, on the reason for the delay in taking preventive action, like information of participation being available only in the course of an investigation.

10. In the present case, the petitioner is alleged to have committed the acts of breach public order on 10.10.2008 and the order of detention was passed on 13.4.2009. The petitioner has not taken the ground in the writ petition that there was no close proximity between the alleged acts committed by him on 10.10.2008 and the order of detention dated 13.4.2009 and therefore the respondents have not explained the delay of six months in detaining the petitioner under the Act. Nonetheless, Burhanpur town is prone to communal riots between the Hindu and Muslim and to prevent such communal riots affecting the peace and tranquility of the Burhanpur town and to maintain the public order, the District Magistrate has passed the order detaining the petitioner under the Act. The fact that others who allegedly participated in the communal riots during 10.10.2008 to 20.10.2008 have not been detained under the Act and are only facing regular trials in criminal courts and the fact that witnesses in the trial in the criminal cases against the petitioner are turning hostile, are not relevant for deciding whether the detention of the petitioner under the Act was necessary. If the District Magistrate was satisfied on the materials that it was necessary considering the active role played by the petitioner in the communal riots on 10.10.2008 to detain him under the Act and not to detain others who may have relatively a lesser role in the communal riots, the order of detention can not be held to be bad only because the other participants have been arrested but have been set at liberty on bail or because witnesses against the petitioner have turned hostile in the criminal trials.

11. For the aforesaid reasons, we do not find any merit in this writ petition and we accordingly dismiss this writ petition.

Petition dismissed.

I.L.R. [2009] M. P., 3107
WRIT PETITION
Before Mr. Justice S. Samvatsar & Mr. Justice Abhay M. Naik
25 August, 2009*

ISRAT JAHAN (SMT.) ... Petitioner
Vs.
RAJIA BEGUM & ors. ... Respondents

Court Fees Act (7 of 1870), Section 7(iv)(c) - ***Payment of ad valorem court fees - Sale deed executed by father binding on the son - Held - Ad valorem court fees on the valuation of the sale deed is required to be paid - Even if the relief is couched in declaratory form, the relief of avoidance and/or cancellation is implicit in the declaratory relief contained in plaint.*** (Para 13)

*W.P. No.4846/2008 (Gwalior)

ISRAT JAHAN (SMT.) Vs. RAJIA BEGUM

न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv)(सी) – एड वेलोरेम न्यायालय फीस का संदाय – पिता द्वारा निष्पादित विक्रय विलेख पुत्र पर बंधनकारी है – अभिनिर्धारित – विक्रय विलेख के मूल्यांकन पर एड वेलोरेम न्यायालय फीस संदत्त करना आवश्यक है – यद्यपि अनुतोष घोषणात्मक रूप में गर्भित है, तथापि वादपत्र में अन्तर्विष्ट घोषणात्मक अनुतोष में परिवर्जन और/अथवा रद्दकरण का अनुतोष अन्तर्निहित है।

Cases referred :

AIR 1973 SC 2364, 1995(1) VIBHA 148, 2005(II) MPWN 43, 1999(II) MPWN 136, 1997(1) JLJ 136, 1996(I) MPWN 235, 1993(1) VIBHA 259, 2002(2) MPLJ 44.

Lakhan Goswami, for the petitioner.

D.D. Bansal, for the respondent Nos. 1 to 7.

ORDER

The Order of the Court was delevered by ABHAY M. NAIK, J. :–This writ petition is preferred under Article 227 of the Constitution of India against the order dated 13.8.2008 passed by the court of District Judge Vidisha in Civil Suit No.2A/08.

2. Short facts involved herein are that the plaintiffs/ respondents No.1 to 7 instituted a suit against defendant/petitioner and defendant/respondent No.8 with the allegation that their predecessor namely, Sabdar Hussain (husband of plaintiff No.1 and father of plaintiff Nos.2 to 7) was owner of the suit property to the extent of one half. He was an old person with weak eye sight and weak mental faculty. A registered sale deed dated 24.4.2007 was got executed from him by the defendant/ petitioner in respect of his share in the disputed land. Sale deed was for consideration of Rs.5,64,400/-, out of which Rs.2 lacs was shown to have been paid in advance. It was alleged that the consideration was not paid at all and the registered sale deed was got executed in collusion with the Sub Registrar. Accordingly, a declaration has been sought that the registered sale deed dated 24.4.2007 is illegal . and void. Possession and mesne profit are also prayed for.

3. Defendant/petitioner submitted an application under order 7 Rule 11 CPC that the plaintiffs may be directed to pay ad valorem court fees on Rs.5,64,400/- being valuation of the sale deed.

4. Learned trial judge dismissed the application by the impugned order holding that the plaintiffs were not party to sale deed and they can not be directed to pay ad valorem court fees on the valuation of the sale deed. This order has been challenged in the present writ petition.

5. Learned counsel for the parties argued at length.

6. Admittedly, the suit has been valued for the purpose of declaration at Rs.5,64,400/- being the valuation of the sale deed in question, which was executed by Sabdar Hussain, husband of the plaintiff No.1 and father of plaintiffs Nos.2 to 7. Property in question belonged to him. Thus, he was quite competent to execute

the sale deed. Plaintiffs are bound by the sale deed unless the same is avoided. Although the relief clause is couched in declaratory form, the relief sought by the plaintiffs shall have the effect on cancelling/avoiding it. Thus, it is governed by clause (c) of Section 7 (iv) of the Court Fees Act, 1870 and an ad valorem court fees is payable as setting aside the sale deed dated 24.4.2007 is implicit in the declaratory relief sought by the plaintiffs.

7. We may successfully refer to the apex court's decision in the case of *Shamsher Singh v. Rajinder Prashad and others* (AIR 1973 SC 2364). In the *Shamsher Singh's case* (supra), the plaintiff has prayed for declaration that the mortgage deed executed by the father in respect of joint family property was null and void for want of legal necessity and consideration. The apex court observed that although the relief was couched in a declaratory form, the same was in substance a suit either for setting aside the decree or for a declaration with a consequential relief of injunction restraining the decree holder from executing the decree against the mortgaged property. It was further found that unless the decree was set aside, it would have remained executable against the son and it was essential for the son to ask for setting aside the decree. Likewise in the present case, if the sale deed executed by the Sabdar Hussain is not avoided, it will remain binding on the plaintiffs, who would not inheritate the property.

8. Shri Bansal, learned counsel appearing for the respondents relied upon Full Bench decision of this Court in the case of *Santosh Chandra & others v. Gyan Sunder Bai & others* (1970 JLJ 290), wherein it is observed :-

> "Thus, all these cases lay down the proposition that where it is necessary for a plaintiff to avoid an agreement or a decree or a liability imposed, it is necessary for him to avoid that and unless he seeks the relief of having that decree, agreement, document or liability set aside, he is not entitled to a declaration simpliciter. In such cases the question of court-fees has to be determined under S.7 (iv)(c) of the Act. But, however, where a plaintiff is not a party to such a decree, agreement, instrument or a liability, and he cannot be deemed to be a representative in interest of the person who is bound by that decree, agreement, instrument or liability, he can sue for a declaration simpliciter, provided he is also in possession of the property."

Even in the aforesaid Full Bench view, the plaintiffs being successor of Sabdar Hussain are bound by the sale deed executed by him. Thus,, the Full Bench decision does not render any assistance to the contesting respondents.

9. Learned Trial Judge has passed the impugned order in favour of the plaintiffs on the ground that the plaintiffs were not party to the said sale deed. Learned Trial Judge has failed to consider that the plaintiffs are claiming the suit property from Sabdar Hussain, who has executed the registered sale deed in question.

Thus, they represent the estate of Sabdar Hussain and in absence of avoidance of the registered sale deed, they would remain bound by the same. It is not a case where the plaintiffs claimed the suit property independent of Sabdar Hussain. Thus, without avoiding the sale deed executed by the Sabdar Hussain, no relief would be available to the plaintiffs. This being so, they are bound to pay the ad valorem court fees.

10. This court in the case of *Manoharlal v. Vedahisharan and others* [1995 (I)] VIBHA 148, has after taking into consideration various authorities observed :-

> "(i) where a party seeks to avoid a deed or a decree to which he is party, then ad valorem court-fees is payable.
>
> (ii) where substance of the relief is either for setting aside the decree or for a declaration with a consequential relief for cancellation or restraining then, ad valoren court-fees is payable."

11. At the cost of repetition, it is reiterated that the plaintiffs having claimed the suit property from Sabdar Hussain are bound to avoid the sale deed dated 24.4.2007 and the learned trial judge has thus erred in holding contrary. We may successfully refer on this point other decision of this court reported in 2005 (2) MPWN 43 *(Kamalkishore v. Jagannath Prasad)*.

12. Reliance by *Shri D.D.Bansal* on 1999 (II) MPWN 136 *(Bhikam Chandra v. Ghichi Bai)*, 1997 (1) JLJ 136 *(Ambaram v. Smt. Pramilabai and others)*; 1996 (I) MPWN 235 *(Varud Ahmed v. Nihal Amhed)*, 1993 (1) VIBHA 259 *(Omprakash and others v. Suratram and others)* and,2002 (2) MPLJ 44 *(Laxmikant Dube v. Smt.Piyaria)* are of no assistance because in none of these cases, plaintiff was bound by the deed.

13. Contrary to this, it is found in the present case that according to the plaint averments themselves, the suit property was owned by Sabdar Hussain, who was husband of plaintiff No.1 and father of plaintiffs No.2 ro 7. It allegedly devolved upon the plaintiffs after death of Sabdar Hussain. In case, if the registered sale deed executed by Sabdar Hussain on 24.4.2007 is not avoided, the suit property can not be treated as available for devolution on plaintiffs. Thus, it is obligatory on the part of plaintiffs to seek the cancellation or avoidance of the said sale deed. Although relief clause is couched in declaratory form, the relief of avoidance and/or cancellation is implied in the declaratory relief contained in plaint. This being so, the case of the plaintiff is found squarely covered by the apex court decision in the case of *Shamsher Singh* (supra). The impugned order is thus not found sustainable in law. The same is hereby set aside. Plaintiffs are directed to pay ad valorem court fees on the valuation of the sale deed. Trial court shall grant reasonable time to pay the deficit court fees before proceeding further on. merits in accordance with law. Petition stands allowed in the aforesaid manner.

No orders as to costs.

Petition allowed.

I.L.R. [2009] M. P., 3111
WRIT PETITION

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava
25 August, 2009*

MANZOOR AHMED ... Petitioner
Vs.
JAGGI BAI & ors. ... Respondents

Court Fees Act (7 of 1870), Schedule II, Article 17 - *Ad valorem court fee - Void & voidable transaction - Sale deed obtained by playing fraud - Document is void not voidable - Held - In case of a void document it is not necessary to seek the relief of cancellation of document - Ad valorem court fees is not payable.* (Paras 8 & 9)

न्यायालय फीस अधिनियम (1870 का 7), अनुसूची II, अनुच्छेद 17 – एड वेलोरेम न्यायालय फीस – शून्य और शून्यकरणीय संव्यवहार – विक्रय विलेख कपट द्वारा अभिप्राप्त – दस्तावेज शून्य है न कि शून्यकरणीय – अभिनिर्धारित – शून्य दस्तावेज की दशा में यह आवश्यक नही है कि दस्तावेज के रद्दकरण का अनुतोष चाहा जाए – एड वेलोरेम न्यायालय फीस देय नही है।

Cases referred :

1976 JLJ 703, AIR 1937 Nag 14, 2008(1) MPLJ 116, AIR 1997 MP 25, 1982 MPWN 464, AIR 1958 All 41, AIR 1955 Cal 341, AIR 1953 Cal 34, AIR 1950 Cal 85, AIR 1953 Bom 382, AIR 1949 Mad 778.

B.P. Sharma, for the petitioner.
Pushpraj Agrawal, for the respondents.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–Writ petition has been filed as against order dated 25.3.2009 passed by the trial court rejecting an application filed by the defendants under order 7 Rule 11 of CPC to reject the plaint on the ground that trial court was not having pecuniary jurisdiction as well as adequate court fees was not paid.

2. The plaintiff/respondent has filed the suit for declaration of title and confirmation of possession. Prayer has also been made to declare the sale deed dated 20th September, 2007 as null and void. Prayer for permanent prohibitory injunction has also been made.

3. Plaintiff has averred that plaintiff is the Bhumiswami of the land in question. Her age is 100 years, she is disabled also. Plaintiff no.2 is residing with her and looking after agricultural operation. Plaintiff wanted to obtain the loan under the Kisan Credit Scheme for improving fertility of the land. She was assured by the defendants that for performing formalities, she would have to sign certain

*W.P. No.7324/2009 (Jabalpur)

documents. Under the guise of processing the papers of Kisan Credit Scheme, a sale deed was got executed which she had never executed. She has lodged objection on coming to know of the execution of sale deed and also lodged report at PS, Majhgawan. She has never sold the land and fraud was played. There was no question of receipt of consideration.

4. In the application filed under order 7 Rule 11 CPC, it was submitted that suit has not been properly valued, advalorem Court fees was required to be paid on consideration mentioned in the sale deed of Rs. 2,29,000. Trial Court has rejected the application, hence the petition.

5. Shri B.P. Sharma, learned counsel appearing for petitioner has submitted that it is necessary to seek consequential relief of cancellation of sale deed as the plaintiff is a party to the document, thus, she was bound to make the payment of advalorem Court fees. He has referred to certain decisions to be referred later.

6. Shri Pushpraj Agrawal, learned counsel appearing for respondents has supported the impugned order.

7. The main question for consideration is whether advalorem Court fees is required to be paid. Document is shown to be void not voidable. Plaintiff has averred that she was never told about the sale deed which has been obtained by playing fraud. She never intended to execute the sale deed, she wanted to obtain the loan and taking the advantage of her advanced age and disability, sale deed was obtained. No consideration was paid. The averments made in the plaint indicate that document is shown to be void not voidable. There is difference in incident of payment of Court fees in case document is voidable at the instance of executant advalorem Court fees is required to be paid, not in the case of void document in such cases injunction which has been prayed flows from the relief of declaration. In case of void document, it is not necessary to seek the relief of cancellation of document itself, it is only in the cases of voidable documents, it is necessary to claim such a relief. This question was considered by this Court in *Pratap and another vs. Punia Bai and others* 1976 JLJ 703 thus :-

> "5. Learned counsel for the applicant relied mainly on the Full Bench decisions of this Court in *Santoshchandra and others Vs. Gyansunder Bai* 1970 JLJ 290= 1970 MPLJ 363 (FB). It was held in that case that where it is necessary for a plaintiff to avoid an agreement or a decree or a liability imposed, he must seek the relief of having that decree, agreement, instrument or liability set aside and he is not entitled to a declaration simpliciter in such cases. This decisions was followed in *Sunderbai vs. Manohar Singh Yadav* 1974 JLJ Short Note 75 . In that case plaintiff had filed a suit for a declaration and for permanent injunction alleging that the sale deed in question was got executed

by her by playing fraud. The plaintiff was held liable to pay an ad valorem Court fees under section 7(c) of the Court Fees Act. From the aforesaid decisions it is clear that where a person who is party to an agreement or transaction and his allegation is that it is not binding on him because it was obtained by misrepresentation or fraud, it is necessary for him to seek the consequential relief of setting aside such agreement or transaction and as such the suit falls within the purview of section 7(c) of the Court Fees Act. But the question of avoiding an agreement or an instrument arises only where it is voidable. If it is wholly void a mere declaration that it is so, is sufficient and it is not necessary for the plaintiff to seek the relief of setting aside something which has no existence in law. It is not necessary to ask for relief of setting aside an agreement or an instrument which is wholly void.

6. The question whether the suit is really one for a declaration with the consequential relief or not has to be determined by looking to the pleadings of the plaintiff only, vide *Manohar Singh Nathasingh vs. Parmeshwari and others* AIR 1949 Nag 211. If we carefully examine the allegations in the plaint it would appear that the case of the plaintiff is that she did not execute the sale deed in question, that she did not receive any consideration of the sale and that she was not a party to any document of sale. From these allegations it would appear that there was no sale at all and the plaintiff is merely seeking a declaration that she did not execute the sale deed in question and thus did not transfer any property to the defendants. As such it is not necessary for her to seek relief of setting aside the sale deed in question, because, as pointed out above, the question of seeking the relief of setting aside something which has no existence in law, does not arise. In such a case bare declaration would suffice.

7. Voidable transfer remains valid until avoided and, therefore,it is necessary to avoid it by seeking the relief of setting it aside. But a transaction, which is void ab initio, must be deemed to have never taken place. It is not to be regarded as an alienation which is perfect till it is set aside. There is a clear distinction between a fraudulent misrepresentation as to the character of a document and as to its contents. Where the misrepresentation is both as to contents as well as character of the document, the transaction is wholly void."

8. It depends upon the averments made in each case in the plaint whether ad valorem Court fees is payable or not. Court has to find out whether a transaction

is alleged to be "void" or "voidable". In case of void document, it is not necessary to seek the relief of cancellation of document. Similar view was taken by Nagpur High Court in *Secretary of State vs. Dadoo Ghanshyamsingh Gupta and others* AIR 1937 Nagpur 14. It has been laid down that if on averments made in the plaint, the substantial relief could not be other than one for a declaratory decree and it is coupled with another relief, which follows naturally in the wake of the declaration, then the case must be regarded as falling within the ambit of S.7(iv)(c). This Court in *Ashok Kumar Gehani and another vs. Ramhet Agrawal and another* 2008 (1) MPLJ 116 has relied upon *Pratap and another vs. Punia Bai and others* (supra) and came to the similar conclusion. In *Smt. Sabina alias Farida vs. Mohd. Abdul Wasit* AIR 1997 MP 25 relief of injunction was not consequential relief, it was claimed because of settled possession of plaintiff, thus, ad valorem Court fees was not required to be paid. In the instant case also plaintiff is claimed to be in possession, she is not claiming relief for possession, thus, it could not be said that ad valorem court fees is required to be paid. When declaratory relief is the main relief has also been considered in *Johan Ram vs. Dasmat Bai*, 1982 MPWN 464, *Vibhuti Narain Singh vs. Municipal Board, Allahabad* AIR 1958 Allahabad 41, *Bhupat Singha and others vs. Jnanendra Kumar Chowdhury and others* AIR 1955 Calcutta 341, *Jatindra Nath Nandi and others vs. Krishnadhan Nandi and another* AIR 1953 Calcutta 34, *Balram Mandal vs. Sahebjan and others* AIR 1950 Calcutta 85, *Burjor Pestonji Sethna vs. Nariman Minoo Todiwala and others* AIR 1953 Bombay 382 and in *Messrs. Kalla Surayya and Sons represented by Kalla Venkataraju vs. Province of Madras, represented by the Collector of East Godavari at Kakinada and another* AIR 1949 Madras 778.

9. Petitioner's counsel has relied upon Division Bench decision of this Court in *Shyamacharan Paul and another vs. Roopali Promoters and Construction (M/s) and others* 2009 (3) MPHT 113 in which on the averments made, it was held by Division Bench of this court that consequential relief of cancellation of sale deed was necessary, declaration would not suffice. The ratio has no application on the facts of the instant case. Petitioner's counsel has also relied upon decision in *Mohammad Jameel Khan and others vs. Miththulal Khushal Singh Gujar* 1999 (1) MPLJ 37. We are unable to subscribe to the aforesaid view as it is trite law that in the case of void document it is not necessary to seek the relief of cancellation of document. In our opinion, the order passed by the trial Court is proper in the facts of the instant case.

10. Resultantly, writ petition being devoid of merits deserves dismissal, same is hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2009] M. P., 3115
WRIT PETITION
Before Mr. Justice S.K. Gangele
26 August, 2009*

MOHD. ISMAIL KHAN ... Petitioner
Vs.
M.P. ROAD TRANSPORT CORPORATION & anr. ... Respondents

Service Law - State Road Transport Employees Conduct, Discipline and Appeal Regulations, M.P. 1975, Regulations 34 & 36 - *Inquiry Officer - Competence - An authority under the regulation could be delegated the power to inquire into the truth by the Competent Authority as Inquiry Officer - Admittedly, Inquiry Officer posted on deputation as Deputy Secretary and not an employee of Corporation - His substantive post was Professor in Higher Education Department - Consequently, enquiry conducted by such officer is against the provisions of Regulations and beyond his power - Proceedings null & void - Appointment of Inquiry Officer and subsequent proceedings conducted by him quashed - Petition allowed.* (Paras 8 to 16)

सेवा विधि – राज्य सड़क परिवहन कर्मचारी आचरण, अनुशासन और अपील विनियम, म.प्र. 1975, विनियम 34 व 36 – जाँच अधिकारी – सक्षमता – सक्षम प्राधिकारी द्वारा विनियम के अन्तर्गत किसी प्राधिकारी को जाँच अधिकारी के रूप में वास्तविकता का पता लगाने की शक्ति प्रत्यायोजित की जा सकती थी – स्वीकृत रूप से जाँच अधिकारी उप–सचिव के रूप में प्रतिनियुक्ति पर पदस्थ था और निगम का कर्मचारी नही था – उसका मूल पद उच्च शिक्षा विभाग में प्राध्यापक का था – परिणामतः ऐसे अधिकारी द्वारा की गयी जाँच विनियम के उपबंधों के विरुद्ध और उसकी शक्ति से परे है – कार्यवाहियाँ अकृत और शून्य – जाँच अधिकारी की नियुक्ति और उसके द्वारा की गयी पश्चात्वर्ती कार्यवाहियाँ अभिखंडित – याचिका मंजूर।

Cases referred :

AIR 1952 SC 369, AIR 2004 SC 1039, AIR 2007 SC 1956.

Vivek Jain, for the petitioner.
S.S. Bansal, for the respondent No.1.

ORDER

S.K. Gangele, J. :–These two writ petitions have been filed by petitioner, Mohd. Ismail Khan, who was erst-while employee of the respondent-Corporation. Initially, petitioner filed writ petition No.314/2009(s) challenging appointment of Inquiry Officer. This Court vide order dated 23.01.09 passed an interim order directing respondent No.2 not to take any coercive action against the petitioner. However, in spite of operation of stay order of this Court petitioner has been removed from service after enquiry. Hence, the petitioner in subsequent writ petition, W.P. No. 1829/09 (s) challenged his order of dismissal from service.

*W.P. No.314/2009(S) (Gwalior)

2. Mr. Dilipraj Dwivedi, Deputy Secretary, Department of Transport, was appointed as Inquiry Officer in the case to conduct enquiry and competency to conduct the enquiry by Mr. Dilipraj Dwivedi has been challenged in these writ petitions, hence with the consent of parties, both writ petitions are heard and decided by this common order.

3. Petitioner was initially appointed as Traffic Superintendent in Madhya Pradesh Road Transport Corporation in 1982. He was promoted as Depot Manager in the year 2000. He was given current charge of Divisional Manager on 01.07.2006 and was posted as Divisional Manager, MPSRTC, Gwalior. A charge sheet has been issued to the petitioner vide Memo dated 26.11.2008 by the Managing Director of the Corporation. By the afore said charge sheet seven charges have been leveled against the petitioner. The petitioner vide letter, Annexure P/-5, asked for certain documents for filing reply of the charge sheet. Subsequently, vide letter Annexure P-6, dated 17.12.2008, he filed his reply and denied the charges. After considering the reply of the petitioner vide impugned order, Annexure P-1 dated 15.02.2008 the Managing Director appointed Mr. Dilipraj Dwivedi, Dy. Secretary, Department of Transport, as Inquiry Officer and Mr. R.K. Jain,, Divisional Manager, MPSRTC, HQ, as presenting Officer. The petitioner vide letter dated 19.12.2008 requested to change the Inquiry Officer. It has been mentioned by the petitioner that earlier Mr. Dilipraj Dwivedi was posted as Professor in Higher Education Department and his substantive post is of Professor in Higher Education Department. He is not familiar with the Rules and Regulations and working of the Madhya Pradesh Road Transport Corporation, hence he could not conduct the enquiry properly. It has further been stated that Mr. Dilipraj Dwivedi, respondent No.2, is not eligible to be appointed as Inquiry Officer in accordance with the Regulations named as 'Madhya Pradesh State Road Transport Employees Conduct, Discipline and Appeal Regulations, 1975', herein after referred to as the 'Regulations of 1975. The aforesaid objection of the petitioner has been rejected vide order dated 09.01.2009, Annexure P.9. Thereafter, the petitioner filed writ petition No. 314/09 before this Court. This Court on 23.01.09 passed the following order :-

> "Keeping in view the order passed by the Principal Seat of this Court in the identical case challenging the same that an enquiry officer was appointed who was the Deputy Secretary working under the State of M.P., it is ordered that till the next date of hearing the respondent No.2 shall not take any coercive action against the petitioner in the departmental enquiry in which the respondent No.2 is the enquiry officer.
>
> The petitioner shall also place English Version of the regulations of 1975 on record.

Issue notice to the respondents on payment of process fee within seven days failing which this petition shall stand dismissed without reference to the Court.

List the matter on 02.03.09."

4. Principal Seat of this Court at Jabalpur in identical cases challenging appointment of Inquiry Officer, also ordered that respondent No.2 shall not take any coercive action. The respondent No.2 is the Inquiry Officer. In spite of the stay order of this Court, the Inquiry Officer conducted the enquiry and found the charges proved against the petitioner. Thereafter, Managing Director vide order dated 08.04.09 passed an order of dismissal of the petitioner from service. The aforesaid order has been challenged by the petitioner in petition, Writ Petition No. 1829/09 (s).

5. Learned counsel for the petitioner before arguing the case on merits, has submitted that appointment of respondent No.2 as Inquiry Officer is arbitrary and illegal because at the relevant time he was on deputation as Deputy Secretary and his substantive post is of Professor in Higher Education Department. Hence, the enquiry conducted against the petitioner is against the law. Learned counsel for the petitioner has further submitted that in spite of the stay order granted by this Court, the order of dismissal of the petitioner has been passed, hence, the order of dismissal of the petitioner is also against the law.

6. Contrary to this, learned counsel for respondents has submitted that the Managing Director had power and authority to appoint respondent No.2 as an Inquiry Officer, hence the disciplinary enquiry conducted by respondent No.2 is as per law. Learned counsel further submitted that the stay order passed by this court was against respondent No.2. There was no order of stay against the Corporation, hence the dismissal order passed by the Corporation is as per law.

7. Undisputed facts of the case are that the petitioner is an employee of the Madhya Pradesh Road Transport Corporation. Respondent No. 2 was appointed as Inquiry Officer vide order dated 15.02.2008, Annexure P-1. At that time respondent No. 2, Mr. Dilipraj Dwivedi, had been working as Deputy Secretary, Department of Transport, Bhopal. The petitioner further pleaded that the substantive post of respondent No. 2 is Professor in Higher Education Department and he was on deputation as Deputy Secretary in the Department of Transport. In reply to the aforesaid pleadings of the petitioner respondent No.1 did not dispute the above facts that the substantive post of respondent No.2 is of Professor in Higher Education Deptt. and he was on deputation as Deputy Secretary at the relevant time.

8. Respondent No.1, Madhya Pradesh State Road Transport Corporation was incorporated under section 3 of the Road Transport Corporation Act, 1950, hereinafter referred as 'Act of 1950'. Section 45 of the Act of 1950 gives power

to make regulations. In exercise of aforesaid power conferred by Section 45 of the Act of 1950, the respondent No.1 with the previous sanction of the State Government framed the regulations named as "Madhya Pradesh State Road Transport Employees Conduct, Discipline and Appeal Regulations, 1975". The aforesaid regulations came into force w.e.f. 05.09.1975. These regulations are applicable to the employees who are in the services of the Corporation. Regulation 32 provides penalty, minor and major. Regulation 34 thereof provides authority competent to impose penalty, which is as under :-

> "34. Authority competent to impose penalty
>
> (1) The Corporation may impose any of the penalties specified in regulation 32 on any Corporation employee.
>
> (2) Notwithstanding anything contained in this regulation no penalty specified in clauses (v) to (ix) of regulation 32 shall be imposed by any authority subordinate to the appointing authority."

9. Regulation 36 provides procedure for imposing major penalties, which is as under :-

> "36 Procedure for imposing major penalties :-
>
> (a) No order imposing any of the major penalties specified in regulation 32 shall be made except after an enquiry is held, as for as may be, in the manner provided in this regulation and regulation 37.
>
> (b) whenever the competent authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct against an employee, it may itself inquire, or appoint under this regulation an authority to inquire into the truth thereof."

10. For the purpose of determining the question that whether respondent No.2 was eligible to be appointed as Inquiry Officer, Section 36 (b) is important. It has been mentioned in the aforesaid regulation that "whenever the competent authority is of the opinion that there are ground for inquiring into the truth of any imputation of misconduct against an employee, it may itself inquire, or appoint under this regulation an authority to inquire into the truth thereof". The words used under this regulation 'an authority to inquire' is important. In the regulation the word 'or appoint under this regulation an authority' has been used. The question is whether a person who is not an employee of the Corporation or who is not an authority under the Regulations of 1975, could be appointed as 'an inquiry officer'. In Advanced Law Lexicon, 3rd Edn., word 'Authority' has been defined as under :-

> "AUTHORITY, is nothing but a power to do something; it is sometimes given by word, and sometimes by writing: also it is by writ, warrant, commission , letter of attorney, &c. and sometimes

by law. The authority that is given must be to do a thing lawful; for if it be for the doing anything against law, as to beat a man, take away his goods, or disseise him of his lands this will not be a good authority to justify him that doth it." (Dyer 102; Tomlin).

(In contracts) The lawful delegation of power by one person to another."

11. In Regulations of 1975 the words have been used are "or appoint under this regulation an authority to inquire into the truth thereof". If the words haver been used "to appoint an authority to inquire into the truth thereof" then it can easily be held that any person or body or agency could be appointed to inquire into the truth because it is settled law that a competent authority can delegate the power of the enquiry to any other authority.

12. Hon'ble the Supreme Court in *Aswini Kumar Ghose and another v. Incorporated Law Society, Calcutta High Court and others,* AIR 1952 SC 369 has held as under with regard to interpretation of statute :-

> "It is a sound principle of construction to brush aside words in a statute as being inapposite surplusages, if they they can have appropriate application in circumstances conceivably within the contemplation of the statute."

13. The Hon'ble Supreme Court further in *State of Orissa and others v. Joginder Patjoshi and another,* AIR 2004 SC 1039, has held as under with regard to interpretation of statute where the language used in a statute is clear and unambiguous :-

> "12. Learned counsel appearing on behalf of the respondents' submission that subsequently another department of the State of Orissa intended to grant a higher benefit is of no consequence. In this case, this Court is required to interpret Rule 8 of the Rules as it stood prior to the amendment and not the amended Rules. It is now well settled principle of law that where the language used in a Statute is clear and unambiguous, the question of taking recourse of any principle of interpretation would not arise. In *Padma Sundara Rao's case* AIR 2002 SC 1334 : (2002 AIR SCW 1156, Para 13) this Court held:
>
> "While interpreting a provision the Court only interprets the law and cannot legislate it, if a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See *Rishabh Agro Industries Ltd. v. P. N. B. Capital Services Ltd* (2000(5 SCC 515). The legislative casus omissus cannot cannot be supplied

by judicial interpretative process. Language of Section 6 (1) is plain and unambiguous. There is no scope for reading something into it, as was done in *Narasimhaiah case*. In Nanjudaiah case the period was further stretched to have the time period run from date of service of the High Court's order. Such a view cannot be reconciled with the language of Section 6 (1). If the view is accepted it would mean that a case can be covered by not only clause (1) and / or clause (ii) of the proviso to Section 6 (1), but also by a non-prescribed period. Same can never be the legislative intent."

13. Similarly in *Hansoli Devi's case*. AIR 2002 SC 3240 : 2002 AIR SCW 3755), this Court held :-

"9. Before we embark upon an inquiry as to what would be the correct interpretation of Section 28-A, we think it appropriate to bear in mind certain basic principles of interpretation of a statute. The rule stated by Tindal, C.J. in *Sussex Peerage case* (1844) 11 CI & Fin 85 : 8 ER 1034 still holds the field. The aforesaid rule is to the effect (ER P. 1057)

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

It is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the Court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In *Kirkness v. John Hudson & Co. Ltd.* (1955) 2 All ER 345 : 1955 AC 696 : (1955) 2 WLR 1135 Lord Reid pointed out as to what is the meaning of "ambiguous" and held that (All ER P. 366 C-D) :

"A provision is not ambiguous merely because it contains a word which in different contexts is capable or different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is, in my judgment, ambiguous only if it contains a word or phrase which in that particular context is capable of having more than one meaning."

It is no doubt true that if on going through the plaint meaning of the language of statutes, it leads to anomalies, injustices and

absurdities, then the court may look into the purpose for which the statute has been brought and would try to give a meaning, which would adhere to the purpose of the statute. Patanjali Sastri, C.J. in the case of *Aswini Kumar Ghose v. Arabinda Bose,* AIR 1952 SC 369 : 1953 SCR 1 had held that it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In *Quebec Railway, Light Heat & Power Co. Ltd. v. Vandry,* AIR 1920 PC 181, it had been observed that the legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. Similarly, it is not permissible to add words to a statute which are not there unless on a literal construction being given a part of the statute becomes meaningless. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into a law. at times, the intention of the legislature is found to be clear but the unskilfulness of the draftsman in introducting certain words in the statute results in apparent ineffectiveness of the language and in such a situation, it may be permissible for the court to reject the surplus words, so as to make the statute effective. Bearing in mind the aforesaid principle, let us now examine the provisions of Section 28-A of the Act, to answer the questions referred to us by the Bench of two learned Judges. It is no doubt true that the object of Section 28-A of the Act was to confer a right of making a reference, (sic on one) who might have not made a reference earlier under Section 18 and, therefore, ordinarily when a person makes a reference under Section 18 but that was dismissed on the ground of delay, he would not get the right of Section 28-A of the Land Acquisition Act when some other person makes a reference and the reference is answered. But Parliament having enacted Section 28-A, as a beneficial provision, it would cause great injustice if a literal interpretation is given to the expression "had not made an application to the Collector under Section 18" in section 28-A of the Act. The aforesaid expression would mean that if the landowner has made an application for reference under Section 18 and that reference is entertained and answered. In other words, it may

not be permissible for a land owner to make a reference and get it answered and then subsequently make another application when some other person gets the reference answered and obtains a higher amount. In fact in *Pradeep Kumari's case* (AIR 1995 SC 2259 : (1995 AIR SCW 1834) the three learned Judges, while enumerating the conditions to be satisfied, whereafter an application under Section 28-A can be moved, had categorically stated (SCC p. 743), para 10), "the person moving the application did not make an application to the Collection under Section 18". The expression "did not make an application", as observed by this Court, would mean, did not make an effective application which had been entertained by making the reference and the reference was answered. When an application under Section 18 is not entertained on the ground of limitation, the same not fructifying into any reference, then that would not tantamount to the effective application and consequently the rights of such applicant emanating from some other reference being answered to move an application under Section 28-A cannot be denied. We, accordingly, answer Question 1 (a) by holding that the dismissal of an application seeking reference under Section 18 on the ground of delay would tantamount to not filing an application within the meaning of Section 28-A of the Land Acquisition act, 1894."

14. In *Dayal Singh's case* (AIR 2003 SC 1140 : 2003 AIR SCW 685),, a three Judge Bench of this Court, in which both of us were members, observed as under ;–

"37. It is a well settled principle of law that the Court cannot read anything into the statutory provision which is plain and unambiguous. The Court has to find out legislative intent only from the language employed in the statutes. Surmises and conjectures cannot be restricted to for interpretations cannot be restricted to for interpretation of statutes. (See *Union of India v. Filip Tiago De Gama,* (1990) 1 SCC 277 : AIR 1990 SC 981).

38. This Court in *Bhavanagar University v. Palitana Sugar Mill (P) Ltd.* (2003) 2 SCC 111 : (2002) 9 Scale 102, has observed (SCC p. 121, para 25)

"25. Scope of the legislation on the intention of the legislature cannot be enlarged when the language of the provision is plain and unambiguous. In other words statutory enactments must ordinarily be construed according to its plain meaning an no words shall be added, altered or modified unless it is plainly necessary to

do so to prevent a provision from being unintelligible absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute.

15. The said decision has been followed by this Court in *Illachi Devi's case* AIR 2003 SC 3397 : 2003 AIR SCW 4824.

14. Hon'ble the Supreme Court further in *Promoters & Builders Association of Pune v. Pune Municipal Corporastion & others*, AIR 2007 SC 1956, has held, as under, with regard to interpretation of statute :-

"9. The main challenge of the review petitioners is to the addition of the words "from the very said plot" towards the end of the clause (b) in DCR 2.4.11. Learned counsel for the petitioners have submitted that in the proposal sent by the Pune Municipal Corporation after following the procedure prescribed in Sub-section (1) of Section 37 the afore said words were not there. However, the State Government while sanctioning the proposal added the said words which in law it could not do. It has been submitted that the municipal Corporation had submitted the proposal after inviting objections and after giving an opportunity of hearing and the proposal so made by the Municipal Corporation could not have been modified or altered by the State Government without inviting objections or giving an opportunity of hearing with regard to changes which it proposed to make and which were ultimately made in the notification issued by it. This point has been considered and examined in the judgment and order of this Court dated 5.5.2004. The language of Sub-section (2) of Section 37 uses the expression "sanction the modification with or without such changes, and subject to such conditions as it may deem fit, or refuse to accord sanction". The language of the Section is very clear and it empowers the State Government to sanction the proposal of the Municipal Corporation regarding modification of Development Control Rules "with or without any changes as it may deem fit". These words are important and cannot be ignored. They have to be given their natural meaning. In *Union of India v. Hansoli Devi* (2002) 7 SCC 273 it has been held that it is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the Court must give effect to the words used in the statute and it would not be open to the court to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and the policy of the Act. In *Nathi Devi v. Radha Devi Gupta* (2005) 2

SCC 271 it was emphasized that it is well settled that in interpreting a statute, effort should be made to give effect to each and every word used by the legislature. The courts always presume that the legislature inserted every part of a statute for a purpose and the legislative intention is that every part of the statute should have effect. In *Dr. Ganga Prasad Verma v. State of Bihar* (1995) Supp. (1) SCC 192 it has been held that where the language of the Act is clear and explicit, the Court must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature. Therefore, the view taken by this Court in the judgment and order dated 5.5.2004 that the State Government had full authority to make any changes or add any condition in the proposal of the Municipal Corporation is perfectly correct. In fact, on the plain language of the statute no other view can possibly be taken."

15. From the above stated principle of law laid down by Hon'ble the Supreme Court, it is clear that it is not permissible to brush aside words in a statute and the scope of the statute, when the language of the provision is plain and unambiguous could not be enlarged. Regulation 36 (b) means that an authority under the regulation could be delegated the power to enquire into the truth by the competent authority as Inquiry Officer. It means that a competent authority, who is competent to impose major penalty can enquire in to the truth of imputation of misconduct by himself or it could appoint or delegate his power to another authority appointed under the regulations of 1975.

16. In the present case, the Managing Director has appointed Respondent No. 2 as the Inquiry Officer. Respondent No.2 admittedly is not an employee of the Corporation. He was working at the relevant time as Deputy Secretary in the Department of Transport on deputation. Admittedly his substantive post at the relevant time was Professor in the Higher Education Department. Consequently, the enquiry conducted by respondent No.2 is against the provisions of Regulations of 1975 and beyond his power, hence the proceedings are null and void.

17. When the enquiry proceedings have been declared as null and void, in such circumstances, it is not necessary to decide the merits of the case. Consequently, the petitions of the petitioner are allowed. The order dated 15.12.2008, Annexure P-1, appointing respondent No.2 as Inquiry Officer (filed in W.P. No.314/09(s)) is hereby quashed and subsequent proceedings conducted by him and also the order, dated 08.04.2009, Annexure P-1 (filed in W.P. No. 1829/09(s)) is also quashed. Because this Court granted stay in favour of the petitioner in spite of that petitioner has been dismissed from service, hence petitioner is entitled to get arrears of salary. After going through the facts of the case, in my opinion, the respondents have deliberately passed the order of dismissal in spite of stay order granted by

this Court. It is hereby clarified that the respondents are free to take disciplinary action against the petitioner on the basis of charge sheet issued by the Managing Director in accordance with Regulations of 1975. No order as to cost.

Petition allowed.

I.L.R. [2009] M. P., 3125
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
28 August, 2009*

JEEVANRAM ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - ***Disciplinary proceedings - Joint enquiry - Quantum of punishment*** - *Three officials tried in a joint enquiry - All three awarded punishment - In appeal, the penalty of two officials reduced substantially but the appeal filed by the petitioner dismissed and punishment of demotion was maintained - Held - Petitioner has been singled out in regard to imposition of penalty by awarding a severe penalty as against the other two similarly placed employees - Respondents directed to reconsider the matter keeping view that in a joint enquiry other two employees have been awarded lesser punishment.* (Para 10)

सेवा विधि – अनुशासनिक कार्यवाहियाँ – संयुक्त जाँच – दण्ड की मात्रा – तीन कर्मचारियों का संयुक्त जाँच में विचारण – तीनों को दण्ड अधिनिर्णीत – अपील में दो कर्मचारियों की शास्ति सारतः कम की गयी किन्तु याची द्वारा प्रस्तुत अपील खारिज और पदावनति का दण्ड कायम रखा गया – अभिनिर्धारित – कठोर शास्ति अधिनिर्णीत करके शास्ति के अधिरोपण के विषय में समरूप रखे गये दो अन्य कर्मचारियों के मुकाबले याची को चुना गया है – प्रत्यर्थियों को निदेश दिया गया कि यह दृष्टिगत रखते हुए मामले पर पुनर्विचार करें कि संयुक्त जाँच में अन्य दो कर्मचारियों को न्यूनतम दण्ड दिया गया है।

Cases referred :

1989 MPLJ 803, (2001) 10 SCC 530, 2007(2) JLJ 425, (2007) 8 SCC 331.

A.S. Agrawal, for the petitioner.
S.S. Garg, G.A., for the respondents.

ORDER

SHANTANU KEMKAR, J. :–Petitioner was working on the post of Head Constable in the Home (Police) Department of the State Government. On 16.11.2005 a charge sheet (Annexure-A) was issued to him as well as one B.L.Akole Inspector and Mohan Jat Constable of the same department alleging therein their inability to control the gambling /illegal betting activities while

*W.P. No.7001/2007(S) (Indore)

discharging their duties at Dhamnod. As per the said charge-sheet their acts were amounting to dereliction of duty, negligence and doubtful conduct on their part. The said charges were enquired into by holding a joint disciplinary enquiry against all the three employees as aforesaid and in the said enquiry the Enquiry Officer found the petitioner as well as other two employees to be guilty of the alleged misconduct.

2. The disciplinary authority third respondent after consideration of the enquiry report vide order dated 27.05.2006 (Annexure-O) imposed upon the petitioner penalty of demotion from the post of Head Constable to the post of Constable for a period of 5 years. Through the same order the disciplinary authority imposed penalty of demotion for a period of 5 years on Inspector B.L.Akole demoting him from the post of Inspector to the post of Sub-Inspector and imposed penalty of dismissal from service on Mohan Jat Constable.

3. The said order of penalty was assailed by the petitioner in departmental appeal before the second respondent Director General of Police. The other two employees namely B.L.Akole and Mohan Jat also challenged the order of penalty imposed upon them by filing separate appeals. All the three appeals were considered by the then Director General of Police. According to the petitioner a decision was taken by which penalty of all the three employees were reduced and they were inflicted with penalty of withholding of two increments with cumulative effect. However, instead of implementing the said decision as would be clear from Annexure-S a Note-sheet, after joining the said post of Director General of Police the newly posted Director General of Police he ordered to maintain the penalty which was imposed upon the petitioner by the disciplinary authority and also in respect to B.L.Akole, Inspector, however he reduced the penalty of dismissal from service which was awarded to Mohan Jat Constable to withholding of one increment without cumulative effect with a further direction that he will not be posted for five years on any police station.

4. Thus, according to the petitioner the action of the respondents in not implementing the decision of the then Director General of Police (Swaraj Puri) and the action of passing another order by the newly joined Director General of Police (Anand Rao Pawar) is contrary to law laid down by this Court in the case of *Mohd. Rafiq Akhtarbhai Vs. State Transport Authority, Gwalior* (1989 MPLJ 803). According to the petitioner, the respondents were required to do only the ministerial act of issuance of the order in pursuance to the decision Annexure-S taken by the then Director General of Police and it was not within the jurisdiction of the successor of the post Shri Anand Rao Pawar to have passed a fresh order.

5. It is also the case of the petitioner that the said decision of Shri Anand Rao Pawar Director General of Police was given effect to by dismissing his appeal vide order dated 19.10.2006 (Annexure – Q) whereas the appeal filed by

B.L.Akole was partly allowed by the State Government vide order dated 01.09.2007 (Annexure-T) and the punishment imposed upon him was reduced to withholding of one increment for one year without cumulative effect. The appeal filed by Mohan Jat Constable was partly allowed by the Director General of Police and he was inflicted with penalty of withholding of one increment for one year without cumulative effect vide order dated 19.10.2006 (Annexure-R) in place of penalty of dismissal from service.

6. Thus, according to the petitioner for the identical allegations and charges found to be proved in connection with the same incident the petitioner has been singled out and has been punished severely as compared to B.L.Akole and Mohan Jat in whose cases a lenient view has been adopted. He alleged that the punishment imposed upon him is discriminatory. In support he placed reliance on the judgment of the Supreme Court in the case of *Tata Engineering & Locomotive Co. Ltd., Vs. Jitendra PD. Singh and another* (2001) 10 SCC 530, *Triveni Sharan Mishra Vs. Life Insurance Corporation of India and others* 2007 (2) JLJ 425 and *Vishwanath Vs. Union of India & Ors.* 2007 (8) Supreme 331.

7. The respondents have filed reply and have tried to justify their action of imposition of penalty on the petitioner. According to the respondents order Annexure-S is merely a Note-sheet and as such after joining the post of Director General of Police by Shri Anand Rao Pawar he has rightly taken the decision on the appeals of the petitioner and Mohan Jat. It is also stated that appeal of B.L.Akole has rightly been decided by the State Government being the Appellate authority.

8. Heard learned counsel for the parties and perused the documents filed along with the petition and the return.

9. On going through the charge-sheet and the order of disciplinary authority it is revealed that for the identical charges the petitioner, B.L.Akole Inspector and Mohan Jat Constable were held guilty by the Enquiry Officer and they were punished. In the appeals filed by B.L.Akole and Mohan Jat the punishment was substantially reduced by the appellate authority whereas the petitioner's appeal has been dismissed and the punishment of demotion was maintained.

10. Having regard to the law laid down in the case of *Tata Engineering & Locomotive Co. Ltd., Vs. Jitendra PD. Singh and another* (supra), *Triveni Sharan Mishra Vs. Life Insurance Corporation of India and others* (supra) and *Vishwanath Vs. Union of India & Ors.* (supra), I am of the view that the petitioner's grievance that he has been singled out in regard to imposition of penalty by awarding a severe penalty as against the other two similarly placed employees requires to be considered by the first respondent Secretary Department of Home Government of M.P.

11. Accordingly, the petition is disposed of directing the first respondent to

consider and take appropriate decision within three months from the date of receipt of copy of this order as to quantum of punishment that can be imposed upon the petitioner. While considering the matter in regard to imposition of penalty on the petitioner, the first respondent shall keep into consideration the law laid down in the cases referred to above and the fact that the other two employees against whom a joint enquiry was conducted with the petitioner have been awarded lesser punishment as compared to the petitioner.

12. In case the petitioner feels dissatisfied with the decision as may be taken by the first respondent he shall be at liberty to challenge such decision and shall also be at liberty to raise the grounds which he has raised in this petition more particularly pertaining to challenge to the action of not implementing the decision taken vide Annexure-S by the then Director General of Police (Swaraj Puri) and pertaining to the authority and jurisdiction to pass another order by the successor Director General of Police.

13. With the aforesaid liberty and directions, the petition stands disposed of.

Petition disposed of.

I.L.R. [2009] M. P., 3128
WRIT PETITION
Before Mr. Justice K.K. Lahoti & Mr. Justice K.S. Chauhan
31 August, 2009*

KAMAL VASINI AGARWAL (SMT.) ... Petitioner
Vs.
M/s.HINDUSTAN PETROLEUM CORPORATION LTD. ... Respondent

A. Civil Procedure Code (5 of 1908), Order 47 Rule 4 - *Whether a First Appeal u/s 96 CPC would be maintainable or a Miscellaneous Appeal under Oder 43 Rule 1, against an order allowing an application under Order 47 Rule 4 - Held - If an order under Rule 4 of Order 47 CPC granting an application of review is passed then Miscellaneous Appeal would lie and not a First Appeal.* (Para 5)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 4 – क्या आदेश 47 नियम 4 के अन्तर्गत किसी आवेदन को मंजूर करने के आदेश के विरुद्ध सि.प्र.सं. की धारा 96 के अन्तर्गत प्रथम अपील पोषणीय होगी या आदेश 43 नियम 1 के अन्तर्गत विविध अपील – अभिनिर्धारित – यदि पुनर्विलोकन का आवेदन अनुदत्त करते हुए सि.प्र.सं. के आदेश 47 नियम 4 के अन्तर्गत आदेश पारित किया जाता है तब विविध अपील की जायेगी न कि प्रथम अपील।

B. Civil Procedure Code (5 of 1908), Order 47 Rule 1 - ***Review - Powers of trial Court*** - *Can a Court modify its earlier judgment when such question was not considered in earlier judgment - Held - No - Such recourse*

*W.P. No.14607/2007 (Jabalpur)

was not available to the trial Court - Modifying the decree by allowing mense profit was beyond the scope of Order 47 Rule 1 of CPC, when such question was not at all considered in the earlier judgment. (Para 10)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1 – पुनर्विलोकन – विचारण न्यायालय की शक्तियाँ – क्या कोई न्यायालय अपना पूर्ववर्ती निर्णय उपांतरित कर सकता है जब ऐसे प्रश्न पर पूर्ववर्ती निर्णय में विचार नही किया गया – अभिनिर्धारित – नही – विचारण न्यायालय को ऐसा विकल्प उपलब्ध नही है – अन्तवर्ती लाभ मंजूर करते हुए डिक्री उपांतरित करना सि.प्र.सं. के आदेश 47 नियम 1 के विस्तार से परे था, जब ऐसा प्रश्न पूर्ववर्ती निर्णय में विचारित नही किया गया।

C. Civil Procedure Code (5 of 1908), Order 43 Rule 1(w) - ***Appeal - Powers of appellate Court - Held - While considering the appeal under Order 43 Rule 1(w), the appellate Court was required to examine merits of the case - The appellate Court has not considered the earlier judgment on merits but confined its order limited to the extent of granting relief of mesne profit by allowing review application by the trial Court.*** (Para 12)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 43 नियम 1(डब्ल्यु) – अपील – अपीलीय न्यायालय की शक्तियाँ – अभिनिर्धारित – आदेश 43 नियम 1(डब्ल्यु) के अन्तर्गत अपील पर विचार करते समय अपीलीय न्यायालय को मामले के गुणदोषों की परीक्षा करना आवश्यक था – अपीलीय न्यायालय ने पूर्ववर्ती निर्णय को गुणदोषों पर विचारित नही किया बल्कि अपना आदेश विचारण न्यायालय द्वारा पुनर्विलोकन आवेदन मंजूर करके अन्वर्ती लाभ का अनुतोष देने के विस्तार तक सीमित रखा।

A.K. Jain, for the petitioner.
Anoop Nair, for the respondent.

ORDER

This petition is directed against order dated 17.09.2007 passed by IXth Additional District Judge, Jabalpur in M.C.A. No.5/07 by which a miscellaneous appeal preferred by respondent herein was allowed and the order daled 20.12.2004 in M.J.C. No.41/04 passed by IVth Civil Judge, Class-II Jabalpur was set aside.

2. The petitioner assailed the aforesaid order on following grounds:-

(a) That against order dated 20.12.2004 in M.J.C. No.41/04 no miscellaneous appeal was maintainable,as the trial Court by allowing an application under order 47 Rule 1 of C.P.C. directed amendment in the decree passed in Civil Suit No. 271A/02 so the respondent ought to have preferred a First Appeal under Section 96 of the Code of Civil Procedure but no miscellaneous appeal under Order 43 Rule 1 of C.P.C. was maintainable.

(b) That the appellate Court erred in considering merits of the case while deciding miscellaneous appeal against the impugned order.

3. Shri Anoop Nair, counsel for the respondent supported the impugned order and submitted that under order 43 Rule 1 (w) of the Code of Civil Procedure, such a miscellaneous appeal was maintainable as it was filed against an order allowing an application under order 47 Rule 4 of C.P.C. The appellate Court was required to consider the merits of the case to appreciate the question raised in the appeal. It was obligatory on the part of the appellate Court to consider the merits of the case.

4. To appreciate rival contentions of the parties, it would be appropriate, if factual position in the case is stated.

(a) The petitioner filed a suit against respondent for mandatory injunction, registered as Civil Suit No.271A/02. In the said suit petitioner herein., was proceeded ex-parte as his right to file written statement was closed by the trial Court by order dated 26.07.03. Thereafter the plaintiff adduced ex-parte evidence and the trial Court by judgment and decree passed on 28.07.2004 granted a decree in favour of the petitioner herein directing respondent to reconstruct damaged wall to its earlier condition within a period of 7 days. The petitioner herein, in the plaint also sought a relief that in case such mandatory injunction is not obeyed then the respondent be directed to make payment of compensation till reconstruction of the wall.

(b) As this relief was not granted by the trial Court in judgment and decree dated 28.07.2004, petitioner herein moved an application under Order 47 Rule 1 of C.P.C. before the trial Court seeking relief, by amendment in the decree in respect of mesne profit, as prayed by the plaintiff. This review application was registered as M.J.C. No. 41/04. The trial Court after issuing notice in M.J.C. No.41/04 allowed the review application and incorporated reliefs No. (3) in the decree as under :-

"The plaintiff shall be entitled mesne profit at the rate of Rs.500 per day from the date of decree till reconstruction is not done by the defendant."

(c) Against the aforesaid order, respondent herein preferred a writ petition before this court but it was dismissed as not maintainable. Thereafter the respondent preferred a revision petition before this court but again it was dismissed as not maintainable. Thereafter again a writ petition was preferred by the respondent which was disposed of finally with a liberty to the respondent to file an appeal against the order dated 20 December, 2004 (Annexure P-4).

(a) The respondent then filed a miscellaneous appeal before the

appellate Court invoking powers under Order 43 Rule 1 (w) of the Code of Civil Procedure which has been decided by the impugned order.

5. Now in the light of the aforesaid facts, first contention of the petitioner may be dealt with that respondent ought to have filed a first appeal under Section 96 of the Code of Civil Procedure and a miscellaneous appeal under Order 43 Rule 1 of C.P.C. was not maintainable. The civil revision No.294/05 was dismissed with the observations that against the impugned order dated 20.12.04 in M.J.C. No.41/04 a miscellaneous appeal under order 43 Rule 1 (w) was maintainable. The respondent though filed a miscellaneous appeal before this Court but it was withdrawn with liberty to file miscellaneous appeal before the appellate Court.

Order 47 Rule 1 reads thus:-

"1. Any person considering himself aggrieved.

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

Order 47 Rule 4 reads thus:-

"Application where rejected.(1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

(2) Application where granted.- Where the Court is of opinion that the application for review should be granted, it shall grant the same:

Provided That-

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and

(b) no such application shall be granted on the grround of discovery of new matter or evidence which the applicant alleges was not

within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."

Order 43 Rule 1(w) reads thus:-

"an order under rule 4 of Order XLVII granting an application for review."

The aforesaid provisions specifically provides a miscellaneous appeal if an order under Rule 4 of Order 47 granting an application for review is passed. In this case, the respondent had not challenged the judgment and decree passed by the trial Court dated 28.07.2004. The respondent was aggrieved only by the order by which an application under Order 47 Rule 1 of C.P.C. was allowed by the trial Court directing payment of mesne profit in favour of the petitioner. Merely the aforesaid reliefs was inserted in the decree, will not be a ground to challenge entire judgment and decree passed by the trial Court while the respondent was aggrieved only by an order passed by the trial Court on an application under Order 47 Rule 4 of C.P.C.

6. From the perusal of earlier judgment and decree Annexure P-2, we find that there was no whisper of any consideration by the trial court in respect of entitlement of petitioner for mesne profit. Trial Court considered the statements of PW-3 Radheshyam Agrawal and PW-2 Satish Kaltare who produced the evidence on merits but had not stated anything in respect of mesne profit.

7. The provisions of Order 47 Rule 1 would have been invoked by the parties within the forecorners as finds place under Order 47 Rule 1 of C.P.C. Order 47 Rule 1 provides review of judgment from the discovery of new and important matter or evidence which, after exercised of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or an error apparent on the face of record, of for any other sufficient reasons. In this case, only the prayer of petitioner was to allow such relief though was prayed but was not allowed by the trial Court.

8. The aforesaid matter was agitated by the petitioner under the clause of "mistake or error apparent on the face of record" as on other grounds such application was not filed.

9. From the perusal of the entire judgment in C.S. No.271A/02 we find that there was no consideration by the trial Court in respect of entitlement of the petitioner in respect of mesne profit. It appears that either no evidence was produced or this ground was not agitated or considered by the trial Court. In these circumstances, it appears, that in absence of evidence or deliberately the trial Court had not granted a decree for mesne profit in favour of the petitioner. Then it was

not a case of error apparent on the face of record. Petitioner if was aggrieved by non granting of such mesne profit then he ought to have challenged the judgment and decree by filing an appeal under Section 96 of the Code of Civil Procedure but recourse of review of order was not available. However, such an application was filed and the trial Court vide order dated 20th December 2004 Annexure P-4 allowed review application and granted the relief of mesne profit to the petitioner.

10. In the opinion of this Court, such recourse was not available to the trial Court. Modifing the decree by allowing mense profit was beyond the scope of Order 47 Rule 1 of C.P.C., when such question was not at all considered in the earlier judgment,

11. In view of the aforesaid, if the appellate court considered this aspect in the impugned order invoking powers under Order 43 Rule 1 Clause (w) no fault is found. The appeal was maintainable, rightly entertained and decided by the appellate court.

12. So far as, second contention of the petitioner is concerned that the appellate court while considering the appeal wrongly considered the merits of the case is concerned, the appellate court was required to consider this aspect. If such question was raised in appeal then the appellate court was required to consider the merits of the case and if considered the merits of the case to the extent of grant of relief of mesne profit, no fault is found in the impugned order. While considering the appeal under Order 43 Rule 1 (w), the appellate Court was required to examine merits of the case. The appellate court has not considered the earlier judgment on merits but confined its order limited to the extent of granting relief of mesne profit by allowing review application by the trial Court.

13. In view of the aforesaid, second contention of the petitioner is also without any merit. This writ petition is dismissed with no order as to costs.

C.C. as per rules.

Petition dismissed.

I.L.R. [2009] M. P., 3133
WRIT PETITION
Before Mr. Justice Sanjay Yadav
2 September, 2009*

ASHWINI KUMAR MISHRA ... Petitioner
Vs.
UNION OF INDIA & anr. ... Respondents

Service Law - Standing Order No.79 (Revised w.e.f. 04.10.2007), Clause 2(b) - Modification in cut off date of age for recruitment - *Petitioner contended that modification in Clause 2(b) of Order 79 w.e.f. 04.10.2007*

*W.P. No.14670/2007(S) (Jabalpur)

i.e. much after the advertisement dated 15-21.09.2007 and was thus not applicable retrospectively for a recruitment process of Sub-Inspectors in RPF/ RPSF already initiated - Held - Modification was in pursuance to decision dated 31.07.2007 which was taken before the issuance of advertisement - There being no accrual of right in favour of the petitioner - The contention that change of cut off date for the purpose of age has prejudicially effected the chance of the petitioner to participate in the selection is of no consequence because the entitlement of a person is only for consideration and the same is on the basis of the rules in vogue - Petition dismissed. (Paras 16 & 17)

सेवा विधि – स्टेंडिंग ऑर्डर क्र. 79 (04.10.2007 से यथा संशोधित), खण्ड 2(बी) – भर्ती के लिए आयु की सीमा तारीख में उपांतरण – याची ने प्रतिवाद किया कि ऑर्डर 79 के खण्ड 2(बी) में उपांतरण 04.10.2007 से यथा प्रभावी अर्थात् विज्ञापन तारीख 15–21.09.2007 के बहुत बाद और इस प्रकार पूर्व से प्रारम्भ की जा चुकी आरपीएफ/आरपीएसएफ में उप–निरीक्षकों की भर्ती प्रक्रिया के लिए भूतलक्षी रूप से लागू नही – अभिनिर्धारित – उपांतरण विनिश्चय तारीख 31.07.2007 के अनुसरण में था जो विज्ञापन जारी करने के पूर्व लिया गया – याची के पक्ष में कोई अधिकार प्रोद्भूत नही होता – यह प्रतिविरोध कि आयु के प्रयोजन के लिए सीमा तारीख के परिवर्तन ने चयन में भाग लेने के याची के अवसर को प्रतिकूल रूप से प्रभावित किया है, का कोई परिणाम नही क्योंकि किसी व्यक्ति की हकदारी विचार के लिए है और यह प्रचलित नियमों के आधार पर है – याचिका खारिज।

Cases referred :

1993 Supp (2) SCC 600, (1998) 4 SCC 202, (1999) 5 SCC 624, (2008) 3 SCC 641.

Anoop Nair, for the petitioner.

N.S. Ruprah, for the respondents.

ORDER

SANJAY YADAV, J. :–Aggrieved of Clause 3(b) of the advertisement published in Employment News dated 15-21.9.2007 under Notification No.2/2007, Railway Protection Force, Ministry of Railway, rendering the petitioner over age to participate in the selection procedure of Sub-Inspector of Railway Protection Force, the petitioner has approached this Court vide this writ petition under Article 226 of the Constitution of India seeking directions to the respondents to:

(i) Correct the irregularity shown in the advertisement;

(ii) Accept the application of the petitioner allowing him to participate in selection procedure.

2. The facts briefly are that the petitioner is a Constable in the Railway Protection Force appointed on 16.11.2001. The date of birth of the petitioner is 25.7.1977. That, an advertisement for recruitment of Sub-Inspector was published in Rojgar Samachar dated 15-21.9.2007, whereunder Clause 3 (b) stipulated that, the candidate as on 1.1.2008 should not be less than 20 years and not more than

25 years. Since the petitioner is born on 25.7.1977, he was over age because even with the relaxation of 5 years stipulated under Clause 3 (iii) of the advertisement he was not eligible and therefore the petitioner could not participate in the selection.

3. The contention of the petitioner is that the procedure regarding recruitment of Sub-Inspectors in RPF/RPS are governed by Standing Order 79 (Revised) dated 27.7.2007 (Annexure P/2); wherein, under Clause 2 (b) the eligibility regarding age stipulates that the candidate should not be less than 20 years and not more than 25 years as on 1st January of the year in case the vacancies are advertised in the first half of the year or as on 1st July of the year if the vacancies are advertised in the second half of the year.

4. It is urged that since the vacancies were advertised in the second half of the year and the petitioner had put in more than 3 years regular service, he was eligible to participate in the recruitment process because he was less than 30 years as on 1.7.2007, but for the action of respondents in stipulating the cut off date as 1.1.2008 for the vacancies advertised in second half of 2007.

5. It is further contended that modification in Clause 2 (b) of Order 79 (Revised) dated 27.7.2007 was effected vide Railway Board letter No.88-Sec (E)/RC-3/6 (IRSI) dated 4.10.2007 i.e. much after the advertisement dated 15-20.9.2007, and was thus not applicable retrospectively for a recruitment process already initiated. It is urged that, since the modification in procedure regarding recruitment of Sub-Inspectors in RPF/RPSF vide 4.10.2007 was prospective, the same ought not to have been made applicable for recruitment undertaken in September, 2007. The relief is accordingly sought for, to allow him to participate in the selection and to grant such relief as deemed fit and proper.

6. The respondents on their turn deny any relief to be granted to the petitioner. It is contended inter-alia that, the decision regarding reckoning of age as 1.1.2008 was taken much prior to issuance of advertisement that is on 31.8.2007. In pursuance whereof, the Chairman, Central Recruitment Committee, issued instructions on 12.9.2007 to respective Chairman, Zonal Recruitment Committee, wherein the advertisement was issued on 15-20.9.2007. It is accordingly urged that there is no anomaly in the advertisement as would warrant any interference.

7. The question which crops up for consideration is whether the respondents are justified in stipulating the modified cut off date regarding the age for determining the eligibility of a candidate.

8. Clause 2 (b) of Standing Order No.79 (Revised) dated 27.7.2007 stipulated the eligibility regarding age in the following terms:

> "Age: Not less than 20 and not more than 25 years as on 1st January of the year in case the vacancies are advertised in the

first half of the year or as on 1st July of the year if the vacancies are advertised in the second half of the year. Relaxation in upper age limit will be admissible to SC, ST, OBC, Ex-servicemen and Central Government Employees as per extant instructions of the Central Government."

9. The aforesaid Clause was modified vide Railway Board circular No.88-Sec (E)/RC-3/6 (IRSI) dated 4.10.2007 in the following terms:

"Age:Not less than 20 years and not more than 25 years as on 1st July of the year for those posts for which notifications are issued between January to June and 1st January of next year for those posts for which notifications are issued between July and December."

10. This modification was after the approval of DG/RPF and has a reference to letter dated 31.8.2007. This letter i.e. No.88-Sec(E)/RC-3/6 (IRSI) dated 31.8.2007 which is brought on record as Annexure P4 proposing various modifications to Standing Order 79 and the modification proposed by replacing existing paragraph regarding relaxation in upper age limit.

11. Thus the decision for modification to Standing Order 79 was already taken before it was incorporated in Standing Order 79.

12. In *Jai Singh Dalal and Others Vs. State of Haryana and another* 1993 Supp (2) SCC 600, it has been observed in para 7 of the Judgment:

"Thus, the HPSC was still in the process of selecting candidates and had yet not completed and finalised the select list nor had it forwarded the same to the State government for implementation. The candidates, therefore, did not have any right to appointment. There was, therefore, no question of the High court granting a mandamus or any other writ of the type sought by the appellants. The law in this behalf appears to be well settled. In the *State of Haryana v. Subash Chander Marwaha* this court held that the mere fact that certain candidates were selected for appointment to vacancies pursuant to an advertisement did not confer any right to be appointed to the post in question to entitle the selectees to a writ of mandamus or any other writ compelling the authority to make the appointment."

13. In *Rajasthan Public Service Commission Vs. Chanan Ram and another* (1998) 4 SCC 202.

"17. In the case of *State of M.P. v. Raghuveer Singh Yadav* (1994) 6 SCC 151 a Bench of two learned Judges of this Court consisting of K. Ramaswamy and N. Venkatachala, JJ., had to

consider the question whether the State could change a qualification for the recruitment during the process of recruitment which had not resulted into any final decision in favour of any candidate. In paragraph 5 of the Report in this connection it was observed that it is settled law that the State has got power to prescribe qualification for recruitment. In the case before the Court pursuant to the amended Rules, the Government had withdrawn the earlier notification and wanted to proceed with the recruitment afresh. It was held that this was not the case of any accrued right. The candidates who had appeared for the examination and passed the written examination had only legitimate expectation to be considered according to the rules then in vogue. The amended rules had only prospective operation. The Government was entitled to conduct selection in accordance with the changed rules and make final recruitment. Obviously no candidate acquired any vested right against the State. Therefore, the State was entitled to withdraw the notification by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended Rules. In the case of *J & K Public Service Commission v. Dr. Narinder Mohan* (1994) 2 SCC 630 : (1994 AIR SCW 1701) another Division Bench of two learned Judges of this Court consisting of K. Ramaswamy and N.P. Singh, JJ. considered the question of interception of recruitment process earlier undertaken by the recruiting agency in this connection it was observed that the process of selection against existing and anticipated vacancies does not create any right to be appointed to the post which can be enforced by a mandamus."

14. In *S.Prakash and another Vs. K.M.Kurian and others* (1999) 5 SCC 624, it was held in para 20 :

"20. From the aforesaid G.O., it is clear that during the selection process, Government had accepted the advice of the Public Service Commission that the changes in the qualifications, method of appointment, age or other conditions of recruitment introduced after the issue of notification for selection to the post by the Public Service Commission will be given effect to in future selections only with an exception as mentioned therein. As stated earlier, in the present case selection process was not over till the list of selected candidates was published by the Public Service Commission on 13th May, 1995 and the impugned Note (3) does not change qualifications, method of appointment, age or other conditions of recruitment. It only fills up the lacuna or clarifies the

ambiguity prevailing for computation of ratio or percentage for appointment by direct recruitment and by transfer. Because of the aforesaid factual position, in our view, it is not necessary to discuss judgments cited by the learned counsel for the respondents. However, we would refer to one decision rendered by this Court in *Rajasthan Public Service Commission v. Chanan Ram* (1998) 4 SCC 202 wherein after considering the decision in the *P. Ganeshwar Rao v. State of Andhra Pradesh* (1998) Supp SCC 740, this Court held that "if the recruitment rules underwent amendment prior to actual filling up of the advertised posts, the amended rules would apply." The Court also referred to a three-Judge Bench judgment of this Court in *Jai Singh Dalal v. State of Haryana,* 1993 Supp (2) SCC 600 wherein it has been held that when the special process of recruitment had not been finalised and culminated into select list, the candidate did not have any right to appointment and that recruitment process could be stopped by the Government at any time before a candidate has been appointed and as the candidate has no vested right to get the process completed except that the Government could be required to justify its action on the touchstone of Art. 14."

15. In *A.Manoharan and Others Vs. Union of India and Others* (2008) 3 SCC 641 para 22:-

"22. The legal principle that an administrative act must yield to a statue is no longer res integra. Once a regulation has been framed, in terms of the provisions of the General Clauses Act, the same must be amended in accordance with the procedures laid down under the principal enactment. Even assuming that the Central Government had the jurisdiction to direct the authority to amend the Regulations, it was required to be carried out in accordance with law, and, thus all requisite procedures laid down therefore were required to be fulfilled. (See *Sant Ram Sharma v. State of Rajasthan* AIR 1967 SC 1910, *DDA v. Joginder S.Monga* (2004) 2 SCC 297, *Vasu Dev Singh v. Union of India* (2006) 12 SCC 753, *Kerala Samsthana Chethu Thozhilali Union v. State of Kerala* (2006) 4 SCC 327 and *State of Kerala v.Unni* (2007) 2 SCC 365)"

16. In the case at hand, as noted supra, the Standing Order No.79 (Revised) dated 27.7.2007 was modified vide Railway Circular No.88-Sec (E)/RC-3/6 (IRSI) dated 4.10.2007 whereby the eligibility regarding age was modified to the extent that "the candidate should not be less than 20 years and not more than 25 years as on 1st July of the year for those posts for which notifications are issued between

January to June and 1st of January of next year for those posts for which notifications are issued between July and December". The said modification was in pursuance to decision dated 31.7.2007 which was taken before the issuance of advertisement dated 15-21.9.2007 in respect of selection, which was to be held after 5.11.2007 and the petitioner was admittedly over age as per stipulations contained in the advertisement.

17. There being no accrual of the right in favour of the petitioner, the contention that, the change of cut-off date for the purpose of age has prejudicially effected the chance of the petitioner to participate in the selection for the post of Sub-Inspector in the Railway Protection Force, is of no consequence; because the entitlement of a person is only for consideration and the same is on the basis of the rules in vogue.

18. Since, the respondents have declared the cut-off date in the advertisement dated 15-21.9.2007 and the same being on the basis of the deliberations by the respondents, which subsequently were incorporated in the Standing Order 79 (Revised), this Court finds no substance in the challenge put forth by the petitioner.

19. In view of the above, the petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2009] M. P., 3139
WRIT PETITION
Before Mr. Justice P.K. Jaiswal
5 October, 2009*

PRAKASH CHANDRA PRASAD ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 10 - *Warning - Whether is a punishment - Held - No -- Warning is not a penalty in Rule 10 and as such does not require the detailed enquiry procedure as contemplated under Rule 14 - It will not come on the way of the petitioner for his further promotion.* (Para 11)

क. सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 10 – चेतावनी – क्या एक दण्ड है – अभिनिर्धारित – नही – नियम 10 में चेतावनी शास्ति नही है और इस रूप में नियम 14 के अन्तर्गत अपेक्षित विस्तृत जाँच प्रक्रिया की आवश्यकता नही है – यह याची की आगे पदोन्नति के लिए उसके रास्ते में नही आयेगी।

B. Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 10 - *Warning - ASJ has made certain observations against the SDM (petitioner) in his order - On this basis show cause notice*

*W.P. No.11335/2003 (Jabalpur)

issued and thereafter a warning was issued to petitioner - Held - An opportunity was given to the petitioner and there has been adequate compliance with the principle of natural justice - Competent Authority considered the facts and circumstances of the case and thereafter passed the order of warning which does not constitute punishment - Petition dismissed. (Paras 11 & 12)

ख. सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 10 – चेतावनी – अतिरिक्त सत्र न्यायाधीश ने अपने आदेश में एस.डी.एम. (याची) के विरुद्ध कतिपय प्रेक्षण किये – इसके आधार पर कारण बताओ सूचनापत्र जारी किया गया और उसके बाद याची को चेतावनी जारी की गई – अभिनिर्धारित – याची को एक अवसर दिया गया था और नैसर्गिक न्याय के सिद्धांत का पर्याप्त अनुपालन किया गया – सक्षम प्राधिकारी ने मामले के तथ्यों और परिस्थितियों पर विचार किया और तत्पश्चात् चेतावनी का आदेश पारित किया जो दण्ड का गठन नही करता है – याचिका खारिज।

V.S. Shroti with *Vikram Johari*, for the petitioner.
Rahul Jain, Dy.A.G., for the respondents.

ORDER

P.K. JAISWAL, J. :–The petitioner has filed an application under Section 19 of the Administrative Tribunals Act, 1985 before the State Administrative Tribunal, Jabalpur challenging the order dated 28.9.1996 (Annexure A/8), passed by the respondent No.1-State by which a warning has been issued to the petitioner to the effect that in future he will function in accordance with law and that he should enhance his knowledge about law. During the pendency of this petition the State Administrative Tribunal has been abolished and therefore the matter has been transferred to this Court.

2. Brief facts of the case are that in the year 1994 the petitioner was posted as Sub Divisional Magistrate, Sagar. During his tenure as Sub Divisional Magistrate one Amarsingh and Sahabsingh, initiated proceedings under Section 145 of the Code of Criminal Procedure against Ram Singh and Gulab Singh on the ground that there were serious disputes between the parties in respect of possession of land of Survey Nos.525, 517, 180, having total area 14.65 acres, situated at village Majhgawan of District Sagar and the said dispute would cause breach of peace between the parties and, therefore, prayed for passing a prohibitory order against party No.1. The Sub Divisional Magistrate called the report from the police station Bahariya of District Sagar and thereafter registered a case vide Case No.99 of 1995. In the application under Section 145 of Cr.P.C. notices were issued to the other party. During the pendency of the proceedings, on 20.2.1995, an application under Section 146 (1) of Cr.P.C was filed. The Sub Divisional Magistrate fixed the case for hearing on 22.2.1995 and without issuing any show cause notice to the other party (Party No.1) heard the party No.2 and passed the prohibitory order dated 10.3.1995. The party No.1 aggrieved by the said order and filed a

criminal revision before the learned III Additional Sessions Judge, Sagar vide Criminal Revision No.36/95. In the said revision, they pointed out that in respect of the same land a civil suit (C.S. No.6-A/94) was pending in which an application for temporary injunction filed by party No.2 was rejected on 27.4.1994. It is also pointed out by party No.1 that the learned Sub Divisional Magistrate without issuing any show cause notice to the party No.1 and without giving an opportunity of hearing passed a prohibitory order on 10.3.1995. The learned Additional Sessions Judge after hearing the parties passed the order dated 14.8.1995 (Annexure A/5) and made certain observations against the present petitioner. The matter was referred to the State Government whereas the State Government on the basis of the observations made by the learned III Additional Sessions Judge, Sagar passed an order dated 28.9.1996 (Annexure A/8) and warning has been issued to the petitioner. By this action the petitioner is aggrieved and filed this petition on the ground that the said order has been passed without issuing any show cause notice to the petitioner and without affording an opportunity of hearing to him.

3. It is also contended by learned counsel for the petitioner that the observation made by the III Additional Sessions Judge is contrary to the record of the case and in support of the said contention, he drew my attention to the order dated 20.2.1995, 22.2.1995 and 10.3.1995 respectively.

4. On the other hand, learned Dy. Advocate General drew my attention to the averments made in the return and submitted that prior to the impugned .order of warning dated 28.9.1996 show cause notice was issued to the petitioner. The petitioner replied the same and thereafter the State Government passed the impugned order on 28.9.1996. It is also pointed out that the warning has been issued to the petitioner because of his conduct during the discharge of his official functions as a judicial authority and while passing the judicial order under Section 145 of Cr.P.C. and therefore the State Government has not committed any legal error in issuing warning to the petitioner.

5. I have heard learned counsel for the parties and perused the record of the case.

6. The primary objective of Section 145 Cr.P.C. is the prevention of the breach of the public peace arising in respect of a dispute relating to immovable property. In order to achieve the object, the section enables the Magistrate to settle the matter temporarily so far as the criminal courts are concerned and to maintain the status quo until the rights of the parties are decided by a competent court. An order made under Section 145 Cr.P.C. deal only with factum of possession of party as on a particular day. The order is subject to decision of civil court. The civil court has jurisdiction to give finding different from that which the Magistrate has reached. In the case of *Mahant Ram Saran Dass vs Harish Mohan and another* (2001) 10 SCC 758 the Apex Court held that where civil suit for declaration of title was already pending and court had passed order of injunction, the Magistrate

cannot entertain application under Section 145 Cr.P.C. fact that applicant before Magistrate was not arrayed as party before Magistrate as party defendant would be immaterial.

7. In the present case when the proceedings under Section 145 of Cr.P.C. was initiated by the party No.2 against the party No.1, before the petitioner, the civil suit No.6-A/94 was pending between the parties in which temporary injunction application of the party No.2 was rejected on 27.4.1994 and it was found that party No.1 was in possession of the disputed land. The initiation of the parallel criminal proceeding is not permitted where question of possession of the disputed property is decided by civil court. The proper course for the party No.2 was to initiate a proceeding under Section 107 of Cr.P.C. peace can be achieved by proceedings under Section 107 of Cr.P.C. The petitioner who was learned Magistrate had erred in passing ex parte order, without issuing notice to the party No.1. The Revisional Court allowed the revision and made the following observations in para 3, 4,7 and 9 which reads as under:-

> 3. ध्यान देने योग्य बात यह है कि विद्वान अनुविभागीय दंडाधिकारी ने पार्टी क. 2 द्वारा धारा 146 द.प्र.सं. का आवेदन पत्र 20.2.95 को जो उनके न्यायालय में प्रस्तुत किया गया था उसे रिकार्ड में लेकर विचारार्थ हेतु प्रकरण दिनांक 22.2.95 को रखा और इस दिन पार्टी क. 2 के अधिवक्ता श्री नेमा को सुनकर आदेश हेतु प्रकरण 10.3.95 रखा । इस प्रकार जबकि थाना बहेरिया द्वारा पार्टी क. 1 एवं पार्टी क. 2 दोनों के विरूद्ध वादग्रस्त संपत्ति के संबंध में धारा 145 का इस्तगासा जब पेश किया था और दोनों पक्षों को सूचना पत्र जारी किया था, तब ऐसी स्थिति में जबकि पार्टी क. 2 द्वारा 20.2.95 को आवेदन पत्र देकर फसल कुर्क कर सुपुर्दगी में दिए जाने का आदेश प्राप्त किया और यह आदेश एकपक्षीय था, तब अवश्य ही विद्वान अनुविभागीय दंडाधिकारी द्वारा न्यायिक परंपरा का दुरूपयोग किया गया है इससे पार्टी क. 1 का नेचुरल जस्टिस से वह वंचित हो गया ।
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> 4. विद्वान अनुविभागीय दंडाधिकारी को चाहिए था कि पार्टी क. 1 को नोटिस देकर बुलवाते तथा संबंधित विषयवस्तु के संबंध में साक्ष्य प्राप्त करते तदुपरांत कुर्की का आदेश देते । जबकि इस रिवीजन में यह बात सामने आयी है कि वादग्रस्त संपत्ति के संबंध में अमरसिंग द्वारा अस्थायी निषेधाज्ञा भी चतुर्थ अति. न्यायाधीश सागर द्वारा व्यवहार वाद क. 6ए/94 आदेश दिनांक 27.4.94 को निरस्त किया जा चुका था, और इस आदेश के होने के उपरांत 20.2.95 को पार्टी क. 2 द्वारा इसी वादग्रस्त भूमि के संबंध में कुर्क किए जाने बावत आवेदन पत्र देकर एकपक्षीय रुप में अनुविभागीय दंडाधिकारी सागर से दिनांक 10.3.95 को आदेश प्राप्त कर लिया, अवश्य ही पार्टी क. 2 द्वारा की गयी कार्यवाही पूर्णतः विधि के अनुरूप नहीं है ।
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> 7. उपरोक्त निष्कर्ष के प्रकाश में मैं इस निष्कर्ष पर पहुंचता हूं कि अनुविभागीय दंडाधिकारी द्वारा विधि प्रकिया की घोर उपेक्षा की है जिससे घोर अन्याय हुआ है और उनका आदेश पूर्णतः त्रुटिपूर्ण है जिससे न्याय का हनन हुआ है ।

9. अंत में मैंने यह पाया कि अनुविभागीय दंडाधिकारी द्वारा यह जो कार्यवाही उन्होंने अपने दा.प्र. कं. 99/95 अंतर्गत धारा 145 द.प्र.सं. के संबंध में जो की, इससे साफ जाहिर है कि उन्हें विधि प्रकिया का बिल्कुल ज्ञान नहीं है और इससे अवश्य ही गरीब जनता जनार्दन को न्याय से वंचित होना पड रहा है । अतः इस संबंध में कमिश्नर जिला सागर को इस बावत लिखा जावे कि वे इस बावत उचित कार्यवाही करें ।

8. Under Section 146(1) of the Code of Criminal Procedure Code, 1973 before passing the attachment order opportunity of hearing and prior notice to the parties for valid attachment in case of emergency is not necessary but normally the Magistrate should provide opportunity of hearing and notice to the other party and in spite of notice having not been served upon opposite party if he did not appear and the situation was explosive attachment could be ordered. In the present case no finding was recorded by the petitioner that attachment order dated 10.3.1990 was made on the ground of emergency and without issuing notice to the other party the said order was passed.

9. It is well settled that no order under Section 146 (1) of Cr.P.C. could be passed while the matter was pending before Civil Court for adjudication of title and possession. Thus, I am of the considered view that the revisional court has not committed any illegality in setting aside the attachment order dated 10.3.1995 passed in an application under Section 146(1) of Cr.P.C. on the ground that in civil court case regarding disputed property was pending and application for temporary injunction filed by the party No.2 was rejected on 27.4.1994.

10. On perusal of the order sheet dated 20.2,1995, 22.2.1995 and order dated 10.3.1995 it is not in dispute that before passing the order dated 10.3.1995 in the application filed by party No.2, under section 146(1) of Cr.P.C. no notice was issued to the party No.1 against whom prohibitory order was passed by the petitioner. It is also not in dispute that in respect of the same land, civil suit was pending between the parties and in the civil suit party No.2 filed an application for grant of temporary injunction which was rejected on 27.4.1994 in Civil Suit No. 6-A/94. Considering these facts, it cannot be said that the learned Sub Divisional Magistrate has passed the order dated 10.3.1995 after issuing notice to the party No.1. It is also not in dispute that before passing the impugned order of warning show cause notice was issued by the State Government on 25.9.1995 (Annexure A/6), asking the petitioner to explain the adverse finding made by the III Additional Sessions Judge. Learned counsel for the petitioner drew my attention to the reply filed by him vide Annexure A/7 on 4.10.1995. In para 2 and 3 of the reply though the petitioner tried to point out that the order has been passed after issuing show cause notice to party No.1 but on perusal of the record, I found that no notice was issued to the party No.1 prior to passing of order dated 10.3.1995. Thus, it cannot be said that the observation made by the III Additional Sessions Judge in para 7

and 9 in its order dated 14.8.1995 is contrary to the record of the case. After considering the aforesaid facts, I am of the considered view that the respondents have not committed any error in passing the impugned order dated 28.9.1996, gave a warning to the petitioner, to be cautious in the future and to make endeavour to improve his knowledge about law.

11. It is well settled that warning is not a penalty specified in Rule 10 of M.P.Civil Services (Classification, Control and Appeal) Rules 1966 and as such does not require the adoption of a detailed enquiry procedure as contemplated under Rule 14 of the Rules of 1966. An opportunity was given to the petitioner and there has been adequate compliance with the principle of natural justice.

12. It is not disputed by learned counsel for the petitioner that warning to the petitioner to make endeavours to improve his knowledge about law is not a punishment under the M.P.Civil Services (Classification, Control & Appeal) Rules, 1966 and circular issued by the State Govt. from time to time. The competent authority while considering the punishment of warning considered the facts and circumstances under which the warning has been given to the petitioner and thereafter passed the impugned order which does not constitute punishment and it will not come on the way of the petitioner for his further promotion.

13. For the above mentioned reasons, the petition filed by the petitioner has no merit and is accordingly dismissed but without any order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 3144
WRIT PETITION
Before Mr. Justice R.S. Garg & Mr. Justice P.K. Jaiswal
12 October, 2009*

RAVINDRA PRAKASH & ors. ... Petitioners
Vs.
STATE OF M.P. & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Order 14 Rule 5 - ***Power to amend and strike out issues*** - *Suit for declaration of title of agricultural land - Application for framing issue regarding maintainability of the suit on the pleadings that land in dispute was subject matter of the agriculture ceiling matter pending before the Competent Authority, M.P. Ceiling on Agriculture Holding Act - Application rejected - Held - Any decree passed in civil suit shall not bind the Competent Authority whether State/Commissioner are party or not a party to the civil suit - The question of maintainability of the suit will have to be decided by the Civil Court - Such issue is required to be cast and answered.* (Paras 9 & 10)

*W.P. No.7918/2007 (Jabalpur)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 14 नियम 5 – विवाद्यकों को संशोधित करने और हटाने की शक्ति – कृषि भूमि के स्वत्व घोषणा के लिए वाद – वाद की पोषणीयता के सम्बन्ध में विवाद्यक विरचित करने के लिए आवेदन इन अभिवचनों पर कि वादग्रस्त भूमि सक्षम प्राधिकारी, म.प्र. कृषि जोत सीमा अधिनियम के समक्ष लम्बित कृषि सीलिंग मामले की विषयवस्तु थी –. आवेदन खारिज – अभिनिर्धारित – सिविल वाद में पारित कोई डिक्री सक्षम प्राधिकारी को बाध्य नही करेगी चाहे सिविल वाद में राज्य/कमिश्नर पक्षकार हो या न हो – वाद की पोषणीयता का प्रश्न सिविल न्यायालय को विनिश्चित करना होगा – ऐसा विवाद्यक विरचित और उत्तरित किया जाना आवश्यक है।

B. Civil Procedure Code (5 of 1908), Order 6 Rule 17 - ***Amendment of pleadings*** - *Defendants filed an application seeking amendment in W.S. by bringing on record an order passed by Additional Commissioner and filing of another appeal - Application disallowed - Held - Defendants want to bring on record the subsequent events which in fact are undisputed - Such facts are required to be brought on record to do complete justice to the parties - Plaintiffs cannot be allowed to take advantage of their own doings by saying that such facts are not required to be brought on record.* (Para 11)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – अभिवचनों का संशोधन – प्रतिवादी ने अपर आयुक्त द्वारा पारित आदेश और एक अन्य अपील का पेश किया जाना अभिलेख पर लाने हेतु लिखित कथन में संशोधन चाहते हुए आवेदन पेश किया – आवेदन नामंजूर – अभिनिर्धारित – प्रत्यर्थी पश्चात्वर्ती घटनाक्रम अभिलेख पर लाना चाहते हैं जो वस्तुतः अविवादित हैं – ऐसे तथ्यों को पक्षकारों के प्रति पूर्ण न्याय करने के लिए अभिलेख पर लाया जाना आवश्यक है – वादियों को यह कहते हुए कि ऐसे तथ्य अभिलेख पर लाया जाना आवश्यक नही हैं उनके स्वयं के कार्यों का लाभ लेने की इजाजत नही दी जा सकती।

Akhilesh Jain, for the petitioners.
Naman Nagrath, Addl.A.G., for the respondent No.1.
R.D. Hundikar, for the respondent Nos.2 & 3.

ORDER

The Order of the Court was delivered by **R.S. GARG, J.** :–The petitioners being aggrieved by the order dated 10.5.2007 passed by the learned Fifth Additional Judge to the Court of First Civil Judge, Class I, Bhopal, in Civil Suit No. 142-A of 2007 rejecting the defendants/petitioners application filed under Order 14 Rule 5 C.P.C and Order 6 Rule 17 C.P.C have filed this writ petition.

2. The checkered history made straight provides that the respondents no.2 and 3 filed the suit in dispute in the Court of Xth Civil Judge, Class II, Bhopal against the State Government praying for the reliefs that they be declared owners of the property and injunction be given against the State Government and the other authorities not to disturb their possession or dispossess them.

3. The present petitioners filed an application under Order 1 Rule 10 C.P.C with a submission that they are vitally interested in the outcome of the suit because the land in dispute was subject matter of the agricultural ceiling matter pending before the competent authority. The said application was allowed and the present petitioners were allowed to be joined as parties/defendants.

4. After joining of the new defendants the said defendants filed their written statement and raised various pleadings. On the basis of the said pleadings the learned trial court framed the following three issues only:

(1). Whether the plaintiffs are in possession of the property and are Bhumi Swami/Owner.

(2). Whether the defendants were trying to interfere with the possession of the plaintiffs.

(3). Whether the suit was barred by limitation.

After such issues were cast, the case was fixed for recording evidence the defendants/petitioners filed an application under Order 14 Rule 5 C.P.C proposing certain issues. Later they also filed an application under Order 6 Rule 17 of the Code of Civil Procedure.

5. Application filed under Order 14 Rule 5 C.P.C was rejected observing that the issues were cast by the court on 19.3.2007 in presence of the parties, therefore, such issues were not required to be cast. Similarly application under Order 6 Rule 17 C.P.C was rejected on 17.5.2007 observing that in light of the amendment in Rule 17 of Order 6 C.P.C such amendment could not be allowed to be brought on record.

6. Learned counsel for the petitioners submitted that a perusal of the conduct of the original plaintiffs/respondents no.2 and 3 would show that on one side placing reliance upon the principles of natural justice they challenged the orders earlier passed against them in the Court of the Additional Commissioner and succeeded in the matter but at the same time violating the said principles and with an intention to play fraud with the Court/State and the present petitioners they filed a suit and sought a decree of declaration and injunction. It is submitted by him that after the order has been passed by the Additional Commissioner in Case No.483/A/ 2004-5 on 18.4.2007 the maintainability of the suit has become doubtful. For the amendment it is submitted that Order 6 Rule 17 C.P.C if is taken into its proper perspective it would clearly appear that after recording the reasons the Court handling the application can allow the same and the bar contained in Rule 17 is not absolute. It is also submitted by him that any decree if is passed in the Civil Suit, the same shall not bind the competent authority and the competent authority will have to be satisfied by the present plaintiffs/respondents no. 2 and 3 that they are *shikmis*, they have acquired Bhumi Swami rights and the land in dispute cannot be declared as surplus.

7. Shri Hundikar, learned counsel for the original plaintiffs/respondents no.2 and 3 however, submitted that the scope of the suit cannot be widened because in the present suit the plaintiffs are not seeking any relief against the petitioners. It is however, submitted by him that a declaration granted by the Court in favour of the plaintiffs shall bind the competent authority.

8. Shri Nagrath, learned Additional Advocate General for the respondent no. 1 however, submitted that any decree which may be passed in this suit shall not bind the competent authority because the competent authority will have to look into the merits of the matter and will have to record his own conclusion.

9. Undisputedly the Additional Commissioner vide his order dated 18.4.2007 in Case No.483/A/2004-05 while setting aside the order dated 20.11.2001 passed by the Collector/competent authority in Ceiling Case No.5/A-90/B-3/1974-1975 remanded the matter back to the Collector with a direction that after the draft statement/final statement are submitted by the respondents of that case, (Ravindra Prakash and Rajendra Kumar) appropriate opportunity of hearing be given to the present plaintiffs/respondents no.2 and 3 and only thereafter final orders be passed. If such are the orders then obviously the respondents are required to appear before the competent authority and satisfy the authority that the land in dispute cannot be treated to be within the agricultural holdings of the present petitioners and cannot be declared surplus. It would be trite to say that any decree passed in a Civil Suit shall not bind the competent authority whether State/Commissioner are party or not a party to the Civil Suit. True it is that the said decree may bind some of the Revenue Officers but shall not bind the competent authority which under the M.P. Ceiling on Agriculture Holding Act has to decide that whether the decree is valid or not and the decree has the binding effect or not.

10. The question that in the proceedings of 1964 Raghuwardayal Saxena, predecessor in title of the petitioners, had made certain declarations into the status of the present plaintiffs however would not affect the jurisdiction of the competent authority. In any case after the order dated 18.4.2007 the question of maintainability of the suit will have to be decided by the Civil Court. In our opinion the issues proposed by the present petitioners are required to be cast and answered.

11. In so far as application under Order 6 Rule 17 of C.P.C is concerned a perusal of the application would show that the petitioners were trying to bring on record the subsequent events which in fact are undisputed. The petitioners want to bring on record an order passed by the Additional Commissioner and the filing of another appeal. Such facts in our opinion are required to be brought on record to do complete justice to the parties and the plaintiffs cannot be allowed to take advantage of their own doings by saying that such facts are not required to be brought on record.

12. Both the orders passed by the learned Court below are quashed. The petition is allowed with costs quantified at Rs.5000/- to be paid by the plaintiffs to the defendants in person before the trial Court. The payment of the cost shall be a condition precedent for proceeding further with the suit.

Petition allowed.

I.L.R. [2009] M. P., 3148
WRIT PETITION
Before Mr. Justice Ajit Singh
3 November, 2009*

PANAH MOHAMMED ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Notaries Act (53 of 1952), Section 8, Notaries Rules, 1956, Rule 4 - *Application for appointment as a notary - Memorial of the petitioner not countersigned by a manager of a nationalized Bank - Since the application was incomplete he could not be appointed as notary - Action challenged - Held - Use of word "shall" in sub-rule (3) of Rule 4 and also in the note appended to Form-I raises a strong presumption that the provision is mandatory - Memorial was incomplete as it was not countersigned as required by sub-rule (3)(b) of Rule 4 - Petition dismissed.* (Para 6)

क. नोटरी अधिनियम (1952 का 53), धारा 8, नोटरी नियम, 1956, नियम 4 – नोटरी के रूप में नियुक्ति के लिए आवेदन – याची का अभ्यावेदन किसी राष्ट्रीयकृत बैंक के प्रबंधक द्वारा प्रतिहस्ताक्षरित नही – चूंकि आवेदन अपूर्ण था इसलिए उसे नोटरी के रूप में नियुक्त नही किया जा सका – कार्यवाही को चुनौती – अभिनिर्धारित – नियम 4 के उपनियम (3) में और प्रारूप I से जुड़े हुए नोट में भी शब्द "किया जायेगा" का प्रयोग सशक्त उपधारणा करता है कि उपबंध आज्ञापक है – अभ्यावेदन अपूर्ण था क्योंकि वह नियम 4 के उपनियम (3)(बी) की अपेक्षानुसार प्रतिहस्ताक्षरित नही किया गया – याचिका खारिज।

B. Notaries Rules, 1956, Rule 4 - ***Incomplete memorial*** - *No such provision in the Rules making it obligatory on the Competent Authority to inform the applicant about the defect in the application (memorial) and get it corrected - Only an application which complies with the requirement of Rule 4 is considered by the Competent Authority u/R 6.* (Para 6)

ख. नोटरी नियम, 1956, नियम 4 – अपूर्ण अभ्यावेदन – नियमों में सक्षम प्राधिकारी पर यह बाध्यकर करने वाला ऐसा कोई उपबंध नही है कि आवेदक को आवेदन (अभ्यावेदन) में त्रुटि के बारे में सूचित करे और उसमें सुधार कराये – सक्षम प्राधिकारी द्वारा नियम 6 के अन्तर्गत केवल ऐसे आवेदन पर, जो नियम 4 की आवश्यकताओं को पूरा करता है, विचार किया जाता है।

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*W.P. No.5435/1998 (Jabalpur)

Vivek Rusia, for the petitioner.
Samdarshi Tiwari, G.A., for the respondent Nos.1 & 2.
N.P. Dubey, for the respondent Nos. 3 & 5.
Ashok Pali, for the respondent No.4.

ORDER

AJIT SINGH, J. :–By this petition the petitioner has challenged the selection and appointments of respondent nos.3 to 5 as notaries in District Tikamgarh vide order dated 9.9.1998, Annexure P5, passed by respondent no.1.

2. The facts are these. On the death of Notary Shankar Prasad Sinha in District Tikamgarh his post fell vacant. The President and Members of District Bar Association, Tikamgarh, therefore, made a representation dated 21.5.1997, Annexure P1, to respondent no.2 for the appointment of notary. Respondent no.2 responded by issuing a notification inviting applications from persons interested for appointment as notary. As many as 11 applications including that of petitioner and respondent nos.3 to 5 were received. Respondent no.2 published the list of names of all 11 applicants in the Gazette Notification dated 15.5.1998, Annexure P3, for inviting objections but no objections were received against any of the applicants. Respondent no.2 thereafter sent his report dated 6.7.1998 to respondent no.1 wherein he recommended the names of three applicants, viz. Subhash Chandra Jain, Vinod Pastor (respondent no.3) and Smt. Prabha Gupta (respondent no.4) and stated that amongst these three any one may be appointed. In the meantime, three more posts of notary were created by the State Government in Tikamgarh district. Respondent no.1, after examining the report of respondent no.2 as well as the applications of all the applicants appointed respondent nos.3 to 5 as notaries by the impugned order dated 9.9.1998, Annexure P5. Respondent no.1 had also found that the application of petitioner was not complete as it was not countersigned by a manager of a nationalised bank.

3. The learned counsel for petitioner has argued that, while selecting and appointing respondent nos.3 to 5 as notaries, the provisions of Rules 6 and 7 of the Notaries Rules 1956 have not been complied with and, therefore, their appointments were liable to be quashed. He also submitted that although the report of respondent no.2 was sent for the appointment of only one applicant, respondent no.1 committed an illegality in appointing three applicants. The learned Government Advocate, on the other hand, submitted that the appointments were made by following the due procedure. He also produced the original record pursuant to the order of this Court and argued that, since the application of petitioner was incomplete he could not have been appointed as notary in any case and, therefore, he has no locus standi to challenge the appointments of respondent nos.3 to 5. According to the learned Government Advocate, respondent no.1 was fully empowered and justified in appointing respondent nos.3 to 5 as three new posts of notary were created. The learned counsel appearing for respondent nos.3 to 5 have adopted the arguments advanced by the learned Government Advocate.

4. After hearing the learned counsel for parties, I deem it proper to first examine whether the petitioner could have been appointed as a notary on his application.

5. The Notaries Rules 1956 have been framed under section 8 of the Notaries Act 1952. Rule 3 prescribes qualification for appointment and rule 4 deals with the application for appointment as a notary. Sub-rule (1) of rule 4 provides for making an application in the form of memorial and sub-rule (2) even prescribes Form-I of memorial for the applicants, such as petitioner. Sub-rule (3) further provides that the memorial of a person shall be signed by the applicant and shall also be countersigned by the persons mentioned therein. Sub-rule (3) of rule 4 reads as under:

> "4. Application for appointment as a notary.-
>
> (1)..
>
> (2)..
>
> (3) The memorial of a person referred to in clause (a) of rule 3 shall be signed by the applicant and shall be countersigned by the following persons:-
>
> (a) a Magistrate;
>
> (b) a Manager of a nationalised bank;
>
> (c) a merchant; and
>
> (d) two prominent inhabitants of the local area within which the applicant intends to practise as a notary."

Likewise, requirement of counter signature on the memorial by the persons mentioned in sub-rule (3) is also clearly stated in the Note appended to Form-I which is as follows:

> "Note.- Under rule 4(3) the memorial should be countersigned by a Magistrate, a manager of a Nationalised Bank, a merchant and two prominent inhabitants of the area where he intends to practise as a notary."

6. From the reading of sub-rule (3) and aforesaid Note in Form-I it becomes clear that for complete memorial by a person seeking appointment as a notary, the memorial has to be signed by the applicant and also to be countersigned by the persons mentioned therein. The words in the sub-rule "shall be counter signed by the following persons" is a mandatory requirement to make the memorial (application) complete which could be considered by the competent authority and later by the State Government. The use of word "shall" in sub-rule (3) and also in the Note Form-I raises a strong presumption that the provision is mandatory. It is to be seen that notary performs very important functions and his actions have far reaching effects. His integrity and honesty must, therefore, be above board. It is

for this reason a mandatory provision has been made that the memorial of a person seeking appointment as a notary must be countersigned by persons such as Magistrate, a manager of a nationalised bank, etc. In the case of petitioner, the memorial was incomplete as it was not countersigned by a manager of a nationalised bank as required by sub-rule (3)(b). The argument of the learned counsel for petitioner that the competent authority (respondent no.2) should have informed the petitioner that his application was incomplete, is not acceptable because there is no such provision in the Rules making it obligatory on the competent authority to inform the applicant about the defect in the application and get it corrected. The consideration of application under Rule 6 by the competent authority for appointment as notary is only in respect of an application which complies with the requirement of Rule 4. An application which does not comply with the mandatory requirements of rule 4 cannot be said to be an application for an appointment of notary needing consideration by the competent authority under rule 6. The rejection of an application for appointment as a notary under rule 6 is only in respect of applications which are fully in conformity with rule 4 but where the applicant does not possess the qualifications specified in rule 3 or his application for appointment as notary was earlier rejected within six months.

7. For these reasons the petitioner in any case could not have been appointed as a notary and, therefore, he has no locus standi to challenge the appointments of respondent nos.3 to 5 as notaries. In view of my this finding, I do not find it necessary to examine the other submission of petitioner that provisions of Rule 7 were not followed by respondent no.1 in making the appointments of notaries.

8. The petition fails and is dismissed but without any order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 3151
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik
30 June, 2009*

SAHIBRAM DHINGRA (DIED) THROUGH L.R.
NARENDRA DHINGRA ... Appellant
Vs.
SHIVSHANKAR GOYAL ... Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) - ***Suit for eviction*** - *Tenant inducted in the tenanted premises for residential purpose - Tenant converted one entire room situated at front side of tenanted premises for STD/PCO Centre - Held - Act of tenant is inconsistent with the purpose of tenancy - Single act of the tenant is sufficient to cause his eviction*

*S.A. No.404/2008 (Gwalior)

provided that the act is of gravity - Judgment & decree u/s 12(1)(c) of the Act affirmed - Appeal dismissed . (Paras 16 to 22)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) – बेदखली का वाद – किरायेदार किरायेदारी परिसर में नैवासिक प्रयोजन के लिए अधिवासित किया गया – किरायेदार ने किरायेदारी परिसर के सामने की ओर स्थित एक पूरा कमरा एस.टी.डी./पी. सी.ओ. सेंटर में परिवर्तित किया – अभिनिर्धारित – किरायेदार का कृत्य किरायेदारी प्रयोजन से असंगत है – किरायेदार का एकमात्र कृत्य उसकी बेदखली कारित करने के लिए पर्याप्त है यदि वह कृत्य गंभीर प्रकृति का हो – अधिनियम की धारा 12(1)(सी) के अधीन निर्णय व डिक्री की पुष्टि की गई – अपील खारिज।

B. Evidence Act (1 of 1872), Section 102 - *On whom burden of proof lies - Tenant contented consent of plaintiff for installation of STD/ PCO centre - Tenant failed to prove factum of having obtained consent - It was not necessary for the plaintiff to appear in witness box for denial of fact which itself has not been proved at all.* (Paras 8 to 11)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 102 – सबूत का भार किस पर होता है – किरायेदार ने एस.टी.डी./पी.सी.ओ. संस्थापित करने के लिए वादी की सम्मति का प्रतिवाद किया – किरायेदार सम्मति अभिप्राप्त करने के तथ्य को साबित करने में विफल रहा – वादी के लिए यह आवश्यक नही था कि तथ्य से इंकारी के लिए कठघरे में उपस्थित होता, जो स्वमेव किसी ढंग से साबित नही किया गया।

C. Civil Procedure Code (5 of 1908), Order 3 Rule 2 - *Power of attorney - Power of attorney holder of the plaintiff may appear and depose only about the facts which are within his knowledge and he cannot appear on behalf of plaintiff to depose about the facts which are exclusively within the personal knowledge of plaintiff.* (Para 12)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 3 नियम 2 – मुख्त्यारनामा – वादी का मुख्त्यार उपसंजात हो सकता है और केवल उन तथ्यों के बारे में अभिसाक्ष्य दे सकता है जो उसके ज्ञान में हैं और वह ऐसे तथ्यों जो अनन्यतः वादी के व्यक्तिगत ज्ञान में हैं उनके बारे में वादी की ओर से अभिसाक्ष्य देने के लिए उपसंजात नही हो सकता है।

Cases referred :

2004(2) Civil Court Cases 364 (AP), 2005(2) Civil Court Cases 324 (SC), 2000(2) Civil Court Cases 606 (P&H), 2002(2) RCR 177, AIR 1978 SC 1601, AIR 2001 SC 1684, 1993 AIR SCW 643, 2004(3) MPLJ 162, 1991(2) MPWN 22, 2000(1) MPHT 15 (NOC), 1997 MPACJ 158, 1979 MPRCJ 110.

R.C. Khanna with *F.A. Shah,* for the appellant.

V.K. Bhardwaj with *Anand Bhardwaj,* for the respondent.

J U D G M E N T

ABHAY M. NAIK, J. :–This appeal has been preferred by the defendant/tenant against a decree for eviction granted by the Courts below in

concurrent manner under Section 12 (1)(c) o the M.P. Accommodation Control Act, 1961.

2. Plaintiff/respondent instituted a suit in the capacity of power of attorney holder of Bhagwan Das Goyal for eviction and recovery of arrears of rent with allegations that the suit house situated at A-B Road, Kamlaganj, Hanuman Colony Shivpuri is owned by the principal (i.e. Bhagwan Das Goyal) which was occupied by the defendant/appellant for residential purpose on rent @ Rs.250/- p.m. Appellant lastly paid the rent on 06-05-2004 and obtained receipt therefor, wherein he acknowledged balance of Rs.4,000/- towards arrears of rent Son of the defendant/appellant, contrary to the purpose of tenancy converted one room of tenanted premises for non-residential purpose and opened a STD/PCO Centre with registration No.07492-503031. The STD/PCO dealership was obtained from Airtel Company which is revealed in the computerized bill No.205468243 dated 02-10-04 which was appended to the plaint. Thus, the appellant having committed an act inconsistent with the purpose of tenancy has made himself liable to be evicted under Section 12 (1)(c) of the M.P. Accommodation Control Act. A notice of demand of rent was issued which was not accepted by the defendant and it came back with an endorsement of refusal. However, entire rent was neither paid nor tendered pursuant to the said demand notice.

3. Though a ground of subletting/parting with was also taken by the plaintiff/ respondent, it having been negatived, I do not feel it proper to burden this judgment with the facts pertaining thereto.

4. Defendant/appellant submitted his written statement, denying thereby the claim of the plaintiff. However, he did not deny that the suit premises was obtained for residential purpose. It was obtained in the year 2000 @ Rs.150/- p.m. as rent. With the consent of the plaintiff STD/PCO Centre was opened in one of the rooms of the tenanted premises and in lieu thereof rent was enhanced from Rs.150/- to Rs.250/- p.m. Defendant is still residing in the remaining portion of the suit premises and has not shifted his residence elsewhere. As regards, demand notice it is alleged that no such notice was tendered to him and he did not refuse to accept the same. However, it was stated in specific that the defendant/ appellant deposited entire arrears of rent and up to date rent within 15 days from the service of summon and has deposited monthly rent regularly in the Court. It was stated in specific that the defendant is still residing in the suit premises and is not liable to be evicted. In addition to this, it was stated in the written statement that the plaintiff/respondent has no authority 'in law to institute a suit in his own name.

5. After recording the evidence, learned trial judge decreed the suit in favour of the plaintiff/respondent vide judgment and decree dated 30th April, 2007 on the ground of inconsistent user.

6. Aggrieved by it, Civil Appeal No.7-A/08 was preferred which, too, has

been dismissed vide impugned judgment and decree dated 23-04-08. Hence, the present appeal which has been heard on the following substantial question of law:

Whether the tenant having converted one of the rooms of the residential premises while retaining the character of dominating purpose of residential tenancy in respect of major portion of tenanted premises is liable to be evicted under Section 12(l)(c) of the M.P. Accommodation Control Act ?

7. Shri R.C. Khanna, learned counsel for the appellant and Shri V.K. Bhardwaj, Sr. Advocate made the submissions for their respective parties.

8. In para 3 of the written statement it was stated that STD/PCO Centre was installed with the permission of the landlord and therefore, rent of the suit premises was enhanced from Rs.150/- to Rs.250/- p.m. There was no whisper in the written statement that consent was in writing. However, during the evidence, it is revealed that defendant/appellant tried to develop that in the rent receipt marked as Ex-D/4 word DUKAN was added which is proof of the consent having been granted. The rent receipt Ex-D/4 was not produced during the plaintiff's evidence and the same was not confronted with any of the witnesses of the plaintiff. It was produced hy Narendra Dhingra, who happened to be son of the tenant. This witness has clearly admitted in para 8 of his cross-examination that t Ex-D/4 does not contain signature of the plaintiff but it contains signature of Govind Das Goyal. If the permission for STD/PCO Centre was given vide receipt Ex-D/4 by adding the word DUKAN, it was a material fact in order to avoid decree for eviction on the ground of inconsistent user and it ought to have been pleaded in specific. Permission for STD/PCO Centre is stated in para 3 of the written statement to have been obtained from landlord i.e. Bhagwan Das Goyal whose signature is not contained in Ex-D/4. Moreover consent according to written statement was obtained by the tenant Sahibram Dhingra, who despite being alive was not examined. Although his son Narendra Dhingra (DW-I) has stated that Sahibram was unable to move but that doesn't prevent him from giving statement on commission. This apart, Ex-D/4 is not original document but is photocopy of an alleged receipt. Defendant submitted an application under Section 65 of the Evidence Act on 02-08-06 (I.A.No-8) with allegation that original of Ex-D/4 was misplaced. This interlocutory application was allowed by the trial judge on 20th September, 2006. It was nowhere disclosed by the appellant that original of Ex-D/4 was not available at the time of cross-examination of plaintiff's witnesses. Evidence of the plaintiff was closed on 07-07-06 and the notice under Section 66 of the Evidence Act for production of the receipt book containing alleged receipt was issued on 14-09-06. In view of the aforesaid facts and circumstances, the Courts below have not committed any error in disbelieving the defendant's plea that STD/PCO Centre was installed with the permission/ consent of the landlord.

9. It is further contended that the power of attorney was not competent to depose about the personal knowledge of the landlord. Accordingly, statement is not admissible in the eye of law.

10. In the instant case defence of the defendant/tenant is that he had obtained the permission from the landlord for installation of a STD/PCO Centre in the suit premises and therefore, is not liable to be evicted. However, tenant Sahibram Dhingra did not appear in the witness box to prove the said consent.

11. As regards, Ex-D/4 it has been admitted by the son of the tenant that it did not contain the signature of the landlord. Since factum of having obtained consent is not duly proved by the tenant himself, it was not necessary for the plaintiff/ landlord to appear in the witness box for denial of the fact which itself has not been proved at all.

12. Shri R.C. Khanna, learned counsel for the appellant placed reliance on the decision of Andhra Pradesh High Court in the case of *S. Padmavathamma Vs. S. Sudha Rani & Others*, 2004 (2) Civil Court Cases 364 (A.P.). wherein it was observed that general power of attorney holder can appear as witness only for his personal capacity but cannot appear on behalf of plaintiff in the capacity of the plaintiff. Thus, it can be taken as a settled view that power of attorney holder of the plaintiff may appear and depose only about the facts which are within his personal knowledge and he cannot appear on behalf of the plaintiff to depose about the facts which are exclusively within the personal knowledge of plaintiff. Reference may be made successfully to the Supreme Court decision in the case of *Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and others* 2005 (2) Civil Court Cases 324 (S.C.). Same view has been taken by Single Bench of Punjab Haryana High Court in the case of *Prem Sagar Vs. Darbari Lal & Another.* 2000 (2) Civil Court Cases 606 (P&H). It has been observed in *Prem Sagar's case* (supra) that:

> *"If a party alone has a particular knowledge of the fact, it has to appear in the witness box and it cannot delegate his power to appear in the witness box to his attorney. In the present case, there is a specific case that the petitioners are using the premises for the residence of their labourers and if that is so, it is a fact which is in the knowledge of the tenant and it is for the tenant to prove the same. In the present case if the landlord did not enter into the witness box, no adverse inference can be drawn against him."*

13. In the instant case defendant/tenant is found to have failed in proving that change of use from residential to non-residential was made with the consent of the landlord. This being so, non appearance of the landlord did not assume importance in view of the facts and circumstances of the case.

14. Reliance by Shri Khanna, learned counsel on this Court's decision in the case of *T.D. Agrawal Vs. Nirrnal Mitra,* 2002 (2) RCR 177 is out of place because in the case of *T.D. Agrawal* (supra) permission to the tenant to use one room as office in the tenanted premises which was dominantly for residential purpose was found proved. T.D. Agrawal case was under chapter III-A of the M.P. Accommodation Control Act and the ground of eviction on the basis of inconsistent use was not available before RCA.

15. Before entering into the contentions of both the learned counsel on the aforesaid substantial question of law, it would be proper to reproduce Section 12 (1)(c) of the M.P. Accommodation Control Act, 1961 which reads as under:

> **12. Restriction on eviction of tenants:-** (1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only namely:
>
> (a) xx
>
> (b) xx
>
> (c) that the tenant or any person residing with him has created a nuisance or has done any act which is inconsistent with the purpose for which he was admitted to the tenancy of the accommodation, or which is likely to affect adversely and substantially the interest of the landlord therein:
>
> Provided that the use by a tenant of a portion of the accommodation as his office shall not be deemed to be an act inconsistent with the purpose for which he was admitted to the tenancy.

16. It is crystal clear from the aforesaid provision that the legislature in its best wisdom made the tenant liable to be evicted if he has done any act which is inconsistent with the purpose for which he was admitted to tenancy. It is not in dispute in the present case that the tenant was inducted into the suit premises for residential purpose and that he used to reside therein during past. It was only in the year 2004, when the tenant converted one of the rooms of the tenanted premises for using it for STD/PCO Centre which obviously was for non-residential purpose and was obviously inconsistent with the purpose of tenancy for which he was admitted. Single inconsistent act of tenant may be sufficient to prove a ground for ejectment provided such an act must be of gravity.

17. Shri Khanna, learned counsel placed reliance on Supreme Court decision in the case of *Sant Ram V. Rajinder Lal and Others* (AIR 1978 SC 1601) to contend that ground of inconsistent user is not available to the plaintiff. In *Sant*

Ram's case (supra), it is held that it is impossible to hold that if a tenant who takes out petty premises for carrying on a small trade also stays in the rear portion, cooks and eats, he so disastrously perverts the purpose of the lease. A different 'purpose' in the context is not minor variations but majuscule in mode of enjoyment. In the present case, it has already been found proved that the defendant has converted entire room situated at the front site for STD/PCO Centre and the same was not used at all for residential purpose. Clause (c) sub section (1) of Section 12 makes a tenant liable to be ejected if he has done any act which is inconsistent with the purpose of tenancy. Single act of the tenant in view of the language of the said provision is sufficient to cause his eviction provided the act is of gravity. Thus, the appellant does not get any assistance from Sant Ram decision.

18. Shri Khanna, learned counsel further placed reliance on Supreme Court decisions in the case of *M/s Atul Castings Ltd. Vs. Bawa Gurvachan Singh,* AIR 2001 SC 1684 and in the case of *Bishamber Dass Kohli Vs. Satya Bhalla (Smt.),* 1993 AIR SCW 643. In the case of *M/s Atul Castings Ltd.* (supra) a residential room was found used for disposal of office work at home and was also being used as study room of family members. In the case of *Bishamber Dass Kohli* (supra) Supreme Court did not find any regular commercial activity for carrying on of business with interaction of public and customers. In the present case it is not disputed that subject portion of the tenanted premises was made available by the tenant for the public at large to pay and avail the facility of STD/PCO. Thus, case of M/s Atui Castings Ltd. and Bishamber Dass Kohli are quite distinguishable on facts.

19. It may be seen that the learned Single Judge of this Court in the case of *Devendra s/o Chandmal Chaoudhary Vs. Warsilal s/o Diwanchandji Dua,* 2004 (3) MPLJ 162 has held that setting up of STD Booth in portion of suit shop contrary to the terms of rent note makes a tenant liable to be ejected.

20. I may successfully further refer on this point another single bench decision of this Court in the case of *Bhojraj Rathi Vs. Suchint Chincholkar,* 1991 (2) M.P. Weekly Notes 22, wherein it was held that in case a tenant used any portion for non-residential purpose of the tenanted premises let-out to him for residential purpose he makes himself liable for eviction under Section 12 (1)(c) of the Act. Likewise a tenant putting up a tea stall in residential premises was held liable to be evicted under Section 12 (1) (c), 2000 (1) M.P.H.T. 15 (NOC). In the case of *Suresh Vs. Prabhulal,* 1997 M.P.A.C.J. 158. it has been held by this Court that where accommodation was let-out for residential purpose and a part of it has been put to different use i.e. for the business of washerman the tenant incures the liability of eviction under section 12(1)(c) of the Act.

21. Division Bench of this Court in the case of *Jagdish Vs. Manikchand*

Jain. 1979 MPRCJ, 110 does support the aforesaid discussions wherein it has been held that an act of the tenant in using a part of the premises for a different purpose was an act inconsistent so as to give rise to the ground for ejectment as contemplated under Section 12(1)(c) of the Act.

22. In the result, it is held that the defendant/tenant who was inducted in the tenanted premises for residential purpose, has made himself liable to ejectment by converting a room for STD/PCO it being an act inconsistent with the purpose of tenancy. Accordingly, substantial question of law is decided against the appellant, in favour of the respondent. Impugned judgment and decree are hereby confirmed. Appellant to bear the costs of respondent to the tune of Rs.5,000/- if already certified. Appeal is accordingly dismissed hereby.

Appeal dismissed.

I.L.R. [2009] M. P., 3158
APPELLATE CIVIL
Before Mr. Justice K.K. Lahoti & Mr. Justice Abhay M. Naik
2 July, 2009*

VIJAY PRAKASH CHATURVEDI ... Appellant
Vs.
PREETI CHATURVEDI ... Respondent

A. Hindu Marriage Act (25 of 1955), Section 13(1)(ia) - *Cruelty* - *Husband was Captain in Indian Army at the time of marriage - Allegation that wife wanted the husband to leave his job and join her father engaged in the business of contractor - Held - Husband did not produce & prove his father-in-law's registration as contractor - Husband also not furnished details of sites and copies of work orders - No iota of evidence to establish that his father-in-law was engaged in business of contractor - Trial Court rightly concluded that it was not probable that wife would insist the husband to leave a well salaried and well reputed permanent job of Indian Army - Curelty not proved.* (Para 12)

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(ia) – क्रूरता – पति विवाह के समय भारतीय सेना में केप्टन था – अभिकथन कि पत्नी चाहती थी कि पति अपनी नौकरी छोड़ दे और उसके पिता के साथ ठेकेदारी का कारोबार करे – अभिनिर्धारित – पति ने अपने श्वसुर का ठेकेदार के रूप में पंजीयन पेश और साबित नही किया – पति ने कार्यस्थल का विवरण और कार्यादेशों की प्रतिलिपियाँ भी प्रस्तुत नही कीं – यह साबित करने के लिए रत्तीभर साक्ष्य नही कि उसके श्वसुर ठेकेदारी का कारोबार करते थे – विचारण न्यायालय ने उचित रूप से यह निष्कर्ष निकाला कि यह अधिसंभाव्य नही था कि पत्नी पति को भारतीय सेना की अच्छे वेतन और उच्च प्रतिष्ठा वाली स्थायी नौकरी छोड़ने के लिए आग्रह करती – क्रूरता साबित नही।

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*F.A. No.3/2008 (Jabalpur)

B. **Hindu Marriage Act (25 of 1955), Section 13(1)(ia) -** ***Cruelty -*** *Threat of implicating husband and his family members in criminal case - No witness examined for corroboration of such bald allegations - Allegation not found proved.* (Para 14)

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(ia) – क्रूरता – पति और उसके परिवार के सदस्यों को दाण्डिक मामले में फंसाने की धमकी – ऐसे सादा अभिकथनों की सम्पुष्टि के लिए किसी साक्षी की परीक्षा नही करायी गयी – अभिकथन साबित होना नही पाये गये।

C. **Hindu Marriage Act (25 of 1955), Section 13(1)(ib) -** ***Desertion - Essential Conditions -*** *(i) factum of separation (ii) intention to bring cohabitation permanently to an end (animus deserendi) -* ***Essential conditions for deserted spouse -*** *(i) absence of consent (ii) absence of conduct giving reasonable cause to the spouse leaving matrimonial home to form necessary intention.* (Para 17)

ग. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(ib) – अभित्यजन – आवश्यक शर्तें – (i) पृथक्करण का तथ्य, और (ii) स्थायी रूप से सहवास का अंत करने का आशय (अभित्यजन का आशय) – अभित्यक्त पति या पत्नी के लिए आवश्यक शर्तें – (i) सम्मति का अभाव (ii) आवश्यक आशय गठित करने के लिए पति या पत्नी को दाम्पत्य निवास छोड़ने का युक्तियुक्त कारण देने वाले आचरण का अभाव।

D. **Hindu Marriage Act (25 of 1955), Section 13(1) -** ***Divorce - Broken marriage -*** *The Act do not provide for divorce merely on the ground of broken marriage.* (Para 20)

घ. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1) – विवाह विच्छेद – खण्डित विवाह – अधिनियम केवल खण्डित विवाह के आधार पर विवाह विच्छेद का उपबंध नही करता है।

Cases referred :

(2007) 4 SCC 511, AIR 1964 SC 40.

Ravendra Shukla, for the appellant.

J.K. Verma, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by ABHAY M. NAIK, J. :–This appeal has been preferred by the applicant/ appellant against the dismissal of his application for decree of divorce by dissolution of marriage on grounds under section 13 (1) (i-a) & (i-b) of Hindu Marriage Act, 1955.

2. Applicant/appellant and non-applicant/respondent are husband and wife on account of having performed marriage on 11.05.2003 at Rewa as per Hindu rites anc rituals, applicant/appellant was appointed as Lieutenant in the Indian Army w.e.f. 12.06.1999. He was promoted to the rank of Captain in June, 2000. He was

posted at Delhi in February, 2002. Thus, at the time of marriage, he was holding the post of Captain. Later on, in July, 2003, he was promoted as Major and was posted at Mhow (Indore). He was transferred to Leh (J & K) in January, 2004 and was thereafter transferred to Banglore in May, 2005. Thus, at the time of marriage, applicant/appellant was Captain in Indian Army.

3. According to the applicant/appellant, the respondent-wife is having qualification of M.Sc. & M.B.A. Her father was retired from M.P.E.B. and after superannuation, he was engaged in the business of contractorship. Respondent herself was engaged as Development Officer with Bajaj Alliance at Rewa from November, 2005 to May, 2006 and was at the time of filing of divorce petition holding the post of Manager, Human Resources in J.P. Cement at Rewa.

4. On 24.06.2006 applicant/appellant submitted an application for seeking divorce with allegations that at the time of marriage and thereafter he was posted at family Head Quarters and was capable of keeping his wife with him. Respondent-wife pressurized him unduly to leave the job and join her father's business of contractorship and get settled there, otherwise, she would not lead the marital life with him. She also threatened that she would commit suicide and would implicate the applicant/appellant and his family members in a criminal case. She also humiliated the applicant/appellant in presence of his colleagues. Thus, it was alleged that the respondent-wife acted with cruelty. Her conduct caused apprehension in the mind of applicant/appellant that it would be risky to live with respondent-wife. The conduct of the respondent-wife also made intolerable to the applicant/ appellant to have co-habitation with her. This apart, the respondent-wife deserted the applicant/appellant without any justifiable cause for a continuous period of two years prior to submission of application for divorce.

5. Applicant/appellant on 24.05.2004 came to Satna being his home town with respondent-wife. She without consent of the applicant/appellant and further without any reasonable cause deserted the applicant/appellant and went to her parental home at Rewa, after threatening the applicant/appellant in the aforesaid manner. Thus, the respondent-wife has deserted the applicant/appellant for a period of over two years and has deprived him of marital rights. Additionally, it is alleged that the marriage between the applicant/appellant and respondent-wife has broken irretrievably and there is no possibility of reconciliation between them.

6. Respondent-wife submitted her written statement refuting thereby the allegations made by the applicant/ appellant. It was denied that the father of respondent was engaged in the business of contractorship. It was equally denied that the respondent was holdipg the post of Development Officer in Bajaj Alliance or Manager Human Resources in J.P. Cement, Rewa. Allegations were made with ulterior motive of avoiding the liability of maintenance. It was stated in specific that the marriage was performed because the applicant/appellant was

holding the post of Officer in Indian Army and it was never insisted by the respondent that the applicant/appellant shall leave the job. Other allegations about threatening of suicide, etc. were also denied. It was further denied that the respondent had ever humiliated the applicant/appellant. On the contrary, it was stated in the written statement that the respondent had performed all the functions of dutiful wife till 14.06.2006. In additional plea, it was alleged that the father of respondent-wife gave jewellery of worth Rs. 2 lacs, other materials of Rs. 2 lacs, clothes of Rs. 75,000/-, cash of Rs. 10,00,000/-, Motor Car worth Rs. 4.5 lacs and utensils of about Rs. 50.000/- at the time of marriage which have been retained by the applicant/appellant. This apart, dress and other materials of about Rs. one lac was also given to the applicant/appellant's parents and other family members which, too, have been retained by him. It was further pleaded in specific that the applicant/appellant's parents started construction of house at Satna about a month before the day of marriage. Construction was incomplete for want of money. After marriage, the mother of the applicant/appellant insisted the respondent to bring Rs. 2 lacs as additional dowry which was not accepted by the respondent. Applicant/appellant further, therefore, started abusing the respondent-wife and used to pick up quarrels with her. Marriage between the applicant/appellant and respondent-wife was performed on mediation/negotiations of one Shri Ram Pavitra Pandey who discussed the matter with the parents of the applicant / appellant. He was also insulted and humiliated by the family members of the applicant/appellant. Applicant/appellant had availed leave in the 2"d week of January, 2006. He had gone to Satna during his leave, at that time, respondent-wife was at Rewa. Applicant/appellant on 14.06.2006 came to Rewa. He stayed with respondent-wife for a while and maintained physical relations with her and went back to his service place.

7. Applicant/appellant examined himself alone in evidence whereas respondent has examined herself as (DW-1), Laxman Prasad Dwivedi (DW-2), Ram Pavitra Pandey (DW-3) & Smt. Gayatri Tiwari (DW-4). Both the parties have also produced- documentary evidence. In the light of evidence, learned trial judge vide order dated 31.10.2007 dismissed the divorce petition. Hence, the present appeal.

8. Shri Ravendra Shukla and Shri J.K. Verma, learned counsel for the parties made their submissions which have been considered in the light of the material on record.

9. It is contended on behalf of the applicant/appellant that the grounds of cruelty and desertion have been duly proved by the evidence on record and the learned trial judge has committed an error while appreciating it.

10. We have perused the pleadings as well as evidence on record.

11. According to the applicant/appellant, he was treated with cruelty by the

respondent in the sense that he was unduly pressurized that he shall leave the job and join business of contractorship with the father of the respondent.

12. On perusal, it is found that the applicant/appellant has not placed an iota on record to establish that the father of the respondent was engaged in the business of contractor. His registration as contractor was not placed on record. Particulars of his registration as contractor are also not produced / proved. Applicant/appellant has not furnished details of sites or copies of work orders to establish that the respondent's father was in fact engaged in the business of contractorship. This being so, learned trial judge has rightly concluded that it was not probable that the respondent would insist her husband-applicant/appellant to leave a well salaried/ well reputed permanent job of Indian Army.

13. Applicant/appellant has pleaded that he was humiliated by the respondent in the presence of his colleagues. No such colleague has been examined in the Court. Thus, the allegation of humiliation has not been established on record.

14. As regards, allegations of threatening of suicide and of implicating the applicant/appellant and his family members in a criminal case, it is suffice to say that the same has not been found proved by the learned trial judge on the basis of correct appreciation of evidence on record. Not a single witness has been examined for corroboration of even such bald allegations. Cruelty in order to enable the parties to seek divorce on this ground may be physical or mental. We are not here concerned with physical cruelty, since, the applicant/appellant has not so pleaded. At the most it may be stated by the applicant/appellant to be a case of mental cruelty. "Mental Cruelty" is not defined in the Hindu Marriage Act and perhaps cannot be defined in comprehensive manner as observed by Hon'ble the Supreme Court of India in the case of *Samar Ghosh Vs. Jaya Ghosh* (2007) 4 Supreme Court Cases 511.

Supreme Court has observed :-

"98. On proper analysis and scrutiny of the judgments of this Court and other courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of "mental cruelty" within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behavior is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate' the entire human behavior in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing,

level of sensitivity, educational, family and cultural background, financial position, social status, customs traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though

supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

Applying the aforesaid yardsticks, we find that the ingredients of cruelty within the aforesaid meaning are not established in the instant case and the applicant/appellant having failed to provide foundation for the ground of cruelty is not entitled to seek divorce on this ground. Though the applicant/appellant has also sought divorce on the ground of desertion, he is found to have failed in establishing that the respondent has deserted him since, 14.06.2006.

15. In paragraph 14 of statement of applicant/appellant, he admitted that the respondent resided with him up to December, 2003. He was posted at Leh (J& K) from January, 2004 to June, 2005. He stated on oath that the respondent did not join him because she was to appear in the examination of MBA which was to be held in the month of May/June. Applicant/appellant did not visit the parental house of respondent-wife to bring her back. He did not make any effort to call her back to mattimonial home.

16. Clause (i-b) of sub-section (1) of Section 13 of the Hindu Marriage Act enables the applicant/appellant to seek divorce, if other party has deserted for a continuous period of two years immediately preceding the presentation of the petition.

Explanation with this provision reads as under :-

*"13. **Divorce-(1)** Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party–*

(i).....

(i-a).....

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

Explanation:- In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly."

17. It is settled position of law as reiterated by the Supreme Court of India in

the case of *Lachman Uttamchand Kirpalani Vs. Meena alias Mota,* AIR 1964 Supreme Court 40 that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi) Similarly two elements are essential so far as the deserted \ spouse is concerned:- (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.

18. Learned trial judge has held that it has not been proved by the applicant/ appellant that the respondent-wife had deserted him for a period of two years or more without reasonable cause. Respondent has examined her mother Smt. Gayatri Tiwari (DW-4). Ram Pavitra Pandey who was mediator in the marriage has also been examined who has supported the contents of the written statement. After appreciating the entire material on record, learned trial judge has found that the alleged desertion within the meaning of section 13 (l)(i-b) of Hindu Marriage Act was not caused by the respondent and instead she herself was humiliated by the applicant/appellant and his family members. This finding is not shown to have been vitiated on any account.

Considering the aforesaid, it was rightly held by the learned trial judge that the ground of desertion has also not been established.

19. Learned counsel for the applicant/appellant has been unable to demonstrate consideration of any inadmissible evidence or non-consideration of any material admissible piece of evidence. This being so, there is no scope of interference in the findings recorded by the learned trial judge in respect of alleged desertion.

20. Lastly, it is contended that it being a case of broken marriage, parties should be relieved by passing a decree of divorce. Looking to the material on record, it is a highly misconceived submission. Provisions of Hindu Marriage Act, 1955 do not provide for divorce merely on the ground of broken marriage, independent of sub-section (1), (I-A) or (2) of section 13 of the said Act. A person seeking divorce is under an obligation to prove any of the grounds enumerated in law. If any of the grounds is proved, the fact that the marriage between the parties is irretrievably broken provides additional support to the grant of decree of divorce. In the present case, desertion for the purpose of ground under section 13(1) (i-b) is not found to have been established. Non-applicant/respondent was to appear in the examination of MBA and was therefore residing with her parents as admitted by the applicant/ appellant himself. It did not amount to irretrievably broken marriage or separate living without any reasonable cause and cannot be further termed as causing mental cruelty.

21. In the result, we do not find any force in this appeal, the same is hereby dismissed. Appellant shall bear the cost of litigation of the respondent to the tune of Rs. 5.000/-, if already certified.

Appeal dismissed.

I.L.R. [2009] M. P., 3167
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
21 July, 2009*

KARIM BHAI ... Appellant
Vs.
STATE OF MAHARASHTRA & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Order 7 Rule 11 - *Rejection of plaint - Powers of Court - A plaint shall be rejected on the grounds mentioned in the Rule, but the instances as given cannot be regarded as exhaustive of all the cases, in which the Court can reject the plaint or is limiting the inherent powers of the Court in respect thereof - Provisions are procedural and enacted with an aim and object to prevent vexatious and frivolous litigation.* (Para 22)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – वादपत्र का नामंजूर किया जाना – न्यायालय की शक्तियाँ – कोई वादपत्र नियम में उल्लिखित आधारों पर नामंजूर कर दिया जायेगा, किन्तु दिये गये दृष्टांत सभी मामलों के लिए व्यापक नही समझे जा सकते, जिनमें न्यायालय वादपत्र नामंजूर कर सकता है या उसके सम्बन्ध में न्यायालय की अन्तर्निहित शक्तियों को सीमित करते हैं – उपबंध प्रक्रियात्मक हैं और तंग करने वाले तथा तुच्छ मामलों को रोकने के ध्येय व उद्देश्य से अधिनियमित किये गये हैं।

B. Civil Procedure Code (5 of 1908), Order 7 Rule 11 - *Rejection of plaint - Duty of Court - Court is also required to see that the vexatious and frivolous litigation should not be allowed to proceed so as to kill the time of the Court for nothing.* (Para 22)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – वादपत्र का नामंजूर किया जाना – न्यायालय का कर्तव्य – न्यायालय से अपेक्षित है कि तुच्छ व तंग करने वाले मामलों में कार्यवाही करने की इजाजत नही देना चाहिए कि न्यायालय का समय बिना कारण के नष्ट किया जाए।

C. Civil Procedure Code (5 of 1908), Order 7 Rule 11(a) - *Rejection of plaint - Where it does not disclose a cause of action - Mere writing that plaintiff is having cause of action would in itself is not sufficient to hold that plaintiff has disclosed the cause of action.* (Para 24)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11(ए) – वादपत्र

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*S.A. No.495/2005 (Indore)

का नामंजूर किया जाना – जहाँ वह वाद हेतुक प्रकट नही करता है – केवल यह लिखना कि वादी वाद हेतुक रखता है यह अभिनिर्धारित करने के लिए स्वमेव पर्याप्त नही होगा कि वादी ने वाद हेतुक प्रकट किया है।

Cases referred :

AIR 1996 SC 2140, 2008(4) MPHT 136 (SC), AIR 1970 SC 1717, AIR 1967 SC 1454, 1991(1) SCALE 389.

Deepak Sharma, for the appellant.
Rashmi Pandit & S.D. Bohare, G.A., for the respondent Nos. 1 to 6.
M.L. Pathak, for the respondent No.7.
Ashok Kutumble with *Amit Purohit,* for the respondent No.14.

ORDER

A.K. SHRIVASTAVA, J. :–Heard on the question of admission.

The order passed in this appeal shall also govern the disposal of connected second appeals viz. Second Appeal No.494/05 (*Khan Ali & others v. State of Maharashtra Mothers*) and Second Appeal No.496/05 *(Sajjad Hussain v. State of Maharashtra & others).*

2. This second appeal has been filed against the judgment and decree dated 12.1.2005 passed by the learned District Judge Ujjain in dismissing the Civil Appeal N0.14-A/04 filed by the appellant Karim Bhai against the order and decree dated 31.8.2004 passed by the learned Fourth Civil Judge Class-I, Ujjain in Civil Suit No.73-A/04, whereby the application under Order VII Rule 11 CPC filed by the defendants-respondents has been allowed and the plaint has been rejected.

3. The appellants have filed Civil Suit in the Trial Court praying to decree the civil suit for declaration that the entry made by the Registrar under M.P. Public Trusts Act, 1951 (for brevity the "Act") on 10.07.1997 entering the suit property as "Public Trust's" property is illegal, nonest, nullity in the eye of law, void ab initio and is not binding on the plaintiffs-defendants. The plaintiffs have further prayed that the judgment and decree passed by the Third Joint Civil Judge, Senior Division, Nagpur, in Special Civil Suit No. 143/1967 and confirming by the judgment and decree passed by the Fourth Additional District Judge, Nagpur, in Regular Civil Appeal No. 16/1987 and affirming by the judgment and decree passed by the High Court of Judicature at Bombay, Nagpur Bench, Nagpur, in Second Appeal No. 132/1992 and upheld by the Supreme Court of India in a Special Leave Petition (Civil) No.25004 of 1996 and Review Petition No. 1075/1997 and the order passed by the defendant no.6 (The Collector Nagpur, who is Registrar under M.P. Public Trusts Act, 1951) in Miscellaneous Review Case No.8/1996-97 are illegal, nonest, nullity in the eye of law, void ab initio and not binding on the plaintiffs and has been obtained by fraud. A decree of injunction has also been sought against the defendant no.6 directing him to delete the entry made by him in the Public Trust Register on 10.7.1997 that the suit property is a public trust property.

4. According to the plaintiff, the said property was purchased by him vide registered sale deed dated 23.6.1979 from Maulana Hasan Noorani, who is the father of defendant no.20, namely Maulana Amiruddin. The plaintiffs brother is Sajjad and the wife of Sajjad Bhai is the resident of Nagpur. The brother-in-law (wife's brother) of Sajjad Bhai also resides at Nagpur. On 27.2.1999, the plaintiff came to know that the disputed property is Trust's property and on being inquired, it was found that there was a long drawn litigation, which went upto the Apex Court and it was held that the, suit property is the Trust's property, hence, the present suit has been filed by the plaintiff seeking the aforesaid reliefs.

5. An application under Order VII Rule 11 CPC was filed on behalf of the defendant/respondent no.8, namely, Salim Jafar Chirnthanawala to reject the plaint. According to the defendant, the present suit is malafide, vexatious and frivolous. In the application, it has been mentioned that the judgment delivered by the Supreme Court in Civil Appeal No. 1710/95 and 1711/95 has attained finality. The Supreme Court has specifically held that the properties comprised in Ex. P/249 are the Trust's properties and it was further held by the Apex Court that it is no more open to contend that the properties mentioned in Ex.P/249 are not the Trust's properties. The copies of the judgment of the Supreme Court were also filed alongwith the application.

6. It has also been stated in the application that the present suit is meritless and is in abuse of the process of the Court. The suit property was sold to plaintiff by the father of the defendant no.20, who was the party in the earlier round of litigation, which travelled upto the Supreme Court and attained finality. In Paragraph II of the application, it has been stated that the sale deed executed by the predecessor of the defendant no.20 during the pendency of the Civil Suit was only with a view to do away with the Trust's property. The predecessors of the present defendant no.20 himself have been judicially held to be usurpers of the Trust's properties. In the sale deed (a copy of which has been filed by the plaintiff) there is a specific clause that in case any defect is found in the title, the defendant no.20 will re-compensate the plaintiff. It has further been stated in the application that the property in dispute has been throughout held to be the Trust's property, which attained finality since stamp of approval was put by the Apex Court.

7. Reply of the application filed under Order VII Rule 11 CPC was filed by the plaintiff.

8. The learned Trial Court did not pass any order on the application filed under Order VII Rule 11 CPC and directed the defendants to file written statement. Against the said order, the defendants filed Civil Revision before this Court, which was dismissed. The order passed by this Court was assailed by the defendants in the Supreme Court and the Apex Court by setting aside the order of this Court as well as that of the Trial Court directed to the learned Trial Court to decide the application filed under Order VII Rule 11 CPC.

9. According to the direction of the Supreme Court, the learned Trial Court decided the application under Order VII Rule 11, CPC holding that the plaint is liable to be rejected.

10. The plaintiff feeling aggrieved by the order of the learned Trial Court preferred First Appeal, which has been dismissed by the impugned judgment and decree. In this manner, this second appeal has been filed by the appellants.

11. I have heard Shri Deepak Sharma, learned counsel for the appellants and also heard Smt. Rashmi Pandit and Shri S.D. Bohare, learned Government Advocates for respondents 1 to 6, Shri M. L. Pathak, Advocate for respondent no.7 and Shri Ashok Kutumble, Senior Advocate with Shri Amit Purohit, Advocate for respondent no. 14.

12. I have also heard Shri Z. A. Haque, the learned counsel for the appellants in Second Appeal No-496/2005.

13. The contention of the learned counsel for the appellants is that the learned Trial Court has allowed the application on three grounds that, (1) the suit of plaintiff is hit by the doctrine of *lis pendens;* (2) barred by the dictum of *res judicata;* and (3) the plaintiff is not having any cause of action to file the suit and, hence the plaint has been rejected. The Appellate Court has also affirmed the order of learned Trial Court. The contention of learned counsel is that this could hardly be a ground to allow the application under Order VII Rule 11, CPC and to reject the plaint at the threshold. In support of his contention, the learned counsel has placed heavy reliance on the decision of the Supreme Court *State of Orrisa v. Klockner & Co.*, AIR 1996 SC 2140.

14. On the other hand, the learned counsel for the respondents argued in support of the impugned judgment and submitted that the cogent reasons have been assigned by the learned two Courts below in passing the impugned judgment and no interference is required since no substantial question of law is involved in this appeal, therefore, this appeal and connected second appeals be dismissed. In support of their contention, the learned counsel have placed reliance on the decisions Smt. *Sulochana v. Rajendra Singh,* 2008 (4) MPHT 136 (SC); *Arjan Singh v. Punit Ahluwalia,* 2009 (1)MPLJ 495; *Kedarnath v. Sheonarain,* AIR 1970 SC 1717; and *Sales Tax Commissioner, Indore v. M/s. J. Singh,* AIR 1967 SC 1454.

15. Learned counsel for the respondents have further invited my attention by submitting a certified copy of the judgment of the High Court of judicature at Bombay, Nagpur Bench, Nagpur in Second Appeal No.529/05 *(Amiruddin Hasan Noorani Malak Saheb v. Salimbhai Mukhtar Jafarbhai Chimthanawala & others)* dated August 24, 2007, directing Wakf Board to take note of recitals of Paragraph 3 of the joint pursis mentioned in the order and in view of the Joint Pursis all Civil Applications were stood disposed of.

16. Having heard the learned counsel for the parties, I am of the view that this appeal and the connected Second Appeals No-494/05 *(Khan Ali & others v. State of Maharashtra & others)* and No.496/05 *(Sajjad Hussain v. State of Maharashtra & others)* deserve to be dismissed since no substantial question of law is involved in these appeals.

17. The learned counsel for the appellants did not dispute that in the earlier round of litigation, the predecessor of the plaintiff was party. The said litigation attained finality. The Supreme Court has categorically held in Paragraph 9 of the order that the properties mentioned in Ex.P/249 are Trust's properties and the said finding has become final and it is not open to contend that the properties mentioned in Ex.P/249 is not the Public Trust's properties. The learned counsel for the appellants did not dispute rather has admitted that the suit property is also included in Ex.P/249. This decision of Supreme Court has been reported in *Salimbhai Mukhtar Jafarbhai Chimthanawala v. Amiruddin S/o Hasan Noorani & anr.*, 1991 (1) SCALE, 389.

18. Learned counsel for the appellants has also admitted passing of the order of High Court of judicature at Bombay, Nagpur Bench, Nagpur, in Second Appeal No. 529/05 dated 24.8.2007.

19. In the earlier round of litigation, Hasan Noorani, who is the father of defendant-respondent no.20, was the party and during the pendency of the earlier litigation, the plaintiff-appellant bought the suit property on 23.6.1979. Thus, the plaintiff purchased the suit property from a person who was already a party in earlier round of litigation, which travelled upto the Supreme Court and the point was put to rest, since in Ex.P/249 of the earlier suit, the Supreme Court has categorically held that for all practical purposes, the properties mentioned in this Exhibit (including the suit property) is the Trust's property and, therefore, now the plaintiff cannot re-agitate this point by filing the present suit.

20. The learned counsel for the appellants could not point out that how and in what manner, the judgment passed in the earlier suit is not binding on him. Merely suit has been filed on the basis of alleged fraud, according to me, in view of the finding of the Supreme Court on Ex.P/249 and since the suit property has been sold by the predecessor of defendant no. 20 and because the predecessor of defendant no. 20 was the party in the earlier suit, the doctrine of *lis pendens* would be applicable as well as the decision passed in earlier suit would also operate as *res judicata* in the present suit.

21. On reading of the plaint it appears to be manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue and therefore, the Trial Court has rightly exercised its power under Order VII Rule 11 CPC taking care to see that the ground mentioned in the said provision is fulfilled.

22. Under Order VII Rule 11 CPC, a plaint shall be rejected on the ground

mentioned in the Rule, but the instances as given cannot be regarded as exhaustive of all the cases, in which the Court can reject the plaint or is limiting the inherent powers of the Court in respect thereof. The provisions of Order VII Rule 11 CPC are procedural and they are enacted with an aim and object to prevent vexatious and frivolous litigation. The Court is also required to see that the vexatious and frivolous litigation should not be allowed to proceed so as to kill the time of the Court for nothing.

23. According to me, the given case in hand is nothing but a vexatious and frivolous litigation, which is not permitted to proceed.

24. I have gone through the reasonings assigned by the learned Appellate Court dismissing the appeal and I find those reasonings to be cogent. The decision of *Klockner* (Supra) placed reliance by the learned counsel for the appellants speaks that the powers under Order VII Rule 11 (a), CPC should not be exercised only on the ground that the plaintiff has no cause of action. According to me, the said decision is not applicable because taking the cumulative effect, apart from the reasonings, which have been assigned by the learned First Appellate Court and by this Court hereinabove, the plaint does not disclose a cause of action. Mere writing that the plaintiff is having cause of action would in itself is not sufficient to hold that the plaintiff has disclosed the cause of action. If all the circumstances are taken into cumulative effect, I am of the view that plaint does not disclose any cause of action.

25. For the reasons stated hereinabove, this appeal and the connected Second Appeals No.494/05 *(Khan Ali & others v. State of Maharashtra & others)* and No-496/05 *(Sajjad Hussain v. State of Maharashtra & others)* are hereby dismissed since no substantial question of law is involved in these appeals.

Appeal dismissed.

I.L.R. [2009] M. P., 3172
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
23 July, 2009*

BHANWARLAL (DEAD) THROUGH L.RS.
SMT. SUSHILA BAI & anr. ... Appellants
Vs.
CHANDRA SHEKHAR VASHISHTHA ... Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) - *Changed the user of accommodation - Trial Court passing a decree u/s 12(1)(c) and First Appellate Court affirming the findings - Held - First Appellate Court*

*S.A. No.568/2007 (Indore)

erred in substantial error of law by affirming the judgment and decree passed by the Trial Court u/s 12(1)(c) without giving any reason. (Para 12)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12 (1)(सी) – स्थान के उपयोग में परिवर्तन – विचारण न्यायालय ने धारा 12(1)(सी) के अंतर्गत डिक्री पारित की और प्रथम अपीलीय न्यायालय ने निष्कर्षों की पुष्टि की – अभिनिर्धारित – प्रथम अपीलीय न्यायालय ने बिना कोई कारण बताए विचारण न्यायालय द्वारा पारित धारा 12(1)(सी) के निर्णय और डिक्री की पुष्टि कर विधि की सारवान त्रुटि की।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(i) *- Acquired suitable accommodation for residential purpose - Tenant alleging that the acquired property is in dilapidated condition - Held - Tenant admitted that he is residing with his family in the purchased house it consists of nine rooms plus latrine & bathroom having electrical and water fittings - Tenant acquired a suitable accommodation for his residence - Merely because First Appellate Court has mentioned that tenant is also residing in the house purchased in the name of his wife, would in itself is not a ground to hold that the tenant is not residing in his own house - Decree affirmed - Appeal dismissed.* (Para 14)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41) – धारा 12(1)(आई) – नैवासिक प्रयोजन के लिए उपयुक्त स्थान का अर्जन – किरायेदार का अभिकथन कि अर्जित सम्पत्ति जीर्ण शीर्ण स्थिति में है – अभिनिर्धारित – किरायेदार ने स्वीकार किया कि वह उसके परिवार के साथ क्रय किये हुए मकान, जिसमें नौ कमरे, लेट्रिन और बाथरूम हैं और बिजली और पानी की फिटिंग है, में निवास कर रहा है – किरायेदार ने उसके निवास के लिए उपयुक्त स्थान अर्जित कर लिया – केवल प्रथम अपीलीय न्यायालय का यह दर्शाना कि किरायेदार उसकी पत्नी के नाम क्रय किये गये मकान में भी निवास कर रहा है, यह अपने आप में यह अभिनिर्धारित करने का आधार नहीं है कि किरायेदार उसके स्वयं के मकान में निवास नहीं कर रहा है – डिक्री की पुष्टि की – अपील खारिज।

A.S. Garg with *Aditya Garg,* for the appellants.
Vishal Lashkari, for the respondent.

J U D G M E N T

A.K. Shrivastava, J. :–This second appeal has been filed by the tenant/ defendants, who has lost from both the Courts below.

2. The plaintiff Chandra Shekhar filed a suit for eviction against his tenant Bhanwarlal. During the pendency of the Civil Suit, defendant-Bhanwarlal died and his legal representatives Smt. Sushila Bai and Shekhar Kanswa (present appellants) have been brought on record.

3. The plaintiff respondent filed a suit for eviction on the relationship of the landlord and tenant by highlighting the grounds envisaged under Section 12 (1) (b), (c) and (i) of the M.P. Accommodation Control Act, 1961 (for brevity

the "Act"). According to the plaintiff, the defendant has inducted a sub-tenant in the suit accommodation and has converted the residential portion for non-residential purposes. Further, it has been pleaded that the defendant has acquired an accommodation suitable for his residence and he is residing in it. On these three grounds, it has been prayed by the plaintiff that the suit be decreed.

4. The defendant-Bhanwarlal filed written-statement and refuted the plaint averments and specifically denied that any of the ground is made out to get the suit accommodation vacated.

5. The learned Trial Court after framing the necessary issues and recording the evidence of the parties, decreed the suit of the plaintiff on the ground envisaged under Section 12 (1) (c) and (i) of the Act. The learned Trial Court did not find the ground under Section 12 (1) (b) of the Act to be proved, hence, did not pass a decree on this ground.

6. The defendant assailed the judgment and decree passed by the learned Trial Court. The plaintiff also filed cross-objections agitating the ground under Section 12(1) (b) of the Act and prayed that a decree be passed on this ground also.

7. The learned First Appellate Court dismissed the appeal of tenant and also dismissed the cross-objections filed by the landlord.

8. In this manner, this second appeal has been filed by the appellants/ tenant assailing the judgment and decree of eviction passed by the two Courts below.

9. This Court on 14.5.2008 admitted this second appeal on the following substantial questions of law :-

> "1. Whether the learned First Appellate Court erred in substantial error of law by not deciding the appeal of appellant assailing the judgment and decree passed on the grounds envisaged under Section 12 (1) (c) of the Act by the learned Trial Court?
>
> 2. Whether the decree passed under Section 12 (1) (i) of the Act by the learned Trial Court, and affirmed by learned First Appellate Court is dehors to the provisions of law since the house is of the wife of defendant No. 2"

10. I have heard Shri A.S. Garg, learned Senior Counsel with Shri Aditya Garg, Advocate for appellants and Shri Vishal Lashkari, learned counsel for the respondent. Having heard the learned counsel for the parties, I am of the view that this appeal deserves to be dismissed.

Regarding substantial question of law No.1:-

11. The learned Trial Court framed issue no.8 in respect to the ground of eviction under Section 12 (1) (c) of the Act and in Para 27 onwards has held that the

defendant has changed the user of the accommodation and hence decreed the suit on this ground.

12. The tenant by filing an appeal challenged the judgment and decree passed by learned Trial Court. On going through the entire judgment, I do not find any discussion of the learned First Appellate Court holding that the ground under Section 12 (1) (c) of the Act stands proved. Hence, according to me, the learned First Appellate Court erred in substantial error of law by affirming the judgment and decree passed by the learned Trial Court under Section 12 (1) (c) the Act. This substantial question of law is thus answered in favour of appellants and against the respondent.

Regarding substantial question of law No. 2:-

13. On going through Para 3 clause 1 (a) of the plaint, this Court finds that there is a specific pleading of the plaintiff stating that defendant-Bhanwarlal has purchased a house bearing House No-49/3, Ward No. 22 and has started living in that house with his family members. The averment made in this Para of the plaint has been denied by the defendant in the written-statement. According to the defendant, the said house is in dilapidated condition and he is still residing alongwith his brother in the suit accommodation. In order to prove this ground, the plaintiff has filed certified copy of the sale deed (Ex.P/9) of defendant-Bhanwarlal. On going through Ex.P/9, this Court finds that the said house was purchased by defendant-Bhanwarlal on 5.7.1991. In the sale deed, it has been mentioned that the said house is double storey. The ground floor consists of five rooms and on the first floor, there are four rooms. After the death of defendant-Bhanwarlal, the present appellants were brought on record as defendants in the Trial Court. Appellant Shekhar Kanswa, who is defendant no.2, examined himself as DW1. In cross-examination Para 30, it has been specifically admitted by him that vide Ex. P/9, one house was purchased by his father (defendant-Bhanwarlal). Further, he has admitted that the said house was purchased for residential purposes and this house consists of latrine and bathroom. Electric fitting is also there and the house is also having water connection. Further, he has admitted that this house is double storey. He has further admitted that on the ground floor, there are as many as 5 rooms and on the first floor there are 4 rooms. Further, he has admitted that after purchasing the house, his father started living in it.

14. In this view of the matter, I am of the view that the ground under Section 12 (1) (i) of the Act has been made out by the landlord to get the suit accommodation vacated. On account of admission by the defendant that he is residing with his family and looking to the description of the house, since it consists of as many as 9 rooms having electrical and water fittings and also consists of latrine and bathroom, I am of the view that the tenant has acquired the vacant possession of a accommodation suitable for his residence. Merely because in Para 33, it has

been mentioned by the learned First Appellate Court that the defendant is also residing in the house purchased in the name of his wife, would in itself is not a ground to hold that the defendant is not residing in his own house, which he has purchased vide registered sale deed (Ex. P/9). The learned First Appellate Court in Para 33 has also held that in House No.49/3, which was purchased by defendant-Bhanwarlal, he is residing comfortably. In this view of the matter, I am of the view that the decree passed by learned Trial Court and affirmed by learned First Appellate Court under Section 12 (1) (i) of the Act does not run dehors to the provisions of the law. The substantial question of law is, thus, answered against the appellants and in favour of the respondent.

15. At this juncture, the learned counsel for the appellants submits that some breathing time may be allowed to him to vacate the suit premises because in the suit premises their ancestors were residing since 1964.

16. This prayer has been vigorously opposed by Shri Vishal Lashkari, learned counsel for the respondent/landlord.

17. Looking to the facts and circumstances of the case, I hereby direct to vacate the suit premises within a period of one year on the following conditions :-

I) The appellants shall vacate the suit premises on or before 31.7.2010 and would not create any third party's interest;

II) the appellants shall deposit the costs of the two Courts below on or before 31.8.2009 in the Trial Court/ Executing Court;

III) the appellants shall deposit the entire rent due, if any, on or before 31.8.2009 and shall continue to deposit the monthly rent strictly in terms of Section 13 of the Act;

IV) the respondent shall be free to withdraw the amount of costs as well as the rent, which shall be deposited by the appellants;

V) an undertaking satisfying the aforesaid conditions shall be submitted by the appellants in the Trial Court/ Executing Court on or before 31.8.2009; and

VI) if any of the condition is violated by the appellants, the respondent shall be free to get the decree executed.

18. For the reasons stated hereinabove, this appeal fails and is hereby dismissed with costs. Counsel's fee Rs.3,000/-, if pre-certified.

Appeal dismissed.

I.L.R. [2009] M. P., 3177
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik
12 August, 2009*

OMPRAKASH & anr. ... Appellants
Vs.
DHARMA BAI & anr. ... Respondents

A. Evidence Act (1 of 1872), Section 67, Specific Relief Act, 1963, Section 20 - *Agreement to sell executed by an illiterate person - Proof of execution - No specific denial that the sale agreement bears thumb impression of illiterate person - Plaintiff's husband stated on oath that he had paid the amount to the illiterate person and after counting the money illiterate person had put his thumb impression on the sale agreement - In absence of cross-examination on this point, it would be presumed to be correct - It may also be presumed that illiterate person was well aware of the contents of the document on which he puts his thumb impression, unless he pleads and proves that the money received by him was for some another particular purpose.* (Para 15)

साक्ष्य अधिनियम (1872 का 1), धारा 67, विनिर्दिष्ट अनुतोष अधिनियम, 1963, धारा 20 – अनपढ़ व्यक्ति द्वारा निष्पादित विक्रय अनुबन्ध – निष्पादन का सबूत – कोई विनिर्दिष्ट प्रत्याख्यान नही कि विक्रय अनुबन्ध पर अनपढ़ व्यक्ति का अंगूठा निशानी है – वादी के पति ने शपथ पर कथन किया कि उसने अनपढ़ व्यक्ति को धनराशि अदा की थी और अनपढ़ व्यक्ति ने धनराशि गिनने के बाद विक्रय अनुबन्ध पर अपना अंगूठा निशानी लगाया था – इस बिन्दु पर प्रतिपरीक्षा के अभाव में इसके सही होने की उपधारणा की जायेगी – यह भी उपधारणा की जायेगी कि अनपढ़ व्यक्ति को दस्तावेज, जिस पर उसने अपना अंगूठा निशानी लगाया, की अन्तर्वस्तु का ज्ञान था, जब तक वह यह अभिवचन और साबित नही करता कि उसके द्वारा प्राप्त किया गया धन किसी दूसरे विशिष्ट प्रयोजन के लिए था।

B. Specific Relief Act (47 of 1963), Section 20 - ***Suit for specific performance of contract - When plaintiff has to prove that he was bona fide purchaser*** - *Suit resisted by defendants that there was earlier agreement and this fact was in the knowledge of plaintiff - Held - No such agreement was placed on record - On the contrary, defendants have not even appeared in the witness box to establish the existence of earlier agreement - Plaintiff and her husband had nowhere admitted the existence of earlier agreement - In absence of establishment of earlier agreement, plaintiff was not required to prove that she was bona fide purchaser - Decree for specific performance rightly granted by the first appellate Court.* (Para 16)

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 20 – संविदा के विनिर्दिष्ट पालन के लिए वाद – कब वादी को यह साबित करना होगा कि वह

*S.A. No.163/2000 (Gwalior)

सद्भाविक क्रेता है – प्रतिवादी द्वारा वाद का विरोध किया गया कि पूर्ववर्ती अनुबन्ध था और यह तथ्य वादी के ज्ञान में था – अभिनिर्धारित – ऐसा कोई अनुबन्ध अभिलेख पर नही – इसके विपरीत, पूर्ववर्ती अनुबन्ध का अस्तित्व साबित करने के लिए प्रतिवादी भी कठघरे में उपस्थित नही हुए – वादी और उसके पति ने कहीं भी पूर्ववर्ती अनुबन्ध के अस्तित्व को स्वीकार नही किया – पूर्ववर्ती अनुबन्ध के साबित होने के अभाव में वादी को यह साबित करना आवश्यक नही था कि वह सद्भाविक क्रेता थी – प्रथम अपीलीय न्यायालय द्वारा विनिर्दिष्ट पालन की डिक्री उचित रूप से प्रदान की गयी।

Cases referred :

1985 MPWN SN 540.

Vilas Tikhe, for the appellants.

R.P. Rathi, for the respondent No.1.

V.S. Chaturvedi, G.A., for the respondent No.2/State.

J U D G M E N T

ABHAY M. NAIK, J. :–This appeal has been preferred against the judgment dated 10-02-2000 passed by the Court of First Additional District Judge, Guna in Civil Appeal No.28-A/1998.

2. Facts relevant for the purpose of this appeal are that plaintiff/respondent No. 1 instituted a suit for specific performance and perpetual injunction, mainly with the allegations that defendant/appellant No. 1 was recorded Bhumiswami of the land comprised in survey No.170/1/2 in area 0.490 hectare situated in village Dhanankhedi, Tahsil and District Guna. On mediation of Jalam Singh, father of defendant/appellant No.1, appellant No.2 entered into an agreement of sale in favour of plaintiff in respect of the suit land for a consideration of Rs.10,000/-. Initially, agreement was oral and possession was delivered to the plaintiff pursuant thereto. On 16-12-1994, an agreement was reduced into writing and entire consideration was received by the appellant No.2 in cash. Plaintiff was short of expenses of registered document, therefore, it was agreed that the plaintiff after harvesting of crops in the month of May 1995 would get the sale deed executed from appellant No.2. Negotiations in respect of agreement were made by Ratanlal Kirar-husband of plaintiff on her behalf and consideration was also paid by him on plaintiff's behalf to the appellant No.2. Similarly, possession of the suit land was also obtained by plaintiff's son on her behalf. On 23-07-1995, appellant No.2 asked the plaintiff's husband to remove his possession and threatened him of dispossession, in case possession is not removed. It is further stated in the plaint that mutation in favour of plaintiff was already made by Patwari on the basis of sale agreement which was well within the knowledge of appellant No.2 before he purchased it from appellant No. 1. Thus, both the defendants/appellants were and are bound by the sale agreement dated 16-12-1994. Therefore, plaintiff instituted a suit against defendants/appellants for specific performance and perpetual injunction, restraining them from interfering into plaintiff's possession. In alternative plea, refund of consideration was sought.

3. Defendants/appellants submitted a joint written statement, refuting thereby allegations contained in the plaint. It was denied that appellant No.2 entered into an agreement of sale in favour of the plaintiff and had delivered possession of the suit land in pursuance of it. Alleged written agreement dated 16-12-1994 was also denied. It was further denied that a sum of Rs.10,000/- was received by defendant No.2 from plaintiff.

4. In additional plea, it was stated that appellant No.2 had already entered into an agreement of sale in favour of appellant No.1 on 16-08-1994 and pursuant thereto a registered sale deed was executed by him in favour of appellant No. 1 on 14-03-1995, therefore, the alleged subsequent agreement in favour of plaintiff is void and ineffective.

5. It is pertinent to note that it was pleaded in para 3 of the written statement that appellant No.2 puts his thumb impression being illiterate. In case, if an agreement has been got prepared by the plaintiff taking undue advantage of illiteracy of appellant No.2, the same is not binding and is not enforceable. Although, the mutation in favour of plaintiff was admitted by defendants, it was stated that the same could not have been effected on the basis of merely an agreement. This apart, it was stated that defendant No. I has been in possession of the suit land since 16-08-1994 and, possession could not have been delivered on 16-12-1994 to the plaintiff as alleged in the plaint.

6. After framing of issues, plaintiff examined herself (PW-1), Ratanlal (PW-2), Ramgopal (PW-3) and Shyamlal (PW-4) in her evidence. She produced agreement dated 16-12-1994 (Ex-P/1) in her documentary evidence.

7. Defendants/appellants did not adduce either documentary or oral evidence.

8. Learned trial Judge vide judgment and decree dated 26-08-1998 has held that the alleged agreement dated 16-12-1994 was not duly proved and that plaintiff has failed to prove readiness on her part to get the sale deed executed. Accordingly, the suit was dismissed.

9. Aggrieved by the aforesaid, plaintiff preferred an appeal which having been allowed, the present appeal has been submitted which is heard on the following substantial questions of law:

> i- Whether the lower appellate Court committed error in granting the decree in spite of the admission made by P.W.-2 in para 6 of his evidence that he had knowledge of the agreement dated 16-08-1994 executed by defendant No.1 in favour of defendant No.2?
>
> ii- Whether the findings recorded by the lower appellate Court is perverse and contrary to the admission made by P.W.-1 and P.W.-2?

iii- Whether the plaintiff, is a bonafide purchaser and in spite of knowledge of agreement dated 16-08-1994, executed an agreement for purpose of suit land vide Ex-P/1 dated 16-12-1994 and lower appellate Court committed legal error in decreeing the suit ?

10. Shri Vilas Tikhe and Shri R.P. Rathi, learned counsel for the parties addressed this Court on the aforesaid substantial questions of law.

11. As regards substantial question of law No. 1, it is contended by Shri Vilas Tikhe, learned counsel for the appellants that Ratanlal, husband of the plaintiff has admitted in paragraph no.6 of his statement that he had knowledge about the agreement dated 16/8/1994, set up by the defendant No.2 in his favour. On perusal, it is found that the said witness who happens to be husband of the plaintiff, has stated in this paragraph that he talked to the Patwari for mutation, after about 15 days from the date of agreement in favour of the plaintiff. Patwari had assured that the mutation would be done on the basis of the said document without even registered deed. This witness has further stated that Omprakash, defendant No.2 had asked Ratanlal that why did he get the document prepared in his favour. He was apprised of the same by Omprakash. This witness has clearly stated in this paragraph that when the document (i.e., agreement to sale in favour of the plaintiff) was executed this witness had no knowledge about the alleged agreement in favour of Omprakash.

12. From the gist of events stated hereinabove by the said witness in paragraph no.6, it is revealed that it was never admitted by the plaintiff's husband that he was aware of the alleged agreement in favour of Omprakash. On the contrary, it was clearly stated in the statement that the said witness (husband of the plaintiff) was not aware of the alleged agreement in favour of Omprakash when the agreement to sell in favour of the plaintiff was executed.' In view of the aforesaid, substantial question of law No. 1 is decided against the appellant.

13. As regards substantial question of law No.2, it is stated by the learned counsel for the appellant that Imratlal, defendant/appellant No.2 was an illiterate and the agreement to sell contained in Ex.P/1 is not duly proved by the plaintiff inasmuch as the contents of the document are not proved to have been explained to defendant No.2 and are further not shown to have been accepted by him at the time of putting the thumb impression. Reliance has been placed for this purpose on the decision of this court in the case of *Dhaniram V. Karan Singh,* 1985 M.P.W.N. S.N. 540, wherein it has been held that in case of execution by an illiterate person, it has to be proved that the executant was made aware of the contents of the document before execution and he had accepted the same.

14. Normally, the aforesaid is the position of law when execution of a document by an illiterate is disputed. In the present case, defendant Imratlal is admittedly an

illiterate person, who has put thumb impression on the Vakalatnama as well as written statement. Plaintiff's case is that Imratlal agreed to sell the suit property to the plaintiff on negotiation through Jalam Singh, father of defendant No.2 for a consideration of Rs.10,000/-. Entire consideration was received by Imratlal and pursuant thereto, possession of the suit land was delivered to the plaintiff. It was initially agreed orally which was later on reduced into writing on 16/12/1994. Defendants No. 1 and 2 submitted joint written statement refuting thereby the plaint averments. However, it is important to note that in paragraph no. 3 of the written statement it has been stated in specific that the defendant No. 3 does not put signature but puts thumb impression. If the plaintiffs have taken undue advantage of the same, it has no legal significance.

15. Thus, it may be seen that the defendants No1 and 2 have not in specific denied that the sale agreement contained in Ex.P/1 bears his thumb impression. Plaintiff in her statement has stated that her husband participated in the proceedings of agreement on her behalf. Her husband Ratanlal appeared as PW-2 who has stated on oath about the terms and condition of the agreement. He has stated in specific that he had paid Rs.10,000/- to Imratlal and that Imratlal after counting the money, had put his thumb impression on the sale agreement contained in Ex. P/1. His this version that Imratlal put his thumb impression after counting money, has not been cross-examined at all. Similarly, he was not cross-examined on his statement that Imratlal had received Rs. 10,000/- and had counted it. In the absence of cross-examination on this point, it would be presumed that the version of PW-2 that Imratlal had put his signature on the sale agreement (Ex.P/1) after counting and receiving Rs.10,000/-as consideration, is admitted to the defendants. An illiterate person who accepts money as consideration, counts it and puts his thumb impression thereafter in token thereto, may be conveniently presumed to be well aware of the contents of the document on which he puts his thumb impression, unless he pleads and proves that the money received by him was for some another particular purpose. In the written statement, it has been nowhere pleaded by Imratlal that the money was received by him for consideration for some other purpose. No such suggestion was made to PW-2 in his cross-examination. Above all, it may be seen that the defendants have not even dared to appear in the witness box. In the peculiar facts and circumstances as stated herein above, law laid down by this court in the case of *Dhaniram* (supra) has no applicability and the findings recorded by the lower appellate court are thus not found to be perverse.

16. As regards third substantial question of law,it is observed that it was for the defendant/appellant No.1 to prove the existence of the alleged agreement dated 16/8/1994. No such agreement was placed on record by the defendants either in the cross-examination or in their own evidence. On the contrary, defendants have not even appeared in the witness box to establish the existence of the alleged

agreement dated 16/8/1994. While deciding substantial question of law No. 1, it has already been held that the plaintiff or her husband (PW-2) has nowhere admitted the existence of the aforesaid alleged agreement. In the absence of establishment of existence of the alleged agreement dated 16/8/94, plaintiff was not required to prove that he was bonafide purchaser. On the contrary, defendant Imratlal having executed the sale agreement in favour of the plaintiff after receiving consideration is bound to execute registered sale-deed in favour of the plaintiff as directed by the learned lower appellate court. Plaintiff and her husband both have stated on oath that Imratlal had agreed to sell the suit land to the plaintiff in the presence of Omprakash (appellant No.1) and his father Jalam Singh. Both these persons have not appeared in the witness box to refute it. Thus, the lower appellate court is not found to have committed any error in granting a decree for specific performance in favour of the plaintiff. Substantial question of law No.3 is also decided against the appellant.

17. In the result, appeal being without merits is hereby dismissed, however with no order as to costs.

Appeal dismissed.

I.L.R. [2009] M. P., 3182
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
26 August, 2009*

SHOBHA MISHRA & anr. ... Appellants
Vs.
VINOD KUMAR & ors. ... Respondents.

A. Civil Procedure Code (5 of 1908), Order 21 Rule 97 - *Resistance or obstruction to possession of immovable property - Application/objection how to be adjudicated - Holding the inquiry by Executing Court does not mean to adduce the evidence but the inquiry means the satisfaction of the Court in the available circumstances with respect of objections raised by the objectors - Court is not bound to record the evidence or direct the parties to adduce the evidence in support of the objections.* (Para 9)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 97 – स्थावर सम्पत्ति पर कब्जा करने में प्रतिरोध या बाधा – आवेदन/आपत्ति कैसे न्यायनिर्णीत की जाऐंगी – निष्पादन न्यायालय द्वारा जाँच करने का अर्थ साक्ष्य पेश करना नही होता बल्कि जाँच का अर्थ आपत्तिकर्ताओं द्वारा उठायी गयी आपत्तियों के सम्बन्ध में उपलब्ध परिस्थितियों में न्यायालय के समाधान से है – न्यायालय साक्ष्य अभिलिखित करने या आपत्तियों के समर्थन में पक्षकारों को साक्ष्य पेश करने का निदेश देने के लिए बाध्य नही है।

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*S.A. No.1415/2007 (Jabalpur)

B. **Civil Procedure Code (5 of 1908), Order 21 Rule 97** - *Resistance or obstruction to possession of immovable property - Married daughters of deceased tenant filed objections that they were not impleaded as party and no opportunity of hearing given to them, therefore, decree is not binding - Held - Objectors did not have any right to inherit the tenancy right as member of the family of deceased tenant - Objectors were neither in possession of the premises nor paid the rent - Objections rightly dismissed by executing Court and appellate Court.* (Para 7)

ख., सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 97 – स्थावर सम्पत्ति पर कब्जा करने में प्रतिरोध या बाधा – मृत किरायेदार की विवाहित पुत्रियों ने आपत्ति पेश की कि उन्हें पक्षकार नही बनाया गया और साक्ष्य पेश करने का कोई अवसर उन्हें प्रदान नही किया गया, इसलिए डिक्री बाध्यकारी नही है – अभिनिर्धारित – आपत्तिकर्ताओं को मृत किरायेदार के पारिवारिक सदस्य के रूप में किरायेदारी अधिकार उत्तराधिकार में पाने का कोई अधिकार नही था – आपत्तिकर्ता न तो परिसर के कब्जे में थे और न ही किराया अदा किया – निष्पादन न्यायालय और अपीलीय न्यायालय द्वारा आपत्तियाँ उचित रूप से खारिज की गईं।

Cases referred :

AIR 1997 SC 856, 1997 MPWN (I) Note 55, AIR 1963 SC 468, AIR 1998 SC 1754, (2004) 2 SCC MPLJ 310.

Neeraj Ashar, for the appellants.

Rakesh Sharma, for the respondent Nos.1 & 2.

ORDER

U. C. MAHESHWARI, J.:–The appellants/ objectors have directed this appeal under Section 100 of CPC being aggrieved by the judgment and decree dated 14.08.2007 passed by District Judge, Betul in Civil Regular Appeal No.9-A/2007 affirming the order dated 6.3.2007 and 20.2.2007 passed by Additional Civil Judge Class-I, Betul in Execution Case No.175-A/00 (T. D No.23/06) dismissing their separate applications filed under Order 21 Rule 97 of CPC.

2. The facts giving rise to this appeal in short are that the respondents No.1 and 2 herein filed a Civil Original Suit No.20-A/99 against the respondents No.3 to 5 for eviction with respect of some premises the same was decreed by the trial Court vide judgment and decree dated 29.6.2002, on challenging the same by the respondents No.3 to 6 in their two separate Civil Regular Appeals No.3-A/03 and 15-A/03 the the same were dismissed, thereafter respondents No.3 to 6 filed S. A. No.456/03, on consideration the same was also dismissed by this Court vide order dated 11.1.2005. Accordingly, aforesaid decree passed by the trial Court had affirmed against the respondents No.3 to 6. Subsequently on filing the execution proceedings by the respondents No.1 and 2 against respondents No.3 to 6 for taking possession of the premises and recovery of the sum, the appellants herein respectively filed their separate applications under Order 21 Rule 97 of CPC

stating that initially their father and the predecessor of respondents No.3 to 6 namely Nandlal Tiwari was tenant in the disputed premises and after his death they along with respondents No.3 to 6 inherited such rights in the disputed accommodation and in such capacity they are also in possession of such accommodation as a tenant. The aforesaid decree was obtained by the respondents No.1 and 2 without impleading them to be the party as defendants, as such without giving any opportunity of hearing to them, hence such decree is neither binding nor executable against them and resisted the execution proceeding on such ground.

3. The averments of such applications were opposed by the respondents No.1 and 2 in their reply stating that the appellants are neither the tenant nor in possession of the disputed accommodation, hence, they did not have any locus-standi to resist the execution of the decree. It is also stated by the respondents that the present appellants never inducted in the tenant premises. The married daughter of the tenant could not be treated as a member of the family. The rent of the disputed accommodation was not paid for a longer period i. e. years together by any of the appellants.

4. After hearing the parties on consideration the executing Court vide Order dated 6.3.2007 dismissed the applications of the appellants holding that they did not have any right to resist the execution of the aforesaid decree of eviction. On challenging both the orders jointly by the appellants before sub-ordinate appellate Court, after extending the opportunity of hearing the same was also dismissed. Thereafter the appellants have come forward to this Court with this appeal.

5. Shri Neeraj Ashar, learned appearing counsel of the appellants after taking me through the judgments and decree passed in the aforesaid Civil Original Suit, which have been later upheld up to the second appeal, as stated above, said that it is undisputed fact on record that the appellants were not impleaded as defendants in the original suit at any stage of suit or in the appeal. While after the demise of Nandlal Tiwari, the appellants being his daughters have also inherited the tenancy right in the disputed premises, in such premises such decree could not be executed against them but without considering such aspect both the Courts below have committed error in dismissing their objections filed under Order 21 Rule 97 of CPC. He further said that the procedure prescribed under the provisions of Order 21 Rule 97 to Rule 99 of CPC have not been followed by the executing Court to consider their applications; as the opportunity to adduce the evidence was not extended to them and their objections have been dismissed without making any elaborate inquiry and such illegal order has been upheld by the first appellate Court under the wrong premises and prayed for admission of this appeal on the proposed substantial questions of law mentioned in the appeal Memo. He also placed his reliance on reported decisions in the matter of *"Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal"* reported in AIR 1997 S.C.856 and in the matter of

Municipal Council, Mau Vs. Mata Prasad Yadav reported in 1997 MPWN Vol-1 Note 55.

6. Having heard the counsel at length, I have gone through the record, all the judgments and decree passed in Civil Original Suits and their respective appeals along with the impugned orders passed in execution case and also the judgment of first appellate Court. It is apparent that the aforesaid suit for eviction was filed on some available grounds including the ground of arrears of rent by the respondents No.1 and 2 against the respondents No.3 to 6 stating them to be in possession of the tenanted accommodation after the death of Nandlal Tiwari, their predecessor and the same was decreed up to the second appeal by this Court. Thereafter on filing the execution proceedings by respondents No.1 and 2 against the respondents No.3 to 6 for taking possession of the disputed property and recovery of the arrears of rent, the impugned applications under Order 21 Rule 97 of CPC were filed by the appellants to resist the execution of decree stating themselves to be the legal representatives of the deceased Nandlal Tiwari and without impleading them the decree has been obtained, hence the same is not binding against them.

7. As per findings of both the Courts below appellant No.1 being married daughter did not have any right to inherit the tenancy right as member of the family of Nandlal Tiwari. Besides this at any point of time any of the appellants have not paid the rent to respondent No.1 and 2. It is also held that in the eviction suit the persons who are in possession of the disputed accommodation and paying the rent as tenant to the landlord are only necessary parties. In such premises by holding that they were neither in possession of the premises nor paid the rent their applications were dismissed by the executing Court, on filing the appeal by them, the same were also dismissed by the appellate Court.

8. In view of law laid down by the Apex Court in the matter of *Kanji Manji Vs. The trustees of the Port of Bombay* reported in (AIR 1963 S. C. 468), holding that quite notice to one of the joint tenant to determine the case and also the suit for ejectiment against one of the joint tenant is good, the approach of the Courts below does not appear to be perverse. As per concurrent findings of both the Courts below the appellants could not prove their independent tenancy right by filing any documents showing they are in possession of the disputed accommodation as tenant. It is apparent fact on record that at any point of time either of the appellants has not paid the rent of the disputed accommodation to respondent No.1 and 2. In such premises also the approach of the Courts below do not appear to be perverse.

9. So for objection of the appellants' counsel that without extending the opportunity to adduce the evidence their applications have been dismissed contrary to the settled proposition of law laid down by the Apex Court in *Brahmdeo*

Chaudhary's case (Supra) is concerned, in view of aforesaid discussion, the principle laid down in cited case is not applicable here; the execution of the decree was resisted by the objectors in such case on the basis of some independent rights, title and interest in the decreetal property, which is not the situation here. Besides this in my opinion to decide such objections filed under Order 21 Rule 97 of CPC, the executing Court is not bound to extend the opportunity to the parties for adducing the evidence but if deems necessary then the Court can direct the party to adduce the evidence in support of such objections. Under the aforesaid provisions holding the inquiry does not mean to adduce the evidence but the inquiry means the satisfaction of the Court in the available circumstances with respect of objections raised by the objectors. In each case the Court is not bound to record the evidence or direct the parties to adduce the evidence in support of the objections. My aforesaid view is based on the principle laid by the Apex Court in the matter of *Silverline Forum Pvt. Ltd. Vs. Rajiv Trust and another* reported in AIR 1998 S. C. 1754 in which it is held as under :

> "12-13. It is clear that executing Court can decide whether the resistor or obstructor is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21, Rule 97(2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary."

10. On arising the occasion the aforesaid view has been further followed by this Court in the matter of *Hamid Khan Ansari Vs. Lilabai* reported in 2004 (2) MPLJ 310.

11. In the aforesaid premises, I have not found any perversity in the impugned order of the executing Court as well as the judgments of the appellate Courts giving rise to any question of law much less the substantial question of law requiring any interference under Section 100 of CPC at this stage. Consequently, the appeal being devoid of any merits, the same deserves to be and is hereby dismissed at the stage of motion hearing.

12. The appeal is dismissed as indicated above.

Appeal dismissed.

STATE OF M.P. Vs. HABIB AHMAD

I.L.R. [2009] M. P., 3187

APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mrs. Justice Sushma Shrivastava

15 May, 2009*

STATE OF M.P. ... Appellant

Vs.

HABIB AHMAD & anr. ... Respondents

A. Criminal Procedure Code, 1973 (2 of 1974), Section 154 - *FIR* - *FIR is not a substantive piece of evidence - Can be used for contradiction and corroboration.* (Para 16)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – एफ.आई.आर. – एफ.आई.आर. साक्ष्य का सारभूत भाग नही है – खण्डन और सम्पुष्टि के लिये प्रयुक्त की जा सकती है।

B. Evidence Act (1 of 1872), Section 45 - *Expert opinion - Rigor mortis* - *Presence of rigor mortis varies from person to person - There is no barometer in order to indicate that when the process of rigor mortis would start.* (Paras 18 & 33)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 45 – विशेषज्ञ की राय – मृत्यु के कुछ घण्टे बाद जोड़ों और पेशियों का अकड़ना – अकड़न की उपस्थिति व्यक्ति से व्यक्ति परिवर्तित होती है – यह उपदर्शित करने के लिए कोई बैरोमीटर नही है कि कब जोड़ों और पेशियों के अकड़न की प्रक्रिया प्रारम्भ होगी।

C. Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 3 - *Reliability of witness* - *Deceased a pillion rider going on scooter with eye witness - After stopping the scooter, deceased was assaulted by knife - Conduct of eye witness in not informing the family members of the deceased about the incident and running away from the place of occurrence immediately after the incident not unnatural as no one would dare to remain present - As this witness became perplexed, he could not see the other witnesses - Witness reliable.* (Para 22)

ग. दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धारा 3 – साक्षी की विश्वसनीयता – मृतक स्कूटर पर पीछे बैठकर प्रत्यक्षदर्शी साक्षी के साथ जा रहा था – स्कूटर रोकने के बाद मृतक पर चाकू से हमला किया गया – प्रत्यक्षदर्शी साक्षी का मृतक के परिवार के सदस्यों को घटना के बारे में सूचित न करना और घटना के तुरन्त बाद घटनास्थल से भागने का आचरण अस्वाभाविक नही, क्योंकि कोई भी खड़े रहने का साहस नही करेगा – चूंकि यह साक्षी दुविधाग्रस्त हो गया, इसलिए वह अन्य साक्षियों को नही देख सका – साक्षी विश्वसनीय।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 157 - *Non-compliance* - *There is prompt FIR - Police reached on the spot immediately -*

*Cr.A. No.269/1994 (Jabalpur)

Spot map prepared mentioning the crime number etc - Dead body sent for postmortem mentioning the summary story of case - Assault by respondent No.1 also mentioned in application addressed to Doctor - Non-compliance of S. 157 would not be fatal to the prosecution. (Para 32)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 157 – अननुपालन – तत्काल एफ.आई.आर. है – पुलिस तुरन्त घटनास्थल पर पहुँची – अपराध क्रमांक आदि का उल्लेख करते हुए घटनास्थल का नक्शा बनाया गया – शव मामले की संक्षिप्त कहानी का उल्लेख करते हुए शव–परीक्षा के लिए भेजा गया – प्रत्यर्थी क्र. 1 द्वारा हमले का चिकित्सक को सम्बोधित आवेदन में भी उल्लेख किया गया – धारा 157 का अननुपालन अभियोजन के लिए घातक नही होगा।

E. Criminal Procedure Code, 1973 (2 of 1974), Section 157 - *Spot map - Spot map prepared in the presence of eye witnesses - Eye witness also signatory to spot map - If the place where the witness was standing is not shown, it would not dilute the case of the prosecution.* (Para 34)

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 157 – घटनास्थल का नक्शा – घटनास्थल का नक्शा प्रत्यक्षदर्शी साक्षियों की उपस्थिति में बनाया गया – प्रत्यक्षदर्शी साक्षी भी घटनास्थल के नक्शे का हस्ताक्षरकर्ता था – यदि स्थान, जहाँ साक्षी खड़े रहे थे, दिखाई नही देता, तो यह अभियोजन के मामले को हल्का नही करेगा।

F. Penal Code (45 of 1860), Section 201 - *Causing disappearance of evidence - No iota of evidence that cloths of respondent No.1 were seized from the house of respondent No.2 - No evidence that respondent No.2 washed the blood stained cloths of respondent No.1 - Acquittal proper.* (Para 37)

च. दण्ड संहिता (1860 का 45), धारा 201 – साक्ष्य का गायब होना कारित करना – कण मात्र भी साक्ष्य नही कि प्रत्यर्थी क्र. 1 के कपड़े प्रत्यर्थी क्र. 2 के घर से अभिग्रहीत किये गये – कोई साक्ष्य नही कि प्रत्यर्थी क्र. 2 ने प्रत्यर्थी क्र. 1 के रक्तरंजित कपड़े धोये – दोषमुक्ति उचित।

Cases referred :

(1997) 11 SCC 19, (1994) 5 SCC 188, (2002) 1 SCC 487, 1990 MPJR 736, (2004) 9 SCC 193, (2003) 12 SCC 449, (2007) 11 SCC 261, AIR 1954 SC 31, AIR 1997 SC 2193, AIR 1986 SC 1769, AIR 1983 SC 680, (2002) 3 SCC 57.

T.K. Modh, Dy.A.G., for the appellant/State.
Vijay Nayak, Anand Nayak & S.A. Wakil, for the respondent No.1.
Satyam Agrawal, for the respondent No.2.

J U D G M E N T

The Judgment of the Court was delivered by **A.K. Shrivastava, J.** :–Feeling aggrieved by the judgment of absolvitur dated 13/6/1993 passed by learned 5th Additional Sessions Judge, Bhopal in S.T.No.214/92 acquitting respondent no. 1 from the charges punishable under section 302 IPC and under section 25 (1B) of the Arms Act and also acquitting respondent no. 2

from the charges punishable under sections 201 and 212 IPC the State of Madhya Pradesh has preferred this appeal after obtaining leave to file appeal.

2. In brief the case of prosecution is that on 15/2/1992 at 9.45 a.m. complainant Mohd. Ashfaq alias Bablu was going from his house to purchase meat, at that juncture from Bhadbhuja Ghati one scooter was coming which was being driven by Anjum. On the said scooter Adeeb (hereinafter referred to as **'the deceased'**) was a pillion rider. As soon as the said scooter reached nearby the house of vegetable vendor Rafique Miyan, respondent no. 1 stopped the scooter and dragged the deceased. Thereafter, a long knife which was wiped on his waist was taken out by him and in order to kill the deceased dealt its blow on his abdominal region. When respondent no. 1 tried to inflict second blow of the said knife, deceased caught hold of the weapon, as a result of which his fingers were cut. Thereafter, respondent no. 1 dealt knife blow on the neck region of the deceased, as a result of which his neck was chopped and blood started oozing. It is the further case of prosecution that deceased was screaming and requesting respondent no. 1 not to kill him, but respondent no. 1 mercilessly dealt several knife blows and ultimately fled from the place of occurrence.

3. Complainant Mohd. Ashfaq alias Bablu thereafter went to Police Station Talaiya and lodged the FIR. On lodging of the FIR the criminal law was triggered and set in motion. The FIR was registered; investigating agency started investigation and in pursuance to its investigation arrived at the spot; prepared spot map; prepared inquest of the dead body and sent it for post-mortem; seized ordinary and blood stained earth from the place of occurrence; recorded the statement of the witnesses; arrested respondent no. 1 on 19/2/1992 and seized a knife which was used as a weapon in the commission of offence from his possession; arrested respondent no. 2 Rahat Warsi on 1/3/1992 and seized blood stained clothes of respondent no. 1 which were washed, from him. The investigating agency in furtherance to its investigation send blood stained articles for chemical and serological examinations.

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

5. Learned trial Judge on the basis of the evidence placed on record came to the conclusion that charges under section 302 IPC and under section 25 (1B) of the Arms Act against respondent no. 1 as well as charges under sections 201 and 212 IPC against respondent no. 2 are not proved, as a result of which acquitted both of them by the impugned judgment.

6. In this manner the State of M.P. has come up in this appeal after obtaining leave to file appeal.

7. The contention of Shri T.K.Modh, Dy. Advocate General appearing for the

appellant/State is that there are as many as 3 eyewitnesses to the incident; they are Mohd. Tazim (PW-2), complainant Mohd. Ashfaq alias Bablu (PW-3) and Anjum (PW-6) and all these witnesses in a singular voice have stated that respondent no. 1 dealt knife blows on the person of the deceased as a result of which he had died. By inviting our attention to the evidence of Autopsy Surgeon Dr. C.S. Jain (PW-11) and his post-mortem report Ex.P-18, it has been contended by learned State counsel that the evidence of eyewitnesses is also medically corroborated and there is no scintilla of doubt that it was respondent no. 1 who stabbed the deceased and dealt umpteen knife blows on his person, as a result of which he died at the spot and, therefore, learned trial Judge has erred in acquitting respondent no. 1 from the charges punishable under section 302 IPC as well as under section 25 (1B) of the Arms Act.

8. By putting deep dent on the finding of learned trial Judge acquitting respondent no. 2 Rahat Warsi from the charges punishable under sections 201 and 212 IPC it has been argued that since there is overwhelming evidence of the prosecution against him, therefore, learned trial Judge erred in acquitting him from these charges.

9. Per contra, Shri Vijay Nayak, learned counsel for the respondent no. 1 argued in support of the impugned judgment and has submitted that presence of alleged eyewitness Mohd. Tazim (PW-2) and his name has not been stated in the FIR by the author of the FIR Mohd. Ashfaq alias Bablu (PW-3), who has also been cited as an eyewitness by the prosecution. Learned counsel has drawn our attention to various paragraphs of the statement of this witness in this regard. It has also been contended by learned counsel that presence of this witness has also not been stated by another eyewitness Anjum (PW-6).

10. By attacking on the evidence of Mohd. Ashfaq alias Bablu (PW-3), who is also the author of the FIR, it has been contended by the learned counsel that testimony of this witness is not at all reliable and further submitted that if his evidence, particularly para 9, is considered in proper perspective it is difficult to hold that he has seen the incident and thus, according to learned counsel, the FIR (Ex.P-2) which has been lodged by this witness appears to be ante dated and ante time. By inviting our attention to the evidence of this witness in para 13, it has been contended by learned counsel that as per the case of prosecution the inquest report was prepared at the spot, but in Court this witness is saying that in the mortuary it was prepared, therefore, the evidence of this witness cannot be placed reliance. By inviting our attention to the spot map (Ex.P-3), it has been contended that though this witness is signatory of this document, but despite he has been posed as an eyewitness by the prosecution, for the reasons best known to the investigating agency, the place where this witness was standing has not been shown in the spot map. In support of his contention learned counsel for respondent

no. 1 has placed heavy reliance on the decision of the Supreme Court *State of U.P. v. Bhagwan and others* (1997) 11 SCC 19.

11. Another submission of learned counsel for the respondent no. 1 is that there is non-compliance of provisions of section 157, Cr.P.C. and, therefore, for this reason case of prosecution becomes highly doubtful. In support of his contention, learned counsel has placed reliance on two decisions of the Supreme Court; they are *Mehraj Singh (L/Nk.) v. State of U.P.* (1994) 5 SCC 188 and *Thanedar Singh v. State of M.P.* (2002) 1 SCC 487. On the same point learned counsel has also placed reliance on the Division Bench decision of this Court *Chhakki v. The State of Madhya Pradesh* 1990 MPJR 736.

12. By inviting our attention to the testimony of Autopsy Surgeon Dr. C.S. Jain (PW-11), it has been contended that post-mortem was conducted at 11.45 a.m. and as per prosecution's own case the incident had taken place at 9.45 a.m. which would mean that within two hours the post-mortem was conducted, but autopsy surgeon found rigor mortis on the entire body of the deceased and if that is the position, according to learned counsel, the incident must have taken place at least 7-8 hours earlier to the time of performing the post-mortem and in this context he has placed heavy reliance on the decision of the Supreme Court *Kunju Muhammed alias Khumani and another v. State of Kerala* (2004) 9 SCC 193.

13. By attacking the testimony of Mohd. Tazim (PW-2), it has been contended by learned counsel that this witness has stated that he has also received injuries in the same incident, but since this witness did not produce himself for medical examination in order to corroborate his statement about receiving injuries in the same incident, his evidence becomes highly suspicious. In this context learned counsel has placed reliance on the decision of the Supreme Court *Gorle S. Naidu v. State of A.P. and others* (2003) 12 SCC 449. It has been argued by learned counsel for the respondent no. 1 that conduct of Mohd. Tazim (PW-2) is highly unnatural as he did not state the incident to the family members of the deceased nor he lodged any FIR and, therefore, he is not at all a reliable witness. In this context learned counsel has placed heavy reliance on the decision of the Supreme Court *State of Maharashtra v. Raju Bhaskar Potphode* (2007) 11 SCC 261.

14. By questioning the hallmark of the evidence of Anjum (PW-6), who is another eyewitness it has been argued that conduct of this witness is highly unnatural, because despite he saw the incident he did not inform about the incident to the family members of the deceased, nor he lodged any report and, therefore, conduct of this witness also becomes highly unnatural. It has also been putforth by learned counsel that the Investigating Officer Daulat Singh (PW-12) has stated that statement under Section 161 Cr.P.C. of this witness was recorded in the evening while according to this witness, the same was recorded in the night and therefore, presence of this witness at the spot becomes highly doubtful. On these

premised submission it has been contended by learned counsel for respondent no.1 that learned trial judge after scanning the entire gamut of the matter has taken the view that prosecution has utterly failed to prove its case beyond all reasonable doubts and therefore rightly acquitted the respondent no.1. According to learned counsel in an appeal against acquittal, if sound reasonings have been assigned by learned trial judge acquitting the accused, same should not normally be disturbed in appeal, particularly when appellate court comes to the conclusion that another view is also possible.

15. Shri Satyam Agrawal, learned counsel appearing for respondent no.2 by inviting our attention to the findings recorded by learned trial judge in para 39 to 43 of the impugned judgment has submitted that cogent reasons have been assigned while acquitting respondent no.2 from the charges punishable under Section 201 and 212 IPC. By inviting our attention to the testimony of prosecution witnesses it has been contended by learned counsel that the house from where washed blood stained clothes of respondent no.1 were seized is of respondent no.2, this fact has not at all been proved. Further it has been contended that there is no evidence on record in order to prove that this respondent washed the blood stained clothes of respondent no.1 so that the evidence against respondent no.1 may disappear and therefore, learned trial judge did not commit any error in acquitting this respondent from the charges punishable under Sections 201 and 212 IPC.

16. In reply Shri Modh, learned Deputy Advocate General submitted that FIR is not a substantive piece of evidence and it can be used only for contradiction and corroboration. He has also cited the decision of the Supreme Court *Abdul Gani and others v. State of Madhya Pradesh* AIR 1954 SC 31.

17. By replying argument of learned counsel for respondent no.1 it has argued by learned State counsel that FIR (Ex.P-2) was lodged within 25 minutes at 10:10 A.M. and immediately thereafter the investigating agency came into action and prepared the spot map at 11:00 A.M. and in the spot map Crime No.87/92 has been mentioned. By inviting our attention to Ex.P-18 which is an application addressed to District Hospital to perform the postmortem, the summary description of the incident has been mentioned and the name of respondent no.1 has also been mentioned causing injury to the deceased and, therefore, according to learned State counsel although there is compliance of Section 157 Cr.P.C. but even for the sake of argument if it is held that there is non compliance, it will not be fatal to the prosecution in the peculiar facts and circumstances of the case.

18. By replying the argument of learned counsel for respondent no.1 in regard to the presence of rigor mortis on the dead body of the deceased it has been contended by learned State counsel that it varies person to person and in this context he has placed heavy reliance on the decision of the Supreme Court *Tanviben Pankajkumar Divetia v. State of Gujarat* AIR 1997 SC 2193. Learned

State counsel has also invited our attention to paras 7 to 9 and 13 of the statement of Autopsy Surgeon Dr. C.S. Jain (PW-11) in this regard. In respect to the conduct of the eyewitnesses, learned State counsel has placed heavy reliance on two decisions of the Supreme Court *State of U.P. v. Brahma Das* AIR 1986 SC 1769 and *Rana Pratap and others v. State of Haryana* AIk 1983 SC 680.

19. So far as not showing the place where eyewitness complainant Mohd. Ashfaq @ Bablu (PW-3) was standing in the spot map (Ex.P-3) is concerned, learned State counsel submits that Mohd. Ashfaq @ Bablu (PW-3) is the signatory of the spot map also, therefore, it was not necessary for the Investigating Officer to point out the place where this witness was standing in the spot map. Apart from this, it has been putforth by learned State counsel that this infirmity at the most indicates that investigation was defective, but on the basis of defective investigation the benefit will not go to the accused, if the charges are otherwise proved from the evidence. In this context learned State counsel has placed reliance on the decision of the Supreme Court *Allarakha K. Mansuri v. State of Gujarat* (2002)3 SCC 57.

20. Having heard learned counsel for the parties we are of the view that this appeal deserves to be allowed in part.

21. We shall first deal with the judgment of learned trial judge acquitting respondent no.1 Habib Ahmed. The prosecution has taken pains to examine three eyewitnesses, they are Mohd. Tazim (PW-2), Complainant Mohd. Ashfaq @ Bablu (PW-3) and Anjum (PW-6). Before we scan the testimony of Mohd. Tazim (PW-2) and Complainant Mohd. Ashfaq @ Bablu (PW-3) we would like to put emphasis on the evidence of eyewitness Anjum (PW-6). According to this witness, on the fateful day he was driving his scooter and the deceased was the pillion rider on that scooter. According to him after travelling a particular distance by the said scooter, he found that respondent no.1 was holding one boy later on he came to know the name of that person to be Tazim. Needless to say that Mohd. Tazim (PW-2) is also an eyewitness. According to PW-6 when his scooter reached nearby the place where respondent no.1 was standing, the accused Habib brandished knife to him as a result of which he brought the scooter nearby the brim of the road and thereafter deceased alighted from the scooter. At that juncture respondent no.1 came nearby the deceased and conversation started in between them. According to this witness respondent no.1 was scolding on the deceased by saying that he should not try to become a 'hero.' Thereafter accused dealt knife blow on the abdominal region of the deceased. When he tried to give another blow, the deceased caught hold of the knife. On seeing the incident this witness became astonished and palpitated as result of which he ran away from the place of occurrence and came to the house of Atique. He also called Atique and without waiting for his arrival he ran away from the house of Atique and again

came back to the place of occurrence where he found the deceased to be dead and the mob was assembled there. Thereafter he picked up his scooter and came back.

22. Statement of this witness under Section 161 Cr.P.C. was recorded on the date of incident only. True there are certain minor discrepancies and omissions in it such as he became late to go to his college has not been mentioned in his case-diary statement. Further he has not stated that he asked the deceased to push the scooter etc. We have also gone through his case diary statement (Ex.D-3) of this witness. This witness is a student having age of 21 years on the date of incident and therefore, if this witness had not gone to the house of the deceased to inform his family members about the incident, according to us his conduct cannot be questioned. The conduct of this witness is quite natural because as soon as he saw that respondent no.1 has dealt knife blow on the abdominal region of the deceased, he ran away from the place of occurrence because no one would dare to remain present there especially when this witness was carrying the deceased as pillion rider on his scooter. In para 11 this witness has stated that he did not see Mohd. Ashfaq, Mohd. Siddique and Mohd. Tafique at the place of occurrence, but in the same breathe he has stated that because he became perplexed, therefore, he could not see who were standing at the place of occurrence. He has also stated that on account of fear he became perplexed and he did not go to the house of deceased to narrate the incident.

23. We do not find any merit in the contention of learned counsel for the respondent no.1 that statement of this witness (PW-6) was recorded at 11:00 in the night by Police persons and according to Investigating Officer the same was written in between 5 to 6 P.M. If paras 6 and 13 of the statement of this witness are kept in juxtaposition to the statement of Investigating Officer Daulat Singh (PW-12) we find that this witness came to the police station at 5-6 P.M. and thereafter his statement was recorded. This would not mean that the statement was recorded in the evening. In para 13 of his deposition this witness has specifically stated that he went to the police station in the evening and at 11:00 in the night, his statement was recorded and therefore according to us there is no inconsistency in his statement. According to us, statement of this witness is clear, cogent and trustworthy and proves the entire case of the prosecution.

24. So far as the evidence of another eyewitness Mohd. Tazim (PW-2) is concerned, his testimony is also quite reliable. According to this witness he is an employee of the Municipal Corporation and his duty was in the night. In the morning after his duty was over, he came nearby Areethe Wali Masjid where he saw respondent no. 1 standing there who scolded on him that why this witness allowed one Shahzade to manhandle respondent no. 1 and thereafter respondent no. 1 took out the knife and tried to cause injury on him but he stopped the blow by

holding it as a result of which he sustained injury in his fingers. Thereafter this witness pacified him that he never asked Shahzade to beat respondent no. 1. Thereafter respondent no. 1 carried him inside the Masjid where he sworn and told that he never asked Shahzade to beat respondent no. 1. Thereafter on seeing that blood was coming out from his hand respondent no. 1 asked this witness that he will carry him, to provide the first-aid. Thereafter according to this witness he saw deceased coming on a scooter which was being driven by Anjum. Respondent no. 1 stopped the scooter and by catching hold of the collar of the deceased dealt knife blow on the abdominal region of the deceased. On seeing the incident this witness also became astonished and fled from the place of occurrence and went away towards Bhadbhuja Ghati.

25. During his cross-examination several questions were put to him such as after discharging his duty on the way to his house he was not required to go across the place of occurrence etc. We are not at all impressed by the submission of learned counsel for the respondent no. 1 that on this ground testimony of this witness is liable to be discarded. According to us it is for this witness to choose a particular way. If on the date of incident he has chosen a different way where the place of occurrence falls, according to us, merely on this ground testimony of this witness cannot be belied. Similarly we do not find any merit in the contention of learned counsel that because this witness did not go to the house of the deceased to inform family members his conduct becomes highly unnatural. In this context para 11 of his cross-examination may be seen in which it has been specifically stated by this witness that deceased was not his friend, but he was known to him. Further he has clarified that he is not acquainted with the whereabouts of the house of the deceased and for this reason he did not go to inform his family members. This witness when told about the incident to his mother she pacified not to go anywhere and to stay in the home and, therefore, in these state of affairs, according to us, evidence of this witness cannot be said to be unnatural or his conduct becomes doubtful as argued by learned counsel for respondent no. 1 and for this reason decision of *Raju Bhaskar Potphode* (supra) is not applicable in the present facts and circumstances of the case and the decision of *Rana Partap* (supra) placed reliance by learned State counsel is applicable. The Supreme Court in this case has categorically held in para-6 that the evidence of a witness cannot be discarded merely on the ground that he did not react in any particular manner and therefore, according to us if eyewitnesses have not reacted immediately would not be a ground to hold that they are not the eye-witnesses.

26. This witness has also proved the presence of author of the FIR Mohd. Ashfaq alias Bablu and in para 18 he has specifically stated that while running away from the place of occurrence he saw Mohd. Ashafq, Mohd. Sidique, Mohd. Atique etc. Thus according to us the statement of this witness also proves that respondent no. 1 caused injuries by knife on the person of the deceased.

27. We do not find any merit in the contention of learned counsel for respondent no. 1 that because this witness was not medically examined and, therefore, accusing respondent no.1 for causing injury by knife to this witness not only becomes highly doubtful but also weakens the case of prosecution and presence of this witness becomes doubtful. In this regard, if para-6 of statement of this witness is taken into consideration, it would become crystal clear as he has stated specifically that he lodged a separate report in respect of causing injury by respondent no.1 to him and a separate case is pending against him. We also do not find any merit in the contention of learned counsel for the respondent no.1 that in the same incident this witness received injury in his fingers. According to us, the incident took place much after receiving of the injury by this witness. It has come in the testimony of this witness that on the point of quarrel between Shahzada and respondent no.1 it has been stated by this witness that respondent no.1 tried to assault this witness, but the blow was stopped by this witness with the aid of the fingers of his hand and thereafter both of them went inside the Masjid and after sometime both of them came out. After they came outside from the Masjid this witness saw deceased coming on a scooter and thereafter injuries were dealt by respondent no.1 by knife to the deceased. Hence, it cannot be said that this witness received injury in the same incident.

28. So far as evidence of Mohd. Ashfaq @ Bablu (PW/3) is concerned on the fateful day he was going to purchase meat and when he reached nearby the house of one Sarang Saheb he found a scooter passing away from him. After going little ahead he saw Habib and Tazim. At that juncture, respondent no.1 in front of the shop of vegetable vendor Rafique stopped the scooter and by catching hold of the collar of the deceased dragged him from the scooter which was being driven by Anjum. The scooter also fell down and respondent no.1 dealt knife blows on his chest and thereafter, when he tried to cause another blow, knife was caught hold by the deceased as a result of which his fingers were cut. The cut injuries are also found in the post-mortem report. The deceased by catching hold his stomach sat down at the place of occurrence and thereafter respondent no. 1 again dealt the blow of knife on his neck region in the same manner like a slaughterer chops the goat.

29. In para 7 of his cross-examination this witness has stated that he is not having intimacy with the deceased but was having only a formal relation with him. According to this witness deceased was the friend of his elder brother Atique. Contention of learned counsel for the respondent no. 1 is that this witness has been cited as an eyewitness and is also the author of the FIR, but he has not seen the incident and in this context learned counsel has invited our attention to para 9 of the testimony of this witness in which this witness has stated that after lodging of the FIR, when deceased was sent to the hospital and when doctor told about the factum of the death of the deceased at that juncture he came to know that deceased had died and, therefore, at the time of lodging of the FIR by this witness

stating about the death of the deceased, becomes highly suspicious. The argument at the first blush appears to be quite attractive, however, on deeper scrutiny we find it to be devoid of any substance. If we keep para 9 of the testimony of this witness in juxtaposition to para 13 of his statement we find that immediately after seeing the incident he went to lodge the report and thereafter police persons came to the spot and carried the deceased to the hospital in the emergency ward of the hospital where doctor declared him to be dead. Therefore, if this witness in para 9 has stated that on intimating by the doctor that deceased in fact had died would not somersault the stand taken by this witness in the FIR wherein it has been stated by him that deceased had died at the spot and, therefore, according to us, this witness cannot be said to be a manufactured witness or FIR can be said to be ante time and dated.

30. We also do not find any force in the submission of learned counsel for the respondent no. 1 that this witness (PW-3) in his testimony has stated that the inquest report was prepared in the mortuary and according to the prosecution same was prepared at the spot and, therefore, this witness cannot be said to be an eyewitness. This witness was cross-examined for a considerable longer duration and in the latter part of para 13 he has stated that since there is long gap of time, he did not remember where the inquest report was prepared. Therefore, even if he has stated in the Court that the inquest report was prepared at the mortuary and not at the spot it would not weaken the case of prosecution.

31. Thus according to us, from the statement of this eye witness also, it is proved that it was respondent no.1, who caused injuries by knife to the deceased, as a result of which he had died. The evidence of eyewitnesses is also corroborated by the medical evidence. As per Ex.P-18, Autopsy Surgeon Dr. C.S. Jain (P.W.-11) has found the following injuries on the person of the deceased :

> (1) Neck on anterior and both lateral aspect is cut. Margins are clear cut. Depth of wound is more in centre where it is tapering superiorly just anterior to both ears. Depth in centre is up-to anterior border of cervical IInd Vertebrae near to ears, it is skin deep and at termination clotted blood present in wound at places. Following muscles are cut in injury :
>
> Platysma
> Myelohyoid digastricus.
> Sternocleidomastoid.
> Stylohyoid.
> Sternohyoid.
> Omohyoid.
> Sternothyroid.
> Thyrohyoideus.

Styloglossus.

Following vessels are cut in injuries :-
Internal & External carotid artery,
Facial artery & vein.
Maxillary Artery & Vein.
External & Internal Jugular vein.
Retro mandibular vein. & facial nerve.
Tract direction is Anterior to posterior upward:

(2) All fingers between middle & distal crease live sharply muscles deep cut in transverse place.

Hypothinner & thinner region of palm and upper part of thumb in continuation in same transverse place sharply muscles deep cut. Hand is sumdged in blood. These injuries appear to be defence wounds where cutting edge is sharp & weapon is hard.

(3) Stab wound on left chest 5 cm below nipple entered in thoracic cavity through 7th inter costal space at costochondiral function level giving knick on lower border of 7th rib & upper border of 8th rib. Perforating to thoracic wall & lung it has come out posteriorly through 6th inter costal space on anterior aspect it is situated obliquely vertical where lower end is directed lateral & is blunt 0.3 cm upper end is spindle shaped length on skin is 5 cm & width 2.5 cm on posterior aspect it obliquely vertical where spindle shaped upper end is directed medially 22 cm above posterior superior iliac spine & lower blunt end is directed laterally. Length on posterior aspect 3.5 cm & width 2 cm Blunt end is 0.3 cm.

On anterior aspect from upper end a incised wound arising; this wound is gradually decreasing in depth from medial to laterally. Lateral end subcutaneous deep & spindle shaped.

(4) There are two abrasions and superficial laceration in Rt. iliac region size is 0.5 x 0.3 cm of each.

32. We do not find any merit in the contention of learned counsel for respondent no.1 that on account of alleged non-compliance of Section 157 Cr.P.C., case of prosecution becomes highly doubtful. There is prompt FIR (Ex. P-2) and immediately police persons arrived at the spot and prepared the spot map (Ex. P-3) mentioning crime number etc. Thereafter dead body of the deceased was sent for post mortem mentioning summary story of the case and causing injury by knife by respondent no.1 has also been mentioned in the application addressed to the doctor, who performed the post mortem, which is Ex. P-18 and, therefore, even if it is held that there is non-compliance of section 157 Cr.P.C., according to us, it would not be fatal to the prosecution.

33. We also do not find any merit in the contention of learned counsel for the respondent no. 1 that postmortem was conducted only after 2 hours of the incident and at that juncture doctor found rigor mortis on the body of the deceased and, therefore, it should be held that incident had taken place 7-8 hours before conducting the postmortem. In this context we may profitably place reliance on paras 7 to 9 of the evidence of Autopsy Surgeon Dr. C.S. Jain (PW-11) wherein it has been specifically stated by the doctor that it varies man to man and nature of the injuries sustained by the deceased. The doctor has stated that in Bhopal if a person receives injuries as sustained by the deceased and blood continues to ooz, the rigor mortis may start immediately after the death. In para 9 it has been stated that a person who has received injuries and if his body is covered by a bed-sheet in the month of February, and the dead body is examined in between half and one hour, rigor mortis can be seen on his entire body and, therefore, according to us, there is no barometer in order to indicate that when the process of rigor mortis would start and therefore the decision of *Kunju Muhammed alias Khumani* (supra) placed reliance by respondent is not applicable in the present case. The Supreme Court in another decision *Tanviben Pankajkumar Divetia* (supra) placed reliance by learned State counsel, in para 35 after analysing the evidence has held that presence of rigor mortis was only a rough guide for determining the time of the death. Hence, we do not find any merit in the contention of learned counsel that because rigor mortis was present on the entire body of the deceased the incident had taken place 7-8 hours before conducting the post mortem.

34. We also do not find any merit in the contention of learned counsel for the respondent no. 1 that in the spot map the Investigating Officer did not mention the place from where Mohd. Ashfaq alias Bablu (PW-3), who is also author of the FIR has seen the incident and therefore the presence of PW-3 at the spot becomes doubtful. The author of the FIR is also signatory of spot map (Ex.P-3) and in his presence it was prepared and, therefore, if the place where he was standing has not been shown, this will not dilute or somersault the entire case of prosecution. Even otherwise a defective investigation is not a ground to acquit the accused and in this context decision of Supreme Court *Allarakha K. Mansuri* (supra) may be placed reliance.

35. For the reasons stated here-in-above we are of the view that the view taken by the learned trial court cannot be said to be reasonably possible view. According to us the evidence of eyewitnesses is fully reliable and learned trial Judge on flimsy grounds discarded their testimony. Looking to the injuries of the deceased since his neck has been completely chopped, his lung was also cut and it is also proved from the testimony of the eyewitnesses that the deceased also tried to stop the blow of knife by putting his hand in front of the weapon as a result of which his fingers were cut, according to us respondent no.1 is guilty of committing the offence of culpable homicide amounting to murder and therefore, charge u/s. 302 IPC is proved against respondent No.1.

36. On going through the finding recorded by the trial court, it is gathered that respondent no.1 has been rightly acquitted from the charge u/s. 25(1B) of Arms Act. The said finding is hereby affirmed.

37. So far as acquittal of respondent no.2 Rahat Warsi is concerned, according to us, since there is no iota of evidence that the clothes of respondent no.1 were seized from the house of this respondent and also because there is no evidence that this respondent washed the blood stained clothes of respondent no. 1, therefore, according to us learned trial Judge did not commit any error in acquitting this respondent from the charges punishable u/s. 201 and 212 of IPC. In this regard the findings recorded in para-39 to 43 are quite cogent and they are based on correct appreciation of evidence on record.

38. Resultantly, the judgment of acquittal of respondent no.1 Habib Ahmed under section 302 of IPC is hereby set aside and it is hereby held that the charge under section 302 IPC is proved against him. However, charge u/s. 25(1B) of Arms Act has not be found to be proved against him and his acquittal from this charge is hereby affirmed. Since charges u/s. 302 of IPC has been found to be proved we hereby sentence respondent No.1 Habib Ahmed to undergo life imprisonment. The judgment of acquittal passed in respect of respondent no. 2 Rahat Warsi is hereby affirmed.

39. Respondent No.1 Habib Ahmed is on bail, his bail bonds are cancelled and he is hereby directed to surrender before learned Trial Court on or before 1st June, 2009 and learned Trial Court shall send him to jail to serve out the sentence. Registry is hereby directed to send back the record to the Trial court post haste so as to reach much earlier to 1st June, 2009. Trial court is further directed that in case respondent no.1 Habid Ahmed fails to surrender, a perpetual warrant of arrest be issued against him and a notice be also issued to the surety to show cause why bail amount be not forfeited and may pass necessary order in that regard. Registry is hereby directed to send the bail papers of respondent no.1 to the learned Trial court and a photocopy of thereof be kept in the record of this file. The learned Trial Court is also directed to intimate the Registry of this Court about the factum of arrest of respondent no.1.

Order accordingly.

MOHD. SHAMIM Vs. STATE OF M.P.

I.L.R. [2009] M. P., 3201
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
1 July, 2009*

MOHD. SHAMIM & ors. ... Appellants
Vs.
STATE OF M.P. ... Respondent

A. Essential Commodities Act (10 of 1955), Section 3 r/w 7, Motor Spirit and High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1990, Clause 5 - *Tanker filled with kerosene parked at the HSD Pump - A pipe for discharging kerosene from the tanker into the HSD tank was duly fitted in the corresponding nozzle - Appellants convicted u/s 3/7 of the Act for making an attempt to commit adulteration in HSD - Held - Sample drawn from HSD tank was not found to be adulterated - Appellants had made preparation to commit the violation of Order, 1990 - However, possibility of commission of offence was not relevant as it is the actual commission of act in attempting to commit offence that constitutes offence of attempt - Conviction & sentences set-aside - Appeal allowed.* (Paras 6 to 8)

क. आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3 सहपठित धारा 7, मोटर स्प्रिट और हाईस्पीड डीजल (आपूर्ति और वितरण में अनाचार का निवारण) आदेश, 1990, खण्ड 5 – एचएसडी पम्प पर केरोसीन से भरा हुआ टेंकर खड़ा किया गया – टेंकर से एचएसडी टेंक में डीजल मुक्त करने के लिए एक पाइप सम्यक रूप से तत्स्थानी टोंटी में लगाया गया – अपीलार्थियों को हाईस्पीड डीजल में अपमिश्रण करने का प्रयत्न करने के लिए अधिनियम की धारा 3/7 के अन्तर्गत दोषसिद्ध किया गया – अभिनिर्धारित – एचएसडी टेंक से निकाला गया नमूना अपमिश्रित होना नही पाया गया – अपीलार्थियों ने आदेश, 1990 का उल्लंघन करने की तैयारी की थी – तथापि, अपराध करने की संभावना सुसंगत नही थी क्योंकि यह अपराध करने का प्रयत्न करने में कार्य का वास्तविक रूप से किया जाना है जो प्रयत्न का अपराध गठित करता है – दोषसिद्धि और दण्डादेश अपास्त – अपील मंजूर।

B. Evidence Act (1 of 1872), Section 5 - *Evidence of police officer - None of Panch witnesses came forward to corroborate prosecution version - In absence of any motive for false implication, evidence of I.O. cannot be underestimated merely because he is a police officer.* (Para 4)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 5 – पुलिस अधिकारी का साक्ष्य – पंच साक्षियों में से कोई भी अभियोजन की कहानी को सम्पुष्ट करने आगे नही बढ़ा – मिथ्या आलिप्त करने के किसी हेतु के अभाव में, अन्वेषण अधिकारी की साक्ष्य केवल इसलिए कम नही आँकी जा सकती कि वह एक पुलिस अधिकारी है।

Cases referred :
AIR 1961 SC 1698, AIR 1969 Raj 65, AIR 1949 Patna 326.

*Cr.A. No.820/1994 (Jabalpur)

MOHD. SHAMIM Vs. STATE OF M.P.

S.C. Datt with *Pushpendra Dubey,* for the appellants.

J.K. Jain, G.A. with *Arvind Singh,* Panel Lawyer, for the respondent/ State.

JUDGMENT

R.C. MISHRA, J. :–The judgment dated 05/08/1994 passed by the Special Court {(constituted under Section 12A of the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act')}, at Bhopal is the subject matter of challenge in this appeal. Accordingly, each one of the appellants and the co-accused namely Kamal Kumar Malviya and Mohd. Sharif (both since expired), was convicted, under Section 3 read with Section 8 of the Act, and sentenced to undergo R.I. for 6 months and to pay a fine of Rs.200/- and, in default, to suffer S.I. for 1 month. They were found guilty of making an attempt to commit adulteration in respect of High Speed Diesel (for brevity 'the HSD'), which is a malpractice within the meaning of Rule 2(e) of the Motor Spirit and High Speed Diesel (Prevention of Mal-practices in Supply and Distribution) Order, 1990 (for short 'the Order 1990'). By this judgment only, Mohd. Sharif and appellant Mohd. Shamim were acquitted of the offence punishable under Section 3 read with 7 of the Act for contravention of Clause 3 of the M.P. Kerosene Dealers Licensing Order, 1979 (for short 'Order 1979') and a finding of not guilty was also recorded in favour of Mohd. Sharif for the offence under Section 407 of the IPC. Admittedly, no appeal against the order of acquittal has been preferred by the State.

2. Prosecution story, in short, may be narrated as under: -

(a) At the relevant point of time, appellant Prakash was the Proprietor of the Firm in the name of M/s Khajuri Highway, an authorized 'dealer' of the HSD as defined in Clause 2(c) of the Order, 1990. Its service station situated on Indore Road in Bhopal was being managed by the appellant Shailesh and co-accused Kamal Kumar Malviya was working there as Salesman.

(b) On 27/08/1992 at about 2 p.m., on receipt of credible information that a Tanker full of kerosene was brought to facilitate adulteration of the HSD to be supplied at the service station, N.S. Damle (PW9), the then SHO of P.S. Khajuri Sadak along with other members of the police force and two panch witnesses viz. Bansilal (PW2) and Ajab Singh (PW7) rushed to the spot where he found that –

(i) Tanker bearing Registration No.MBD-8448 and filled with kerosene was parked at the HSD pump.

(ii) A pipe for discharging kerosene from the Tanker into the HSD tank was duly fitted in the corresponding nozzle.

(iii) Two drums containing 200 litres of kerosene and 200 litres of the HSD respectively were kept near the Tanker.

(c) The Police Officer duly seized the pipe; sealed the Tanker; requested Avtar Singh (PW1), the Inspector, Weights and Measures to measure the volume of kerosene as available in the Tanker and also informed the Oil Company viz. M/s Indian Oil Corporation. Avtar Singh noticed shortage of 530 litres in the total volume of 11000 litres of kerosene, that was entrusted to appellant Mohd. Sharif as driver of the Tanker, on which appellant Mohd. Shamim was working as cleaner, for being transported from the depot of Indian Oil Corporation to the retail outlet run by M/s Bhati Oil Agency at Bairagarh. However, as indicated by Subramanyam (PW3), the Deputy Manager of the Oil Company in the in-house test report (Ex.P/11), the sample of the HSD drawn by Assistant Manager namely Rakesh Kumar Gupta (PW6) from the tank conformed to the standards prescribed.

3. On being charged with the respective offences, the appellants abjured the guilt and pleaded false implication.

4. Although, none of the panch witnesses namely Bansilal (PW2) and Ajab Singh (PW7) came forward to corroborate the prosecution version yet, learned trial Judge while placing reliance on a decision of the Supreme Court in *Aher Raja Khima v. State of Sourashtra* (AIR 1956 SC 217), concluded that in absence of any motive for false implication, evidence of N.S.Damle could not be underestimated merely because he happened to be a Police Officer.

5. At the outset, learned Senior Counsel, in all fairness, conceded that the finding as to veracity of version given by N.S.Damle is well reasoned. However, he is of the view that the facts proved from the evidence of the detecting Officer could only amount to preparation to adulterate the HSD. To fortify the contention, reference has been made to the following illuminating observations made by the Apex Court in *Abhayanand v. State of Bihar* (AIR 1961 SC 1698) -

> "There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, a culprit first intends to commit the offence then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it falls due to reason beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he

commences to do an act with the necessary intention, he commences his attempt to commit the offence."

6. Adverting to the facts of the case, it may be observed that the sample of HSD drawn from the tank was not found to be adulterated. Although, the technical expert viz. Subramanayam (PW3) further opined that it was not possible to detect adulteration if a quantity of 200 litres of kerosene is mixed with 15000 litres of HSD, yet there was nothing on record to prove as to what was the actual quantity available in the HSD tank at the time of the drawing of the sample therefrom. Moreover, Avtar Singh (PW1) clearly admitted that the Tanker comprised 4 compartments, having capacity of 3000, 3000, 3000 and 2000 litres respectively, were found to contain 2750, 2989, 2980 and 1755 litres of Kerosene and it remained unexplained as to how a total volume of 430 litres of kerosene was taken out from these compartments. Further, N.S.Damle also did not specify the compartment from which the Kerosene was proposed to be taken out for being mixed with the diesel.

7. In *State v. Parasmal* (AIR 1969 Rajasthan 65), an attempt to mix kerosene with the HSD was found proved in view of the fact that the kerosene had already been poured into the tank for being supplied. But, the case is distinguishable on facts.

8. An attempt to commit an offence is an act, or series of acts, which leads inevitably to the commission of offence, unless something, which the doer of the act or acts neither foresaw nor intended, happens to prevent this. An act done towards the commission of an offence, which does not lead inevitably to the commission of the offence unless it is followed or, perhaps, preceded by other acts, is merely an act of preparation (See. *Province of Bihar v. Bhagwat Prasad* AIR 1949 Patna 326).

9. Taking into consideration the relative proximity between the act done and the evil consequence contemplated, it could easily be concluded that the appellants had made preparation to commit the violation of the Order 1990. However, the possibility of commission of the offence was not relevant as it is the actual commission of the act in attempting to commit the offence that constitutes the offence of attempt.

10. For these reasons, the appeal is allowed. The impugned convictions and consequent sentences passed against the appellants are hereby set aside. Instead, they are acquitted of the offence. Fine amount, if deposited, be refunded.

11. Appellants are on bail. Their bail bonds shall stand discharged.

Appeal allowed.

NEHRU SINGH Vs. STATE OF M.P.

I.L.R. [2009] M. P., 3205
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mr. Justice U.C. Maheshwari
15 July, 2009*

NEHRU SINGH ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Section 302 - *Murder - Circumstantial evidence - Last seen together - Deceased was seen for the last time in the company of the appellant when he was taking the deceased, his step mother, to his house against her wishes and also assaulted her - Appellant bound to explain that thereafter where she was taken and left by him - In absence of such explanation there is sufficient material on record to draw inference that it was appellant who caused the alleged injuries and committed her murder.* (Paras 12 & 13)

क. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – अंतिम बार साथ–साथ देखे गये – मृतक अंतिम बार अपीलार्थी के साथ देखी गयी जब अपीलार्थी मृतक अर्थात् अपनी सौतेली माँ को उसकी इच्छा के विरुद्ध अपने घर ले जा रहा था और उस पर हमला भी किया – अपीलार्थी यह स्पष्ट करने के लिए आबद्ध था कि उसके बाद उसके द्वारा उसे कहाँ ले जाया और छोड़ा गया – ऐसे स्पष्टीकरण के अभाव में यह निष्कर्ष निकालने के लिए अभिलेख पर पर्याप्त सामग्री है कि वह अपीलार्थी ही था जिसने तथाकथित क्षतियाँ कारित कीं और उसकी हत्या की।

B. Penal Code (45 of 1860), Section 302 - *Murder - Circumstantial evidence - Motive - Deceased, step mother of appellant was given 1/3 share in ancestral property - Appellant was not happy with partition - Deceased was also not residing with appellant - Appellant could have got her share only after her demise - Motive of appellant could be assumed that in the temptation of property he had committed murder.* (Para 14)

ख. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – हेतु – मृतक, अपीलार्थी की सौतेली माँ को पैतृक सम्पत्ति में 1/3 हिस्सा दिया गया – अपीलार्थी विभाजन से खुश नही था – मृतक भी अपीलार्थी के साथ नही रह रही थी – उसका हिस्सा अपीलार्थी केवल उसके निधन के बाद ही प्राप्त कर सकता था – अपीलार्थी का हेतु यह माना जा सकता था कि सम्पत्ति के लालच में उसने हत्या की थी।

Cases referred :

(2003) 1 SCC 534, AIR 1988 SC 1705, AIR 1993 SC 119, AIR 1991 SC 1674, 1995 JLJ 757, 1991(I) MPWN 70, 2001(1) MPLJ (Cri) 341.

L.N. Sankle, for the appellant.
T.K. Modh, Dy.A.G., for the respondent.

*Cr.A. No.2782/2000 (Jabalpur)

NEHRU SINGH Vs. STATE OF M.P.

J U D G M E N T

The Judgment of the Court was delivered by **U.C. MAHESHWARI, J.** :–Appellant, being aggrieved by the judgment dated 03.10.2000 passed by the Special Judge and Addl. Sessions Judge, Shahdol in S.T.No.161/97 convicting him under Section 302 of the IPC with sentence of life imprisonment and fine of Rs.20,000/-, in default of payment of fine, further R.I for one year, has filed this appeal.

2. It is undisputed fact in the matter that deceased Sukrati Bai was the second wife of Dhobi Singh while the appellant Nehru Singh is the son from the first wife of Dhobi Singh who died 3-4 years prior to the date of incident. In the family property there was separate shares of Sukarti Bai and Nehru Singh. Sukarti Bai had agricultural field known in the name of Tilwanhar field, which, she had given for cultivation to one Pusua on sharing basis. Sukarti Bai died unnatural death on 10.4.96 and her dead body was found lying in the culvert near the aforesaid field. The dead body was seen by one Manna Singh who informed the same to the villagers, on which, Khalkiya (P.W.1), Suhablal (P.W.2), Budhsen (P.W.6) and Set Singh (P.W.8) went to such place and saw the dead body of Sukarti Bai. It is also undisputed fact that deceased Sukarti Bai was residing with his brother Khalkiya (P.W.1).

3. Apart from the aforesaid undisputed facts, the prosecution story in short is that on 10.4.96, deceased Sukarti Bai went to her Tilwanhar field for taking her share of Red Gram Crops from Pusua. When she did not return upto the night then her brother Khalkiya went for her search. He came to know from Suhablal that Sukarti Bai was taken by Nehru Singh at his home. On such information, he accompanied with Suhablal and Phool Singh went to the home of Nehru Singh and on asking from Nehru Singh, he told them that she had gone to village Bartola. Thereafter, they along with Nehru Singh came back to the home of Suhablal, where, after leaving Nehru Singh, Khalkiya went to village Bartola for verifying the aforesaid fact. Sukarti Bai was not found in such village also then Khalkiya along with Phool Singh came back to the residence of Suhablal. By that time appellant Nehru Singh fled away from the residence of Suhablal. Khalkiya and Phool Singh stayed there in the night and in the morning i.e. 11.4.96, Khalkiya along with Set Singh, Ex Sarpanch of the village, went to the police station Karan Pathar and lodged the missing person report contending that his younger sister Sukarti Bai w/o Dhobi Singh was residing with him. She did not had any issue while her husband had one son, namely, Nehru Singh from his first wife. Sukarti Bai was living separately from Nehru Singh. The land was partitioned in three shares, out of which, one part was given to Sukarti Bai but Nehru Singh had not given recognition to such family partition and was not permitting her to cultivate such land, however, some of the land of her possession was being cultivated by other on her behalf on sharing basis. In the aforesaid field, Red Gram Crop was

sown. As per further averments, yesterday on 10.4.96, after taking meal, she went to the field to collect her share of the crop from Pusua. When she did not return in the night then he went to search her. On the way, he asked from Bhaiyalal and his son Suhablal about Sukarti Bai then Suhablal told him that Nehru Singh was misbehaving with Bahan (nic name of the deceased) and also beating her by means of stick, kicks and fists and was forcibly taking her to his residence, on which, he along with Phool Singh and Suhab Singh went to the residence of Nehru Singh. On asking regarding Sukarti Bai, he told that, after refreshing herself near Jhiriya, she had gone saying that she is going to village Bartola. Thereafter, Khalkiya brought Nehru Singh at the residence of Bhaiyalal and call the Sarpanch and handed over custody of Nehru Singh to him. Thereafter again he went to search Sukarti Bai but could not found her. On returning the home of Bhaiyalal, he found that Nehru Singh had fled away, on which, the missing person report was given to the police. The same was written in the Rojnamcha Sanha No.290 at 12.10 on 11.4.96 and to search the missing person, SHO of Police Station Karan Pathar, came to village Barajh, where Khalkiya informed him that the dead body of deceased Sukarti Bai was lying in the culvert near field, on which, the inquest intimation (Ex.P/20) and Dehati Nalishi (Ex.P/19) were drawn by him. After calling the witnesses and preparing the inquest panchnama (Ex.P/4) the dead body was sent to hospital for autopsy. The spot-map was also prepared. Clothes and two stones lying on the dead body, the earth stained and simple along with some other articles were seized for which different panchnamas were prepared. The marg and FIR was registered at the Police Station. After investigation, on establishing the offence, appellant was charge-sheeted under section 302 and 201 of IPC while one other accused Phool Singh (since acquitted) was charge sheeted under Section 201 of the IPC.

4. On framing the charges of Section 302 and 201 IPC against the appellant and of section 201 against accused Phool Singh, they abjured the guilt. Consequently, the trial was held. On appreciation, accused Phool Singh was acquitted while appellant has been convicted and sentenced as referred to above. The same is under challenge in this appeal.

5. Shri L.N.Sankle, learned counsel of the appellant by taking us through the evidence led by the prosecution argued that the impugned conviction being based on inadmissible circumstantial evidence of `last seen together', is not sustainable. He further said that none of the witnesses have stated anything connecting the appellant with the unnatural death of Sukarti Bai. The chain of circumstances to connect the appellant with the offence is neither complete nor proved beyond reasonable doubt. The missing person report written in Rojnamcha Sanha has not been proved in accordance with the procedure by Khalkiya. According to him, deceased and the appellant were separated long back and thereafter with respect of the property, no dispute was existing between them. In such premises the

motive for causing such death, has also not been established against the appellant. The prosecution case is also not supported by any independent source of evidence. There was family dispute with respect of the property with the Suhablal thus due to such enmity such witness was also not reliable. With these submissions and relying upon some decisions of the Apex Court and of this court, he prayed for acquittal of the appellant by allowing this appeal.

6. On the other hand, while responding the aforesaid arguments, Shri T.K.Modh, learned Dy. A.G by justifying the conviction and sentence of the appellant said that the same are based on proper appreciation of evidence and also in conformity with law. He further said that as per available deposition of Suhablal (P.W.2) the independent witness, it has been proved that Sukrati Bai was last seen with appellant Nehru Singh while she was taken by him with beating by means of stick on her head. On receving such information from this witness, Khalkiya (P.W.1) after some verification at some places lodged a missing person report, during enquiry of the same, the dead body of Sukarti Bai was found lying in the culvert. On postmortem it was revealed that she died because of the injuries found on her body. He further said that the deposition of Suhablal stating that the deceased was lastly seen in the company of the appellant on the fateful day while she was also being beaten by the appellant. Such company of the appellant with the deceased is also proved by Ram Singh (P.W.4) even on turning hostile. In such premises, the prayer for dismissal of the appeal is made.

7. After hearing the counsel at length, we have examined the record and also perused the impugned judgment. P.W.9 Dr. B.K.Kola carried out the postmortem of the deceased and prepared its report Ex.P/17). According to his deposition, he found following injuries on her body:-

1. whole of face along with forehead with depression on right cheek and nasal bridge, blood comes from nostril and mouth that is open but eyes closed.

2. whole of chest supra clavicle region of both side with depression on right 3rd to 5th ICS region along with both breast region.

3. multiple on left forearm anterior aspect and both legs below knee on anterior aspect size is 2X3 cm and irregular in shape.

4. Lacerated wound 8X3X2 cm on right parietal region.

5. two dry fleshy color bruise present on right lower abdomen and right gluseal region size is about 8X8 cm and 5X 7cm irregular in shape.

As per opinion of the doctor, the death was homicidal in nature due to rupture of heart by violent blow of any hard and blunt object in chest. Such postmortem

report is not challenged on behalf of the appellant in the cross examination of such witness. In view of such unrebutted fact on record, the findings of the trial court holding that death was homicidal in nature because of the aforesaid injuries, does not require any interference at this stage, hence such findings of the impugned judgment are hereby affirmed.

8. Now, we have to examine, whether appellant was the only person who was lastly seen in the company of the deceased and thereafter deceased was found dead with injuries on her body and there is sufficient circumstance to draw the inference that the alleged injuries were caused by the appellant and lastly what was the motive of the appellant to commit such an act with the deceased.

9. Khalkiya (P.W.1), the cousin brother of the deceased deposed that deceased Sukarti Bai his younger sister was married with Dhobi Singh Gond. She did not had any issue while appellant was the son from the first wife of her husband. In family partition, Sukarti Bai got her share of agricultural field while the appellant got some other part in his share. The field known in the name of Tilwanhar field came into the share of Sukarti Bai, who used to get her land cultivated through Pusua on sharing basis. On the date of aforesaid incident at about 3-4 O' Clock P.M Sukarti Bai went to Pusua for collecting her share of the Red Gram Crop. When she did not return up to the evening then, he went to search her. On the way, he came to know from Suhablal that appellant Nehru Singh took away Sukarti Bai at his residence. Phool Singh was also present at the residence of Suhablal. On such information, he along with Phool Singh and Suhablal went to the residence of Nehru Singh to search Sukarti Bai. On asking, he told them that she had gone to Bartola then Set Singh, the ex-sarpanch was called and after leaving him in the custody of Sarpanch, he went to village Bartola to verify the information given by Nehru Singh. On verification, Sukarti Bai was not found in such village, on which, he came back, to the residence of Suhablal. By that time, appellant Nehru Singh had fled away from such place. Thereafter, in the next morning, he accompanied with Set Singh, went to police station and lodged the missing person report. While returning from the police station to village, on way, near the culvert, he saw the dead body of Sukarti Bai in injured condition. Two stones were also lying on the chest of such body. On his information, police came to the village. According to his deposition, he came to know from Suhablal that Sukarti Bai was being taken by the appellant at his residence. He also stated that on his information the missing person report was recorded by the police. Such Rojnamcha Sanha No.210 (Ex.P/18) dated 11.4.96, has been proved by Head Constable Suresh Pandey (P.W.10) who recorded the same. The material facts regarding partition of the agricultural land between the deceased and the appellant stated in the missing person report also stated by Suresh Pandey (P.W.10) in his deposition.

11. The facts regarding beating of the deceased by means of stick, kicks and

fists by the appellant on the allege day of incident has been stated by the complainant Khalkiya (PW 1) on the information received from Bhaiyalal and his son Suhab lal (P.W.2). Such Suhablal (P.W.2), on recording his statement stated that on the date of incident at about 5-6 O' clock in the evening when he was at his farmyard situated on the way of village Barojh, he saw that the deceased was being forcibly taken by the appellant towards his home while Sukarti Bai was saying that she will not go, on which, she was subjected to blows of stick on her head by the appellant. The blood also profused from her head and due to such injuries Sukarti Bai was feeling uneasy. Thereafter he informed such incident to Set Singh Sarpanch who assured him that he will see the matter in the morning. Accordingly, the version stated in the missing person report regarding beating of the deceased by the appellant is proved by this eye witness of such event. He further stated that he along with Phool Singh and Khalkiya went to the house of Nehru Singh to search the deceased, whom they found there and on asking about Sukarti Bai Nehru Singh told them that he left her on the way from where she might have gone to village Bartola, on which, they brought Nehru Singh with him at his residence where in presence of Sarpanch Set Singh, appellant Nehru Singh stated that he asked Sukarti Bai to go at his residence but she did not come and said that she will reside at Barojh. In further averments he stated that on verification, the deceased was not found at Bartola. After returning from Bartola, Khalkiya accompanied with Set Singh Sarpanch went to police station for lodging the report. On going through his cross examination the facts stated by him regarding beating of Sukarti Bai by the appellant, is remained intact. This witness has also proved that before recovery of the dead body of Sukarti Bai, she was lastly seen with the appellant while she was being beaten by him by means of stick and sustained the injuries with bleeding. The presence of the appellant with the deceased at the alleged place of beating has been proved by the nearest relative, the maternal uncle of the appellant, namely, Ram Singh (P.W.4) although he turned hostile on other facts. He also stated that Nehru Singh was taking the deceased to his home by catching hold her hand. At that time, deceased Sukarti Bai was not saying anything. In this manner the facts mentioned in the missing person report and Dehati Nalishi with respect of the beating of the deceased by the appellant before her death has been proved by this witness. In the available set of the facts, this witness Suhablal appears to be independent and reliable as he is neither relative of any of the party nor interested in any of them.

12. In view of the aforesaid it has been established on record that a day before the recovery of the dead body of Sukarti Bai, she was lastly seen with the appellant while she was being beaten by the appellant by means of stick, kicks and fists for taking her to his residence and thereafter on the very next day she was found dead in some culvert near the field. The other examined witness Bhondu (P.W.5) did not support the case of prosecution and turned hostile while the other witnesses

are examined either with respect of the investigation or preparation of different papers during investigation.

13. In the aforesaid circumstance, the appellant was bound to explain that after causing the injury to Sukarti Bai where she was taken and left by the appellant. In the lack of such explanation of the accused, there is sufficient circumstance on record to draw an inference that appellant was the only person who caused the alleged injuries to the deceased and none else and thereby he committed her murder. We have not found any evidence on record showing that between the aforesaid incident of evening and the time when the dead body was seen near the culvert, the deceased was seen in the company of any other person except the appellant. In such premises, the chain of circumstantial evidence connecting the appellant with the alleged murder of Sukarti Bai is complete. It is settled preposition of the law that if the complete chain of circumstances are found to be proved against the accused then his conviction is only the consequence of it.

14. In the matter of *Sahadevan alias Sagardevan Vs. State Represented by Inspector of Police, Chennai*-(2003)1 SCC 534, the Apex Court has held as under :-

> (19) THE last circumstance relied on by the courts below pertains to the stand taken by the appellants in the trial as to parting company with Vadivelu. Here we must notice that as discussed hereinabove, the prosecution has established the fact that Vadivelu was seen in the company of the appellants from the morning of 5.3.1985 till atleast 5 p.m. on the same day, whem he was brought to his house and thereafter his dead body was found in the morning of 6.3.1985. Therefore, it has become obligatory onihe appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is On the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company....."

In view of the aforesaid principle, on examining the case at hand, in the lack of any explanation of the appellant about parting the company of the deceased such dictum is applicable to the present case and, in such premises, the findings of the trial court holding conviction against the appellant do not require any interference at this stage.

15. So far motive of the appellant to cause death of the deceased is concerned, although it has come on record that the ancestral property was partitioned and separated between the appellant and the deceased. The other examined witnesses, namely Khalkiya (P.W.1), Suhablal (P.W.2), Manna Singh (P.W.3) and Ram Singh (P.W.4) have not stated specifically that there was any dispute between the

appellant and the deceased with respect of any of the property. But it is apparent and undisputed fact in the case that the deceased was not residing with the appellant and the property of the deceased was also not in possession of the appellant. She was residing with her brother Khalkiya (P.W.1). Her land was also cultivated by one Pusua on sharing basis and, therefore, this possibility could not be ruled-out that in any case without consent of the deceased the appellant could not get her share of the property or only after her demise he could have got such property, so, the motive of the appellant could be assumed that in the temptation of the property he had committed the alleged murder. Even otherwise, if the circumstances connecting the appellant with the alleged crime is proved by the prosecution beyond reasonable doubt then the absence of motive would not hamper a conviction. Such principle is laid down by the Apex court in the matter of *Sahadevan alias Sagardevan Vs. State Represented by Inspector of Police, Chennai*-(2003)1 SCC 534, in which it was held as under:-

> "24. It is then.....This Court had held in the case of circumstantial evidence that if the circumstances relied upon by the prosecution are proved beyond doubt, then the absence of motive would not hamper a conviction....."

16. It is also noted that in the accused statement in reply of the question No.47 the appellant himself has categorically stated that due to the dispute of the property the witnesses have stated against him. In such premises, the findings of the trial court regarding motive of the appellant for committing the alleged crime dos not require any interference and deserves to be upheld.

17. So far the argument of the appellant that the missing person report lodged by Khalkiya (P.W.1) has not been proved by prescribed procedure is concerned, we would like to state here that such missing person report was written in the Rojnamcha Sanha at the instance of Khalkiya (P.W.1) by Head Constable Suresn Pandey (P.W.10) and the same has been proved on record by such Head Constable by mentioning some material description of it. Such testimony of this witness has not been challenged in his cross-examination. Therefore, it could not be said that such Rojnamcha Sanha, the missing person report, the registration of the Marg and Dehati Nalishi have not been proved on record. All such papers have been duly proved by concerning witnesses and also by the investigating officer, therefore, such reports could not be held to be inadmissible on any ground. In any case, if some lacuna was left by the investigating agency while investigating the matter or subsequent to it then mere on technical ground, the person like appellant cannot be benefited by extending the acquittal.

18. So far the decisions cited by the counsel for the appellant are concerned, in the facts and circumstances of the case at hand, the same are distinguishable on facts and also on the question decided in such cases and the question involved in the present matter. The same are discussed one by one.

(a) In the matter of *Makhan Singh Vs. State of Punjab*-AIR 1988 SC 1705, the circumstantial evidence was not found against the accused person and on that count such law was laid down which is not the situation in the case at hand as discussed above.

(b) In the matter of *Anant Bhujangrao Kulkarni Vs. State of Maharashtra*-AIR 1993 SC 119, the accused gave evasive answers when asked about the whereabouts of the deceased on his interrogation by the police but the same was not proved and only on the basis of recovery of the dead body of the deceased which was found near the portion of the building occupied by him, the accused was not found connected with the alleged incident in any manner. Such situation is not available in the present case, hence on the facts such case is distinguishable.

(c) In the matter of *Inderjit Singh and ano. Vs. State of Punjab*-AIR 1991 SC 1674, the appellant was acquitted holding that no direct circumstantial evidence connecting the accused with the crime was available. The factor of enmity was also considered in such case but in the case at hand not only the appellant/accused was lastly seen with the deceased but he was also seen by witness Suhablal while the deceased was being beaten by the appellant. In such premises this citation is also not helping to the appellant.

(d) So far reported cases of this court in the matter of *Ramanand Vs. State of M.P.*-1995 JLJ-757, *Suleman Vs. State of MP*-1991(1)MPWN-70 and *Omprakash Vs. State of M.P.*-2008(1) MPLJ (Cri.)341 cited by the appellant are concerned, in view of the aforesaid appreciation and the principle laid down by the Apex Court in the matter of *Sahadevan alias Sagardevan* (supra), the same are not helping to the appellant.

19. In view of the aforesaid, we have not found any perversity, error or infirmity in the impugned judgment of the trial court convicting and sentencing the appellant, hence, this appeal being devoid of any merits, is hereby dismissed. It appears from the record that appellant was directed to be, and was, released on bail in pendency of the appeal. His bail bonds are hereby canceled and he is directed to surrender himself on or before 10.8.09 before the trial court to serve the remaining sentence, failing which the trial court is directed to take appropriate steps in this regard.

Appeal dismissed.

I.L.R. [2009] M. P., 3214
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mr. Justice U.C. Maheshwari
17 July, 2009*

LAL BAHADUR DUBEY ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. **Criminal Procedure Code, 1973 (2 of 1974), Section 174** - *Inquest report - Eye witnesses claimed to be present on spot but no enquiry was made by police - Investigating Officer did not join eye witnesses of incident in inquest proceedings - Inquest proceedings were conducted before other witnesses - It is also mentioned that no eye witness was available and cause of death was also not known - Above facts cast serious doubt on the truthfulness of evidence of eye witness.* (Para 12)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 174 – मृत्यु–समीक्षा रिपोर्ट – प्रत्यक्षदर्शी साक्षियों ने घटनास्थल पर उपस्थित होने का दावा किया किन्तु कोई जाँच नही की गई – अन्वेषण अधिकारी ने घटना के प्रत्यक्षदर्शी साक्षियों को मृत्यु–समीक्षा कार्यवाहियों में शामिल नही किया – मृत्यु–समीक्षा कार्यवाहियाँ अन्य साक्षियों के समक्ष की गयीं – यह भी उल्लेख किया गया कि कोई प्रत्यक्षदर्शी साक्षी उपलब्ध नही था और मृत्यु का कारण भी ज्ञात नही था – उपर्युक्त तथ्य प्रत्यक्षदर्शी साक्षी के साक्ष्य की सत्यनिष्ठा पर गम्भीर संदेह डालते हैं।

B. **Penal Code (45 of 1860), Section 302** - *Murder - Dead body of deceased found hanging in the room - Room was found bolted from inside - There is no evidence on record to indicate that there was any other door or outlet in room - This creates serious dent in prosecution story.* (Para 13)

ख. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – मृतक का शव कमरे में लटका हुआ पाया गया – कमरे में अन्दर से सिटकिनी लगी हुई पायी गयी – यह उपदर्शित करने के लिए अभिलेख पर कोई साक्ष्य नही है कि कमरे में कोई अन्य दरवाजा या निकास था – यह अभियोजन की कहानी को गम्भीर रूप से प्रभावित करता है।

C. **Penal Code (45 of 1860), Section 302** - *Murder - Allegation that deceased was taken to room by dragging and assaulting and thereafter coiled a cable wire around his neck and pulled it from both ends and thereafter was hanged - However, only one ligature mark was found on the neck with mark of knot on the left side of ligature - There should have been 2 ligature marks in case the cable wire was coiled around his neck - Evidence of witnesses contrary to medical evidence - It creates doubt about truthfulness of witnesses.* (Para 14)

ग. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अभिकथन कि मृतक को कमरे तक घसीटते हुए और हमला करते हुए ले जाया गया और उसके बाद केबिल का तार उसकी

*Cr.A. No.47/2001 (Jabalpur)

गर्दन के चारों ओर लपेटा गया और उसे दोनों सिरों से खींचा गया और उसके बाद लटकाया गया – तथापि, गर्दन पर केवल एक बन्ध निशान बन्ध के बांयी ओर गाँठ के निशान सहित पाया गया – उसकी गर्दन के चारों ओर केबिल का तार लपेटे जाने की दशा में 2 बन्ध निशान होने चाहिए थे – साक्षियों की साक्ष्य चिकित्सीय साक्ष्य के प्रतिकूल – यह साक्षियों की सत्यनिष्ठा के बारे में संदेह सृष्ट करता है।

S.C. Datt with *Siddharth Datt,* for the appellant.

T.K. Modh, Dy.A.G., for the respondent.

JUDGMENT

The Judgment of the Court was delivered by **RAKESH SAKSENA, J.** :–Since both the appeals arise out of the common judgment passed by the trial Court, they are being disposed of by this common judgment.

2. Appellants have filed these appeals against the judgment dated 19th December, 2000, passed by the Special Judge (Atrocities), Rewa in Sessions Trial Nos. 162/1999 and 181/1999, convicting them under Sections 342/34, 302/34 and 201 of the Indian Penal Code and sentencing them to rigorous imprisonment for six months with fine of Rs. 200/-, imprisonment for life with fine of Rs. 1000/- and rigorous imprisonment for two years with fine of Rs. 200/-, with default stipulation on each count respectively. In both the aforesaid Sessions Trial, common evidence was recorded and they were disposed of by the common judgment.

3. According to prosecution, on 12.11.1998 at about 12.15 P.M., Bhaiya Lal (PW7), lodged the report at police station, Gurh District Rewa that at about 9 A.M. when he was at his house, his son Mordhwaj (PW6) and Raj Kumar came and informed him that accused Kamta Prasad, Sujeet Patel, Ramniranjan Patel, Kamlesh, Ramanand and others forcibly took away his another son viz. Ashok Patel to their house and after assaulting hanged him, the dead body of Ashok was lying hanged in their house and the door was closed. He went at that house and after seeing the body of Ashok Patel through the window came to police station to lodge the report. Accused persons had killed his son because of old enmity. On the aforesaid report, Head Constable Udaynath Pandey (PW8) recorded merg intimation under Section 174 of the Code of Criminal Procedure and Sub Inspector R.S.Pandey (PW9) went at the spot. He conducted the inquest and sent the dead body of Ashok for the postmortem examination. Dr. M.K.Tiwari (PW4) of G.M. Hospital, Rewa performed the postmortem examination. On 13.11.1998, Sub Inspector R.S.Pandey (PW9) registered the first information report Ex. P/15 under Sections 147, 341, 302/201 of the Indian Penal Code.

4. After requisite investigation, charge sheet was filed against the accused persons and the case was committed for trial. During trial, all the accused persons denied the charges and pleaded false implication. According to them, Ashok Patel (deceased) had committed rape on Manwati who belonged to their family and was also the maternal aunt of Ashok. Enraged village people had caught hold of

Ashok and had confined him in the room with a view of handing him over to the police, but out of shame, he committed suicide in the room by hanging. The complainant party taking undue benefit of this occurrence, concocted a false case against them. Accused Lal Bahadur, Ramniranjan and Kuntima pleaded that they were not present at the spot and were falsely implicated due to enmity. According to Lal Bahadur, in the past a false report was lodged by Bhaiya Lal against him, but he was acquitted, therefore, Bhaiya Lal roped him again in the present case.

5. To substantiate its case, prosecution examined nine witnesses. In defence, accused persons also examined four witnesses. Trial Court relying mainly on the evidence of PW4-Dr.M.K.Tiwari, PW5-Mukesh Kumar Patel, PW-6 Mordhwaj Patel, PW7- Bhaiyalal and Investigating Officers PW8-Udaynath Pandey, Head Constable and PW9-R.S.Pandey, Sub Inspector, held the accused persons guilty and convicted and sentenced them as mentioned aforesaid.

6. Learned Senior Advocates Shri S.C.Datt and Shri Surendra Singh submitted that the trial Court committed serious error in convicting the accused persons. The evidence of alleged eye-witnesses Mukesh Patel and Mordhwaj was false and unreliable. Their conduct was unnatural. Names of all the accused persons were not mentioned by complainant Bhaiyalal in merg report Ex. P/13, though it had been lodged on the basis of information furnished to him by eye-witnesses Mukesh and Mordhwaj. The allegations made in the merg report though clearly indicated the commission of the offence, yet the first information report was not recorded. The first information report was recorded on the next day i.e. 13.11.1998, after the investigation. The statements of witnesses allegedly recorded by the police on 12.11.1998 were withheld and instead the statements recorded on 14.11.1998 were filed along with the charge sheet. Despite the fact that names of all the accused persons were mentioned in the merg report, the Investigating Officer did not make any effort to arrest them. Only relatives and inimical eye-witnesses were produced in the trial to the total exclusion of independent witnesses. The prosecution story was otherwise improbable and unnatural and was belied by the medical evidence. According to them, the impugned judgment of conviction deserved to be set aside.

7. On the other hand, Shri T.K.Modh, Deputy Advocate General for the State submitted that the evidence of eye-witnesses was reliable. Their evidence was corroborated by the medical evidence and the merg report lodged by witness Bhaiyalal. Though some mistakes were committed by the Investigating Officers in the investigation, yet in view of the clear and cogent evidence of eye witnesses, the prosecution case could not be discarded. He justified the finding of conviction recorded by the trial Court.

8. We have heard the submissions made by the learned counsel of both the parties and perused the impugned judgment and the evidence on record carefully.

9. According to eye-witness Mordhwaj (PW6), in the morning of 12.11.1998, his father asked him to bring pipe and rope from the field. He, Ashok and Raj Kumar went to the field on two bicycles. When they were returning, the chain of his bicycle went out of free-wheel, due to which, he stopped on the way. After about 10 minutes, when he reached near the `Khalihan' of Ramanand Patel, he saw the bicycle of Ashok lying there. Ashok was not there. He climbed over an embankment and saw accused Kamta, Niranjan, Ramanand, Rajkumar, Lal Bahadur and Sujeet assaulting and dragging Ashok. He went there and saw them confining Ashok inside the room. He though tried to rescue him, but Kuntima pushed him and out. When Kuntima intimidated him, he ran away towards his house and met his brother Rajkumar who was carrying a pipe. He narrated the occurrence to Rajkumar and with him went again at the place where Ashok was confined. Accused persons had coiled an electric cable around the neck of Ashok and were pulling it. Kuntima uttered that Ashok had died. He stated that when they were peeping through the window, their cousin Mukesh also reached there and saw the incident from the said window. Ashok died. He started weeping. Kuntima opened the door and intimidated them, then they all ran away. He narrated the occurrence to Bhaiyalal and number of other persons. They all reached at the spot. Kuntima again threatened them that they shall also be killed.

10. Other eye-witness Mukesh Patel (PW5) deposed that in the morning when he was going to fetch labourers for working in his field, near the house of Gulab Patel, he saw Mordhwaj shouting that his brother was being killed. He reached there with Rajkumar and Mordhwaj and saw through the window in the room of Gulab Patel. He saw accused persons pulling rope which was wrapped around the neck of Ashok. At one side of it were Sujeet and Kamta and on another side there were Ramniranjan, Lalbahadur and Rajkumar. Kuntima had pressed his mouth and Ramanand Patel had pressed his chest. After some time, Ashok died. Sujeet told others that they should hang the body of Ashok on a peg. Kuntima when opened the door, she saw them and shouted whereupon all of them ran away and went to their house and informed about the occurrence to Bhaiyalal and other persons. All of them again went at the house of Gulab Patel and enquired from Kamta about Ashok who in turn told them that he had been killed. Others accused persons were also present there with lathis. They again entered the room. Bhaiyalal (PW7) deposed that on getting the information from Mordhwaj and Mukesh about the incident, he along with other family members went to the house of Sujeet (S/o Gulab Patel) and saw Kamta, Sujeet, Ramniranjan, Ramanand, Rajkumar and Lalbahadur standing there. On asking them about Ashok, Kamta abused him and told that he was killed and hanged and also intimidated them. From the window he too saw Ashok hanged in the room and when he got satisfied that Ashok had died, on a motorcycle with Chakradhar went to police and lodged the report Ex. P/13.

11. On a close scanning and scrutiny of the evidence of the aforesaid three witnesses, we find their testimony highly improbable, unnatural and suspicious. It's quite unnatural that Mukesh (PW6) who happened to be the real brother of deceased, did not raise hue and cry and collected people to save his real brother. Though he saw accused persons assaulting, dragging and confining Ashok in the room, but he ran away towards his house. It is strange that when he met his brother Rajkumar, both of them went at the house of Gulab Patel and kept on silently peeping through the window. In para 10 of his statement, he admitted that his father and the people who assembled at the place of occurrence did not make any effort to take out Ashok, who was confined in the room. Similarly, Mukesh Patel, cousin of deceased, reached the house of Gulab Patel hearing hue and cry allegedly made by Mordhwaj, but he also went on viewing the incident through the window. Though at the time of occurrence three brothers of deceased were present, yet they remained silent spectators and did not make any endeavour to rescue him. It cannot be assumed of any prudent man to have behaved in that manner when their brother was confined and was being killed. None of the aforesaid witnesses stated that the accused persons were armed with fire arms or other lethal weapons. We are unable to accept that when Mordhwaj, as stated by him, remained shouting while witnessing the occurrence through the window, none of the accused heard his voice or saw him. It is also not acceptable that when Bhaiyalal and number of other persons went at the house of Sujeet, all the accused persons remained present there.

12. Bhaiyalal (PW7), though informed by Mordhwaj and Mukesh that accused Kamta, Sujeet, Ramniranjan, Ramanand and Rajkumar took away Ashok and killed him and though, he himself went at the place of occurrence and found Kamta, Sujeet, Rajkumar, Ramniranjan, Lalbahadur, Ramanand present there, yet in the merg report Ex. P/13, he named only four accused persons viz. Kamta, Sujeet, Rajkumar and Ramanand. It is also strange that he named one Kamlesh Patel also whose presence in the occurrence was not found established by the police itself and he was not named even by Bhaiyalal in the Court. Bhaiyalal though named accused Lalbahadur and Kuntima, before the Court as assailants, but they were not named in Ex. P/13. Mukesh (PW5) stated that he and Bhaiyalal (PW7) were though present at the spot when police came on 12.11.1998, but on that day police made no enquiry from him. According to him, Superintendent of Police reached there earlier then Station Officer of Police Station. On 12.11.1998, he did not inform the police about the incident as they did not ask anything from him. He further stated that he did not disclose to police anything even on the next day and he gave his statement to police only on the third day when Investigating Officer enquired from him. It is strange that investigating officer R.S.Pandey (PW9) did not join the eye witnesses of the incident in the inquest proceedings, rather he conducted the said proceeding before other witnesses, ignoring Bhaiyalal and

Mordhwaj who were present at the spot. It is also important to note that in the inquest Ex. P/2 Investigating Officer mentioned that no eye witness of the incident was available and the cause of death of the deceased was also not known, therefore, it was necessary to send the dead body for postmortem examination. On the reverse of the merg report Ex. P/13 also it was mentioned that the cause of death of deceased was not known. It is also suspicious that though police received the information about the commission of the cognizable offence on 12.11:1998 itself, yet the crime was registered and first information report was recorded on 13.11.1998 at 9 P.M. Investigating Officer R.S.Pandey (PW9) admitted that though he had evidence, still he did not register the crime because he wanted to get it further verified. According to him, he had recorded the statements of the witnesses on 12.11.1998, but those statements were not produced before the Court with the charge sheet. The statements of the eye witnesses which were recorded on 14.11.1998 were only filed with the charge sheet. All the above facts cast serious doubt on the truthfulness of the evidence of eye witnesses Mukesh and Mordhwaj Patel.

13. Yet another important aspect of the case is that when police reached at the spot, the room in which the dead body was found, was bolted from inside. The door latch was got opened with the help of a bamboo. It remains unanswered that when Bhaiyalal, Mukesh and Mordhwaj and number of other persons reached the place of occurrence and found the accused persons present out side the room, how the door of the room could be bolted from inside, especially when there is no evidence on record to indicate that there was any other door or outlet in the room. This further creates a serious dent in the prosecution story.

14. We also find substance in the submission made by the learned counsel for the appellants that there were serious inconsistencies between the medical evidence and the account of incident given by eye witnesses. It has been stated by the alleged eye witnesses that the accused persons brought Ashok in the room dragging and assaulting and thereafter coiled a cable wire around his neck and pulled it from both the ends in opposite directions. However, Dr. M.K.Tiwari (PW4), who performed the postmortem examination of the dead body found only one ligature mark on the neck of the deceased. He found mark of a knot on the left side of the ligature on the side angle of the mandible. According to him, if a rope was coiled around the neck and was pulled from different sides, there would be two marks of ligature on the neck at one point and at other place the ligature mark would be single. He did not find double ligature marks at any place on the neck of the deceased. He also did not find any other injury on other parts of his body. The evidence of eye witnesses was thus clearly inconsistent with the medical evidence. It rather indicated that it could have been a case of partial hanging. Presence of a knot mark on the angle of the mandible indicated that there had been a knot in the ligature which did not fit in the version given by the alleged eye witnesses. These

significant inconsistencies between the evidence of doctor and the evidence of eye witnesses further created doubt about the truthfulness of the eye witnesses.

15. The argument advanced by the learned counsel for the State that the merg intimation was recorded on the basis of information furnished by Bhaiyalal, a villager, therefore it cannot be discarded on the ground of minor infirmities, is not acceptable to us. Though, merg report Ex. P/13 was lodged by Bhaiyalal immediately after receiving the information from the alleged eye witnesses Mukesh, Mordhwaj and Rajkumar even after visiting the place of occurrence and seeing the accused persons at the place of occurrence, yet it did not contain the names of accused Lalbahadur and Kuntima.

16. The defence of the accused persons was that on 10.11.1998 deceased had committed rape on Maniwati who was his maternal aunt. A report in that regard was lodged with the police which was recorded in Rojnamcha No. 297 Ex. D/5-C. People of village had caught the deceased and confined him in the room with a view to hand him over to police, but he committed suicide by hanging himself with the aid of an electric cable on a peg. Though there was no clear evidence to establish this defence, yet it appears significant that when Investigating Officer R.S.Pandey (PW9) reached the spot, door of the room was bolted from inside, deceased was found partially hanging in the peg and that an earthen pot was found lying crushed under the body of the deceased. These facts threw thick cloud of suspicion on the veracity of the prosecution story.

17. All the infirmities and flaws pointed out hereinabove assume importance, when considered in the light of probabilities. Circumstances emerging from the evidence on record inevitably led to the conclusion that the evidence of the alleged eye witnesses was not worthy of reliance and the prosecution story was conceived and constructed after due deliberation and delay and was not free from doubt and suspicion. In our opinion, the trial Court committed error in holding the accused persons guilty and convicting them.

18. For all the foregoing reasons we allow these appeals, set aside the conviction of the appellants and acquit them of the charges levelled against them. Appellant no.3 Ram Niranjan @ Narayan of Criminal Appeal No. 102/2001 is in jail, he shall be released forthwith, if not required in any other case.

19. A copy of the judgment be kept in the record of Criminal Appeal No.102/2001.

Appeal allowed.

NANDA Vs. STATE OF M.P.

I.L.R. [2009] M. P., 3221
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
31 July, 2009*

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

A. **Evidence Act (1 of 1872), Section 45** - *Age of prosecutrix - Margin of error - Age of prosecutrix assessed above 14 and below 16 years on the basis of findings of radiological examination of joints comprising radius, ulna & femur bones and crest of ilium - Admission of doctor of margin of error of 2 years on both sides was misconceived as ossification test was not confined to x-ray examination of a single bone only - Margin of error could be 6 months.* (Para 8)

क. साक्ष्य अधिनियम (1872 का 1), धारा 45 – अभियोक्त्री की आयु – त्रुटि का अंतर – अभियोक्त्री की आयु रेडियस, अल्ना और फीमर अस्थियों को समाविष्ट करने वाले जोड़ों और श्रोणिफलक के शिखर के रेडियोलॉजिकल परीक्षण के निष्कर्षों के आधार पर 14 वर्ष से अधिक और 16 वर्ष से कम निर्धारित की गई – दोनों ओर 2 वर्ष की त्रुटि के अंतर की चिकित्सक की स्वीकृति का गलत अर्थ लगाया गया क्योंकि ऑसीफिकेशन टेस्ट केवल एक अस्थि के एक्स–रे परीक्षण तक सीमित नही रखा गया – त्रुटि का अंतर 6 माह हो सकता था।

B. **Penal Code (45 of 1860), Section 376, Criminal Procedure Code, 1973, Section 154** - *Delay in lodging FIR - FIR was lodged after the father returned back to home as reputation of the family and future of the prosecutrix were at stake - Explanation is sufficient and delay in lodging FIR is inconsequential.* (Para 10)

ख. दण्ड संहिता (1860 का 45), धारा 376, दण्ड प्रक्रिया संहिता, 1973, धारा 154 – एफ.आई.आर. दर्ज कराने में विलम्ब – एफ.आई.आर. पिता के घर वापस आ जाने के बाद दर्ज करायी गयी क्योंकि परिवार की प्रतिष्ठा और अभियोक्त्री का भविष्य दांव पर थे – स्पष्टीकरण पर्याप्त है और एफ.आई.आर. दर्ज कराने में हुआ विलम्ब महत्वहीन है।

C. **Penal Code (45 of 1860), Section 363** - *Kidnapping - Word 'takes' does not necessary connote taking by force and is not confined only to use of force, actual or constructive but means 'to cause to go', 'to escort' or 'to get into possession'.* (Para 12)

ग. दण्ड संहिता (1860 का 45), धारा 363 – व्यपहरण – शब्द 'ले जाता है' आवश्यक रूप से बलपूर्वक ले जाने का संकेत नही करता है और केवल वास्तविक अथवा प्रलक्षित बल के प्रयोग तक सीमित नही है, बल्कि इसका अर्थ 'जाना कारित करना', 'अनुरक्षित करना' या 'कब्जे में प्राप्त करना' है।

*Cr.A. No.575/1994 (Jabalpur)

NANDA Vs. STATE OF M.P.

Cases referred :

AIR 2001 SC 2231, AIR 2000 SC 2798, AIR 2002 SC 2235, AIR 1973 SC 2313.

N.K. Mishra, for the appellant.

Puneet Shroti, Panel Lawyer, for the respondent.

J U D G M E N T

R.C. MISHRA, J. :–This appeal has been preferred against the judgment dated 10.05.1994 passed by Sessions Judge, Mandla in S.T. No.105/1993 whereby the appellant was convicted and sentenced as under with the direction that the jail sentences shall run concurrently –

Convicted under Section	Sentenced to
363 of the IPC	undergo R.I. for 3 years and to pay a fine of Rs.200/- and in default, to suffer S.I. for 2 months.
376 of the IPC	undergo R.I. for 3 years and to pay a fine of Rs.200/- and in default, to suffer S.I. for 2 months.

2. The prosecution case, in short, may be stated thus -

(a) At the relevant point of time, the prosecutrix (PW1), a 13-year-old daughter of Nanhelal (PW3) and the appellant were residing in the same Village viz. Tikaria.

(b) On 22/2/1993 at about 4 p.m., finding that the prosecutrix was sitting all alone in the corridor of her house, the appellant asked her to accompany on the pretext of grazing bullocks. However, as they reached near his house, the appellant caught hold of her hand and took her to the house wherein she was subjected to sexual intercourse and was turned out immediately thereafter. On her way back to home, the prosecutrix was found weeping by Chaina Bai and Ahilya Bai (PW2) and in answer to their query, she narrated the incident. As her father had gone out of station to sell bullocks, the FIR (Ex.P-1) could be lodged only after his return.

(c) Upon the FIR made on 26.02.1993, a case under Section 376 was registered at Police Station Shahpura, Distt. Mandla. The prosecutrix was sent to the hospital for medical examination. Dr. S. Shahwar, while expressing her inability to give a definite opinion as to recent intercourse, prepared two slides from the vaginal smear for chemical analysis and also preserved

sample of pubic hair and Sari said to have been worn by the prosecutrix at the time of sexual assault, for chemical examination. The lady doctor further advised X-ray examination for determination of the prosecutrix's age. On the basis of ossification test, Dr. Karuna Marskole (PW7) opined that the prosecutrix was to be between 14 to 16 years of age.

(d) On 27.02.1993, the appellant was apprehended and was also subjected to medical examination. Dr. C.B. Badhiye found him capable of performing sexual intercourse. The medical expert further prepared two slides from the appellant's semen and preserved the underwear worn by him for chemical analysis. The seized articles were sent to FSL, Sagar for chemical examination. However, the corresponding report could not be placed on record during trial.

3. On being charged with the offences punishable under Sections 363 and 366 of the IPC, the appellant abjured the guilt and pleaded false implication at the instance of Ram Milan, who allegedly refused to deliver possession of land even after receiving a sum of Rs.4,000/- as consideration for its sale. An alternative defence was suggested in the cross-examination of the prosecutrix to the effect that she herself wanted to marry the appellant. However, in the examination, under Section 313 of the Code of Criminal Procedure, he reiterated that Ram Milan was the mastermind behind his prosecution on false grounds.

4. The prosecution sought to prove the charges by examining as many as 7 witnesses including the prosecutrix, her father Nanhelal and Ahilya Bai. No evidence was led on behalf of the appellant. However, Dr. S. Shahwar and Dr. C.B. Badhiye were not summoned as the contents of their reports (Ex.P-6 and P-7) pertaining to medical examinations of the prosecutrix and the appellant respectively were admitted by the defence.

5. Upon a critical appraisal of the entire evidence on record, the learned trial Judge, for the reasons assigned in the impugned judgment, concluded that the guilt of the appellant for the offences charged with was established beyond a reasonable doubt. He, accordingly, convicted the appellant and sentenced him as indicated hereinabove.

6. Legality and propriety of the convictions in question has been challenged on the following grounds -

(i) Want of cogent evidence to prove that age of the prosecutrix was less than 16 years.

(ii) Absence of corroborative medical evidence as to rape.

(iii) Material contradictions between the sworn testimony of the prosecutrix and recital of a belated FIR.

However, the Panel Lawyer, while making reference to the incriminating pieces of evidence, has contended that the convictions were fully justified.

7. In order to appreciate the merits of the rival contentions in a proper perspective, it would be necessary to first advert to the medical and other evidence regarding age of the prosecutrix.

8. Being an illiterate father, Nanhelal (PW3) was not able to state the exact date of the prosecutrix's birth. As per his statement, he had duly informed the Kotwar about birth of the prosecutrix but the corresponding entry in the register was not tendered in evidence. Contents of the report (Ex.P-15) and the X-ray plates annexed thereto clearly indicated that Dr. Karuna Marskole (PW7) had assessed age of the prosecutrix as above 14 and below 16 years on the basis of findings of the radiological examination of joints comprising radius, ulna & femur bones and crest of ilium. Her admission that margin of error in determination of radiological age can be 2 years on both sides was apparently misconceived simply because the ossification test was not confined to X-ray examination of a single bone only (See. *Ram Deo Chauhan v. State of Assam* AIR 2001 SC 2231. Accordingly, the margin of error could be ±6 months. This apart, the following physical features reflected by Dr. S. Shahwar in the report (Ex.P-6), which is an admitted document, clearly proved that the prosecutrix was about 14 years of age (*State of H.P. v. Mango Ram* AIR 2000 SC 2798 followed) -

(a) Menarche not yet attained.

(b) Breasts – not well developed, firm pointed and small nipples.

(c) Teeth $\frac{6+7}{7+7} = 27$

(d) Labia majora not well developed.

(e) Vagina admitted only one finger.

9. Coming to the testimony of the prosecutrix (PW1), it may be observed that she was able to give true account of sequence of events leading to her ravishment by the appellant. According to her, on being persuaded by the appellant to accompany for grazing the cattle, she had voluntarily left the house for the purpose but while proceeding towards the pasturage, the appellant took her to his house and forcibly committed sexual intercourse with the result that she started bleeding per vagina. She further deposed that after completing the sexual assault, the appellant had made her to leave the house through a lane. As per her statement, while returning home, she happened to meet Chaina Bai and Ahilya Bai who, noticing her weeping, had enquired about the cause thereof and were apprised of what the appellant had done. Her evidence drew ample support from the evidence

of Ahilya Bai (PW2) and the defence was not able to elicit any material inconsistency in their cross-examination.

10. Explaining the delay in lodging the FIR, the prosecutrix asserted that before return of her father Nanhelal (PW3) from the other village, she, out of shame, had not informed other members of the family including her mother about the incident. Nanhelal corroborated the fact that, at the relevant point of time, he was not available in the village. According to him, immediately after his return home, his daughter viz. the prosecutrix had apprised him of the occurrence and in turn, he first informed Paranu, Kandhilal and Gaya Prasad, respectively Kotwar, Gram Patel and Sarpanch of the village before taking her to the police station for lodging the report. His evidence drew ample support from the statements of Gaya Prasad (PW4) and Kandhilal (PW5). It was, therefore, clearly established from the evidence on record that the decision to take action against the appellant was taken only after return of Nanhelal as the reputation of the family and future of the prosecutrix were at stake. This cogent and credible explanation was rightly considered as sufficient to treat the delay as inconsequential (*State of Rajasthan v. Om Prakash* AIR 2002 SC 2235 referred to).

11. The medical report (Ex.P-6) prepared by Dr. S. Shahwar further indicated that at the time of examination on 28.02.1993, hymen of the prosecutrix was found newly torn and her vagina admitted only one finger. As pointed out already, the medical opinion recorded by Dr. C.B. Badhiye in his report dated 27.02.1993 (Ex.P-7) as to capability of the appellant to perform sexual intercourse was also not disputed.

12. The contention that the offence of kidnapping was not made out in view of prosecutrix's willingness to enjoy company of the appellant deserves rejection as it is well settled that the word 'takes' does not necessary connote taking by force and it is not confined only to use of force, actual or constructive but means 'to cause to go', 'to escort' or 'to get into possession" (See. *Thakorlal D. Vadgama vs. The State of Gujarat* AIR 1973 SC 2313).

13. The defence that the appellant was roped in a false charge of rape at the instance of Ram Milan was apparently improbable as no father would allow her minor daughter to be used by his relative for wreaking personal vengeance. This apart, the suggestion that the prosecutrix, who had not even attained the age of puberty, was herself inclined to have a marital relationship with the appellant who was already having a spouse, was far from being convincing.

14. For these reasons, none of the grounds raised in the appeal deserves acceptance. The impugned convictions, therefore, deserve to be maintained as well merited.

15. Coming to the question of sentence, it may be observed that, taking note of the fact that for the offence of rape, less than statutorily prescribed minimum

punishment has been imposed by learned trial Judge without assigning any special or adequate reasons, a co-ordinate Bench of this Court vide order-dated 05.01.2008, proceeded to issue a notice for enhancement of sentence. In reply, the appellant submitted that all disputes prevailing between him and the prosecutrix have been amicably settled. However, the corresponding application for grant of permission to compound the offences has been dismissed as none of them is compoundable. Taking into consideration the social impact of the crime and other relevant circumstances of the case including that a lenient view has already been taken in the matter, no further indulgence would be justified.

16. In the result, the appeal stands dismissed. The impugned convictions and the consequent sentences are hereby affirmed.

17. Appellant is on bail. He is directed to surrender to his bail bonds before the trial Court on or before 15.10.2009 for being committed to the custody for undergoing remaining part of the sentence.

Appeal dismissed.

I.L.R. [2009] M. P., 3226
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar
6 August, 2009*

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

A. Evidence Act (1 of 1872), Sections 32(2) & 67 - *Medical report - How can be proved if doctor not available - Medical report should be proved by examining doctor who medically examined the victim - In case doctor was not available, the report can be proved by examining any other employee of the same hospital like ward boy or nurse who were acquainted with the handwriting & signature of the doctor - Same could have been admissible in evidence as per provision u/s 32(2) of Act because the medical report was given by the doctor in discharging his professional duty.* (Para 6)

क. साक्ष्य अधिनियम (1872 का 1), धाराएँ 32(2) व 67 – चिकित्सीय रिपोर्ट – कैसे साबित की जा सकती है यदि चिकित्सक उपलब्ध न हो – चिकित्सीय रिपोर्ट उस चिकित्सक की परीक्षा करके साबित की जानी चाहिए जिसने पीड़ित की चिकित्सीय परीक्षा की – यदि चिकित्सक उपलब्ध न हो तो रिपोर्ट उसी चिकित्सालय के किसी अन्य कर्मचारी जैसे वार्ड बॉय अथवा नर्स, जो चिकित्सक के हस्तलेख और हस्ताक्षरों से परिचित हैं, की परीक्षा कराकर साबित की जा सकती है – वह रिपोर्ट अधिनियम की धारा 32(2) के उपबंध अनुसार साक्ष्य में ग्राह्य की जा सकती है क्योंकि चिकित्सक द्वारा उसके वृत्तिक कर्तव्य के निर्वहन में चिकित्सीय रिपोर्ट दी गयी थी।

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*Cr.A. No.804/1995 (Indore)

B. Penal Code (45 of 1860), Section 376(2)(g) - *Gang rape - Prosecutrix an unmarried minor girl - Presence of semen and human spermatozoa in slide of vaginal swab as well as on her Kurti is very incriminating evidence and corroborating to testimony of prosecutrix.* (Para 10)

ख. दण्ड संहिता (1860 का 45), धारा 376(2)(जी) – सामूहिक बलात्संग – अभियोक्त्री एक अविवाहित अवयस्क बालिका – वैजाइनल स्वैब की स्लाइड में और उसकी कुर्ती पर वीर्य और मानव शुक्राणुओं की उपस्थिति बहुत अभिशंसी साक्ष्य है और अभियोक्त्री के परिसाक्ष्य की पुष्टि हो रही है।

C. Penal Code (45 of 1860), Section 376, Evidence Act, 1872, Section 9 - *No test identification parade - Effect - Prosecutrix remained in company of accused persons for a pretty long time - She had sufficient time to see, identify and keep their features and personality in mind - Description and features of accused persons was stated in FIR which was lodged without any delay - No harm would cause to prosecution case if no test identification parade was held.* (Para 12)

ग. दण्ड संहिता (1860 का 45), धारा 376, साक्ष्य अधिनियम, 1872, धारा 9 – कोई शिनाख्त परेड नही – प्रभाव – अभियोक्त्री काफी लम्बे समय तक अभियुक्तों के साथ रही – उसके पास देखने, पहचानने और उनकी शक्ल और व्यक्तित्व ध्यान में रखने का पर्याप्त समय था – अभियुक्तों का हुलिया और शक्ल का उल्लेख एफ.आई.आर. में किया गया जो बिना किसी विलम्ब के दर्ज करायी गयी थी – अभियोजन के मामले को कोई हानि कारित नही होगी यदि कोई शिनाख्त परेड न करायी गयी।

D. Penal Code (45 of 1860), Section 376(2)(g), 376, Criminal Procedure Code, 1973, Section 215 - *Defect in charge - Appellants charged simplicitor for offence u/s 376 of IPC - Not mentioned that they committed sexual intercourse with prosecutrix in furtherance of common intention - Appellants' conviction converted from S. 376(2)(g) to S. 376 IPC and sentenced to 7 years R.I. - Appeal partly allowed.* (Paras 17 & 18)

घ. दण्ड संहिता (1860 का 45), धारा 376(2)(जी), 376, दण्ड प्रक्रिया संहिता, 1973, धारा 215 – आरोप में त्रुटि – अपीलार्थियों पर केवल भा.द.सं. की धारा 376 के अन्तर्गत आरोप लगाया गया – कोई उल्लेख नही किया गया कि उन्होंने सामान्य आशय के अग्रसरण में अभियोक्त्री के साथ मैथुन किया – अपीलार्थियों की दोषसिद्धि भा.द.सं. की धारा 376(2)(जी) से धारा 376 में परिवर्तित और 7 वर्ष के सश्रम कारावास का दण्डादेश दिया गया – अपील अंशतः मंजूर।

E. Penal Code (45 of 1860), Section 376 - *Rape - Absence of injuries - Prosecutrix has stated about pain and sufferings - Neither prosecution nor Court took pain to brought the medical report on record in accordance with provisions of Evidence Act - However, FSL report is sufficient to corroborate the statement of prosecutrix.* (Para 19)

SUBHASH Vs. STATE OF M.P.

ड. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – क्षतियों का अभाव – अभियोक्त्री ने वेदना और कष्ट के बारे में कथन किया – न तो अभियोजन ने और न न्यायालय ने साक्ष्य अधिनियम के उपबंधों के अनुसार चिकित्सीय रिपोर्ट अभिलेख पर लाने का कष्ट उठाया – तथापि, एफ.एस.एल. रिपोर्ट अभियोक्त्री के कथन की संपुष्टि करने के लिए पर्याप्त है।

Cases referred :

(2003) 5 SCC 446, (2009) 1 SCC (Cri) 17.

J.N. Tiwari & M.S. Chandel, for the appellant.

L.L. Sharma, Dy.G.A., for the respondent/State.

J U D G M E N T

S.L. KOCHAR, J. :–Both the appeals are arising out of one common judgment, therefore, decided by this common judgment.

2. The appellants Subhash and Bhuru have challenged their conviction under Section 376 of the IPC, sentenced to R.I. for 10 years each passed by the learned First Additional Sessions Judge, Khargone, West Nimar in Sessions Trial No.308/91 judgment dated 2nd September, 1995.

3. According to the prosecution case, on 26.05.1999, in the night, at 8.00 p.m., prosecutrix and her father PW-2 Munshi were returning back to their house after taking night meal in the marriage function of one Kishore Sharma residence of Village Thibgaon (Badi). When they reached near Govt. Nursery two persons attacked on them, out of which one was having sword. Person, who was having sword rushed towards her father to assault because of which father Munshi ran away. Prosecutrix also tried to run away but she was caught and taken in a field wherein maize crop was standing. Both had committed sexual intercourse with prosecutrix against her consent and will and also looted her two golden Bali and nose pin (Nath), at that moment father and other villagers reached near the field. Prosecutrix raised cry because of which appellants leaving sword in the field fled away. Villagers chased the accused and caught one accused, who disclosed his name Subhash and he had also disclosed the name of his companion i.e. appellant Bhuru Pardhi. Prosecutrix disclosed about the incident to the villagers. Appellant Subhash with sword was taken to the Police Chowki. Prosecutrix PW-1 lodged the report in the Police Station and was sent for medical examination. Police prepared spot map. Appellant Subhash was also arrested and he was got medically examined by police. On disclosure statement made by the appellant Subhash, from his house nose pin (Nath) was seized. Police collected the clothes of the prosecutrix in a sealed packet from hospital. Clothes of the appellant and prosecutrix as well as slide of vaginal swab were sent to Forensic Science Laboratory and its report is Ex.P/7. On completion of investigation charge-sheet was filed against the appellants for commission of offences under Sections 341 506, 392, 363, 376 of the IPC and under Section 25 of the Arms Act. Appellants denied the charges, therefore, put to

trial. They have not examined any witness in defence. Learned Trial Court finding the appellants guilty, convicted and sentenced them as indicated herein-above.

4. Having heard learned counsel for the parties and on perusal of the entire record carefully, it culled out that conviction of the appellants is based on testimony of PW-1 prosecutrix, PW-2 Munshi, her father and PW-6 Gowardhandas.

5. The core question for this Court is to decide whether the statement of these 3 witnesses are sufficient to prove the guilt of the appellant beyond all reasonable doubt.

6. PW-1 prosecutrix has deposed that she was 14 years of age but prosecution has not filed any documentary or medical evidence to establish age of the prosecutrix. PW-2 Munshi, father of prosecutrix is completely silent about the age of prosecutrix. The medical report of the prosecutrix was not got proved by the prosecution by examining doctor, who medically examined her because doctor was not available. It would be apposite to mention herein that the medical report could have been proved by examine any other employee of the same hospital like ward boy, nurse etc., who were acquainted with the hand writing and signature of the doctor, as per provision under Section 67 of the Evidence Act and same could have been admissible in evidence as per provision under Section 32 Sub-section 2 of the Evidence Act because the medical report was given by doctor in discharging of his professional duty. It is really a matter of great regret that neither prosecution nor the Trial Court had taken pain to prove medical report of the prosecutrix which could be a very important piece of evidence specially in a case of gang rape and when prosecutrix was 14 years of age. The learned Trial Court could have called as court witness any other doctor or witness from concerned hospital in exercise of its power under Section 311 of the Cr.P.C. for proving the medical report in the interest of justice for just decision of the case and finding out the truth.

7. PW-1 prosecutrix has deposed that she was returning back in the evening at 7.00 p.m. along with her father and when they reached near the Govt. Nursery, she was caught and lifted by the appellants and took in maize crop field. Her Salwar was removed and after throwing her on the ground ravished by the appellant Bhuru. She described the special features of appellant Bhuru saying that he was Dudda (what is meaning not known, there is nothing on record). Learned counsel for the appellant Bhuru has pointed out Photostat copy of certificate of disablement of the appellant filed during the pendency of this appeal wherein it is mentioned that right hand is completely imputed from the wrist joint. Disabled Certificate of appellant Bhuru was not filed during the course of trial. There is no suggestion given to the prosecutrix that his one hand was imputed from wrist joint, same is the position with PW-2 Munshi. Defence has not put any question to any prosecution witness about imputation of right hand of appellant Bhuru from wrist joint and there is no material available to this effect in the record of the Trial Court. The incident occurred on 26.05.91 in the night. Witnesses were examined

in the month of March,1995, therefore, Photostat copy of the certificate filed by learned counsel for the appellant during the pendency of this appeal in the High Court cannot be taken into consideration and possibility of imputation of hand after incident as well as after pronouncement of judgment by the Trial court cannot be ruled out.

8. Appellant Bhuru was having sword and both appellants threatened prosecutrix and her father. Father successfully ran away but prosecutrix was caught. Prosecutrix identified the appellants in Court and also given special identifying mark. Appellant Bhuru was having some sort of defect in one eye. Prosecutrix was ravished by both the appellants because of which she had pain and on cry raised by her, villagers named Abba, Kailash, Chhagan and Gowardhandas reached on the spot and appellant Subhash was caught by the villagers. Appellant Bhuru left the sword in the field and ran away. The said sword was seized by the police. Prosecutrix disclosed about the incident to her father and other villagers. Father and prosecutrix went to the Police Station and lodged the report. Prosecutrix was sent for medical examination and examined by lady doctor. Medical requisition form (Ex.P/12) has been proved by PW-7 Head Constable, Shankarlal, over leaf this requisition, medical report is available but according to law, it cannot be read in evidence as discussed herein-above otherwise it could corroborate the statement of the prosecutrix. Learned Trial Court has held that at the time of incident prosecutrix was 10 years of age, which is also clear from medical requisition form (Ex.P/12) and in court statement prosecutrix has disclosed her age 14 years. Court has also mentioned her age 14 years when she was examined on 24.03.1995 after about 4 years of incident.

9. Article "A" underwear of appellant, article "B" Kurti of prosecutrix and article C1 and C2 slides of vaginal swab of prosecutrix were sent for medical examination to Forensic Science Laboratory and according to Forensic Science Laboratory report (Ex.P/7) semen and human spermatozoa was found on these articles. Report has been proved by PW-4 Sub Inspector Shri I.P.Sharma and there is no challenge to the Forensic Science Laboratory report in cross-examination by the appellants. Forensic Science Laboratory report is admissible as per provision under Section 293 of Cr.P.C.

10. Prosecutrix was an unmarried minor girl, therefore, presence of semen and human spermatozoa in slide of vaginal swab as well as on her Kurti is a very incriminating evidence and corroborating to the testimony of prosecutrix, who had no axe to grind against the appellants. No suggestion was given to the prosecutrix in cross-examination about any kind of previous ill-will with the appellants. Appellant Subhash was caught on the spot and he disclosed name of appellant Bhuru as co-accused. Prosecutrix has also given description of Bhuru in First Information Report and in court tallying properly, when prosecutrix was examined in the Court.

11. Statement of prosecutrix is also fully corroborated by her First Information Report (Ex.P/1).

12. Prosecutrix remained in the company of the appellants for a pretty long time. Both appellants committed forcible sexual intercourse with her in the field, therefore, she had sufficient time to see, identify and keep their features and personality in her mind. She lodged the report without any delay in the same night at 10.30 p.m. and distance of Police Station was 11 Km. The description and special features of appellant Bhuru as stated by prosecutrix is fully corroborated by her First Information Report (Ex.P/1). In these circumstances, if no Test Identification Parade was held by the Investigating Agency, no harm would cause to the prosecution case. In case of *Malkhan Singh and other V/s. State of M.P.* (2003 (5) SCC 446) the dock identification of accused has been relied upon by the Supreme Court, because victim was having enough time to see and identify the accused. In the case of rape, accused remains very close to the prosecutrix and because of sexual assault against consent and will memory of incident remained in the mind of the victim for a long period. Supreme Court has observed in paragraph 16 as under :-

> *"In the instant case, the crime was perpetrated in broad daylight. The prosecutrix had sufficient opportunity to observe the featuress of the appellants who raped her one after the other. Before the rape was committed, she was threatened and intimidated by the appellants. After the rape was committed, she was again threatened and intimidated by them. All this must have taken time. This is not a case where the identifying witness had only a fleeting glimpse of the appellants on a dark night. She also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their featuress. In fact on account of her traumatic and tragic experience the faces of the appellants must have got imprinted in her memory, and there was no chance of her making a mistake about their identity. The prosecutrix appears to be a witness on whom implicit reliance can be placed and there is no reason why she should falsely identify the appellants as the perpetrators of the crime if they had not actually committed the offence. In these circumstances if the courts below have concurrently held that the identification of the appellants by the prosecutrix in court does not require further corroboration, there is no reason to interfere with the finding recorded by the courts below after an appreciation of the evidence on record."*

13. PW-2 Munshi, father of prosecutrix has also stated that when they reached near Govt. Nursery, both appellants stopped them and asked their names. Appellant Bhuru was having sword and about to assault him. At that juncture, they ran away but he escaped successfully and his daughter PW-1 prosecutrix was caught

by them. PW-2 Munshi immediately reached in village Kundiya and upon hearing his outcry PW-6 Gowardhandas and other villagers assembled and came on the spot with him. They saw appellants running away from the spot. Appellant Bhuru fled away but appellant Subhash was caught after chasing in the field. Sword was also lying in the field, which was picked up by him and produced in the Police Station at the time of lodging of the report. In cross-examination of prosecutrix and witness Munshi some discrepancies have occurred which is bound to come and no witness can give verbatim statement as given in the FIR and statement under Section 161 of Cr.P.C.. PW-3 Kailash has deposed that upon hearing cry he and Chhagan reached in the field of one Khushyal where they met PW-2 Munshi, who told them that appellant Subhash and one person had caught his daughter. They reached there by running and caught appellant Subhash. Subhash was produced before panch. Though this witness has been declared hostile but his statement regarding hearing of the cry, disclosure by Munshi about catching hold of his daughter by appellant Subhash and co-accused and catching the appellant Subhash immediately can be relied upon for corroboration to the testimony of prosecutrix and PW-2 Munshi. It is settled legal position that statement of hostile witness can be used if court finds ring of truth in some material particulars.

14. PW-6 Gowardhandas has also stated that prosecutrix and her father Munshi disclosed about the incident to them. His statement is also supporting to the statement of the prosecutrix upto some extent about the incident.

15. PW-7 Head Constable Shankarlal has proved FIR (Ex.P/1). Seizure of sword (Ex.P/10), arrest of appellant Subhash through memo (Ex.P/9) on the same day and seizure of his underwear vide seizure memo (Ex.P/11).

16. PW-4 Sub Inspector Shri I.P.Sharma has proved the seizure of sealed packet containing clothes of the prosecutrix and slide brought by Head Constable Shankarlal vide seizure memo Ex.P/6 and sending of seized articles to Forensic Science Laboratory. He has also proved Forensic Science Laboratory report Ex.P/7. This report is automatically admissible as per provision under Section 293 of the Cr.P.C. and as discussed herein-above corroborating to the testimony of the prosecutrix about commission of rape with her.

17. Learned counsel for the appellants have submitted that appellants were not charged for commission of offence of gang rape punishable under Section 376(2)(g) and ingredients of gang rape are also not mentioned in the charge but the learned Trial Court convicted the appellants for commission of gang rape and awarded 10 years jail sentence which is illegal. According to the learned counsel for the appellants, appellants can be convicted only for offence under Section 376 of the IPC for which minimum 7 years jail sentence is prescribed and looking to the fact that appellants are first offender, they may be awarded minimum jail sentence.

18. This court has perused the contents of the charge and find substance in the

argument advanced by learned counsel for the appellants. There is no mention in the charge-sheet about commission of gang rape and ingredients of gang rape are also not mentioned. The appellants have been charged simplicitor for the offence under Section 376 of the IPC. It is true that mentioning of incorrect Section in charge ipso facto is not sufficient to set aside the conviction of the accused and accused has to establish prejudice caused to him as per provision under Section 464 of the Cr.P.C. but in the instant case not only Section but even it is not mentioned that appellants committed sexual intercourse with the prosecutrix one after another in furtherance of the common intention which is the requirement for the punishment of the accused for the offence under Section 376(2)(g) of the IPC.

19. Learned counsel for the appellants has placed reliance on Supreme Court judgment rendered in case of *Lalliram and another V/s. State of M.P.* (2009) Vol.1 Supreme Court Cases (Cri.) 17) on the point that no injury was found on the person of prosecutrix in her medical examination, therefore, her statement should not be relied upon for commission of rape by two matured male persons. This Court has perused this judgment and is of the opinion that the same is not helpful to the appellant in the facts and circumstances of the instant case. In this case, prosecutrix has stated about pain and other sufferings. She was also examined medically without any delay but unfortunately neither the prosecution nor court took pain to brought the medical report on record in accordance with the provisions of Evidence Act as discussed herein-above. In the instant case, even in presence of medical evidence the Forensic Science Laboratory report is sufficient to corroborate the statement of prosecutrix and prosecutrix was a minor girl whereas in case of *Lalliram* (supra) prosecutrix was a pregnant woman and subjected forcible gang rape. It was alleged that prosecutrix was raped by many persons several times but no injury was found on her person. The Supreme Court has also considered material contradictions, improvements, inconsistency and embellishment in the statement of prosecutrix and other prosecution witnesses such is not a situation in the instant case. Supreme Court has also considered the statement of prosecutrix contrary to the medical evidence, therefore given benefit of doubt to the appellant Lalliram.

20. Consequently for the reasons stated herein-above both the appeals are allowed in part. Conviction of the appellants is maintained under Section 376 of the IPC but there sentence of R.I. for 10 years is reduced to the sentence of R.I. for 7 years. Appellants are on bail. They are directed to surrender themselves before the Trial Court on 30th November,2009 and Trial Court is directed to send them to jail for serving out the reminder part of jail sentence.

21. The original judgment be placed in the record of Cr.A.804/1995 and a copy thereof be placed in the record of Cr.A.No.832/1995.

Appeal partly allowed.

PRASHANT PATHAK Vs. STATE OF M.P.

I.L.R. [2009] M. P., 3234
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.S. Garg & Mr. Justice S.A. Naqvi
7 August, 2009*

PRASHANT PATHAK & anr. ... Applicants
Vs.
STATE OF M.P. ... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 158 & 173(3) - *Permission/Order of Magistrate for further investigation not necessary* - *Section 173(3) makes it clear that officer especially appointed u/s 158, pending orders of the Magistrate, may direct the officer in charge of Police Station to make further investigation - Officer in charge is only required to give an information to the concerned Magistrate - However, his authority to issue instructions to officer in charge of Police Station to make further investigation cannot be short circuited.* (Para 9)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 158 व 173(3) – आगे और अन्वेषण करने के लिए मजिस्ट्रेट की अनुज्ञा/आदेश आवश्यक नही – धारा 173(3) यह स्पष्ट करती है कि धारा 158 के अन्तर्गत विशेषतः नियुक्त अधिकारी मजिस्ट्रेट के आदेशों के लम्बित रहते हुए पुलिस थाने के भारसाधक अधिकारी को आगे और अन्वेषण करने का निदेश दे सकेगा – भारसाधक अधिकारी को केवल सम्बन्धित मजिस्ट्रेट को सूचना देना अपेक्षित है – तथापि, आगे और अन्वेषण करने के लिए पुलिस थाने के भारसाधक अधिकारी को अनुदेश जारी करने का उसका प्राधिकार कम नही हो सकता।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 173(8) - *Permission/Order of Magistrate for further investigation not necessary* - *S.173(8) of Cr.P.C. opens with non-obstante clause - S. 173(8) nowhere provides that for further investigation permission/sanction from concerned Magistrate to whom report has already been filed, is required.* (Paras 10 & 11)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 173(8) – आगे और अन्वेषण करने के लिए मजिस्ट्रेट की अनुज्ञा/आदेश आवश्यक नही – द.प्र.सं. की धारा 173(8) सर्वोपरि खण्ड से प्रारम्भ होती है – धारा 173(8) कहीं भी उपबंधित नही करती कि अतिरिक्त अन्वेषण के लिए सम्बन्धित मजिस्ट्रेट से, जिसे रिर्पोट पूर्व में ही पेश की जा चुकी है, अनुज्ञा/मंजूरी लेना अपेक्षित है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 173(8) - *Where officer in charge of police station himself can proceed further investigation - Procedure after further investigation* - *When officer in charge of police station obtains further evidence oral or documentary, he shall forward to the Magistrate a further report/reports regarding such evidence - After further investigation, officer in charge of police station would be entitled*

*M.Cr.C. No.1430/2009 (Jabalpur)

to file supplementary challan - Such supplementary challan is required to be filed in accordance with S. 173(2) of Cr.P.C. - Once the supplementary challan is treated to be a regular challan then provisions of Sub-section (2) to (6) shall apply mutatis mutandis. (Para 13)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 173(8) – जहाँ पुलिस थाने का भारसाधक अधिकारी स्वयं आगे और अन्वेषण करने के लिए अग्रसर हो सकता हो – आगे और अन्वेषण के बाद की प्रक्रिया – जब पुलिस थाने का भारसाधक अधिकारी अतिरिक्त मौखिक या दस्तावेजी साक्ष्य अभिप्राप्त करता है, तो वह ऐसी साक्ष्य के सम्बन्ध में मजिस्ट्रेट को अतिरिक्त रिपोर्ट/रिपोर्टें अग्रेषित करेगा – आगे और अन्वेषण के बाद, पुलिस थाने का भारसाधक अधिकारी अनुपूरक चालान पेश करने का हकदार होगा – ऐसा अनुपूरक चालान द.प्र.सं. की धारा 173(2) के अनुसार पेश किया जाना अपेक्षित है – जब एक बार अनुपूरक चालान को नियमित चालान मान लिया जाता है तब उपधारा (2) से (6) के उपबंध यथावश्यक परिवर्तन सहित लागू होंगे।

D. Criminal Procedure Code, 1973 (2 of 1974), Sections 173(3), (8) & 158 - *Where a superior officer of police appointed u/s 158 direct the officer in charge of the police station to make further investigation - Procedure after further investigation - S. 173(3) is governed and controlled by S. 158 shall continue to be applicable if the original report was required to be filed by an officer especially appointed by the State Government - Then the supplementary challan / additional report will also have to be filed by such authorised officer and none other.* (Para 13)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 173(3), (8) व 158 – जहाँ धारा 158 के अन्तर्गत नियुक्त पुलिस का वरिष्ठ अधिकारी पुलिस थाने के भारसाधक अधिकारी को आगे और अन्वेषण करने के लिए निदेश देता है – आगे और अन्वेषण के बाद की प्रक्रिया – धारा 158 से शासित और नियंत्रित धारा 173(3) लागू होना जारी रहेगी यदि मूल रिपोर्ट राज्य सरकार द्वारा विशेषतः नियुक्त अधिकारी द्वारा पेश किया जाना अपेक्षित था – तब अनुपूरक चालान/अतिरिक्त रिपोर्ट भी ऐसे प्राधिकृत अधिकारी द्वारा न कि अन्य के द्वारा पेश करनी होगी।

E. Criminal Procedure Code, 1973 (2 of 1974), Sections 158 & 173(3) - *Further investigation - Superintendent of Police, Special Police Establishment informed Special Judge that further investigation has been started in pending trial - Challenged the legality, enforceability and effect - Held - Superior officer may give such instructions to the officer in charge of the police station as he thinks fit, and shall after recording such instructions on such report, transmit the same without delay to the Magistrate - In such a case, the special officer is required to submit his personal report along with the report of the officer in charge of the police station.* (Para 14)

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 158 व 173(3) – आगे और अन्वेषण करे – पुलिस अधीक्षक, विशेष पुलिस स्थापना ने विशेष न्यायाधीश को सूचित किया कि लम्बित विचारण में आगे और अन्वेषण प्रारम्भ कर दिया गया है – वैधता, प्रवर्तनशीलता और प्रभाव को चुनौती – अभिनिर्धारित – वरिष्ठ अधिकारी पुलिस थाने के भारसाधक अधिकारी को ऐसे अनुदेश

दे सकेगा जैसा वह उचित समझता है, और ऐसी रिपोर्ट पर ऐसे अनुदेश अभिलिखित करने के बाद उसे बिना किसी विलम्ब के मजिस्ट्रेट को प्रेषित करेगा – ऐसे मामले में, विशेष अधिकारी को पुलिस थाने के भारसाधक अधिकारी की रिपोर्ट के साथ अपनी व्यक्तिगत रिपोर्ट पेश करना अपेक्षित है।

Arvind Chouksey, for the applicants.
J.K. Jain, Dy.A.G., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by **R.S. GARG, J.** :–By the present petition under Section 482 of the Code of Criminal Procedure, the applicants propose to challenge the legality, enforceability and effect of the letter of information dated 26.12.2001 written by the Superintendent of Police, Special Police (Establishment), Sagar to the learned Special Judge, Sagar under which the Special Court, Sagar was informed that in Crime No. 129/95 (Special Case No. 5/99) pending consideration against Shri G.P. Pathak further investigation was started on 10.12.2001.

2. Learned counsel for the applicants submitted that provisions of Section 173 are required to be appreciated in the present matter alongwith the legal authority conferred upon a special officer under Section 158 of the Code of Criminal Procedure.

3. Section 173 and Section 158 of the Code of Criminal Procedure read as under:-

> **"173. Report of police officer on completion of investigation.--**
>
> (1) Every investigation under this Chapter shall be completed without unnecessary delay.
>
> (2)(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating--
>
> (a) the names of the parties;
>
> (b) the nature of the information;
>
> (c) the names of the persons who appear to be acquainted with the circumstances of the case;
>
> (d) whether any offence appears to have been committed and, if so, by whom;
>
> (e) whether the accused has been arrested;
>
> (f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under Section 158, the report, shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report--

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to

the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

158. Report how submitted.--

(1) Every report sent to a Magistrate under section 157 shall, if the State Government so directs, be submitted through such superior officer of police as the State Government, by general or special order, appoints in that behalf.

(2) Such superior officer may give such instructions to the officer in charge of the police station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate."

4. Sub-section (2) of Section 173 provides that as soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating certain particulars as provided in Section 173(2)(i). Sub-section (2) of Section 173 also casts a duty upon the said officer to communicate in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given. Section 173(2) in fact authorises the officer in charge of the police station to submit the police report which is commonly known as challan or charge-sheet. Section 173(3) provides that where a superior officer of police has been appointed under Section 158, the report, shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

5. At this stage, it would be necessary to see that what authority can be conferred by Section 158 upon a superior officer of police. Section 158 clearly provides that every report (challan – charge-sheet) sent to a Magistrate under section 157 shall, if the State Government so directs, be submitted through such superior officer of police as the State Government, by general or special order, appoints in this behalf. A Juxtapose reading of Section 158(1) and Section 173(2) would clearly spell out that ordinarily a report/challan is to be filed by the officer in charge of the police station but in a given case, the State Government may direct that such report shall be submitted through such superior officer of police. Sub-section 2 of Section 158 provides that such superior officer as appointed under Section 158 (1) may give such instructions to the officer in charge of the police station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

6. A fair understanding of sub-section 2 of Section 158 shall make it clear that any superior officer appointed under Section 158(1) of the Code of Criminal Procedure would be entitled to issue instructions to the officer in charge of the police station and shall transmit the matter without delay to the Magistrate. The key words "officer in charge of the police station" are to be found in Section 158(2) so also under Section 173(2). Section 173(2) authorises the officer in charge to file the report while Section 158(1) authorises the special officer to file the report and Section 158(2) authorises such officer to issue further instructions to the officer in charge of the police station.

7. Under Section 173(2) the officer in charge of a police station has absolute powers to file a challan/report while under Section 158(1) the officer in charge of the police station cannot file the charge-sheet because the authority is conferred upon the special officer. The said officer in charge of the police station will have to work under the supervision, guidance and instructions of the officer as appointed under Section 158(1) of the Code. A fair understanding of Section 173(2) and Section 158 would make it clear that they cover different fields.

8. It was then contended that sub-section 3 of Section 173 requires a permission/ orders of the Magistrate to proceed further with the investigation and as in the present matter further orders from the Magistrate were not obtained, the prosecution could not proceed with the further investigation.

9. A perusal of sub-section 3 of Section 173 would make it clear that the officer especially appointed under Section 158 pending orders of the Magistrate direct the officer in charge of the police station to make further investigation. In such a matter the officer in charge is required only to give an information to the concerned Magistrate but however, his authority to issue instructions to the officer in charge of the police station to make further investigation cannot be short circuited.

10. It was then submitted that sub-Section 8 of Section 173 mandates the permission of a Magistrate before further investigation either under the directions of the special officer or by the officer in charge of the police station and as no permission/sanction was obtained by the prosecution/police agency, further investigation was bad and on basis of the same, the accused persons could not be sent for trial.

11. Sub-section 8 of Section 173 opens with a non-obstante clause. It clearly provides that nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate. Sub-section 8 of Section 173 nowhere provides that for further investigation permission/sanction from the concerned Magistrate to whom a report has already been filed, is required.

12. It was, however, submitted that if provisions of sub-sections (2) to (6) of

Section 173 shall apply to further investigation then again the permission/sanction from the Court would be necessary.

13. In our opinion the argument is absolutely misconceived. Sub-section 8 of Section 173 clearly provides that the police agency can proceed further investigation and in such a case, the officer in charge of the police station if obtains further evidence oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed and the provisions of sub-sections (2) to (6) shall apply in relation to such report as they apply in relation to a report forwarded under sub-section 2. A perusal of the provisions of law would make it clear that after further investigation the officer in charge of the police station would be entitled to file a supplementary/additional report, commonly known as supplementary challan. Such supplementary challan is required to be filed in accordance with sub-section 2 of Section 173. Once the supplementary challan is treated to be a regular challan then provisions of sub-sections (2) to (6) shall apply mutatis mutandis. It is also to be seen that sub-section 3 of Section 173 which is governed and controlled by Section 158 shall continue to be applicable if the original report was required to be filed by an officer especially appointed by the State Government. If the report is required to be filed by an officer so authorised under Section 158 then the supplementary challan/additional report will also have to be filed by such authorised officer and none other. Sub-section 2 of Section 173 authorises the officer in charge of the police station to forward the report while Section 173(3) and Section 158 authorise the special officer. If Section 173(8) is read in its true spirit, it would only mean that nothing in Section 173 shall be deemed to preclude further investigation in respect of an offence after a report under sub-section 2 has been forwarded to the Magistrate.

14. At this stage, it would again be necessary to refer to Section 158 which provides that the superior officer may give such instructions to the officer in charge of the police station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate. In such a case, the special officer is required to submit his personal report alongwith the report of the officer in charge of the police station.

15. In our opinion, in the present matter, the police authorities did not commit any wrong in proceeding further with the investigation and they were absolutely justified in committing the accused persons to face the trial.

16. The petition deserves to and is accordingly dismissed.

Petition dismissed.
