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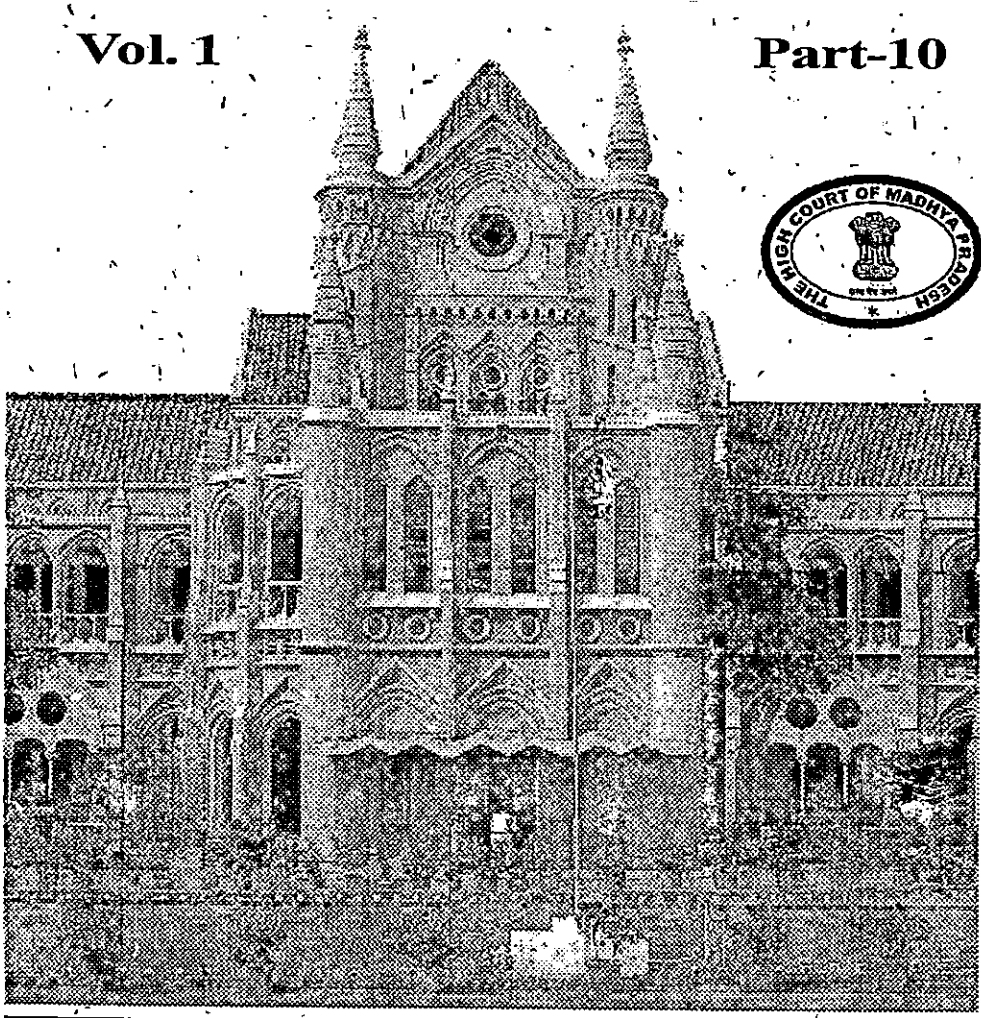

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(Note An asterisk (*) denotes Note number)

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INDEX

(Note An asterisk (*) denotes Note number)

INDEX

(Note An asterisk (*) denotes Note number)

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Short Note
(38)

A.K. Patnaik, CJ & Ajit Singh, J

ANURAG MODI

Vs.

STATE OF M.P. & ors.

A. Constitution, Article 226 - *Investigation by CBI - High Court has power to direct investigation by CBI - However, this power should be exercised only in cases where there is sufficient material to a prima facie conclusion that there is need for such investigation.*

क. संविधान, अनुच्छेद 226 – सी.बी.आई. द्वारा अन्वेषण – उच्च न्यायालय को सी.बी.आई. द्वारा अन्वेषण करने का निदेश देने की शक्ति है – तथापि, यह शक्ति केवल उन मामलों में प्रयुक्त की जानी चाहिए जहाँ प्रथम दृष्ट्या इस निष्कर्ष के लिए पर्याप्त सामग्री हो कि ऐसे अन्वेषण की आवश्यकता है।

B. Constitution, Article 226 - ***Investigation by CBI*** - *Video footage prima facie established that demolition of settlements of Pardhis and death of two persons had support of local administration and elected representatives of that area - Police merely recorded FIR against unknown persons - Two years were passed but not a single person was made an accused - Sufficient material to believe that police was under tremendous political pressure and did not investigate the case properly from very beginning - Director, CBI directed to take over investigation.*

ख. संविधान, अनुच्छेद 226 – सी.बी.आई. द्वारा अन्वेषण – वीडियो फुटेज से प्रथम दृष्ट्या साबित होता है कि पारधियों के आवासों के विनष्टीकरण और दो व्यक्तियों की मृत्यु को स्थानीय प्रशासन और उस क्षेत्र के निर्वाचित प्रतिनिधियों का समर्थन प्राप्त था – पुलिस ने केवल अज्ञात व्यक्तियों के विरुद्ध एफ.आई.आर. दर्ज की – दो वर्ष व्यतीत हो गये किन्तु एक भी व्यक्ति को अभियुक्त नही बनाया गया – यह विश्वास करने के लिए पर्याप्त सामग्री है कि पुलिस अत्यधिक राजनैतिक दवाब में थी और प्रारम्भ से ही मामले का उचित अन्वेषण नही किया – सी.बी.आई. के निदेशक को अन्वेषण का भार ग्रहण करने का निदेश दिया गया।

Cases referred :

AIR 2002 SC 2225, (2008) 2 SCC 409.

Anurag Modi, petitioner in person.

V.K. Shukla, Dy.A.G., for the respondent/State.

Jaideep Sirpurkar, for the intervenor M.P. Human Rights Commission.

Raghvendra Kumar, for the intervenor Aalsia Pardhi.

***W.P. No.15189/2007 (Jabalpur), D/- 7 August, 2009.**

Short Note
(39)

R.S. Jha, J

BADRI NATH
Vs.
STATE OF M.P. & ors.

A. Revenue Book Circular, Part VI, Para 4, Clause (7) - *Natural calamity - Petitioner's son died of drowning - Claimed compensation under the Revenue Book Circular - Held - Financial assistance under the RBC is available only in the case of loss, damage or death on account of the natural calamity like heavy rains, hail, cold wave, loss caused by insect, flood, storm, earth quake and fire - Petitioner's son not died as a result of natural calamity - Application rightly rejected.*

क. राजस्व पुस्तक परिपत्र, भाग VI, पैरा 4, खण्ड (7) – प्राकृतिक विपत्ति – याची के पुत्र की मृत्यु डूबने से हुई – राजस्व पुस्तक परिपत्र के अन्तर्गत प्रतिकर का दावा किया – अभिनिर्धारित – राजस्व पुस्तक परिपत्र के अन्तर्गत वित्तीय सहायता केवल भारी वर्षा, ओलावृष्टि, शीत लहर, कीट से कारित हानि, बाढ़, तूफान, भूकम्प और अग्नि के सदृश प्राकृतिक विपत्ति के कारण हानि, क्षति या मृत्यु की दशा में उपलब्ध है – याची के पुत्र की मृत्यु प्राकृतिक विपत्ति के परिणामस्वरूप नही – आवेदन उचित रूप से नामंजूर।

B. National Family Scheme - *Deceased was neither included in the list of Below Poverty Line nor was he the head or the bread earner of the family - Disentitled for compensation under the National Family Scheme.*

ख. राष्ट्रीय परिवार योजना – मृतक को न तो गरीबी रेखा से नीचे की सूची में सम्मिलित किया गया और न ही वह परिवार का मुखिया या रोजी–रोटी कमाने वाला था – राष्ट्रीय परिवार योजना के अन्तर्गत प्रतिकर के लिए निर्हकित।

R.L. Ariha, for the petitioner.

Samdarshi Tiwari, G.A., for the respondents.

***W.P. No.5149/2005 (Jabalpur), D/- 6 August, 2009.**

Short Note
(40)

S.K. Gangele, J

BANWARILAL & ors.
Vs.
RAJENDRA SINGH & ors.

Motor Vehicles Act (59 of 1988), Section 163-A - ***Deduction of personal expenses of a bachelor deceased - Computation*** - *Claim application u/s 163-A - Victim is a bachelor - Held - In the note appended to the Second Schedule, for compensation for third party fatal accident cases, there is no mention of fact that what would have been happened if the victim is a bachelor*

- *Claim shall be reduced by 1/3rd towards personal expenses.* 2008 ACJ 814, 2001(2) TAC 312 (SC) (ref.).

मोटर यान अधिनियम (1988 का 59), धारा 163–ए – अविवाहित मृतक के व्यक्तिगत खर्चों की कटौती – संगणना – धारा 163–ए के अन्तर्गत दावा आवेदन – पीड़ित अविवाहित – अभिनिर्धारित – द्वितीय अनुसूची से संलग्न टिप्पणी में तृतीय पक्ष घातक दुर्घटना मामलों मे प्रतिकर के लिए इस तथ्य का कोई उल्लेख नही है कि यदि पीड़ित अविवाहित है तो क्या होगा – दावा व्यक्तिगत खर्चों के लिए 1/3 कम किया जायेगा। 2008 ACJ 814, 2001(2) TAC 312 (SC) (संदर्भित)

B.D. Verma, for the appellants.
B.K. Agarwal, for the respondent No.3/Insurance Company.

***M.A. No.140/2009 (Gwalior), D/- 11 August, 2009.**

Short Note
(41)

R.S. Garg & I.S. Shrivastava, JJ

GAJENDRA SINGH & ors.
Vs.
STATE OF M.P.

A. Penal Code (45 of 1860), Section 34 - *Common intention - Four appellants came on a jeep - All of them alighted from the jeep and appellant No.2 to 4 exhorted appellant No.1 to kill deceased - Appellant No.1 fired from his rifle - Held - Exhortation given by appellant No.2 to 4 confirms predetermination - It was a planned case of appellants with common intention to kill the deceased.* AIR 1999 SC 3717, AIR 1974 SC 45, AIR 1999 SC 883 (ref.)

क. दण्ड संहिता (1860 का 45), धारा 34 – सामान्य आशय – चार अपीलार्थी एक जीप में आये – सभी जीप से नीचे उतरे और अपीलार्थी क्र. 2 लगायत 4 ने अपीलार्थी क्र. 1 को मृतक को मारने के लिये प्रेरित किया – अपीलार्थी क्र. 1 ने अपनी रायफल से गोली चलायी – अभिनिर्धारित – अपीलार्थी क्र. 2 लगायत 4 द्वारा दी गई प्रेरणा पूर्वचिंतन की पुष्टि करती है – यह अपीलार्थियों का सामान्य आशय के साथ मृतक को मारने का सुनियोजित मामला था। AIR 1999 SC 3717, AIR 1974 SC 45, AIR 1999 SC 883 (संदर्भित)

B. Criminal Procedure Code, 1973 (2 of 1974), Section 161 - *Delay in recording of statement of witnesses - Explanation given by I.O. satisfactory - Objection not tenable.* AIR 2004 SC 2329 (ref.)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – साक्षियों के कथन अभिलिखित करने में विलम्ब – अनुसंधानकर्ता अधिकारी द्वारा दिया गया स्पष्टीकरण समाधानप्रद – आपत्ति मान्य नही। AIR 2004 SC 2329 (संदर्भित)

Manish Mishra, for the appellant No.1.
L.N. Sakle, for the appellant Nos.2 & 3.

S.C. Datt with *Siddharth Datt*, for the appellant No.4.
None, for the respondent.

***Cr.A. No.297/2005 (Jabalpur), D/- 8 October, 2009.**

Short Note
(42)

Rakesh Saksena & S.A. Naqvi, JJ

HARIRAM
Vs.
STATE OF M.P.

Penal Code (45 of 1860), Sections 302 & 304 Part II - ***Murder or culpable homicide not amounting to murder*** - *Appellant took lift in a truck - Appellant stretched his legs outside the window of running truck - Action of appellant objected by deceased who was second driver - Truck was parked near a Dhaba where all the persons alighted from truck - Appellant inflicted a blow by means of bamboo stick - Held - Appellant was not known to deceased from before - Incident of assault occurred at spur of moment in sudden quarrel - No evidence that assault was premeditated - Since appellant inflicted blow on the head of deceased, therefore, it could be inferred that he knew that he was likely to cause his death - Appellant acquitted for charge u/s 302 and convicted u/s 304 Part II - Appeal partly allowed.*

दण्ड संहिता (1860 का 45), धाराएँ 302 व 304 भाग II – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – अपीलार्थी ने ट्रक में लिफ्ट ली – अपीलार्थी ने अपने पैर चलते हुए ट्रक की खिड़की से बाहर की ओर फैलाये – अपीलार्थी के कार्य पर मृतक द्वारा, जो द्वितीय ड्रायवर था, आपत्ति की गई – ट्रक एक ढाबे के निकट खड़ा किया गया जहाँ सभी व्यक्ति ट्रक से नीचे उतरे – अपीलार्थी ने बांस की छड़ी द्वारा एक प्रहार किया – अभिनिर्धारित – अपीलार्थी मृतक को पहले से नही जानता था – हमले की घटना अचानक झगड़े में क्षणिक प्रेरणा में घटित हुई – कोई साक्ष्य नही कि हमला पूर्वचिन्तित था – चूंकि अपीलार्थी ने मृतक के सिर पर प्रहार किया, इसलिये यह निष्कर्ष निकाला जा सकता था कि वह जानता था कि उसके कार्य से मृत्यु कारित होना संभाव्य था – अपीलार्थी को धारा 302 के आरोप से दोषमुक्त किया गया और धारा 304 भाग II के अन्तर्गत दोषसिद्ध किया गया – अपील अंशतः मंजूर।

R.P. Mishra, for the appellant.

J.K. Jain, Dy.A.G., for the respondent/State.

***Cr.A. No.2131/2000 (Jabalpur), D/- 21 July, 2009.**

Short Note
(43)

N.K. Mody, J

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

Penal Code (45 of 1860), Section 498-A, Criminal Procedure Code, 1973, Section 177 - *Cruelty - Territorial jurisdiction - Complaint for offence u/s 498-A I.P.C. made before JMFC, Neemuch - No allegation that any demand of dowry was made at Neemuch - Complainant specifically mentioned that demand was made at Indore - Nothing to show that any part of offence was committed at Neemuch - Court directed to return complaint with liberty to file it before competent Court - Petition allowed.* (2004) 8 SCC 1000, 2007(1) MPHT 14 (SC) = 2007(1) JLJ 198 (ref.)

दण्ड संहिता (1860 का 45), धारा 498–ए, दण्ड प्रक्रिया संहिता, 1973, धारा 177 – क्रूरता – क्षेत्रीय अधिकारिता – भा.द.सं. की धारा 498–ए के अपराध के लिए परिवाद न्यायिक मजिस्ट्रेट प्रथम श्रेणी, नीमच के समक्ष किया गया – कोई अभिकथन नही कि दहेज की कोई माँग नीमच में की गई – परिवादी ने विनिर्दिष्ट रूप से उल्लिखित किया कि माँग इन्दौर में की गई – यह दर्शाने के लिए कुछ नही कि अपराध का कोई भाग नीमच में किया गया – न्यायालय को निदेश दिया गया कि परिवाद उसे सक्षम न्यायालय के समक्ष पेश करने की स्वतंत्रता के साथ वापस करे – याचिका मंजूर। (2004) 8 SCC 1000, 2007(1) JLJ 198 (संदर्भित)

M. Raveendran, for the applicants.
C.R. Karnik, Dy.G.A., for the non-applicant.

***M.Cr.C. No.1437/2009 (Indore), D/- 20 March, 2009.**

Short Note
(44)

K.K. Lahoti & K.S. Chauhan, JJ

RAMAN KUMAR
Vs.
SMT. BHAWNA

A. Hindu Marriage Act (25 of 1955), Section 13(1)(ia) - *Cruelty - What amounts to - Held - Wife refused from the very beginning to have sexual intercourse by the husband with her - This amounts to mental cruelty - Ground of cruelty proved - Entitled for decree of divorce.* AIR 1975 SC 1534, AIR 1988 SC 121, AIR 1973 Delhi 200 at 209, AIR 1981 Delhi 53, AIR 1982 Delhi 240, AIR 1994 SC 710, AIR 2009 P&H 33 (ref.)

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(ia) – क्रूरता – क्या शामिल है – अभिनिर्धारित – पत्नी ने प्रारम्भ से ही उसके साथ पति द्वारा मैथुन से इंकार कर दिया – यह मानसिक क्रूरता की कोटि में आता है – क्रूरता का आधार साबित – विवाह विच्छेद की डिक्री

का हकदार। AIR 1975 SC 1534, AIR 1988 SC 121, AIR 1973 Delhi 200 at 209, AIR 1981 Delhi 53, AIR 1982 Delhi 240, AIR 1994 SC 710, AIR 2009 P&H 33 (संदर्भित)

B. **Hindu Marriage Act (25 of 1955), Section 13(1)(ib) -** *Desertion - Desertion has not been defined in any statute - However, the essential ingredients of desertion are (i) the factum of separation, and (ii) the intention to bring cohabitation permanently to an end (animus deserendi).*

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(ib) – अभित्यजन – अभित्यजन को किसी कानून में परिभाषित नही किया गया है – तथापि, अभित्यजन के आवश्यक तत्व हैं (i) पृथक्करण का तथ्य, और (ii) स्थायी रूप से सहवास का अंत करने का आशय (अभित्यजन का आशय)।

C. **Hindu Marriage Act (25 of 1955), Section 13(1)(ib) -** ***Desertion - What amounts to -*** *After marriage wife remained with husband only for 23 days - Then she went to her parental house and never returned - She lodged the report u s 498-A IPC and also filed an application u/s 125 Cr.P.C - Held - Wife deserted husband without any cause for a continuous period of more than 2 years - Circumstances indicate that marriage between the parties has been irretrievably broken down completely and practically there is no chance of revival, making them possible to live together in future - Ground of desertion proved - Entitled for decree of divorce.* AIR 1975 SC 176, AIR 1972 SC 459, 1978 RLR 97 (ref.)

ग. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(ib) – अभित्यजन – क्या शामिल है – विवाह के बाद पत्नी केवल 23 दिन तक पति के साथ रही – तब वह अपने पैतृक गृह चली गई और कभी नही लौटी – उसने भा.द.सं. की धारा 498-ए के अन्तर्गत रिपोर्ट दर्ज करायी और द.प्र.सं. की धारा 125 के अन्तर्गत आवेदन भी पेश किया – अभिनिर्धारित – पत्नी ने बिना किसी कारण के 2 वर्ष से अधिक की निरंतर कालावधि तक पति का अभित्यजन किया – परिस्थितियाँ उपदर्शित करती हैं कि पक्षकारों के मध्य विवाह असुधार्य रूप से पूर्णतः खण्डित हो गया है और व्यवहारिक रूप से भविष्य में उनका एक साथ रहना संभव करते हुए पुनःप्रवर्तन की कोई संभावना नही है – अभित्यजन का आधार साबित – विवाह विच्छेद की डिक्री का हकदार। AIR 1975 SC 176, AIR 1972 SC 459, 1978 RLR 97 (संदर्भित)

Sanjay Dwivedi, for the appellant.

None, for the respondent.

***F.A. No.636/2003 (Jabalpur), D/- 6 July, 2009.**

Short Note
(45)

N.K. Mody, J

RATILAL & ors.

Vs.

STATE OF M.P. & anr.

Criminal Procedure Code, 1973 (2 of 1974), Section 437(6) - *Grant of bail - Section 437(6) is mandatory in nature - One of the prosecution witnesses could not be cross-examined as counsel for applicants was not engaged on that date - Trial could not be completed within 60 days - Valuable right was accrued to applicants for grant of bail - Bail cannot be denied - Application allowed.* 2005(II) MPWN 138 (ref.)

"Undisputedly the trial commenced w.e.f. 8/12/2008 from perusal of record it appears that on 8/12/2008 no advocate was engaged by the petitioners, however inspite of that case was not adjourned but statement of Umesh was recorded and case was adjourned for recording of evidence of other witnesses. The statement of some other witnesses were recorded on the next date of hearing and thereafter the counsel for petitioner moved an application on 30/1/2009 for recalling of the witness Umesh who is non else but a Govt. employee of the Excise Department. In the facts and circumstances of the case even if it is assumed that there was a mistake on the part of petitioners in not cross-examining the witness Umesh on 8/12/2008, then too trial could not complete within a period of 60 days and valuable right was accrued to the petitioner for grant of bail under section 437(6) Cr.P.C."

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 437(6) – जमानत का अनुदान – धारा 437(6) की प्रकृति आज्ञापक है – एक अभियोजन साक्षी की प्रतिपरीक्षा नही की जा सकी क्योंकि उस तारीख को आवेदकों के अधिवक्ता नियुक्त नही थे – विचारण 60 दिनों के भीतर पूर्ण नही हो सका – आवेदकों को जमानत के अनुदान का मूल्यवान अधिकार प्रोद्भूत हुआ – जमानत से इनकार नही किया जा सकता – आवेदन मंजूर। 2005(II) MPWN 138 (संदर्भित)

Subodh Abhyankar, for the applicants.

C.R. Karnik, Dy.G.A., for the non-applicant.

***M.Cr.C. No:2823/2009 (Indore), D/- 20 April, 2009.**

Short Note

(46)

N.K. Mody, J

TCL INDIA HOLDINGS PVT. LTD. & anr.

Vs.

MURTAZA

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code, 1860, Section 420 - *Cheating - Applicants given C & F agency to non-applicant and on his default, agency was terminated - Magistrate took cognizance u/s 420 IPC on complaint against applicants - Held - As per the terms & conditions of agreement, the applicants were entitled to cancel the agreement in case of default on the part of non-applicant - In these circumstances, it cannot be said that any offence has been committed by the applicants - Court below committed error in taking cognizance of offence against the applicants u/s 420 IPC.* AIR 1996 SC 204, 2005(1) MPLJ 190, MPWN Vol.I Note 167, AIR 2006 SC 2872, 2005(1) MPLJ SC 260 (ref.)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड संहिता, 1860, धारा 420 – छल – आवेदकों ने अनावेदक को सी एण्ड एफ एजेंसी दी और उसके व्यतिक्रम पर एजेंसी समाप्त कर दी गई – मजिस्ट्रेट ने आवेदकों के विरुद्ध भा.द.सं. की धारा 420 के अन्तर्गत संज्ञान लिया – अभिनिर्धारित – आवेदक अनुबन्ध की शर्तों और निबंधनों के अनुसार अनावेदक की ओर से किसी व्यतिक्रम की दशा में अनुबन्ध रद्द करने के हकदार थे – इन परिस्थितियों में यह नही कहा जा सकता कि आवेदकों द्वारा कोई अपराध किया गया – अधीनस्थ न्यायालय ने आवेदकों के विरुद्ध भा.द.सं. की धारा 420 के अन्तर्गत अपराध का संज्ञान लेने में त्रुटि की। AIR 1996 SC 204, 2005(1) MPLJ 190, MPWN Vol.I Note 167, AIR 2006 SC 2872, 2005(1) MPLJ SC 260 (संदर्भित).

Mr. Jai Singh with *Pankaj Gaur,* for the applicants.

Vishal Baheti, for the non-applicant.

***M.Cr.C. No.6848/2007 (Indore), D/- 20 March, 2009.**

I.L.R. [2009] M. P., 2735

SUPREME COURT OF INDIA

Before Mr. Justice Dalveer Bhandari & Mr. Justice Dr. Mukundakam Sharma

20 August, 2009*

SHIPRA SENGUPTA ... Appellant

Vs.

MRIDUL SENGUPTA & ors. ... Respondents

Succession Act (39 of 1925), Section 372 - *Grant of succession certificate to the nominee - Effect - Deceased before marriage nominated his mother for provident fund governed by the Imperial Bank of India Employees Provident Fund Rules - Held - Amount in any head can be received by the nominee, but the amount can be claimed by the heirs of the deceased in accordance with law of succession governing them - Nomination does not confer any beneficial interest in the nominee - Wife of deceased entitled for half of the amount of GPF.* (Para 19)

उत्तराधिकार अधिनियम (1925 का 39), धारा 372 – नामनिर्देशिती को उत्तराधिकार प्रमाण पत्र का अनुदान – प्रभाव – अभिनिर्धारित – मृतक ने इंपीरियल बैंक ऑफ इंडिया इम्प्लॉईज प्रोविडेंट फंड रूल्स से शासित भविष्य निधि के लिए विवाह के पूर्व अपनी माता को नामनिर्दिशित किया – अभिनिर्धारित – किसी शीर्ष में कोई धनराशि नामनिर्देशिती द्वारा प्राप्त की जा सकती है, किन्तु मृतक के वारिसों द्वारा उन्हें शासित करने वाली उत्तराधिकार विधि के अनुसार धनराशि का दावा किया जा सकता है – नामनिर्देशन नामनिर्देशिती को कोई फायदाप्रद हित प्रदत्त नही करता – मृतक की पत्नी जी.पी.एफ. की आधी धनराशि की हकदार।

Cases referred :

(1984) 1 SCC 424, 1988 Lab. I.C. 500, (2000) 6 SCC 724, (1998) VII AD (Delhi) 639.

J U D G M E N T

The Judgment of the Court was delivered by DALVEER BHANDARI, J. :– This appeal is directed against the judgment dated 12.9.2000 passed by the High Court of Madhya Pradesh at Jabalpur in Miscellaneous Civil Case No. 1209 of 1998.

2. The appellant is the wife of Late Shri Shyamal Sengupta who was a Head Clerk in the State Bank of India, Bhopal, Madhya Pradesh. He was initially an employee of the Imperial Bank of India and after constitution of the State Bank of India under the State Bank of India Act, 1955, the business of the Imperial Bank of India was taken over by the State Bank of India as per the provisions of the State Bank of India Act, 1955. Shyamal Sengupta died issueless on 8.11.1990 at Bhopal. He left behind him his widow Smt. Shipra Sengupta, his mother Niharbala Sengupta, his brothers Pushpal Sengupta and Mirdul Sengupta.

*C.A. No.809/2002

3. It may be pertinent to mention that Shyamal Sengupta was unmarried at the time when he joined the service of the bank and he nominated his mother as his nominee.

4. The appellant herein Smt. Shipra Sengupta filed an application under section 372 of the Indian Succession Act, 1956, in which she claimed that she was entitled to her share of insurance, gratuity, public provident fund etc. etc. According to the appellant, her claim was based on the principle that any nomination made by Shyamal Sengupta prior to his marriage would automatically stand cancelled after his marriage.

5. The appellant submitted that after the death of her husband both, she and mother of the deceased Niharbala Sengupta, were Class-I heirs under the schedule of the Hindu Succession Act, 1956 and consequently she was, therefore, equally entitled to succeed to the property along with her mother-in-law Niharbala Sengupta.

6. The Trial Court granted succession certificate to the appellant and the mother of the deceased in respect of total amount of life insurance, gratuity, public provident fund and general provident fund due to Shyamal Sengupta. The Trial Court held that both of them shall be entitled to half share in the aforesaid amounts due to Shyamal Sengupta from different heads. As to rest of the items mentioned in paragraph 6 of the application, the Trial Court held that the appellant alone was entitled to a succession certificate.

7. In an appeal jointly filed by the mother of the deceased Niharbala Sengupta and brother of the deceased Pushpal Sengupta, the Appellate Court rejected the contention of the applicants that on account of nomination made in favour of Niharbala Sengupta, in respect of the aforesaid items, the appellant Smt. Shipra Sengupta would not get any share in the amount credited or payable to Shyamal Sengupta. The learned District Judge held that the nomination did not confer any beneficial interest in the amount due towards life insurance, gratuity, public provident fund and general provident fund.

8. The learned District Judge relied on the decision of this Court in *Smt. Sarbati Devi & Another v. Smt. Usha Devi* (1984) 1 SCC 424 and on *Om Wati v. Delhi Transport Corporation, New Delhi & Others* 1988 Lab. I.C. 500 and modified the order of the Civil Judge in respect of other items holding that the mother of the deceased Niharbala Sengupta being the Class-I heir under the Hindu Succession Act, 1956 was equally entitled to the half share along with the appellant Smt. Shipra Sengupta. Accordingly, the learned District Judge modified the order passed by the Civil Judge and directed him to issue succession certificate in accordance with the modifications made by him in the order of the Civil Judge.

9. Niharbala Sengupta and Pushpal Sengupta, aggrieved by the order of the istrict Judge, filed a Civil Revision before the High Court. During the pendency of

the said civil revision, Niharbala Sengupta died and her other son Mirdul Sengupta was substituted in her place on the basis of an alleged Will executed by her prior to her death in favour of Mirdul Sengupta. The Will expressly dealt with the amount to which she was entitled to receive as a consequence of grant of a succession certificate.

10. Pushpal Sengupta did not challenge the Will by which he was affected. Therefore, the position that emerged was that the court must presume for the purpose of this revision that the Will is validly executed in favour of Mirdul Sengupta.

11. In the impugned judgment, the High Court relied on the judgment of *Sarbati Devi* (supra) and observed that the nomination did not confer any beneficial interest on the nominee. The High Court passed the following order:

> "(i) The amount of General Provident Fund deposited in the name of Shyamal Sengupta declaring that Mirdul Sengupta shall be entitled to entire sum due to Shyamal Sengupta together with interest to which he is entitled as per rules of deposit by the Bank till he is paid in full.
>
> (ii) So far as rest of the items mentioned in paragraph 6(a) of the application under section 372 are concerned it is declared that after the death of Niharbala Sengupta, Mirdul Sengupta is entitled to succession certificate along with Shipra Sengupta. Both of them shall be entitled to 1/2 share each as directed by the District Judge.
>
> (iii) The Civil Judge shall also direct non-applicant No. 2 or any other authority to pay the interest on the amount mentioned in paragraph 2 till that is paid to them at the usual rate of 9% from the date of death of Shyamal Sengupta or the usual rate available to the depositor/subscriber whichever is less."

12. The appellant, aggrieved by the impugned judgment of the High Court, preferred this appeal. The following questions have been raised by the appellant in this appeal:

> "I. Whether nomination of mother by a member of a Provident fund governed by the Imperial Bank of India Employees' Provident Fund Rules before his marriage confers ownership on the nominee and destroys right of succession of the widow under Succession Act?
>
> II. Whether nomination only indicates the hand which is authorized to receive the amount on the payment of which trustees of the provident fund get a valid discharge?
>
> III. Whether the provident fund can be claimed by the heirs of

the member of the provident fund in accordance with the law of succession governing them?

IV. Whether it was proper for the High Court to rely upon a forged and fabricated Will which was not even signed by Niharbala?

V. Whether it was proper for the High Court to accept the alleged Will on record in its revisional Jurisdiction, in absence of any application to that effect?

VI. Whether the High Court was entitled to take Will on record without giving fresh opportunity to lead evidence on it?

VII. Whether the High Court was right in interpreting and relying upon section 3(2) of Provident Fund Act, 1925?"

13. The appellant submitted that according to the settled legal position crystallized by the judgment of *Sarbati Devi* (supra), the principle of law is that the nomination is only the hand which accepts the amount and a nomination does not confer any beneficial interest in the nominee.

14. In *Sarbati Devi* (supra), this Court has laid down that a mere nomination does not have the effect of conferring to the nominee any beneficial interest in the amount payable under the life insurance policy, on death of the insurer. The nomination only indicates the hand which is authorized to receive the amount on payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession.

15. The appellant also placed reliance on the judgment of this Court in *Vishin N. Khanchandani & Another v. Vidya Lachmandas Khanchandani & Another* (2000) 6 SCC 724, wherein this Court held that the law laid down in *Sarbati Devi* (supra) holds the field and is equally applicable to the nominee becoming entitled to the payment of the amount on account of National Savings Certificates received by him under Section 6 read with Section 7 of the Act who in turn is liable to return the amount to those in whose favour the law creates a beneficial interest, subject to the provisions of sub-section (2) of Section 8 of the Act.

16. Learned counsel for the appellant also placed reliance on a Division Bench judgment of the Delhi High Court in *Ashok Chand Aggarwala v. Delhi Administration & Others* (1998) VII AD (Delhi) 639. This case related to the Delhi Co-operative Societies Act. The High Court while following *Sarbati Devi case* (supra) held that it is well settled that mere nomination made in favour of a particular person does not have the effect of conferring on the nominee any beneficial interest in property after the death of the person concerned. The nomination indicates the hand which is authorized to receive the amount or manage the property. The property or the amount, as the case may be, can be claimed by

the heirs of the deceased, in accordance with the law of succession, governing them.

17. The controversy involved in the instant case is no longer res integra. The nominee is entitled to receive the same, but the amount so received is to be distributed according to the law of succession.

18. In terms of the factual foundation laid in this case, the deceased died on 8.11.1990 leaving behind his mother and widow as his only heirs and legal representatives entitled to succeed. Therefore, on the day when the right of succession opened, the appellant, his widow became entitled to one half of the amount of the general provident fund, the other half going to the mother and on her death, the other surviving son getting the same.

19. In view of the clear legal position, it is made abundantly clear that the amount in any head can be received by the nominee, but the amount can be claimed by the heirs of the deceased in accordance with law of succession governing them. In other words, nomination does not confer any beneficial interest on the nominee. In the instant case amounts so received are to be distributed according to the Hindu Succession Act, 1956. The State Bank of India is directed to release half of the amount of general provident fund to the appellant now within two months from today along with interest.

20. The appeal filed by the appellant is accordingly allowed and disposed of, leaving the parties to bear their own costs.

Appeal allowed.

I.L.R. [2009] M. P., 2739
SUPREME COURT OF INDIA
Before Mr. Justice Altamas Kabir & Mr. Justice Cyriac Joseph
1 September, 2009*

ANIL KUMAR JAIN ... Appellant
Vs.
MAYA JAIN ... Respondent

A. Hindu Marriage Act (25 of 1955), Sections 13, 13-B - *The doctrine of irretrievable break down of marriage is not one of the grounds indicated whether u/ss 13 or 13-B of the Act - Doctrine can be applied to a proceeding under either of the two provisions only where the proceedings are before Supreme Court - In exercise of its extraordinary powers under Article 142 of the Constitution, the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in S. 13-B of the Act.* (Para 17)

*C.A. No.5592/2009

क. हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ 13, 13–बी – विवाह के असुधार्य भंग का सिद्धांत अधिनियम की धारा 13 या 13–बी के अन्तर्गत उपदर्शित आधारों में से एक नही है – सिद्धांत केवल वहाँ लागू हो सकता है जहाँ दोनों उपबन्धों में से किसी के अधीन कार्यवाहियाँ उच्चतम न्यायालय के समक्ष हो – उच्चतम न्यायालय संविधान के अनुच्छेद 142 के अन्तर्गत अपनी असाधारण शक्तियों के प्रयोग में अधिनियम की धारा 13–बी में बतायी गयी छः माह की वैधानिक कालावधि की प्रतीक्षा किये बिना भी पक्षकारों को अनुतोष प्रदान कर सकता है।

B. **Hindu Marriage Act (25 of 1955), Sections 13, 13-B** - *Doctrine of irretrievable break down of marriage is not available - Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in S. 13 & 13-B of the Act.* (Para 17)

ख. हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ 13, 13–बी – विवाह के असुधार्य भंग का सिद्धांत उपलब्ध नही है – इसलिए न तो सिविल न्यायालय और न उच्च न्यायालय भी अधिनियम के सुसंगत उपबंधों के अन्तर्गत विहित कालावधि के पूर्व या ऐसे आधारों पर जो अधिनियम की धारा 13 या 13–बी में उपबंधित नही हैं, आदेश पारित कर सकते हैं।

C. **Hindu Marriage Act (25 of 1955), Section 13-B** - ***Divorce by mutual consent*** *- Civil Court or High Court are not competent to pass a decree for mutual divorce, if one of the consenting parties withdraws his/her consent before the decree is passed - Only the Supreme Court, in exercise of its extraordinary powers under Article 142 of the Constitution, can pass orders to do complete justice to the parties.* (Para 18)

ग. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13–बी – पारस्परिक सम्मति से विवाह विच्छेद – सिविल न्यायालय या उच्च न्यायालय पारस्परिक विवाह विच्छेद की डिक्री पारित करने के लिए सक्षम नही हैं यदि सम्मत पक्षकारों में से कोई एक डिक्री पारित किये जाने के पूर्व अपनी सम्मति वापस ले लेता/लेती है – केवल उच्चतम न्यायालय संविधान के अनुच्छेद 142 के अन्तर्गत अपनी असाधारण शक्तियों के प्रयोग में पक्षकारों के प्रति पूर्ण न्याय करने के लिए आदेश पारित कर सकता है।

D. **Hindu Marriage Act (25 of 1955), Sections 13, 13-B** - *Conversion of petition - Divorce to divorce by mutual consent - Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under S. 13 of the Act into one u/s 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months - None of the other Courts can exercise such powers.* (Para 18)

घ. हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ 13 व 13–बी – याचिका का संपरिवर्तन – विवाह विच्छेद से पारस्परिक सहमति से विवाह विच्छेद में – उच्चतम न्यायालय, संविधान के अनुच्छेद 142 के अन्तर्गत अपनी असाधारण शक्तियों के प्रयोग में, छः माह की वैधानिक कालावधि की प्रतीक्षा किये बिना अधिनियम की धारा 13 के अन्तर्गत कार्यवाही को धारा 13–बी में संपरिवर्तित कर सकता है और पारस्परिक विवाह विच्छेद की डिक्री पारित कर सकता है – अन्य कोई न्यायालय ऐसी शक्तियों का प्रयोग नही कर सकता।

E. **Hindu Marriage Act (25 of 1955), Section 13-B** - *Divorce by mutual consent - Joint petition u/s 13-B of Act for divorce by mutual consent - After 6 months, on the date of consideration of the petition, wife withdrew her consent - Held - Parties are living separately for more than 7 years - As part of agreement between the parties, husband had transferred valuable property rights in favour of wife and it was after registration of such transfer of property that wife withdrew her consent for divorce - Wife still continues to enjoy the property and insists on living separately from husband - Supreme Court, in special circumstances of the case, by exercising the powers under Article 142 of the Constitution allowed the petition u/s 13-B of the Act.* (Para 20)

ड. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13–बी – पारस्परिक सम्मति से विवाह विच्छेद – पारस्परिक सम्मति से विवाह विच्छेद के लिए अधिनियम की धारा 13–बी के अन्तर्गत संयुक्त याचिका – 6 माह बाद, याचिका पर विचार की तारीख को पत्नी ने अपनी सम्मति वापस ले ली – अभिनिर्धारित – पक्षकार 7 वर्ष से अधिक समय से पृथक रह रहे हैं – पक्षकारों के मध्य अनुबन्ध के भाग के रूप में पति ने पत्नी के पक्ष में मूल्यवान सम्पत्ति अधिकार अंतरित कर दिये थे और यह सम्पत्ति के ऐसे अंतरण के रजिस्ट्रेशन के बाद था कि पत्नी ने विवाह विच्छेद की अपनी सम्मति वापस ले ली – पत्नी अभी भी सम्पत्ति का निरंतर उपभोग कर रही है और पति से पृथक रहने पर जोर देती है – उच्चतम न्यायालय मामले की विशेष परिस्थितियों में संविधान के अनुच्छेद 142 के अन्तर्गत शक्तियों का प्रयोग करते हुए अधिनियम की धारा 13–बी के अन्तर्गत याचिका मंजूर कर सकता है।

Cases referred :

(1997) 4 SCC 226, (1991) 2 SCC 251, (1993) 2 SCC 6, (1998) 8 SCC 369, (1997) 1 SCC 490, (2000) 1 SCC 243, (2002) 1 SCC 194, (2004) 1 SCC 123, (2005) 13 SCC 410, (2007) 2 SCC 220.

JUDGMENT

The Judgment of the Court was delivered by ALTAMAS KABIR, J. :–Leave granted.

2. The short point for decision in this appeal is whether a decree can be passed on a petition for mutual divorce under Section 13-B of the Hindu Marriage Act, 1955, when one of the petitioners withdraws consent to such decree prior to the passing of such decree.

3. In the instant case, the appellant husband was married to the respondent wife on 22nd June, 1985, according to Hindu rites. On account of differences between them, they took a decision to obtain a decree of mutual divorce, which resulted in the filing of a joint petition for divorce under Section 13-B of the Hindu Marriage Act, 1955, (hereinafter referred to as 'the Act') on 4th September, 2004, in the District Court at Chhindwara. The same was registered as Civil Suit No.167-A of 2004. As required under the provisions of Section 13-B of the aforesaid Act, the learned Second Additional District Judge, Chhindwara, fixed the date for consideration of the petition after six months so as to give the parties

time to reconsider their decision. On 7th March, 2005, after the expiry of six months, the learned Second Additional District Judge, Chhindwara, took up the matter in the presence of both the parties who were present in the Court. While the appellant husband reiterated his earlier stand that a decree of mutual divorce should be passed on account of the fact that it was not possible for the parties to live together, on behalf of the respondent wife it was submitted that despite serious differences which had arisen between them, she did not want the marriage ties to be dissolved. On account of withdrawal of consent by the respondent wife, the learned Judge dismissed the joint petition under Section 13-B of the Act.

4. Aggrieved by the order dated 17th March, 2005, passed by the learned Second Additional District Judge, Chhindwara, the appellant filed an appeal under Section 28 of the Act in the High Court of Madhya Pradesh at Jabalpur on 4th April, 2005, and the same was registered as First Appeal no.323 of 2005. Even before the High Court, on 12th March, 2007, the respondent wife expressed her desire to live separately from the appellant, but she did not want that a decree of dissolution of marriage be passed. In that view of the matter, by his order dated 21st March, 2007, the learned Single Judge dismissed the First Appeal. While dismissing the appeal, the learned Single Judge took note of the decision of this Court in similar circumstances in the case of *Ashok Hurra v. Rupa Bipin Zaveri* [1997 (4) SCC 226], wherein this Court granted a decree of mutual divorce by exercising its extra-ordinary powers under Article 142 of the Constitution of India. It was indicated that the High Court did not have such powers and Section 13-B required that the consent of the spouses on the basis of which the petition under Section 13-B was presented, had to continue till a decree of divorce was passed by mutual consent. On that basis, the learned Single Judge of the High Court, while dismissing the appeal, observed that the appellant would be free to file a petition of divorce in accordance with law, which would be decided on its own merits by keeping in mind the special fact that the parties were living separately for about five years and the respondent wife was adamant about living apart from her husband.

5. It is against the said order passed by the High Court rejecting the appellant's prayer for grant of mutual divorce that the present appeal has been filed.

6. Appearing on behalf of the appellant husband, Mr. Rohit Arya, learned Senior Advocate, contended that prior to the filing of the petition for mutual divorce, the parties had entered into a settlement which had been fully acted upon by the appellant and that under the said agreement valuable property rights had been transferred to the respondent wife, which she was and is still enjoying. Mr. Arya submitted that apart from the above, the attitude of the respondent wife in openly declaring that she had no intention to remain with the appellant, was

sufficient to indicate that the marriage had broken down irretrievably and in similar circumstances this Court had invoked its extra-ordinary powers under Article 142 of the Constitution to grant a decree of divorce under Section 13-B of the Hindu Marriage Act, even though one of the parties had withdrawn consent before the passing of the final decree. Reference was made to the decision in *Ashok Hurra's case*(supra), which also involved a petition under Section 13-B of the Act.

7. However, the facts of the said case were a little different from those in the instant case.In the said case, after six months from the date of filing of the petition under Section 13-B, an application was filed by the husband alone for a decree of divorce on the petition under Section 13-B of the Act. Not only did the wife not join in the said application, she made a separate application for withdrawal of consent given by her for mutual divorce after the expiry of 18 months from the date of presentation of the divorce petition. At this juncture, reference may be made to the provisions of Section 13-B of the above Act and the same is extracted hereinbelow :-

> **"13B. Divorce by mutual consent. -**
>
> (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.
>
> (2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

As will be clear from the above, sub-Section (1) of Section 13-B is the enabling Section for presenting a petition for dissolution of a marriage by a decree of divorce by mutual consent. One of the grounds provided is that the parties have been living separately for a period of one year or more and that they have not been able to live together, which is also the factual reality in the instant case. Sub-Section (2) of Section 13-B, however, provides the procedural steps that are

required to be taken once the petition for mutual divorce has been filed and six months have expired from the date of presentation of the petition before the Court. The language is very specific in that it intends that on a motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-Section (1) and not later than 18 months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

8. The question whether the consent of both the parties given at the time of presentation of the petition for mutual divorce under Section 13-B of the Act must continue till the decree is finally passed, has been the subject matter of several decisions of this Court. The issue was raised in the case of *Smt. Sureshta Devi vs. Om Prakash* [(1991) 2 SCC 25], wherein this Court held that the consent given by the parties to the filing of a petition for mutual divorce had to subsist till a decree was passed on the petition and that in the event, either of the parties withdrew the consent before passing of the final decree, the petition under Section 13-B of the Hindu Marriage Act would not survive and would have to be dismissed.

9. Subsequently, however, in *Ashok Hurra's case* (supra), doubts were expressed by this Court with regard to certain observations made in *Sureshta Devi's case* (supra) and it was felt that the same might require re-consideration in an appropriate case. Basing its decision on the doctrine of irretrievable break-down of marriage, the Hon'ble Judges were of the view that no useful purpose would be served in prolonging the agony of the parties to a marriage which had broken down irretrievably and that the curtain had to be rung down at some stage. It was further observed that the court had to take a total and broad view of the ground realities of the situation while dealing with adjustment of human relationships. Their Lordships placed reliance on the decision of this Court in *Chandrakala Menon (Mrs.) & Anr. vs. Vipin Menon (Capt.) & Anr.* [(1993) 2 SCC 6], in arriving at such a conclusion. In the said case, although, indisputably consent for the petition under Section 13-B of the Act was withdrawn within a week from the date of the filing of the joint petition, the Court, in exercise of its powers under Article 142 of the Constitution, granted a decree of divorce by mutual consent under Section 13-B of the Act and dissolved the marriage between the parties in order to meet the ends of justice, subject to certain conditions. It was also made clear that the decree would take effect only upon satisfaction of the conditions indicated therein.

10. The decision in *Ashok Hurra's case* (supra) to invoke the power under Article 142 of the Constitution was, thereafter, followed in several cases based upon the doctrine of irretrievable break-down of marriage.

11. In keeping with the trend of thought which found expression in *Ashok Hurra's case* (supra) another question arose before this Court in the case of *Sandhya M. Khandelwal vs. Manoj K. Khandelwal* [(1998) 8 SCC 369], which had come up before this Court by way of a transfer petition seeking transfer of a matrimonial suit. During the pendency of the transfer petition before this Court, the parties settled their disputes, and, although, the petition involved a proceeding under Section 13 of the Hindu Marriage Act, 1955, keeping in mind the settlement arrived at between the parties and also the interest of the parties, this Court granted a decree of divorce by treating the pending application as one under Section 13-B of the said Act.

12. The views expressed in *Ashok Hurra's case* (supra) were echoed in *Anita Sabharwal vs. Anil Sabharwal* [(1997) 1 SCC 490] and in the case of *Kiran vs. Sharad Dutt* [(2000) 10 SCC 243]. In the former case decree for mutual divorce was granted without waiting for the statutory period of six months. In the latter case, after living separately for many years and after 11 years of litigation involving proceedings under Section 13 of the Hindu Marriage Act, 1955, the parties filed a joint application before this Court for amending the divorce petition. Treating the said divorce petition as one under Section 13-B of the Act, this Court, by invoking its powers under Article 142 of the Constitution, granted a decree of mutual divorce at the SLP stage.

13. Without referring to the decisions rendered by this Court in *Ashok Hurra's case* (supra) and in *Kiran's case* (supra), a three Judge Bench of this Court in the case of *Anjana Kishore vs. Puneet Kishore* [(2002) 10 SCC 194], while hearing a transfer petition, invoked its jurisdiction under Article 142 of the Constitution, and directed the parties to file a joint petition before the Family Court at Bandra, Mumbai, under Section 13-B of the Hindu Marriage Act, 1955, for grant of a decree of divorce by mutual consent, along with a copy of the terms of compromise arrived at between the parties. This Court also directed that on such application being made, the Family Court could dispense with the need of waiting for six months as required by Sub-Section (2) of Section 13-B of the Act and pass final orders on the petition within such time as it deemed fit. This Court directed the Presiding Judge to take appropriate steps looking to the facts and circumstances of the case emerging from the pleadings of the parties and to do complete justice in the case.

14. Again in the case of *Swati Verma (Smt.) vs. Rajan Verma & Ors.* [(2004) 1 SCC 123], which was a transfer petition, the doctrine of irretrievable break-down of marriage was invoked. Pursuant to a compromise arrived at between the parties and leave granted by this Court, an application was filed under Section 13-B of the Hindu Marriage Act read with Article 142 of the Constitution and having regard to the aforesaid doctrine, this Court, in exercise of its powers vested

under Article 142 of the Constitution, allowed the application for divorce by mutual consent filed in the said proceedings, in order to give a quietus to all litigation pending between the parties. The same procedure was adopted by this Court in the case of *Jimmy Sudarshan Purohit vs. Sudarshan Sharad Purohit* [(2005) 13 SCC 410], where upon a settlement arrived at between the parties, a joint petition was filed under Section 13-B of the Hindu Marriage Act and the same was allowed in exercise of powers under Article 142 of the Constitution.

15. The various decisions referred to above were considered in some detail in the case of *Sanghamitra Ghosh vs. Kajal Kumar Ghosh* [(2007) 2 SCC 220], and the view taken in the various cases was reiterated based on the doctrine of irretrievable break-down of marriage.

16. Although, the decision rendered in *Sureshta Devi* (supra) was referred to in the decision rendered in *Ashok Hurra's case* (supra) and it was observed therein that the said decision possibly required reconsideration in an appropriate case, none of the other cases has dealt with the question which arose in *Sureshta Devi's case* (supra), namely, whether in a proceeding under Section 13-B of the Hindu Marriage Act, consent of the parties was required to subsist till a final decree was passed on the petition. In all the subsequent cases, the Supreme Court invoked its extraordinary powers under Article 142 of the Constitution of India in order to do complete justice to the parties when faced with a situation where the marriage-ties had completely broken and there was no possibility whatsoever of the spouses coming together again. In such a situation, this Court felt that it would be a travesty of justice to continue with the marriage ties. It may, however, be indicated that in some of the High Courts, which do not possess the powers vested in the Supreme Court under Article 142 of the Constitution, this question had arisen and it was held in most of the cases that despite the fact that the marriage had broken down irretrievably, the same was not a ground for granting a decree of divorce either under Section 13 or Section 13-B of the Hindu Marriage Act, 1955.

17. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable break-down of marriage is not one of the grounds indicated whether under Sections 13 or 13-B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the

Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13-B of the Hindu Marriage Act, 1955.

18. The second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other Courts can exercise such powers. The other Courts are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed. Under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes up for orders and a decree for divorce is finally passed and it is only the Supreme Court, which, in exercise of its extraordinary powers under Article 142 of the Constitution, can pass orders to do complete justice to the parties.

19. The various decisions referred to above merely indicate that the Supreme Court can in special circumstances pass appropriate orders to do justice to the parties in a given fact situation by invoking its powers under Article 142 of the Constitution, but in normal circumstances the provisions of the statute have to be given effect to. The law as explained in *Smt. Sureshta Devi's case* (supra) still holds good, though with certain variations as far as the Supreme Court is concerned and that too in the light of Article 142 of the Constitution.

20. In the instant case, the respondent wife has made it very clear that she will not live with the petitioner, but, on the other hand, she is also not agreeable to a mutual divorce. In ordinary circumstances, the petitioner's remedy would lie in filing a separate petition before the Family Court under Section 13 of the Hindu Marriage Act, 1955, on the grounds available, but in the present case there are certain admitted facts which attract the provisions of Section 13-B thereof. One of the grounds available under Section 13-B is that the couple have been living separately for one year or more and that they have not been able to live together, which is, in fact, the case as far as the parties to these proceedings are concerned. In this case, the parties are living separately for more than seven years. As part of the agreement between the parties the appellant had transferred valuable property rights in favour of the respondent and it was after registration of such transfer of property that she withdrew her consent for divorce. She still continues to enjoy the property and insists on living separately from the husband.

21. While, therefore, following the decision in *Smt. Sureshta Devi's case* we are of the view that this is a fit case where we may exercise the powers vested

in us under Article 142 of the Constitution. The stand of the respondent wife that she wants to live separately from her husband but is not agreeable to a mutual divorce is not acceptable, since living separately is one of the grounds for grant of a mutual divorce and admittedly the parties are living separately for more than seven years.

22. The appeal is, therefore, allowed. The impugned judgment and order of the High Court is set aside and the petition for grant of mutual divorce under Section 13-B of the Hindu Marriage Act, 1955, is accepted. There will be a decree of divorce on the basis of the joint petition filed by the parties before the Second Additional District Judge, Chhindwara, under Section 13-B of the Hindu Marriage Act, 1955, in respect of the marriage solemnized between the parties on 22nd June, 1985, according to Hindu rites and customs and the said marriage shall stand dissolved from the date of this judgment.

23. There will be no order as to costs.

Appeal allowed.

I.L.R. [2009] M. P., 2748

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S. Samvatsar & Mr. Justice A.K. Shrivastava

28 August, 2009*

MUNSHI SINGH ... Petitioner

Vs.

NAGAR PANCHAYAT, JOURA ... Respondent

Industrial Disputes Act (14 of 1947), Section 25-F - *Once it is found that the termination order is violative of S. 25-F of Act then the said order is ab initio void and the employee is entitled to reinstatement with full back wages - However, the Court can refuse to grant relief of reinstatement for a particular reason which will depend on the facts & circumstances of each case - There is no hard and fast rule that the Court should grant the relief of reinstatement with full back wages in each and every case - Reference answered accordingly.* (Para 15)

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25–एफ – जब एक बार यह पाया जाता है कि सेवा समाप्ति आदेश अधिनियम की धारा 25–एफ के उल्लंघनकारी है तब उक्त आदेश आरम्भ से शून्य है और कर्मचारी पूर्ण पिछले वेतन सहित पुनर्नियुक्ति का हकदार है – तथापि, न्यायालय किसी विशिष्ट कारण से, जो प्रत्येक मामले के तथ्यों और परिस्थितियों पर निर्भर करेगा, पुनर्नियुक्ति का अनुतोष देने से इंकार कर सकता है – कोई कठोर नियम नही है कि न्यायालय को प्रत्येक मामले में पूर्ण पिछले वेतन सहित पुनर्नियुक्ति का अनुतोष देना चाहिए – निर्देश तदनुसार उत्तरित।

*W.P. No.1138/2008(S) (Gwalior)

Cases referred :

AIR 1979 SC 75, AIR 1981 SC 1253, AIR 2001 SC 672, AIR 1970 SC 1401, 2007 LLR 1233, (2006) 5 SCC 127, (2006) 2 SCC 711, (2008) 1 SCC 575, (2007) 9 SCC 748, (2006) 7 SCC 752.

Ravi Jain, for the petitioner.
M.P.S. Raghuvanshi, for the respondent.

ORDER

The Order of the Court was delivered by S. SAMVATSAR, J. :–This writ petition came up for hearing before a Division Bench of this Court on 23/1/2009 and the Division Bench vide its order dated 23/1/2009 has referred this case to Full Bench, as the Division Bench was of the opinion that the question whether once the termination order is struck down on the ground that it is in violation of Section 25-F of Industrial Dispute Act (for short "the Act") then the Court has to strike on the illegality and direct reinstatement.

2. The gist of the question, referred to the Full Bench is whether once the termination order is struck down by holding the same to be violative of Section 25-F of the Act, it is mandatory for the Court to strike on the illegality and direct reinstatement.

3. The Apex Court in the case of *M/s. Hindustan Tin Works Pvt. Ltd vs. The Employees of M/s. Hindustan Tin Works Pvt. Ltd. and others,* AIR 1979 SC 75 has laid down in paragraph 9 of the judgment that:-

> "It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus, the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the

protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer."

4. Thus, in the aforesaid judgment, the Apex Court has held that once the termination order is set aside by holding it to be illegal, the natural consequences of striking down of the order of termination would be reinstatement with full back wages.

5. Another judgment referred by the Apex Court in which the Apex Court has considered this aspect of matter is in the case of *Mohan Lal vs. The Management of M/s. Bharat Electronics, Ltd., Air* 1981 SC 1253. The Apex Court in para 17 of the aforesaid judgment had held that:-

"If the termination of service is ab initio void and inoperative, there is no question of granting reinstatement because there is no cessation of service and a mere declaration follows that he continues to be in service with all consequential benefits."

6. Similar is the view of the Apex Court in the case of *Vikramaditya Pandey vs. Industrial Tribunal and another*, AIR 2001 SC 672, wherein the Apex Court in para 6 of the judgment has laid down that:-

"Once the termination of his service had been held to be illegal and more so when the same was not challenged; ordinarily, once the termination of service of any employee is held to be wrongful or illegal the normal relief of reinstatement with full back wages shall be available to an employee; it is open to the employer to specifically plead and establish that there were special circumstances which warranted either non-reinstatement or non-payment of back wages. In that case, the Court can deny the back wages or reinstatement to the employee."

7. Similarly, the Apex Court in the case of *Ruby General Insurance Company, Ltd vs. Chopra* (P.P.), 1970 L.L.J., 63 and in case of *M/s. Hindustan Steels Ltd., Rourkela, vs. A.K.Roy and others,* AIR 1970 SC 1401 has held that the

Court before granting reinstatement must consider facts of each case and exercise its discretion properly whether to grant reinstatement or to award compensation. Thus, in these cases, the Apex Court has held that normal rule is that once termination order is set aside, the employee is entitled to reinstatement with full back wages. However, in special circumstances, the Court can deny or refuse to grant full back wages or reinstatement.

8. Thus, the view of the Apex Court in all these cases was that once the order of termination is held to be illegal retrenchment then the nature of consequence was to reinstatement with full back wages. However, the Apex Court in its subsequent judgments has changed its view.

9. In case of *Karan Singh vs. Executive Engineer, Haryana State Marketing Board*, 2007 LLR 1233, the employee whose services were terminated, has approached the Tribunal after a long delay and the Apex Court has held that the delay in approaching the natural Tribunal is no ground to strike down the reference, if the termination order is violative of Section 25-F of the Industrial Dispute Act. It is not proper for the Court to refuse to strike down the termination order. The Court in such a situation finds that termination order is bad in law, the Court can instead of granting reinstatement can award compensation. In that case, the Apex Court has granted compensation to the employee to the tune of Rs.60,000/-.

10. Another judgment is in the case of *Nagar Mahapalika (Now Municipal Corpn.) Vs. State of U.P. and Others* (2006) 5 SCC 127. In that case, the retrenchment was found to be illegal by the Apex Court. However, considering the provisions of U.P.Nagar Mahapalika Adhiniyam, 1959, the Apex Court has refused to grant reinstatement and held that the order of reinstatement should not be granted as a matter of course but the legality or otherwise of the termination should be considered to be an important factor in the matter of grant of relief.

11. The next judgment is in the case of *State of M.P. and Others Vs. Arjunlal Rajak* (2006)2 SCC 711. In that case, the Apex Court has held that for non-compliance of the provisions of Section 25-F of the I.D. Act, ordinarily workman could be directed to be reinstated with or without back wages, but when a project or scheme or an office itself is abolished, relief by way of reinstatement cannot be granted.

12. In the case of *Mahboob Deepak Vs. Nagar Panchayat, Gajraula and Others* (2008) 1 SCC 575, the Apex Court has held that even if the order of termination is illegal, the compensation can be granted as there are allegations against the terminating employee for misconduct and financial irregularities.

13. In the case of *Madhya Pradesh Administration Vs. Tribhuban,* (2007) 9 SCC 748, the Apex Court has held that consequence of non-compliance of provisions of Section 25-F of the I.D. Act is not automatic reinstatement and compensation can be awarded to the employee in appropriate cases.

14. In the case of *U.P. State Road Transport Corporation Vs. Man Singh* (2006) 7 SCC 752, the Apex Court has considered the case of conductor whose services were terminated after a period of one year from his appointment. The Apex Court has refused to direct reinstatement as there was nothing on record to show that the employment was in accordance with rules and awarded compensation of Rs. 50,000/-

15. Thus, from the cases referred herein-above, it is clear that the normal rule is that once it is found that the termination order is violative of Section 25-F of Industrial Dispute Act, then the said order is ab initio void and the employee is entitled to reinstatement with full back wages. However, in a particular case, the Court can refuse to grant relief of reinstatement for a particular reason which will depend on the facts and circumstances of each case. Thus, there is no hard and fast rule that the Court should grant the relief of reinstatement with full back wages in each and every case. The same relief shall depend on the facts and circumstances of each case. Hence, the reference is answered accordingly. Now the case be listed before the appropriate Division Bench.

Order accordingly.

I.L.R. [2009] M. P., 2752
FULL BENCH
Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S. Samvatsar & Mr. Justice A.K. Shrivastava
28 August, 2009*

PAWAN RANA ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. **Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69(1), 70(1), 86(1) & 86(2) - *Appointment of Panchayat Karmi* - *In case Gram Panchayat fails to make appointment of a Panchayat Karmi despite direction issued by State Government or prescribed authority - State Government or prescribed authority can direct C.E.O. of Janpad Panchayat within whose territorial jurisdiction a Gram Panchayat is located to appoint a Panchayat Karmi - View taken by D.B. in Leelawati's case [ILR (2008) MP 2817] approved - Whereas view taken in W.P. No.206/2008 Smt. Madhu Bhadoria Vs. State of M.P. & ors. overruled.** (Para 14)

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 69(1), 70(1), 86(1) व 86(2) – पंचायत कर्मी की नियुक्ति – यदि राज्य सरकार या विहित प्राधिकारी द्वारा जारी निदेश के बावजूद ग्राम पंचायत, पंचायत कर्मी की नियुक्ति करने में विफल रहती है – राज्य सरकार या विहित प्राधिकारी जनपद पंचायत के मुख्य कार्यपालक अधिकारी,

*W.P. No.4104/2007(S)-(Gwalior)

जिसकी क्षेत्रीय अधिकारिता के भीतर ग्राम पंचायत स्थित है, को पंचायत कर्मी की नियुक्ति करने का निदेश दे सकते हैं – खण्ड न्यायपीठ द्वारा लीलावती के मामले [ILR (2008) MP 2817] में लिये गये दृष्टिकोण को अनुमोदित किया गया – जबकि रिट याचिका क्र. 206/2008 श्रीमती मधु मदोरिया बनाम् म.प्र. राज्य व अन्य में लिये गये दृष्टिकोण के विरुद्ध निर्णय दिया गया।

B. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 86(2) - *Object of provision is to ensure that if the Panchayat fails to perform any particular duty conferred on it under the Act despite directions issued by State Government or prescribed authority u/s 86(1) - State Government or prescribed authority must have the required powers to get the directions complied with and when State Government or prescribed authority exercises such necessary powers, it will be deemed as if Panchayat has exercised its powers under the Act.* (Para 10)

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 86(2) – उपबंध का उद्देश्य यह सुनिश्चित करना है कि यदि पंचायत राज्य सरकार या विहित प्राधिकारी द्वारा धारा 86(1) के अन्तर्गत जारी निदेशों के बावजूद अधिनियम के अन्तर्गत उसे प्रदत्त किसी विशिष्ट कर्तव्य का पालन करने में विफल हो जाती है – राज्य सरकार या विहित प्राधिकारी को निदेशों का अनुपालन कराने की अपेक्षित शक्तियाँ अवश्य होनी चाहिए और जब राज्य सरकार या विहित प्राधिकारी ऐसी आवश्यक शक्तियों का प्रयोग करते हैं, यह समझा जायेगा मानो पंचायत ने अधिनियम के अन्तर्गत अपनी शक्तियों का प्रयोग किया हो।

C. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 87(1) & 86(2) - *A drastic measure contemplated by the legislature against a Panchayat and can be resorted to strictly in the circumstances mentioned in S. 87(1) and not otherwise and these circumstances are different from those mentioned in S. 86(2).* (Para 12)

ग. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 87(1) व 86(2) – विधायिका द्वारा पंचायत के विरुद्ध एक प्रबल उपाय अनुध्यात किया गया है और धारा 87(1) में उल्लिखित परिस्थितियों में कठोरतापूर्वक आश्रय लिया जा सकता है न कि अन्यथा और ये परिस्थितियाँ उनसे भिन्न हैं जो धारा 86(2) में उल्लिखित हैं।

D. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 53(2) - *This general provision will apply where instead of the Panchayats performing functions entrusted to them, the State Government itself undertakes to execute such functions of the Panchayats through its own agencies - This provision obviously does not apply where the Panchayat fails to perform a particular duty conferred on it under the Adhiniyam despite a direction by the State Government or prescribed authority to perform such duty.* (Para 13)

घ. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 53(2) – यह सामान्य उपबंध वहाँ लागू होगा जहाँ पंचायतों को सौंपे गये कार्यों का निष्पादन करने

के स्थान पर स्वयं राज्य सरकार अपनी स्वयं की एजेंसियों द्वारा पंचायतों के ऐसे कार्यों के निष्पादन का दायित्व लेती है – यह उपबंध स्पष्ट रूप से वहाँ लागू नही होता जहाँ पंचायत, अधिनियम के अधीन उसे प्रदत्त किसी विशिष्ट कर्तव्य का निष्पादन करने में, राज्य सरकार या विहित प्राधिकारी द्वारा ऐसे कर्तव्य का निष्पादन करने का निदेश देने के बावजूद विफल रहती है।

Cases referred :

AIR 1990 SC 123, 2008(4) MPHT 470 (DB) = ILR (2008) MP 2817.

M.P.S. Raghuvanshi with *Vivek Bhargava,* for the petitioner.

R.D. Jain, A.G. with *Vivek Khedkar, G.A.*, for the respondent No.1/State.

Pratip Visoriya, for the respondent No.2.

K.S. Tomar with *J.S. Kaurav,* for the respondent No.4.

O P I N I O N

The Judgment of the Court was delivered by **A.K. PATNAIK, C. J. :–** This is a reference made to the Full Bench by a learned Single Judge of this Court because of difference of opinion in the judgments of two different Division Benches of the High Court on interpretation of Section 86 of the Madhya Pradesh Panchayat Raj Adhiniyam 1993 (for short 'the Adhiniyam, 1993').

2. The background facts leading to this reference are that under Section 69 of the Adhiniyam, 1993, the State Government or the prescribed authority has the power to appoint Secretary for a Gram Panchayat or group of two or more Gram Panchayats and under Section 70 of the Adhiniyam, 1993, a Gram Panchayat has the power to appoint such other officers and servants as it considers necessary for the efficient discharge of its duties with the previous approval of the prescribed authority. The State Government issued a circular dated 12.9.1995 regarding appointment of Panchayat Karmis by the Gram Panchayats and issued another circular dated 27.1.2006 clarifying that in case within a period of one month a Gram Panchayat fails to make the appointment of Panchayat Karmi, the Collector of the concerned District in exercise of powers under Section 86(1) of the Adhiniyam, 1993, may direct the Chief Executive Officer of the Janpad Panchayat within whose territorial jurisdiction the Gram Panchayat is situated to complete the process of selection of Panchayat Karmi. The Chief Executive Officer of the Janpad Panchayat, Dabra, by an advertisement called for applications from the eligible and qualified persons to fill one post of Panchayat Karmi in Gram Panchayat Chiruli and the petitioner amongst others applied. When the appointment of the Panchayat Karmi was not made in the Gram Panchayat Chiruli, the Collector, Gwalior district, who is the prescribed authority, directed the Chief Executive Officer of the Janpad Panchayat Dabra to make appointment of Panchayat Karmi and the Chief Executive Officer appointed the respondent No. 4 as Panchayat Karmi of Gram Panchayat, Chiruli. Aggrieved, the petitioner has filed the present writ petition for quashing the order of appointment of the

respondent No. 4 as Panchayat Karmi and for directing the Gram Panchayat, Chiruli, to make an appointment strictly on the basis of merit.

3. When the present writ petition came up for hearing before a learned Single Judge of the High Court at Gwalior on 23.6.2009, the petitioner contended that the power to appoint a Panchayat Karmi is vested in a Gram Panchayat under Section 70 of the Adhiniyam, 1993, and the prescribed authority in exercise of powers under Section 86(1) of the Adhiniyam, 1993, cannot change the appointing authority and confer jurisdiction on the Chief Executive Officer of the Janpad Panchayat to make the appointment of Panchayat Karmi. In support of this contention, the petitioner cited a Division Bench Judgment of this Court in *Smt. Madhu Bhadoria Vs. State of M.P. & others* (W.P. No.206/2008).

4. The respondents No. 1 and 2, on the other hand, contended that in *Leelawati and another Vs. State' of M.P. & others,* reported in 2008(4) MPHT 470 (DB), another Division Bench has taken a view that the Collector as the prescribed authority in exercise of powers under Section 86(1) of the Adhiniyam, 1993, can issue a direction to the Chief Executive Officer to appoint a Panchayat Karmi and by virtue of such direction the Chief Executive Officer has a power to appoint a Panchayat Karmi.

5. The learned Single Judge in his order dated 23.6.2009 found that there was difference of opinion of the two Division Benches of this Court on the interpretation of Section 86(1) of the Adhiniyam, 1993, while in *Smt. Madhu Bhadoria Vs. State of M.P. &, others* (supra), the Division Bench has held that only a Gram Panchayat can appoint a Panchayat Karmi as per the provisions of the Adhiniyam 1993, in *Leelawati & another Vs. State of M.P. & others* (supra), another Division Bench has taken a view that under Section 86(2) of the Adhiniyam, 1993, the Chief Executive Officer of the Janpad Panchayat can be directed by the Collector as the prescribed authority to make an appointment of Panchayat Karmi of the Gram Panchayat. In the order dated 23.6.2009 passed in the present case, the learned Single Judge has observed that this controversy deserves to be put to rest by a larger Bench and accordingly, the difference of opinion in the judgments of two Division Benches' has been referred to this Full Bench.

6. Sections 69(1), 70(1), 86(1) and 86(2) of the Adhiniyam, 1993, which are relevant to answer the reference are quoted herein below :

> *"S.69. Appointment of Secretary and Chief Executive Officer.- (1) The State Government or the prescribed authority may appoint a Secretary for a Gram Panchayat or group of two or more Gram Panchayats:*
>
> *Provided that the person holding the charge of a Secretary of Gram Panchayat immediately before the commencement of this Act shall continue to function as such till a Secretary is appointed in accordance with this Section.*

Provided further that a person shall not hold charge of a Secretary of Gram Panchayat, if such a person happens to be relative of any office bearer of the concerned Gram Panchayat.

"S. 70. Other officers and servants of Panchayat. -(1) Subject to the provisions of Section 69 every panchayat may with previous approval of prescribed authority appoint such other officers and servants as it considers necessary for the efficient discharge of its duties."

"S.86. Power of State Government to issue order directing Panchayat for execution of works in certain cases.– (1) The State Government or the prescribed authority may, by an order in writing, direct any Panchayat to perform any duty imposed upon it, by or under this Act, or by or under any other law for the time being in force or any work as is not being performed or executed, as the case may be, by it and the performance or execution thereof by such Panchayat is, in the opinion of the State Government or prescribed authority, necessary in public interest.

(2) The Panchayat shall be bound to comply with direction issued under sub-section (1) and if it fails to do so the State. Government or the prescribed authority shall have all necessary powers to get the directions complied with at the expense, if any, of the Panchayat and in exercising such powers it shall be entitled to the same protection and the same extent under this Act as the Panchayat or its officers or servants whose powers are exercised."

7. Section 69(1) quoted above thus provides that the State Government or the prescribed authority may appoint a Secretary for a Gram Panchayat or group of two or more Gram Panchayats and Section 70(1) states that subject to the provisions of Section 69, every panchayat may with the previous approval of the prescribed authority appoint such other officers and servants as it considers necessary for the efficient discharge of its duties. Section 86(1) states that the State Government or the prescribed authority may, by an order in writing, direct any Panchayat to perform any duty imposed upon it, by or under the Act. Section 86(2) further states that the Panchayat shall be bound to comply with the direction issued under Section 86(1) and if it fails to do so the State Government or the prescribed authority shall have all necessary powers to get the directions complied with at the expense, if any, of the Panchayat and in exercising such powers it shall be entitled to the same protection and the same extent under the Act as the Panchayat or its officers or servants whose powers are exercised.

8. On an interpretation of the provisions of Sections 69(1) and 70(1), it is clear that the State Government or the prescribed authority has the power to appoint a Secretary for a Gram Panchayat or a group of two or more Gram Panchayats under Section 69(1) and the Gram Panchayat has the power to appoint other officers and servants as it considers necessary for efficient discharge of its duties including Panchayat Karmis with the previous approval of the prescribed authority. It is further clear on an interpretation of Section 86(1) that the State Government or the prescribed authority may direct the Panchayat to perform any duty imposed upon it under the Act.

9. According to Mr. M.P.S. Raghuvanshi, learn counsel for the petitioner, under Section 70 the Gram Panchayat is not conferred with any duty but with the power to appoint such other officers and servants including panchayat karmis as it considers necessary for the efficient discharge of its duties. We are unable to accept this submission of Mr. Raghuvanshi. It will be clear from Section 86(2) that the Panchayat is bound to comply with the . direction issued under Section 86(1) and if it fails to do so, the State Government or the prescribed authority shall have "all necessary powers" to get the directions complied with and in exercising such powers it shall be entitled to the same protection and to the same extent under the Act as the Panchayat or its officers and servants whose powers are exercised. Thus, in Sections 86(1) and 86(2), the words "duties" and. "powers" have been interchangeably used. In Section 86(1) the word "duties" has been used by legislature to emphasise on the statutory function of the Gram Panchayat under the Act and in Section 86(2) the legislature has used the word 'powers' to emphasise that if the Gram Panchayat fails to perform its statutory function, the State Government or the prescribed authority will have the powers to perform such statutory function. .

10. The expression "all necessary powers" in Section 86(2) is very wide and will mean all the powers that the panchayat has under the Adhinyam, 1993. This will be clear from Section 86(2) which states that in exercising such powers, the State Government or the prescribed authority "shall be entitled to the same protection and the same extent under the Act as the Panchayat whose powers are exercised". The object of the Legislature in making such a provision in section 86(2) is to ensure that if the Panchayat fails to perform any particular duty conferred on it under the Act despite directions issued by the State Government or the prescribed authority under Section 86(1), the State Government or the prescribed authority must have the required powers to get the directions complied with and when the State Government or the prescribed authority exercises such necessary powers, it will be deemed as if the Panchayat has exercised its powers under the Act.

11. This interpretation of Sections 86(1) and. (2) suggested by us is in accordance with the well settled principle of interpretation that the provision of a statute must be so construed as to make it effective and operative. In *Tinsukhia*

Electric Supply Co. Ltd Vs. State of Assam and others (AIR 1990 SC 123), M.N. Venkatchaliah, J, as he then was, speaking for himself and R.S. Pathak, C.J., S. Natrajan and S. Ranganathan, JJ, observed in paragraph 49 at page 152 of the AIR:

> *"The Courts strongly lean against any construction which tends to reduce a Statute to a futility. The provision of a Statute must be so construed as to make it effective and operative, on the principle* ***"Ut res majis valeat quam periat".***

Unless, therefore, we take the view that under Section 86(2) the State Government or the prescribed authority can exercise the same powers as that of the Panchayat through one officer or the other where the Panchayat fails to comply with the directions of the State Government or the prescribed authority, the provision in Section 86(2) will be rendered futile and unworkable.

12. However, the Division Bench has also taken a view in *Smt. Madhu Bhadoriya Vs. State of M.P &. others* (supra) that if the directions of the State Government or the prescribed authority are not complied with by the Panchayat then the State Government has the power to dissolve the Gram Panchayat under Section 87. Section 87(1) empowering the State Government or the prescribed authority to dissolve the Panchayat is quoted hereinbelow:

> ***"S. 87. Power of State Government to dissolve Panchayat for default, abuse of Powers, etc.*** *– (1) If at any time it appears. to the State Government or the prescribed authority that a Panchayat is persistently making default in the performance of the duties imposed on it by or under this Act or under any other law for the time being in force, or exceeds or abuses its powers or fails to carry out any order of the State . Government or the competent authority, the State Government or the prescribed authority, may after such enquiry as it may deem fit, by an order dissolve such Panchayat and may order a fresh constitution thereof."*

On a reading of Section 87(1), we find that the power to dissolve the Panchayat can be exercised by the State Government or the prescribed authority only where the Panchayat persistently makes default in the performance of the duties imposed on it by or under the Act or by any other law for the time being in force or exceeds its powers or fails to carry out any order of the State Government or the prescribed authority after such enquiry as it may deem fit but not otherwise. Hence, only where there are persistent defaults by a Panchayat in the performance of its duties imposed under the Act or by any other law for the time being in force, or in case of abuse of powers or exercise of powers in excess of what is conferred or failure to carry out the order of the State Government or the prescribed authority,

the State Government or the prescribed authority may dissolve the Panchayat. This appears to be a drastic measure contemplated by the Legislature against a Panchayat and can be resorted to strictly in the circumstances mentioned in section 87(1) and not otherwise and these circumstances are different from those mentioned in Section 86(2).

13. Mr. Raghuvanshi learned counsel for the petitioner, submitted that where the Panchayat fails to perform its duties to make an appointment of officers and services including Panchayat Karmis under Section 70, the State Government can taken action under Section 53(2). Section 53(2) of the Adhiniyam 1993, is quoted hereinbelow:

> *"S.53. Power of State Government in relation to functions of Panchayats.–*
>
> *(1) xxx xxx xxx xxx*
>
> *(2) The State Government may, by general or special order, add to any of the functions of Panchayats or withdraw the functions and duties entrusted to such Panchayats, when the State Government undertakes the execution of any of the functions entrusted to Panchayat. The Panchayat shall not be responsible for such functions so long as the State Government does not re-entrust such functions to the Panchayats."*

A plain reading of Section 53(2) would show that the State Government may, by general or special order, add to any of the functions of Panchayats or withdraw the functions and duties entrusted to such Panchayats, when the State Government undertakes to execute any of the functions entrusted to Panchayat and in such a situation, the Panchayats shall not be responsible for such functions so long as the State does not re-entrust such functions to the Panchayats. This general provision will apply where instead of the Panchayats performing functions entrusted to them, the State Government itself undertakes to execute such functions of the Panchayats through its own agencies. This provision obviously does not apply where the Panchayat fails to perform a particular duty conferred on it under the Adhiniyam 1993 despite a direction by the State Government or the prescribed authority to perform such duty.

14. We are thus of the considered opinion that under Section 86(2) of the Adhiniyam, 1993, the State Government or the prescribed authority can direct the Chief Executive Officer of the Janpad Panchayat within whose territorial jurisdiction a Gram Panchayat is located, to appoint a Panchayat Karmi in case the Gram Panchayat fails to make such appointment despite directions for such appointment issued by the State Government or the prescribed authority and that the view taken by the Division Bench in *Leelawati and another Vs. State of M.P. & others* (supra) on this point is correct and the view taken by the Division

Bench in *Smt. Madhu Bhadoria Vs. State of M.P. & others* (supra) that under Section 86(2) of the Adhiniyam 1993, the State Government or the prescribed authority has no powers to change the authority for appointment of Panchayat Karmi of a Grain Panchayat, is not correct.

The Reference is answered accordingly. The writ petition be now placed before the learned Single Judge for hearing on merits.

Order accordingly.

I.L.R. [2009] M. P., 2760
WRIT APPEAL
Before Mr. Justice R.S. Garg & Mr. Justice U.C. Maheshwari
24 March, 2009*

H.S. SIDHU ... Appellant
Vs.
DEVENDRA BAPNA & ors. ... Respondent

Fisheries (Gazetted) Service Recruitment Rules, M.P. 1987, Rule 15(3) - ***Promotion - Promotion of appellant by DPC to the post of Joint Director considering him to be man of exceptional merits and suitability in comparison to his seniors - Held - DPC did not observe anything except observing that appellant is of exceptional merits and suitability - There is no justification behind such observations - The material which could prima facie satisfy is not produced before the HC - The selection process was contaminated and stood corrupted because of non-application of mind and non-granting of reason - Learned Single Judge was justified in holding that appellant could not be promoted as Officiating Joint Director - WA dismissed with cost.*** (Para 12)

मत्स्य उद्योग (राजपत्रित) सेवा भर्ती नियम, म.प्र. 1987, नियम 15(3) – पदोन्नति – अपीलार्थी की उसके वरिष्ठों की तुलना में आपवादिक योग्यता और उपयुक्तता को विचार में लेते हुए डी.पी.सी. द्वारा संयुक्त संचालक के पद पर पदोन्नति – अभिनिर्धारित – डी.पी. सी. ने यह राय कि अपीलार्थी आपवादिक योग्यता और उपयुक्तता रखता है, के सिवाय कोई अन्य राय नही दी – ऐसी राय का कोई न्यायोचित आधार नही – उच्च न्यायालय के समक्ष सामग्री जो प्रथम दृष्ट्या संतुष्ट कर सके पेश नही की गयी – चयन प्रक्रिया मस्तिष्क का प्रयोग न करने और कारण न देने के परिणामस्वरूप संदूषित और भ्रष्ट हो गयी – विद्वान एकल न्यायाधीश का यह अभिनिर्धारित करना न्यायोचित था कि अपीलार्थी को स्थानापन्न संयुक्त संचालक के रूप में पदोन्नत नही किया जा सकता – रिट अपील खर्चे सहित खारिज।

D.K. Dixit, for the appellant.
K.K. Trivedi, for the respondent No.1.
V.K. Shukla, for the respondent Nos.2 & 3.
Noney for the respondent No.4 / MPPSC.

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*W.A. No.370/2008 (Jabalpur)

H.S. SIDHU Vs. DEVENDRA BAPNA

JUDGMENT (ORAL)

The Judgment of the Court was delivered by R.S. GARG, J. :–The appellant being aggrieved by order dated 4.3.2008 passed in W.P. No.23798/2003 (OA. No.927/1997) and W.P.(S) No.1119/2005 has come to this Court with a submission that the learned single Judge was absolutely unjustified in holding that the appellant could not be considered higher in merits in comparison to the original petitioner/respondent no.1 and others.

2. Undisputedly the respondent no.1/original petitioner is senior to the present appellant. When their cases for promotion to the post of Joint Director, Fisheries were under consideration a departmental promotion committee was required to consider their cases. The committee consisted of Mr. M. M. Hussain, Member, Public Service Commission, Shri Prem Prakash Mathur, Secretary, Department of Fisheries, Shri V. L. Shitole, Director, Fisheries Department and Shri A. K. Jain, Under Secretary, State of Madhya Pradesh, Department of Fisheries. It is to be seen that the said committee met on 6.7.1996. It is also to be seen that an earlier committee consisting of Shri M.M. Hussain, Member, Madhya Pradesh Public Service Commissioner, Shri Sirjjiyas Minj, Secretary, Fisheries Department, Shri V. L. Shitole, Director, Fisheries Department and Shri A. K. Jain, Under Secretary of the Fisheries Department had recorded their proceedings. The said committee had observed that the original petitioner Shri D. K. Bapna would be placed as 'very good' while Shri Jitendra Singh and Shri K. D. Singh would be considered as 'good'. The committee also observed that case of Shri Harpal Singh Sidhu could not be considered as his confidential reports were not made available. After sometime the departmental promotion committee was re-constituted and it met on 6.7.1996. In paragraph 3 the committee recorded in relation to the seniority and gradation list. However, in sub para 4 of paragraph 3 the committee referring to Rule 15(3) of Madhya Pradesh Matsyaudhyog (Rajpatrit) Seva Bharti Niyam, 1987 observed that a person of exceptional merit and suitability could be given higher place in this list in comparison to the officers who were senior to him. The Committee also observed that it had considered the confidential reports for the year 1989-90 to 1993-94 for a period of five years. They also observed in paragraph 6 that the committee was of the opinion that for purposes of promotion the requirements would be:

(a). Integrity should be above board.

(b). In the last five years the three years grades at least should be 'good' or higher and for last two years the grade should be 'good'.

(c). The grades of last five years should not be 'bad'.

(d). The committee observed that where the comments etc. were not clear the Committee had assessed the concerned officer with their own wisdom and discretion and;

(e). Where some departmental enquiry was pending consideration then report of such officer was kept in a sealed cover.

3. While considering clause (5) they observed that all the persons who were directed to be promoted vide meeting of Departmental Promotion Committee held on 22.2.1993 have been promoted. While preparing the select list the committee observed and graded the persons as follows :

1. Shri Harpal Singh Sidhu.
2. Shri Jitendra Singh.
3. Shri D. K. Bapna.
4. Shri K. D. Singh.

4. The committee also observed that in its opinion and in view of Rule 15(3) Shri Harpal Singh Sidhu being a man of exceptional merits and suitability could be given the higher position in comparison to his seniors.

5. After the recommendations were placed before the Government, the Government promoted Shri Harpal Singh Sidhu (as Officiating) Joint Director. It appears that after the orders were passed in favour of Shri Harpal Singh Sidhu, the respondent no.1 filed Original Application No.927/1997 before the State Administrative Tribunal. During the pendency of the said petition the present appellant who was officiating as Joint Director was further promoted as officiating Director. It appears that being aggrieved by a further promotion granted in favour of Shri Harpal Singh Sidhu the original petitioner filed W.P. (S) No.1119/2005. The original application filed before the State Administrative Tribunal was transferred to this Court and was registered as W.P. No.23798/2003. As the promotion of the present appellant to the office of the Director was dependant upon confirmation or rejection of his promotion as Joint Director (Officiating), both the petitions were directed to be heard simultaneously.

6. The short submission of the original petitioner all through had been that the respondents/State authority/the departmental promotion committee was not justified in placing the present appellant higher in comparison to the persons who were otherwise senior to him. It was also submitted that Rule 15(3) could not be applied in air and in light of Rule 12 (c) of the said Rules, Shri Harpal Singh Sidhu was not entitled to any favourable position. Shri Harpal Singh Sidhu after notice appeared before the Court and filed his return and submitted that as he was a man of exceptional merits and suitability and he has gained 'A+' for all five years, he was entitled to be placed at a higher position in comparison to the persons who were senior to him.

7. The State Government also appeared and filed its return but however, despite making a submission that Shri Harpal Singh Sidhu was a person of exceptional merits and suitability they did not produce the confidential reports of all concerned to satisfy the judicial conscience of this Court that Harpal Singh Sidhu being a

person of exceptional merits and suitability in view of the confidential reports was entitled to be placed on a higher pedestal. We would not be unjustified in observing that even after both the petitions were allowed the State Government did not think it necessary and suitable to produce all the confidential reports of all concerned though they have placed before us the proceedings recorded by the departmental promotion committee. It is also to be noted the appellant before us (Shri Harpal Singh Sidhu) since after filing of this appeal on 25.3.2008 never made any application to this Court that the confidential reports of the appellant and the original petitioner be requisitioned so that this Court may compare the comparative merits.

8. From the D.P.C proceedings dated 6.7.1996 it only appears that the committee had formed an opinion that Shri Harpal Singh Sidhu was a person of exceptional merits and suitability. While confirming the select list the said committee never observed that on what basis they were recording such opinion. When the comparative merits are considered then the authority or the person considering the comparative merits has to record its finding and a final opinion that why such person is being considered a person of exceptional merits and suitability. Exceptional merits are not like the beauty of someone which lies in the eye of the beholder. When the question of merit is to be appreciated then the entire merits of such person are required to be considered in comparison to the other person. It even does not appear from the report of the D.P.C that they had recorded any reason for recording exceptional merits or suitability of the present appellant.

9. True it is that the State Government in its return had submitted that the present appellant was a person of exceptional merits and suitability but unfortunately the wisdom of the officer who filed the return did not alarm him that he was required to file the confidential reports so that the Court could see and may observe something on the merits. It is also to be seen that if the D.P.C. was not giving any reasons then a person who was a Member of the D.P.C. was required to come to this Court and say that the Committee had considered particular aspects to place Shri Harpal Singh Sidhu on the higher pedestal. Officer-in-charge who does not know the facts which weighed in the mind of the Members of the Departmental Promotion Committee wanted to convey to this Court that what weighed in the minds of the Members of the Departmental Promotion Committee. Personal knowledge is always personal to the person, the third party or the other person can at best guess it, presume it or deem it but what exactly or truly happened will have to be said by such person who was involved in the process of finding the merits and suitability.

10. Of late it is being seen that whenever allegations are made against the officers of the State or the Committee Members some Tom, Dick or Harry or some Head Clerk, some Babu or some Under Secretary would be appointed as officer-in-charge and he would file his affidavit and on oath he would say that on

the basis of the records and information he was filing the affidavit. The affidavit would always be beautifully vague and inarticulate. The affidavit would never say that on what basis and that from where he obtained the information, whether the opinion is based on the records or the information is based on personal discussions with such officers who are shy of filing their personal affidavit in the High Court. When something is done personally then the person involved in the process would always be obliged to file his personal affidavit. In a given case such persons if are not available then the officer-in-charge on basis of the records at best can say but even at that time he will have to produce the entire record before the Court. The officer-in-charge who does not know anything cannot sit over the records and say to the Court that he knows everything and, therefore, he has filed the affidavit.

11. In the present matter officer-in-charge was not associated with the meeting of the departmental promotion committee. He nowhere says that he had a discussion with the Members of the Departmental Promotion Committee. He nowhere says that he had personally seen the confidential reports of all concerned. He nowhere says that what pursued the Members of the Departmental Promotion Committee to hold that the present appellant was of better and higher merits rather was of exceptional merits and suitability. When an affidavit or reply is filed by the State Government in the High Court, filing of such reply and affidavit is not an empty formality. The State Government which has taken an action has to justify its action before the High Court. It is always expected of the State Government that it would be fair not only to its employee but it would be fair to the High Court also. It would neither support anybody nor oppose anybody rather it shall open its cards and place the entire material before the High Court and would sit as a silent spectator so that it can observe the order passed by the High Court.

12. In the present matter the manner in which the State Government is trying to support the case and cause of the present appellant would speak volumes. It would show that somehow or the other they want Harpal Singh Sidhu to continue as Director (Officiating). Our presumption also finds support from the submission of Shri V.K. Shukla, learned counsel for the State, when he stated before the Court that till D.P.C. is completed Shri Harpal Singh Sidhu be allowed to continue as Director (Officiating). If the High Court has asked him to vacate the office then it is not expected of the State Government to make a prayer before the High Court that such officer should be allowed to continue in the higher office till the meeting of the departmental promotion committee is held. The conduct exhibited by the Government is reprehensible. It would simply show that in fact there is something fishy in the matter and is not being unveiled before this Court only to protect the present appellant and place him in the higher seniority. At the time of argument it was repeatedly requested by Shri Dixit, learned counsel for the appellant, that State be asked to produce the confidential reports. Shri Shukla, learned counsel for the State, also repeatedly argued that he be allowed some

time to produce the confidential report so that the comparative merits of such officers are brought on the record. We are shocked to hear this argument. What was to be brought on the record before the learned single Judge is now sought to be produced before this Court in future. Assuming, we call for all the reports then too it would not be possible for this Court to compare the comparative merits and come to a conclusion that Harpal Singh Sidhu in fact is of extra ordinary merits and suitability. The work is to be done by an expert committee. True it is that it is argued by Shri Dixit that the expert committee has found him to be of extra ordinary merits but while considering paragraph 6 of the proceedings recorded by the D.P.C., we have found that the committee has failed in discharging its duties because it has simply recorded its decision on the subject without assigning any reasons. Rule 15 (3) provides that "any junior officer who in the opinion of the committee is of exceptional merits and suitability may be assigned in the list a higher place than that of the officer senior to him". When a person is to be considered as of exceptional merit and suitability then opinion is to be formed and an opinion cannot be formed simply because there are likes and dislikes. The opinion has to be formed on the basis of the material which is made available to the Members of the Committee. In the present matter except observing that Harpal Singh Sidhu is of exceptional merits and suitability the departmental promotion committee did not observe anything. When such observations are made and there is no justification behind that and even the material which could prima facie satisfy the High Court is not produced before the High Court then the High Court would have no choice but to set aside such selection and the entire selection process. In our considered opinion the selection process was contaminated and stood corrupted because of non-application of mind and non-granting of reason. If such bad report is accepted then the High Court would certainly be entitled to strike with the sword of justice on every illegality committed by the State Government its functionaries and/or the persons who have been given certain powers.

13. So far as the question relating to Rule 12 (c) is concerned it was vehemently argued by Shri Dixit that for making an officiating promotion the question of seniority would not come in the way and as the present appellant was promoted as Joint Director (officiating) nothing wrong in the process could be found. In the present matter it is to be seen that the present appellant could secure unparallel, unmatchable and perfect patronage from the State Government. Even when the matter relating to the promotion to the post of Joint Director (Officiating) was in challenge before the State Administrative Tribunal and, thereafter on transfer before this Court the State Government through its wise officers had promoted an officiating officer to a further higher post that too with a direction that the officiating Joint Director shall act as officiating Director. It is also to be seen that Rule 12 (c) in fact talks of the interse seniority of Government servants promoted to officiate in a higher service or higher category of post.

14. The learned single Judge has not only considered Rule 15 (especially Rule 15(3) of the Rules) and Rule 12 (especially Rule 12(c) of the Rules) but he has given his anxious consideration to the totality of the circumstances of the facts of the case. After giving our thoughtful consideration, we are unable to hold that the learned single Judge was unjustified in holding that present appellant could not be promoted as officiating Joint Director.

15. We find no reason to interfere. The appeal deserves to and is accordingly dismissed with costs Rs.5000/-to be paid by the appellant to the contesting respondent no.1.

16. As the promotion of the present appellant to the office of the Joint Director is being set aside, we are unable to protect further promotion of the appellant to the office of Director (officiating). The other appeals are also dismissed.

17. The appeals filed by the State Government registered as W.A. No.412/2008, W.A. No.411/2008 and the appeals filed by Shri Devendra Kumar Bapna, Writ Appeal No.442/2008 and Writ Appeal No.443/2008 are also dismissed.

Appeal dismissed.

I.L.R. [2009] M. P., 2766
WRIT APPEAL
Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice A.M. Sapre
8 April, 2009*

RAJENDRA SINGH DASONDHI & anr. ... Appellants
Vs.
STATE OF M.P. & ors. ... Respondents

A. Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 9(1) Proviso - *Suspension* - *Word 'shall' in proviso indicates that where a Challan for criminal offence involving corruption or other moral turpitude is filed after sanction of prosecution by Government, the government servant has to be invariably placed under suspension and there is very little discretion with authority.* (Para 6)

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9(1) परन्तुक – निलंबन – परन्तुक में शब्द 'करेगा' उपदर्शित करता है कि जहाँ सरकार से अभियोजन की मंजूरी के बाद भ्रष्टाचार या अन्य नैतिक अधमता में आलिप्त करने वाले दाण्डिक अपराध के लिए चालान पेश किया जाता है वहाँ सरकारी कर्मचारी को सदैव निलंबन के अधीन रखना होगा और प्राधिकारी को बहुत कम विवेकाधिकार है।

B. Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 9(1)(b) - *Challan for offence u/ss. 13(1)(d) & 13(2) of Prevention*

*W.A. No.111/2009 (Indore)

of Corruption Act r/w Ss. 120-B & 406 IPC filed against appellant but Government is yet to sanction the prosecution - Proviso to Rule 9(1) not attracted - It is not mandatory for authority to place appellant under suspension but discretion by authority to place the appellant under suspension can not be said to be arbitrarily exercised - Appeal dismissed. (Para 7)

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9(1)(बी) – अपीलार्थी के विरुद्ध भ्रष्टाचार निवारण अधिनियम की धारा 13(1)(डी) व 13(2) सहपठित भा.द.सं. की धारा 120–बी व 406 के अपराध के लिए चालान पेश, किन्तु सरकार को अभी अभियोजन की मंजूरी देना है – नियम 9(1) का परन्तुक आकृष्ट नही – प्राधिकारी के लिए यह आज्ञापक नही है कि अपीलार्थी को निलंबन के अधीन रखे किन्तु प्राधिकारी द्वारा अपीलार्थी को निलंबन के अधीन रखने का विवेकाधिकार मनमाने ढंग से प्रयोग करना नही कहा जा सकता – अपील खारिज।

N.S. Bhati, for the appellants.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, C. J. :–This is an appeal under Section 2(1) of the M.P. Uchcha Niyayalaya (Khand Peeth Ko Appeal) Adhiniyam 2005, against the order dated 1.4.2009, passed by the learned Single Judge in Writ Petition No.5473/08(S).

2. The facts in brief are that the appellant was working as Assistant Manager in M.P. Khadi Gramodyog Board, Badwani. He has been placed under suspension by an order dated 4th March 2008 on the ground that criminal proceedings under Sections 13(1)(d) & 13(2) of the Prevention of Corruption Act read with Sections 120-B and 406 of the I.P.C., have been initiated against the appellant. Aggrieved by the order of suspension, the appellant filed W.P. No.5473/08(S) before this Court and the learned Single Judge dismissed the writ petition by the impugned order dated 1.4.2009.

3. Mr. N.S. Bhati, learned counsel for the appellant submitted that a reading of the impugned order dated 1.4.2009, passed by the learned Single Judge would show that the learned Single Judge has accepted the stand taken by the respondents in the writ petition that the appellant has been placed under suspension, in view of the mandatory provision under proviso to Rule 9(1) of the M.P. Civil Service (Classification, Control & Appeal) Rules, 1966, as amended with effect from 17th April, 1996 (for short 'the Rules'). He submitted that the proviso to Rule 9(1) of the Rules provides that the Government servant has to be placed under suspension where the prosecution is sanctioned by the Government, but in this case the Government is yet to sanction prosecution against the appellant and, therefore, the suspension order is illegal and liable to be quashed and this aspect of the matter has not been considered by the learned Single Judge. He also cited a copy of the order dated 26.05.08 in W.P. No.6501/08 in which the learned Single Judge has stayed the order of suspension of two persons working as Dy. Director and Assistant Manager of Khadi Gramodyog.

4. Rule 9(1) of the Rules, as amended with effect from April 17, 1996 is quoted herein below:-

> "9. (1) The appointing authority or any authority to which it is subordinate or the disciplinary authority or any other authority empowered in that behalf by the Governor by general or special order, may place a Government servant under suspension--
>
> (a) where a disciplinary proceeding against him is contemplated or is pending, or
>
> (b) where a case against him in respect of any criminal offence is under investigation, inquiry or trial;
>
> [Provided that a Government Servant shall invariably be placed under suspension when a challan for a criminal offence involving corruption or other moral turpitude is filed against him;]
>
> Provided further that where the order of suspension is made by an authority lower than the appointing authority, such authority shall forthwith report to the appointing authority the circumstances in which the order was made."

5. A perusal of Rule 9(1) (b) of the Rules quoted above would show that where a case against a government servant in respect of any criminal offence is under investigation, inquiry of trial, the authority may place the government servant under suspension. The word 'may' used in this proviso makes it clear that the authority has discretion to place a government servant under suspension where a case against him in respect of criminal offence is under investigation, inquiry or trial.

6. But, a reading of the first proviso, as introduced by way of an amendment with effect from 26th February, 1982 shows that a government servant shall be placed under suspension when a challan for criminal offence involving corruption or other moral turpitude by the government is against him. Thus, under this proviso only after challan for criminal offence involving corruption is filed against the government servant after sanction of prosecution by the government that a government servant shall be placed under suspension. The word "shall" in this proviso indicates that where a challan for criminal offence involving corruption or other moral turpitude is filed after sanction of prosecution by the government, the government servant has to be invariably placed under suspension and there is very little discretion with the authorities.

7. In the present case, it is not disputed that investigation of a criminal case has been completed and the challan has also been filed under Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act read with Sections 120-B and 406 of the I.P.C., but the government is yet to sanction the prosecution of the appellant.

Hence, Mr. Bhati is right that the first proviso to rule 9(1) of the Rules 1966 is not attracted and, therefore, it is not mandatory for the authority to place the appellant under suspension. But even, it was not mandatory for the authority to place the appellant under suspension under the first proviso to Rule 9(1) of the Rules, the authority had a discretion under Rule 9(1)(b) of the Rules to place the appellant under suspension, as the challan against the appellant and a case of criminal offence was under trial. Considering the fact that the offences for which challan was filed against the appellant are under Sections 13(1)(d) & 13(2) of the Prevention of Corruption Act read with Sections 120-B and 406 of the IPC, it is difficult for us to hold that this discretion by the authority to place the appellant under suspension under Rule 9(1) (b) of the Rules has been arbitrarily exercised.

8. For the aforesaid reasons, we do not find any merit in this appeal and we accordingly dismiss the same. In case, however, the appellant moves the competent authority against the order of suspension for revocation of the order of suspension under the relevant rules it would be open for the competent authority to consider the same on its own merits without being influenced by this order.

Appeal dismissed.

I.L.R. [2009] M. P., 2769
WRIT APPEAL
Before Mr. Justice R.S. Garg & Mr. Justice R.K. Gupta
22 April, 2009*

SAFE GUARD, GF-3, & anr. ... Appellants
Vs.
M.P. STATE AGRICULTURE MARKETING BOARD & ors. ... Respondents

A. **Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Sections 25, 46-F & 59 - *Power of Managing Director to look into legality or proprietary of decision taken or order passed - Mandi committee would be entitled to enter into agreement relating to purchases, sale, lease, mortgage or other transfer of, or acquisition of, interest in immovable property - Section does not refer service contract - Mandi Committee would not be entitled to enter into agreement of providing security guard without permission of Managing Director/Board.*** (Paras 27 & 28)

क. कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धाराएँ 25, 46–एफ व 59 – प्रबंध निदेशक की, लिये गये निर्णय या पारित आदेश की वैधता या औचित्य की जाँच पड़ताल करने की शक्ति – मण्डी समिति स्थावर सम्पत्ति में हित के क्रय, विक्रय, पट्टे, बंधक या अन्य अंतरण या अर्जन से संबंधित अनुबन्ध करने की हकदार होगी – धारा सेवा संविदा को संदर्भित नही करती है – मण्डी समिति प्रबंध निदेशक/बोर्ड की अनुमति के बिना सुरक्षा गार्ड मुहैया कराने का अनुबन्ध करने की हकदार नही होगी।

*W.A. No.811/2008 (Jabalpur)

B. Tender - *Tender condition - Appellant had not purchased tender form - No tenderer challenged the condition - Held - Condition was not essential and the Board had power to relax - Non-fulfilment of condition while submitting tender would not invalidate tender submitted by respondent company.* (Paras 21 & 24)

ख. निविदा – निविदा शर्त – अपीलार्थी ने निविदा फार्म क्रय नही किये थे – किसी निविदाकार ने शर्त को चुनौती नही दी – अभिनिर्धारित – शर्त आवश्यक नही थी और बोर्ड को शिथिल करने की शक्ति थी – निविदा प्रस्तुत करते समय शर्त का पालन न किया जाना प्रत्यर्थी कम्पनी द्वारा प्रस्तुत निविदा को अविधिमान्य नही बना देगा।

C. **Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 40-A** - *Power of State Government to issue direction to Board and market committee - Considering the facts and to avoid anomalous situation State should take action.* (Para 38)

ग. कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 40–ए – राज्य सरकार की बोर्ड या मण्डी समिति को निदेश जारी करने की शक्ति – तथ्यों पर विचार कर और विषम परिस्थिति से बचने के लिए राज्य को कार्यवाही करनी चाहिए।

Cases referred :

(1979) 3 SCC 489, (1993) 1 SCC 445, (2005) 3 SCC 157, (2000) 2 SCC 617, (2001) 2 SCC 451, (1994) 6 SCC 651, (1990) 2 SCC 488, (2006) 11 SCC 548, (2006) 6 SCC 467.

Mrigendra Singh, for the appellants.
Samdarshi Tiwari, G.A., for the respondent Nos.1 & 2.
Naman Nagrath, for the respondent No.3.

ORDER

The Order of the Court was delivered by **R.K. GUPTA, J.** :–The learned single Judge, while disposing of the respective writ petitions of the appellants by a common order dated 8.7.2008 passed in W.P. No.11972/2007 *(M/s Safe Guard vs. M.P. State Agriculture Marketing Board & another)*, W.P. No.1154/2008 *(M/s Safe Guard Security Agency vs. M.P. State Agriculture Marketing Board & others)* and W.P. No. 4774/2008 *(M/s Balaji Detective & Security Services vs. M.P. State Agriculture Marketing Board & others)*, has declined to interfere with the agreements of the Agency with the Mandi Committees as a consequence of which this batch of writ appeals has been perferred under Section 2 of the M.P. Uchcha Nyayalaya (Khand Nyay Peeth Ko Appeal) Adhiniyam, 2005.

2. In Writ Appeals No. 811/2008 and 812/2008, the appellant, M/s Safe Guard, has further prayed for quashment of the impugned NIT dated 1.8.2007 (Annexure A-10), Corrigendum dated 4.8.2007 (Annexure A-11) issued by the Respondent No.1 and the agreement executed between the first respondent, M.P. State

Agriculture Marketing Board (for short "the Board") and the third respondent, M/s Balaji Detective & Security Services in pursuance of the NIT.

3. In Writ Appeal No. 930/2008, the appellant M/s Balaji Detective & Security Services has prayed for a direction to the respondent-Board to enter into the agreement with the appellant in respect of 72 Mandi Committees mentioned in Writ Petition No.11972/2007 and has further prayed for quashing of all the contracts and agreements entered into by the third respondent- M/s Safe Guard with various Mandi Samitis after expiration of the original agreement dated 29.10.2002.

4. From the aforesaid reliefs sought in the appeals it is discernible that the reliefs sought for, as such, are interrelated and the questions of fact and law involved in the petitions also being identical, all the three appeals were heard analogously and are being disposed of by this singular order.

5. The facts which are relevant for the purpose of adjudication of these writ appeals are obtained from W.A. No.811/2008 which state that the appellant, M/s Safe Guard Security Agency (in short as "the appellant-Agency"), which is a Proprietorship firm carries on its business of providing security services to various government and non-government organizations had entered into an agreement with the Board in the year 1995 for providing security guards to all the Mandi Committees in the State of Madhya Pradesh which was further extended from time to time and remained in existence till September, 2001. In the year 2002, the respondent-Board issued directions vide its letter dated 20.11.2002 to all the Secretaries of Mandi Committees of the State that in case the Mandi Committees want to employ the security guards, they may employ the security guards from the appellant-Agency as per the agreement that had already been entered into between them on the basis of tender which was accepted by the Board. As per the format of said agreement, initially the agreement was to be for a period of two years, with the stipulation that it was further extendable by mutual consent upto three years on the rate accepted by the Board. After expiry of the period of three years some of the Mandi Committees further entered into agreement with the appellant Agency for the period upto 31.12.2008. In the meantime, on receipt of some complaints about monopoly of the appellant Agency from 1995, the Board directed to issue fresh Notice Inviting Tender (NIT) on 24.12.2005 for a fresh agreement for providing security to all Mandi Committees and thereafter second amended NIT was issued for inviting applications between 15.2.2006 to 1.3.2006. Subsequently, again two amended NITs were issued for the period between 2.3.2006 to 31.3.2006 and 1.4.2006 to 17.4.2006.

6. The appellant-Agency challenged the aforesaid NITs before the Gwalior Bench of this Court in W.P. No.1972/2006 on the ground that since the Agency had already entered into an agreement and the period of contract was extended by some of the Mandi Committees upto 31.12.2008 on same terms and conditions,

therefore, the Board could not have invited fresh tenders for all the Mandis and the said action of the Board was in breach of the agreement already executed by the Board. The learned single Judge of Gwalior Bench of this Court vide its order dated 23.8.2006 passed in W.P. No.1972/2006 refused to interfere in the contractual matter holding that after the period of contract, the fresh NIT could be invited. Ultimately, the said writ petition was dismissed with cost.

7. Against the aforesaid decision of learned single Judge rendered in W.P. No.1972/2006, an appeal was preferred by the appellant-Agency, which was registered as W.A. No.259/2006. It was contended on behalf of the appellant-Agency that Mandi Committee being an independent statutory body created under the provisions of the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 (for short as "the 1972 Adhiniyam") was within its power to extend the period of agreement and by issuing fresh NIT the rights of the Mandi Committee to enter into the agreement could not have been curtailed and on this basis the appellant-Agency was entitled to be protected. Eventually, the Division Bench (Gwalior) of this Court vide its judgment delivered on 17th July, 2007 held that Mandi Committees can also engage the security services of any security agency by independently entering into agreements and declined to interfere with the agreements of the appellant-Agency with the Mandi Committees as their period was upto 31.12.2008. The Division Bench refused to interfere with the agreements on the foundation that it would amount to shutting of the right of Mandi Committees to enter into agreements. Undisputedly, the said petition was restricted to 11 Mandi Committees which were falling within the territorial jurisdiction of the Gwalior Bench of this Court.

8. It is contended on behalf of the appellant-Agency that perpetuating the illegality, the Board issued another NIT on 1.8.2007 (Annexure A/10 to W.A. No.811/2008) for 320 Mandi Committees and later on finding that there are only 237 Mandi Committees in the State of M.P. barring 11 Mandi Committees in respect of which there was already an order of the Gwalior Bench of this Court, the Board issued a corrigendum dated 3.8.2007 (Annexure A/11). According to the appellant-Agency they intimated the Board about the order of the Division Bench (Gwalior) of this Court passed in W.A. No.259/2007 that the Agency had entered into contract with 72 Mandi Committees in whole of the State of M.P. and, therefore, the issuance of NIT for such Mandi Committees was uncalled for. The alleged apathy of the Board led to filing of writ petitions before this Court challenging the aforesaid NITs dated 1.8.2007 and corrigendum dated 3.8.2007, which were registered as W.P. No. 11972/2007. Initially, vide order dated 7.9.2007 the learned single Judge of this Court granted stay against the NITs in respect of 72 Mandi Committees, which are mentioned in para 9 of the writ appeal) for which the appellant-Agency was found to have already entered into agreement with the Mandis.

9. It seems that during the pendency of the W.P. No.11972/2007, the NITs were issued by the Board and M/s Balaji Detective & Security Services (India) Pvt. Ltd. (in short "the respondent-Company"), which also engages itself in the business of providing security services, submitted its tender in pursuance of the NIT issued by the Board for 237 Mandi Committees. The tender submitted by the Company on being found lowest was accepted but it was stated that agreement could only be signed in respect of 165 Mandis. In this background, the said Company approached this Court by filing W.P. No. 4774/2008 making a prayer for issuance of direction against the Board to execute a contract with respect to those Mandi Committees also with whom the Agency had entered into agreements on the ground that time period of some of the agreements of the Agency with Mandi Committee had also expired and a false statement was made in the petition that all the agreements with 72 Mandi Committees are valid upto 31.12.2008.

10. As mentioned above, the learned single Judge vide common order dated 8.7.2008 has disposed of the aforesaid writ petitions and the decision has such has been challenged in this batch of writ appeals.

11. Before we advert to the rival submissions put forth on behalf of the parties it would be appropriate to refer to the order passed by us on 3.3.2009, which reads as under:-

> "Shri Mrigendra Singh, learned counsel for the appellants in Writ Appeal Nos. 811/2008 and 812/2008.
>
> Shri Naman Nagrath, learned counsel for the appellant in Writ Appeal No. 930/2008.
>
> Shri Nagrath appears for M/s Balaji Detective & Security Services (I) Pvt. Ltd.
>
> In Writ Appeal Nos. 811/2008 and 812/2008, I.A. Nos. 14285/2008 is an application for intervention while I.A. No. 14288/2008 is an application by the appellant to grant him permission to continue the existing agreement. I.A. No. 1638/2009 is an application for taking certain documents on record (it has been filed by the respondent Nos. 1 and 2).
>
> Undisputedly, in the year 2002, tenders were invited and the present appellant No.1, M/s Safe Guard, GF-3 was selected as the security agency, being the lowest, for providing the services. The agreement was entered into between all the Mandis of Madhya Pradesh and the appellant for a period of two years with a further stipulation that the agreement can be continued for a further period of one year. The period accordingly was to expire in 2005. However, some of the Mandis entered into agreement with the

present appellant for a further period of three years. Somewhere, in February 2008, the respondent Nos. 1 and 2 invited the tenders for providing security services. Undisputedly, the appellant No.1 or the appellant No.2, for and on behalf appellant No.1, did not take part in the tender process. Respondent No.3 took part in the tender process and, undisputedly, was selected as the service provider having provided the lowest rate for providing the services.

The appellant, thereafter, filed a writ petition in the High Court submitting, inter-alia, that the action on the part of the respondent Nos. 1 and 2 is patently illegal. It was submitted before the learned single Judge that the Board has no power or authority to float the tenders, issue notice inviting tenders and select one of the agencies. Along with the writ petitions, applications for interim orders were also filed.

The present appellant of Writ Appeal No. 930/2008 submitted before the learned single Judge that in view of his selection as the service provider, interim order could not be granted.

After hearing the parties, vide order dated 8.7.2008 learned single Judge refused to interfere in the matter but, however, observed that he would not interfere with the agreements of the agency with the Mandi committees which were valid upto 31.12.2008. He also directed that the Board shall be at liberty to take a decision in accordance with the provisions of the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 in respect of those agreements of the Agency whose time period has already expired. The petitions were finally disposed of, therefore, the M/s Safe Guard have filed Writ Appeal Nos. 811/2008 and 812/2008 while M/s Balaji have filed Writ Appeal No. 930/2008.

On an earlier occasion we had issued an interim order that the State Government and so also the respondent Nos. 1 and 2 shall inform us that under what authority of law they could call for the tenders and appoint the respondent No.3 as the security agency. Mandi Committee has filed its reply and State Government has also filed its say.

Shri Mrigendra Singh, learned counsel for the appellants placing reliance upon Section 54 of the Act submitted that the Managing Director of the Board would only have certain powers in relation to inspection, enquiry, to examine the written statements, account, etc. and may require a market committee to take into consideration any objection on the ground of illegality etc. and

may direct the Mandi committee that anything, which is about to be done or is being done, should not be done and anything, which should be done but is not being done, should be done within such time as the Managing Director may direct. It is submitted by him that the Mandi Board or the Managing Director have no powers to appoint a security agency for all the Mandis.

Shri Naman Nagrath, learned counsel for the respondent No.3, however, submitted that the present appellant having secured or reaped the fruits of the earlier tender process for a long period of six years, now cannot be allowed to take a somersault and say that the action of the Mandi Board or the Managing Director is bad. It is submitted by him that the appellant does not have any equity in his favour nor has a moral right to challenge the action of the respondent-Board especially when it had taken the advantage of the earlier action of the Board. He also referred to Section 59 of the Act and submitted that the Managing Director has the powers to look into the legality or propriety of the decision taken or order passed and as to the regularity of the proceedings of the Committee. He also referred to Section 46(F) of the Act and submitted that the Board shall have powers to supervise and control over the agricultural marketing committee. He also referred to Section 25 of the Act and submitted that a Mandi committee would be entitled to enter into agreements relating to purchase, sale, lease, mortgage or other transfer of, or acquisition of, interest in immovable property etc. but as Section 25 does not refer to a service contract, the Mandi Committee would not be entitled to enter into such an agreement without the permission and consent of the Managing Director/Board.

Shri Samdarshi Tiwari, learned counsel for respondent Nos. 1 and 2 adopting the arguments raised by Shri Naman Nagrath further submitted that the present appellant is facing criminal prosecution because of the fraud played by him in relation to certain agreements and under the circumstances, the present appellant would not be entitled to a discretionary order in his favour.

Shri T.S. Ruprah, learned Additional Advocate General, however, submitted that the State Government is entitled to issue directions under Section 40-A and in this case the State has no comments to make.

Shri Tiwari and Shri Ruprah, learned counsel for the Mandi Board and the State, however, submitted that looking to the notices inviting tender, the fact that present appellant did not take part in

the tender process and that he is facing criminal prosecution so also that he has taken advantage of the earlier tender process, at this stage, he would not be entitled to any relief and these respondents have no objection, if the person who has submitted the lowest rates, is given the authority to enter into agreement with all the Mandi Committees.

We have gone through the provisions of law and have also heard the parties at length.

Undisputedly, the appellant had taken the advantage of the tender process from February 2002 to 2005 and thereafter got the agreements with number of the Mandi Committees renewed. It is also to be seen from the records that the present petitioner-appellant started challenging the process only after everything was settled in favour of the respondent No.3.

At this stage, taking into consideration the fact that the petitioner-appellant had taken advantage of the earlier tender process and continued with all the Mandi Committees for a period of three years and got number of the agreements renewed for further period of three years, we are of the opinion that at this stage there is no equity in favour of the appellants. The interim orders granted earlier are vacated. The respondent Nos. 1 and 2 are hereby directed to issue directions to all Mandi Committees to enter into security services agreement with the respondent No.3. Such direction shall be issued by the respondent Nos. 1 and 2 preferably within one week and the Mandi Committee would be obliged to enter into agreement within one week further on the rates, as approved by the respondent Nos. 1 and 2.

The appeals, in fact, have been heard at length, it is, therefore, directed that the appeals be listed for final hearing on 17th March, 2009.

Certified copy of this order must be supplied to all the parties today itself."

12. We have been informed by learned counsels appearing for the parties that against the said interim order dated 3.3.2009 a special leave petition was preferred before the Hon'ble Supreme Court, which has been dismissed. In view of the dismissal of the said SLP, the interim order passed by us on 3.3.2009 has attained finality. As is evident from the order dated 3.3.2009, after taking into account submissions of learned counsel appearing for the parties, we had directed the Mandi Board to enter into agreement with M/s Balaji and the agreement as such has been entered into between them.

13. Shri Mrigendra Singh, learned counsel appearing for the appellant-Agency submitted that in view of the judgment passed by a Division Bench (Gwalior) of this Court in W.A. No.259/2006 wherein it has been held that the Mandi Committee has the discretion and power to enter into agreement with the appellant, therefore, no direction could have been issued by the Managing Director of the Board which is the Apex Body for entering into agreement with M/s Balaji, the Company. It is also contended by him that in view of Section 25(2) of the 1972 Adhiniyam, the Secretary of the Marketing Committee may execute contract or agreement on behalf of the market committee where the amount or value of such contract or agreement does not exceed rupees one thousand regarding matters in respect of which he is generally or specially authorized to do so by a resolution of the market committee. He relied upon sub-clauses (b) and (c) of Sub-Section (2) of Section 25 of the 1972 Adhiniyam. It is further contended on behalf of the appellant-Agency that the Managing Director of the Board has no power to issue the NIT or to fix the conditions of the tender form. It is also submitted by him that the conditions as enumerated in the tender form had been very onerous with the result neither the appellant-Agency nor the respondent-Company was eligible to apply against the same and since the respondent-Company though submitted its tender but it was not eligible in terms of the conditions laid down in the tender form, therefore, no tender in its favour could have been accepted by the Managing Director. Another submission of Mr. Singh is that the conditions in the tender form to the extent that a tenderer has to give the names and details of the employees along with license numbers of their guns and that it was a necessary condition that the parties submitting the tenders had to submit the police verification and medical certificates with respect to the persons those who were to be deployed in various Mandi Committees, were very onerous because until the tender is accepted it is very difficult to supply the names of such personnel who will be employed by the security agencies i.e either by the appellant agency or the respondent-company. It is further submitted by him that initially though the tender was issued for 320 Mandi Committees which is clear from the NIT, Annexure-A-10, but subsequently a corrigendum was issued for 237 Mandi Committees, which is Annexure-A-11, and further 11 Mandi Committees in respect of which stay order was in force from the Gwalior Bench, such Mandi Committees could not have been impleaded for issuance of tender. It is also contended that subsequently an application was filed about 72 Mandi Committees which had already entered into agreement with the appellant agency and they were also protected. In the light of aforesaid submissions it is submitted by Shri Singh, learned Counsel appearing for the appellant-agency that the respondent-company M/s Balaji should not have been given tender for all the 237 Mandi Committees.

14. In support of his various submissions detailed above, Shri Singh has placed reliance upon various decisions rendered by the Apex Court in *Ramana Dayaram*

Shetty v. International Airport Authority of India and others, 1979 (3) SCC 489, *Sterling Computers Limited v. M/s M & N Publications Limited and others,* 1993(1) SCC 445, *Laxmi Sales Corpn. V. Bolangir Trading Co. and others,* 2005 (3) SCC 157, *Air India Ltd. v. Cochin International Airport Ltd. and others,* 2000 (2) SCC 617, *W.B. State Electricity Board v. Patel Engineering Co. Ltd. and others,* 2001 (2) SCC 451, *Tata Cellular v. Union of India,* 1994 (6) SCC 651.

15. On behalf of the respondent-company, M/s Balaji, it is submitted that the appellant-agency, in fact, has entered into agreement with various Mandi Committees on the basis of letter issued by the Managing Director of the Board. It is also contended that even after the expiry of initial period of two years the contract was extended in favour of the appellant-Agency by the Mandi Committees for a period of another one year. After expiry of period of another one year again the contract was entered into. The extension of such contracts had been only under the authority of the Managing Director. In the backdrop of these submissions Shri Nagrath submitted that in the past, the appellant-agency itself was the beneficiary of the orders/ directives issued by the Managing Director, therefore, at this stage when the NIT. issued by the Managing Director has already been accepted by him, and the appellant-agency being the beneficiary of an alleged wrong, did not challenge the authority of the Managing Director for a considerable long period, it is not open for the appellant-agency to challenge the authority of the Managing Director that he has no authority to issue the NIT. It is also contended by him that under the provisions of the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 the Managing Director has ample power to control the affairs of the Mandi Committees.

16. The rival submissions advanced on behalf of the parties are considered.

17. It is true that the appellant-Agency was the beneficiary of the directives issued by the Managing Director to various different Mandi Committees to enter into agreement with the appellant-Agency only. This aspect of the matter has been taken into account by us in our order dated 3.3.2009 and we came to the conclusion that once the appellant-Agency being the beneficiary had taken advantage of the directives of the Managing Director for a long time then it is not open for the appellant-Agency to challenge the NIT issued by the Managing Director. It is also not correct to say that only the Managing Director had issued the advertisement/NIT without getting approval from the Board, because a bare perusal of the opening words of the NIT (Annexure P-10) clearly reveals that the Managing Director on behalf of the Board had issued the said NIT and the head office of the Board required security personnel in the headquarter of the Board and also in other Mandi Committees of the State. Another aspect of the matter is that at no point of time the Board had ever objected to the NIT issued in the name of Managing Director. For these reasons, the submission so put forth on behalf of

the appellant-Agency that the Managing Director has no power to issue the NIT is unacceptable.

18. In none of the petitions before the learned single Judge the appellant-Agency ever challenged the authority of the Managing Director to issue the NIT. The only ground which was raised was that since the appellant-Agency had entered into an agreement with the Mandi Committees for a period ending 31.12.2008, therefore, the Managing Director should not have issued the NIT for other security agencies to supply the security guards.

19. We have perused the minutes of the tender proceedings and on the basis of the record it is clear that police verification and medical certificate with respect to the security personnel to be deployed was not initially to be submitted by the tenderers but the same was to be submitted at the time of deployment. It would not be out of place to mention that in the NIT (Annexure A-10) condition as such was not imposed. Though the appellant-agency was not deprived of purchasing the tender form, yet it did not purchase the tender form, it is because there was no such stipulation as pleaded and urged. This leads to another issue, whether the condition which was waived by the tender committee for submitting the said information along with the tender form whether was an essential qualification. The answer has to be in the negative. The reason is that if whole of the tender proceedings is to be appreciated then there is no dispute that it was so floated by the Board for the deployment of the security agencies and the personnel employed by the security agencies were required to act as security guards in different Mandi Committees including headquarter of the Board. The deployment of the personnel has to be done after the tender of any agency or firm is accepted. Thus, no one can expect and it was also not possible that any security agency submitting the tender would submit medical certificates and also the police verification at the time of submitting the tender form. Submission of police verification and medical certificates was the condition to come in force at the time of deployment of security guards i.e. only after when the tender is accepted and, therefore, the condition as such cannot be treated to be the essential qualification or eligibility for supply of tender form. In this context, it would be pertinent to refer to the relevant condition No.5 at Page-133 of the paper-book filed in W.A. No.811/2008 which deals with the necessary qualifications of the tenderers. The condition No.5 in question is reproduced in its Hindi and English version as under:-

> "(5) निविदाकार/एजेन्सी में कार्यरत कर्मचारियों जो कि इस संस्थान में कार्य करेंगे का पुलिस वेरीफिकेशन तथा स्वस्थता प्रमाण पत्र सक्षम चिकित्सक (शासकीय चिकित्सक) का निविदा के साथ प्रस्तुत करना होगा।"
>
> [emphasis applied]
>
> (5) Police verification and medical fitness certificate by the competent doctor (government doctor) of the employees employed

with the tenderer/agency who would work in this institution will have to be submitted along with the tender."

(ENGLISH TRANSLATION)

20. A strict interpretation of the said condition would make the said condition which is said to be essential as unworkable because of the words used therein are "in this institution". The tender was invited for 320 Mandi Committees. Subsequently, corrigendum was issued for 237 Mandi Committees. Once the said qualification itself provides for "in this institution" and does not provide "in the institution" for the deployment of the security personnel then apparently that cannot be called to be an essential condition for submitting the tender form. In this reference, we may profitably refer to a decision rendered by the Apex Court in *G.J. Fernandez v. State of Karnataka and others*, (1990) 2 SCC 488. The relevant paragraphs 13 and 14 from the said decision read as under:-

"13. Interesting as this argument is, we do not see much force in it. In the first place, although, as we have explained above, para V cannot but be read with para I and that the supply of some of the documents referred to in para V is indispensable to assess whether the applicant fulfills the prequalifying requirements set out in para I, it will be too extreme to hold that the omission to supply every small detail referred to in para V would affect the eligibility under para I and disqualify the tenderer. The question how far the delayed supply, or omission to supply, any one or more of the details referred to therein will affect any of the prequalifying conditions is a matter which it is for the KPC to assess. We have seen that the documents having a direct bearing on para I viz. regarding output of concrete and brick work had been supplied in time. The delay was only in supplying the details regarding "hollow cement blocks" and to what extent this lacuna affected the conditions in para 1 was for the KPC to assess. The minutes relied upon show that, after getting a clarification from the General Manager (Technical), the conclusion was reached that "the use of cement hollow block masonry may not be required at all and instead the brick masonry may be used". In other words, the contract was unlikely to need any work in hollow cement blocks and so the document in question was considered to be of no importance in judging the prequalifying requirements. There is nothing wrong with this, particularly as this document was eventually supplied.

14. Secondly, whatever may be the interpretation that a Court may place on the NIT, the way in which the tender documents

issued by i has been understood and implemented by the KPC is explained in its "note", which, sets out the general procedure which the KPC was following in regard to NITs issued by it from time to time. Para 2.00 of the "note" makes it clear that the KPC took the view that para I alone incorporated the "minimum pre-qualifying eligibility conditions" and the data called for under para V was in the nature "general requirements". It further clarifies that while tenders will be issued only to those who comply with the pre-qualifying conditions, any deficiency in the general requirements will not disqualify the applicant from receiving tender documents and that data regarding these requirements could be supplied later. Right or wrong, this was the way they had understood the standard stipulations and on the basis of which it had processed the applications for contracts all along. The minutes show that they did not deviate or want to deviate from this established procedure in regard to this contract, but, on the contrary, decided to adhere to it even in regard to this contract. They only decided, in view of the contentions raised by the appellant that Para V should also be treated as part of the pre-qualifying conditions, that they would make it specific and clear in their future NITs that only the fulfilment of pre-qualifying conditions would be mandatory. If a party has been consistently and bona fide interpreting the standards prescribed by it in a particular manner, we do not think this Court should interfere though it may be inclined to read or construe the conditions differently. We are, therefore, of opinion that the High Court was right in declining to interfere.

The view taken by the Apex Court in *G.J. Fernandez* (supra) has again received consideration of the Apex Court in its decision *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others,* 2006 (11) SCC 548. In para-66 of this judgment, the Apex Court has laid down the following principle with regard to judicial review in relation to essential qualifications:-

"8. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under :

(i) If there are essential conditions, the same must be adhered to;

(ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing

(iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction..

(v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with..

(vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority.

(vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint."

Keeping in view the aforesaid principle laid down in para-66 of its judgment by the Apex Court, in the present case it is to be seen that the principle of strict compliance of the said condition No.5 on which heavy reliance was placed and which has been reproduced in the earlier paragraph of this judgment, cannot be applied in the present case because the person who is submitting the tender form does not know whether his tender would be accepted so that he will submit medical and police verification with respect to all the security personnels to be deployed in a particular Mandi Committee. It is not a case of the appellant agency that conditions which are enumerated in the NIT (Annexure A-10) have not been complied by the respondent-Company i.e. M/s Balaji.

21. In view of aforesaid discussion, we are of the view that even though the Company, M/s Balaji had not submitted the document with respect to the police verification and medical certificate of its personnels to be deployed after acceptance of tender as security guard, the argument put forth on behalf of appellant agency cannot be accepted because it had not purchased the tender form. As is evident from the minutes of the tender proceedings produced before us, out of 10 parties who purchased the tender form excluding the Company whose

rates were found to be lowest, it was accepted, other nine parties who submitted the tender have not come before the Court or before us making a grievance that tender conditions were onerous. The tender committee has also directed that at the time of deployment of security personnels M/s Balaji, the company had to submit the information with regard to police verification and medical certificate before deploying them in the concerned Mandi Committees.

22. That apart, it is manifest that in none of the two petitions filed by the appellant agency before the learned Single Judge challenge was made to the NIT on the ground that the conditions enumerated in the tender form were onerous, therefore, he could not apply for the same. In this reference the grounds raised and reliefs prayed for by the appellant-agency in both the writ petitions before the learned Single Judge can profitably be taken note of. The grounds and reliefs prayed for by appellant-agency in W.P. No.11972/2007 is reproduced as under:-

"(6) Grounds:

(A) That, the NIT Annexure P/1 and amended NIT Annexure P/2 are absolutely illegal and without authority of the law and therefore the same are liable to be set aside. The Mandi Board i.e. respondent no.1 has no authority, jurisdiction under the law to invite tender to provide security and security agency to the Mandi Samities without there consent.

(B) That, even otherwise the issuance of NIT by the respondent Board with respect to 72 Mandi Samities to whom the petitioner has entered into an agreement to provide for the security guards is absolutely illegal and same is unsustainable in the eyes of law.

(C) That, the impugned NIT issued by the respondent Board are otherwise illegal as the contract depends on the consent of the parties whereas by nominating the agency entrusted of contract to the Krishi Upaj Mandi Samities, is no contract in the eyes of law. In this view of the matter also the NIT issued by the respondent Board is liable to be set aside.

(D) That, once the judgment as rendered by this Hon'ble Court which attained finality between the parties the respondent Board being statutory body created under the law of the M.P. Krishi Upaj Mandi Adhiniyam, 1972 is not within its rights to issue again NIT for the similar cause. In this view of the matter the NIT issued by the respondent Board is ab initio void.

(7) RELIEF SOUGHT:

In view of the facts mentioned in para 6 above the petitioner prays that a writ of mandamus or certiorari any other suitable writ, direction may kindly be issued and following relief may be granted to the petitioner:

(i) That, the NIT Annexure P/1 and amended NIT Annexure P/2 may kindly be directed to be set aside.

(ii) That, it may be held that the respondent Board has no jurisdiction and power to assign security agency compelling the Krishi Upaj Mandi Samities to enter into contract and it may also be held that Krishi Upaj Mandi Samities of the State of M.P. are free to enter into agreement in terms of section 7(2) of M.P. Krishi Upaj Mandi Adhiniyam, 1972 for providing security.

(iii) That, the other relief doing justice including cost be awarded."

The grounds and reliefs prayed for by appellant-agency in W.P. No.1154/2008 is reproduced as under:-

"(6) Grounds:

6.1 For that the impugned letter/order dated 7.1.2008 (Annexure P/1) directing the Respondent No.3 to execute an agreement for providing security guards to the establishment of the respondents is per se illegal and arbitrary for the reason that the Respondents have already entered into an agreement with the petitioner for providing security guards to the establishment of answering respondents and the 237 Mandis established in the State. The same being in force the impugned order/letter 7/1/2008 deserves to be set aside.

6.2 For that the impugned letter/order dated 7/1/2008 has been issued in a post haste manner in order to grant the contract to their blue eyed person, i.e. Respondent No.3 for the reason that the Hon'ble Court in a similar matter (Writ Petition No.11972/2007 M/s Safeguard Security Agency v/s MP State Agriculture Marketing Board) was pleased to stay the effect and the operation of the NIT (Annexure P/3 & P/4) so far as the 72 Mandis are concerned for the reason that the petitioner has already executed an agreement with these Mandis, but the Respondents has now issued the impugned letter so far as the remaining 165 Mandis are concerned in order to circumvent the order passed by the Hon'ble Court. The same being an outcome of malafide deserves to be set aside.

6.3 For that as the matter pertaining to issuance of NIT (Annexure P/3 & P/4) is sub-judice before the Hon'ble Court in Writ

Petition No. 11972/2007 (M/s Safeguard Securities v/s MP State Agriculture Marketing Board) therefore the respondents should have restrained themselves from issuing the impugned order which is consequential to the NIT, as the same will effect the rights of the petitioner. Hence, the impugned order smacks malafide and therefore deserves to be set aside.

(7) RELIEF SOUGHT:

In the facts and circumstances of the case, the petitioner prays for the following reliefs:-

(i) To issue a writ in the nature of Certiorari quashing the impugned letter/order dated 7/1/2008 issued by the Respondent No.2.

(ii) To issue a writ in the nature of certiorari quashing the agreement (if any) executed between the Respondent no.1 and Respondent No.2, which is consequential to the letter dated 7/1/2008 (Annexure P/1).

(iii) To issue a command directing the respondents to produce the entire record pertaining to the present petition for kind perusal of the Hon'ble Court.

(iv) Any other relief, which in the facts and circumstances of the case, the petitioner may be found entitled, may also be granted in favour of the petitioner."

23. Shri Samdarshi Tiwari, learned Government Advocate appearing for the Board produced the record of the tender file and the tender proceedings before us. As is evident from the tender proceedings, total 10 tender forms were sold, which were purchased by the following security service providers:-

(1) M/s Balaji Detective & Security Service, Bhopal
(2) M/s World Wild Security Organization, Bhopal
(3) M/s Ideal Security Service, Bhopal
(4) M/s Bharat Security Service, Bhopal
(5) M/s S.S.I. Security Service, Bhilai (C.G.)
(6) M/s Bombay Intelligence & Security Service, Bhopal
(7) M/s Visual Simoram Ltd., New Delhi
(8) M/s S.S.V. Security Service, Gurgaon (Haryana)
(9) M/s Checkmate Security Service, Bhopal
(10) M/s Oford Security Service, Jabalpur.

It is further seen that the tender forms so received were opened before the committee on 27.11.2007 and as per the record four tender forms, which were received for providing security service for the State Mandi Committees, were opened and a comparative assessment of the same is as under:-

Name of the Agency	Post	Percentage of service charge for each post
M/s Balaji Detective & Security Service, Bhopal	Gunman Security Guard	00.00% 00.00%
M/s Bharat Security Service, Bhopal	Gunman Security Guard	0.001% 0.001%
S.S.I. Security Service, Bhilai (Chhattisgarh)	Gunman Security Guard	0.001% 0.001%
M/s Checkmate Security Service, Bhopal	Gunman Security Guard	1.0% 1.0%

24. From the aforesaid narration of the tender proceedings, it is clear that the rates quoted by M/s Balaji Detective & Security Service, Bhopal were found to be the lowest. It is also clear as noon day that the appellant-Agency had not even purchased the tender form. A condition in the tender form was enumerated that while submitting the tender, the parties had also to submit the names of security personnels who were to be deployed along with their gun licence number. It is also not the case of the appellant-Agency that they have come to know from other sources that the conditions of the tender had been onerous. Keeping this important aspect of the matter in view, once the tender form had not been purchased by the appellant-Agency, it is difficult to conceive that the appellant-Agency did not apply because the conditions of the tender form were onerous.

25. That part, these grounds as such were also not raised before the learned single Judge in the petitions by the appellant-Agency and argument that the conditions of the tender form were onerous has only been advanced before us on behalf of the appellant-Agency during the course of hearing. In our opinion, writ appeal being a rectificatory jurisdiction, it is not open for a party to raise a new factual ground which was not raised before the learned single Judge, as has been held by the Apex Court in *Sanjay Kumar and others v. Narinder Verma and others,* 2006 (6) SCC 467. The relevant para-13 of the same, reads as under:-

> "13. Mr. Raju Ramachandran, learned senior counsel appearing for the third respondent in Civil Appeal Nos.5430-34 of 2004, however, urged that one of the grounds of challenge before the Division Bench was that the statutory qualification was discriminatory. He, therefore, contended that in view of the said contention it was open to the High Court to read down the offending Rule instead of striking it down. Having read the portion of the impugned judgment on which this argument is based, we are not satisfied that such a contention was really urged. It is not in dispute

that the writ petitions were not directed towards challenge to the applicable Rules. Merely because an argument was made in the letters patent appeal that the Rules were discriminatory, it is not open to the High Court to have struck down the Rules. The Letters Patent appeals could have proceeded only on the basis of the writ petitions and the judgment of the learned Single Judge, which was being challenged. There being no substantive challenge to the Rules, there was no question of striking down the Rules, nor was there any situation of reading down the Rules. Reliance placed by Mr. Raju Ramachandran on the judgment of this Court in *Umesh Chandra Shukla v. Union of India* is of no avail. That was entirely a different situation where this Court was of the view that the applicable Rules had not been followed as the select list had been interfered with by exercising a power which did not arise from Rule 18 of the applicable Rules to fix the minimum marks in order to include candidates in the final select list. Such is not the situation before us and, therefore, this authority is of no help to us."

26. As far as the submission advanced on behalf of the appellant-Agency that the respondent-Company M/s Balaji should not have been given tender for all the 320 Mandis is concerned, after scrutiny of the record from all spectrums it is observed that the agreement of the appellant-Agency was to expire on or before 31.12.2008 with all the Mandi Committees. The Mandi Committees entered into agreement even beyond the extended period of one year though initially a direction was issued by the Managing Director to enter into agreement for a period of two years, which was extendable for a further period of one year. Under these circumstances, we are of the view that issuance of the NITs for all the 320 Mandi Committees by the Managing Director was not an arbitrary act on his part. But, however, we may clarify that as per the corrigendum to the NIT i.e. Annexure A-11 and minutes of the tender proceedings, the contract could be entered into by the respondent-Company only in respect of 165 Mandi Committees for which tender was accepted by letter dated 2.2.2008 (Annexure A-1 page-125 of paper-book) and subsequently after expiry of the period of the contract with the appellant-Agency with other Mandi Committees after 31.12.2008, the Managing Director was/is within its power to direct the other Mandi Committees to enter into agreement with the respondent-Company, M/s Balaji. The similar direction had been issued by us in our order dated 3.3.2009, which has been affirmed by the Apex Court.

27. On behalf of the respondent-Board it is contended that under the provisions of the 1972 Adhiniyam, the Managing Director enjoys sufficient power of control and supervision over different Mandi Committees. Learned

counsel referred to Clause (c) of Sub-Section (1) of Section 54 which Provide that the Managing Director may call for from a market committee written statements, accounts or report which he may think fit to require such Committee to furnish. He has further invited our attention to Section 46-F which defines the power of the Board with regard to exercise of supervision and control over the agricultural market committee. In this reference, Section 25 of the Act is also relevant which relates to the mode of making contracts by the Mandi Committee. According to the same, providing security personnel is not described under Section 25 of the Act, therefore, market committee has no power to enter into agreement. It is also submitted that whatever action has been taken by the Managing Director of the Board in issuing the NIT and corrigendum and thereafter accepting the bid in favour of the respondent-Company, in the absence of any objection by the appellant-Agency the acts done by the Managing Director have to be treated as approved by the Board, as the Board never objected to the acts of the Managing Director.

28. The next plank of submission raised on behalf of the appellant-Agency is that the Managing Director should not have directed the Mandi Committees to enter into agreement when the tender of the respondent-Company was accepted. In this context Shri Mrigendra Singh, learned counsel appearing for appellant-Agency has placed heavy reliance on the judgment passed by the Division Bench (Gwalior) of this Court in W.A. No.259/2006 (supra). In this regard, we, however, only deem it fit to see whether procedure of fairness was adopted or not in inviting the tenders. The tenders were invited on all India basis. Such a tender could only be floated by an apex body who has control in the affairs of different Mandi Committees situated within the State of Madhya Pradesh. The national level tender could not have been invited by the local Mandi Committees which are the small units. In the interim order passed by us on 3.3.2009, the powers vested with the Mandi Board and the Managing Director in different Sections of the 1972 Adhiniyam have already been taken note of. To recapitulate the submission of Shri Nagrath, counsel appearing for the Company, Section 59 of the Act vests the power with the Managing Director to look into the legality or propriety of the decision taken or order passed and as to the legality or propriety of the proceedings of the Committee, the Board has power under Section 46-F to supervise and control over the agricultural marketing committee and that under Section 25 a Mandi Committee would be entitled to enter into agreement relating to purchase, sale, lease, mortgage or other transfer of, or acquisition of, interest in immovable property etc. but Section 25 does not refer to a service contract, therefore, Mandi Committee would not be entitled to enter into such an agreement without the permission and consent of the Managing Director/ Board.

29. In the backdrop of the aforesaid provisions of the 1972 Adhiniyam, we are disposed to think that it all appears to be in fairness by the Board or Managing Director to invite the tenders and bring transparency in their modus operandi and guide the local Mandi Committees which are small units in proper perspective. Once the tender was accepted, the Managing Director has only intimated the different Mandi Committees to enter into an agreement subject to their financial position and in case they require the security personnel. This is clear from the document dated 2.2.2008 (Annexure A-1) which is filed at Page No.125 of the paper book of W.A. No.811/2008. The Managing Director by writing the said letter has specifically intimated the different Mandi Committees that they can enter into agreement in a prescribed proforma enclosed to the said data keeping in view their financial position and need for deploying the security personnel. Keeping in view the contents of the letter dated 2.2.2008 we are not inclined to hold that any direction as such was issued by the Managing Director necessarily to enter into an agreement with the Company but it was only an intimation. The Mandi Committees would have refused to enter into agreement and that was within their power but surprisingly enough the appellant-Agency has not brought on record any document of any of the Mandi Committees that they would not enter into an agreement with the Company, M/s Balaji. In these circumstances, we are not inclined to hold that any direction as such was issued to different Mandi Committees necessarily to enter into agreement with the Company, M/s Balaji.

30. As mentioned hereinabove, Shri Mrigendra Singh, learned counsel appearing for the appellant-Agency had relied on the authority of various decisions of the Apex Court, which we shall now dwell upon one by one.

31. The question, with regard to raising of objection in relation to a condition prescribed in the tender form by a person who did not submit tender, has been considered by the Apex Court in *Ramana Dayaram Shetty's* (supra). Learned counsel for the appellant has placed heavy reliance on para-9 of the said decision, which is reproduced as below :-

> "That takes us to the next question whether the acceptance of the tender of the 4th respondents was invalid and liable to be set aside at the instance of the appellant. It was contened on behalf of the Ist and the 4th respondents that the appellant had no locus standi to maintain the writ petition since no tender was submitted by him and he was a mere stranger. The argument was that if the appellant did not enter the field of competition by submitting a tender, what did it matter to him whose tender was accepted; what grievance could he have if the tender of the 4th respondents was wrongly accepted. A person whose tender was rejected might very well

complain that the tender of someone else was wrongly accepted, but, it was submitted, how could a person who never tendered and who was at no time in the field, put forward such a complaint? This argument, in our opinion, is misconceived and cannot be sustained for a moment. The grievance of the appellant, it may be noted, was not that his tender was rejected as a result of improper acceptance of the tender of the 4th respondents, but that he was differentially treated and denied equality of opportunity with the 4th respondents in submitting a tender. His complaint was that if it were known that non-fulfilment of the condition of eligibility would be no bar to consideration of a tender, he also would have submitted a tender and competed for obtaining a contract. But he was precluded from submitting a tender and entering the field of consideration by reason of the condition of eligibility, while so far as the 4th respondents were concerned, their tender was entertained and accepted even though they did not satisfy the condition of eligibility and this resulted in inequality of treatment which was constitutionally impermissible. This was the grievance made by the appellant in the writ petition and there can be no doubt that if this grievance were well founded, the appellant would be entitled to maintain the writ petition. The question is whether this grievance was justified in law and the acceptance of the tender of the 4th respondents was vitiated by any legal infirmity."

A careful reading of the aforesaid it is quite vivid that the grievance of the appellant therein was that he was denied equal treatment and because of the differential treatment equality of opportunity was denied to him while submitting the tender. But in the present case, as we have already taken note of the fact that in the NIT (Annexure A-10) there was no condition as such on which reliance is placed on behalf of the appellant-Agency. It was not the case of the appellant-Agency and we have also held that the appellant-Agency was not prevented from purchasing the tender form and any discrimination was practised in this regard. It is nobody's case that the appellant was prevented from purchasing the tender form, therefore, it is not a case of differential treatment by the Mandi Board or the Managing Director or by anybody else with the appellant-Agency.

32. In support of argument with regard to condition No.5 as discussed above, the appellant-Agency has placed reliance on decision of the Apex Court in *Sterling Computers Ltd.'s* (supra) and relying upon para-19 it is submitted that the condition was onerous and the Board ought not to have relaxed the condition in favour of M/s Balaji. The said para reads as under:-

"If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an

objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 15 of the Constitution, the courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by court amounts to encroachment on the exclusive right of the executive to take such decision."

From the aforesaid it is noticeable that once the procedure adopted by an authority for the purposes of entering into contract is held to be against the mandate of Article 14 of the Constitution, the courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters. In our opinion, the condition as such was not essential one and the employer shall have power to relax the conditions which are not essential and for that we have already placed reliance on *B.S.N. Joshi's case* (supra). Therefore, the aforesaid decision of the Apex Court in *Sterling Computers Ltd.* (supra) is of no help to the appellant-Agency.

33. The learned counsel for the appellant has further relied upon para 77 of the decision rendered by the Apex Court in *Tata Cellular's* (supra), which is reproduced as under:-

"The duty of the court is to confine itself to the question of legality, its concern should be:

1. Whether a decision-making authority exceeded its power?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:-

(i) Illegality: This means the decision-maker must understand

correctly the law that regulates his decision-making power and must give effect to it.

(ii). Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. AS a matter of fact in *R. v. Secretary of State for the Home Department*, ex. Brind, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

Similarly, another judgment passed by the Apex Court in *W.B. State Electricity Board* (supra) has been relied upon on behalf of the appellant. The relevant para-7 on which our attention is invited is as follows:-

"Mr. P. Chidambaram, the learned senior counsel appearing for respondents Nos. 1 to 4, argued that in Annexures 1 to 9 which comprised of 749 items there were mistakes in only 37 items due to the fault of the computer; the nature of mistake was not arithmetic (which would mean in multiplication or addition) but mechanical, attributable to the computer and that such mistakes are not covered by clause 29 of the ITB; in a case of an unintended mistake, a Court of equity would not be a silent spectator and the High Court, being both a Court of law and equity, had rightly directed the appellant to permit correction of the mistakes by respondents Nos. 1 to 4. It was submitted that having regard to the nature of the mistakes, the appellant itself ought to have sought clarification from the said respondents under clause 27 of ITB instead of evaluating the bid on the basis of an unintended unit rate to reach an astonishing figure which was wholly disproportionate to the cost of the Project. His contention is that once the total bid price is maintained, the unit rate is a matter of arithmetic exercise which should have been corrected by the appellant; further the mode of payment by the appellant for the work done is not on the basis of each unit but on the basis of bid price. Accepting that the bid price is unalterable, the unit rate should be regarded as adjustable. It was also argued by the Chidambaram that there was no mistake in giving the unit rate as such; the mistake was in giving the conversion equivalent in US Dollars and, therefore, the correction not being the one falling under clause 29 of the ITB was rightly permitted to be corrected by the High Court. Finally, he

contended that their bid being less than the bids of respondents Nos. 11 and 10 by Rs. 40 crores and Rs. 80 crores respectively, the High Court rightly directed consideration of the bid of respondents Nos. 1 to 4 after due correction of the bid documents in public interest which did not warrant interference by this Court."

On a careful perusal of the aforesaid paragraphs from which inspiration is sought to be drawn are only the submissions which are recorded by the Apex Court and not the ratio of the said decision.

34. Learned counsel for the appellant has commended as to the decision of the Apex Court in *Air India Ltd.* (supra). The relevant para-7 on which reliance is placed is reproduced as under:-

"The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *R. D. Shetty v. International Airport Authority,* (1979) 3 SCC 498 : (AIR 1979 SC 1628); *Fertilizer Corporation Kamgar Union v. Union of India,* (1981) 1 SCC 568 : (AIR 1981 SC 844); *Asstt. Collector, Central Excise v. Dunlop India Ltd.,* (1985) 1 SCC 260 : (AIR 1985 SC 330); *Tata Cellular v. Union of India,* (1994) 6 SCC 651 : (1994 AIR SCW 3344 : AIR 1996 SC 11); *Ramniklal N. Bhutta v. State of Maharashtra,* (1997) 1 SCC 134 : (1997 AIR SCW 1281 : AIR 1997 SC 1236) and *Raunaq International Ltd. v. I.V.R. Construction Ltd.,* (1999) 1 SCC 492 : (1999 AIR SCW 53 : AIR 1999 SC 393). The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, is corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides,

unreasonableness and arbitrariness. The State, is corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

From the aforesaid, it is clear that the said decision itself empowers the State to relax a condition for the benefit if tender condition permits such a relaxation. It is also clear from the aforesaid that the State can fix its own term of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. It is free to grant any relaxation, for bona fide reasons. As we held in earlier paragraphs, keeping in view the Apex Court decision in *B.S.N. Joshi's case* (supra) the condition which is said to be essential by the present appellant was in fact, not the essential condition, therefore, non-fulfilment of the same while submitting the tender would not invalidate the tender submitted by the Company.

35. The paragraphs 12 and 13 of the decision rendered in *Laxmi Sales Corpn.* (supra) on which reliance has been placed on behalf of the appellant-Agency read as under:-

"We have heard the argument of the learned counsel for the parties and perused the record. In our opinion, the High Court was not justified in coming to the conclusion that production of the documents mentioned herein above along with the tender form was not mandatory and the High Court was also not justified in coming to the conclusion that neither the rules and conditions governing the tender nor the advertisement calling for tender made it mandatory for an intending tenderer to produce those documents and specially proof of turnover for the relevant year 2001-02. We have already noticed from the various conditions in the tender form and annexures annexed thereto that production of supporting documents wherever applicable in Annexure I and J was one of the requirements of the tender and Annexure J specifically required at Sl. No. 7 the proof of turnover of the firm over the last two relevant years with supporting documents. The same annexure also required the tenderer to produce proof of work experience for the last two years with full details and supporting documents

and the checklist had specifically mentioned that the production of proof of turnover with latest profit and loss account duly certified by a Chartered Accountant-was a mandatory requirement.

13. In this background we are unable to accept the finding of the High Court that there was no mandatory requirement of the production of the above documents. As a matter of fact the High Court erred in coming to the conclusion in para 6 of its judgment in the writ petition that "the advertisement in Annexure-1 to the writ petition only states that for Bolangir-Bhawanipatna, a tenderer must have a turnover of Rs. 25 lakhs, but it does not anywhere state that audited profit and loss account has to be submitted by a tenderer showing a turnover of Rs. 25 lakhs". This finding of fact as noticed by us hereinabove is contrary to records and is an error apparent on face of the record."

The Apex Court in the aforesaid decision has held that the conditions were essential which could not have been relaxed. In the present case, we have already held earlier that the conditions sought to be challenged in this case cannot be treated to be essential condition because it was not possible to submit police verification and medical certificates with respect to the persons who are to be deployed in a private Mandi Committee. Therefore, keeping in view the nature of the clause itself this cannot be treated to be essential condition. In the NIT (Annexure A-10) the requirement was that a party submitting the tender must have at least 700 security personnel with them. It is not the case that 700 employees were not employed with the Company, M/s Balaji. It is also not a case of the appellant-Agency that they were fulfilling the conditions as enumerated in the NIT by employing 700 employees in different Mandi Committees with them.

36. In view of the aforesaid discussion, the Writ Appeals No. 811/2008 and 812/2008 deserve to be dismissed.

37. So far as Writ Appeal No.930/2008 filed by M/s Balaji Detective & Security is concerned, we are only inclined to observe that as the Board had accepted the tender of M/s Balaji vide their letter dated 2.2.2008 (Annexure A-1 at page 125 of the paper-book of W.A. No.811/2008) only with respect to 165 Mandi Committees, therefore, the contract could be entered with respect to those 165 Mandi Committees only. We may also observe that the agreement shall be for a period of two years only from the date it is entered into as per the conditions of tender. So far as other Mandi Committees are concerned, the Managing Director, the respondent No.1 shall be free to issue fresh NIT in accordance with law.

38. Before we part with the case, it would be necessary for us to observe with respect to Section 40-A of the 1972 Adhiniyam, which relates to the power of the State Government to give direction. This Section has been inserted by the M.P.

Act No.27 of 1997 (w.e.f. 15-6-1997). By virtue of this new Section, the State Government has retained the power to give direction to the Board and other Mandi Committees. Sub-Section (2) of Section 40-A further provides that the Board and the Mandi Committees shall be bound to comply with directions issued by the State Government under sub-Section (1). In the present case, it is noticed that in spite of the fact that initial period of contract for the 72 Mandi Committees was of two years with the appellant-Agency, which after expiry was further extendable by further period of one year only. There was no further extension, yet the Mandi Committees entered into agreement with the appellant-Agency. Under these circumstances, there was anomalous situation with respect to power of the Board to give direction to the Mandi Committees to enter into agreement with the appellant-Agency. The documents as such have been filed to show that the Mandi Committee also entered into the agreement against the original agreement issued by the Board. We only hope and trust that there would be an occasion for the State Government for exercising the powers vested with it under Section 40-A of the 1972 Adhiniyam to avoid the said anomalous situation and action in this regard shall be taken by the State Government without any further delay.

39. In view of the aforesaid discussion, the Writ Appeals No. 811/2008 and 812/2008 are dismissed accordingly. The W.A. No.930/2008 stands allowed in part. There shall be no order as to costs.

Order accordingly.

I.L.R. [2009] M. P., 2796
WRIT PETITION
Before Mr. Justice R.S. Garg & Mr. Justice U.C. Maheshwari
30 March, 2009 *

ISHWARCHAND JAIN & ors. ... Petitioners
Vs.
SUSHIL KUMAR JAIN ... Respondent

Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2, Partnership Act, 1932, Section 53 - *Suit for dissolution of partnership firm along with an application for grant of injunction - Appellate Court granted the injunction restraining defendants from using the name of the firm, its goodwill and its property - Held - S. 53 of Act not applicable as suit is for dissolution of partnership firm - Without appreciating allegation and counter allegation, Court can not bring business to standstill or to a grinding halt - The balance of convenience would be in favour of defendants who are running the business - Irreparable injury would be suffered more by defendants in comparison to the plaintiff - Order set-aside with direction protecting interest of plaintiff - Petition allowed.* (Paras 6 & 7)

*W.P. No.6227/2008 (Jabalpur)

ISHWARCHAND JAIN Vs. SUSHIL KUMAR JAIN

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2, भागीदारी अधिनियम, 1932, धारा 53 – व्यादेश प्रदान करने के आवेदन सहित भागीदारी फर्म के विघटन के लिए वाद – अपीलीय न्यायालय ने प्रतिवादियों को फर्म के नाम, उसकी शाख और उसकी सम्पत्ति का उपयोग करने से निषेधित करते हुए व्यादेश प्रदान किया – अभिनिर्धारित – अधिनियम की धारा 53 लागू नही होती क्योंकि वाद भागीदारी फर्म के विघटन के लिए है – अभिकथन और प्रति–अभिकथन का विवेचन किये बिना न्यायालय कारोबार को विराम–स्थिति या चलने पर विराम लगाने की स्थिति में नही ला सकता – सुविधा का संतुलन प्रतिवादियों के पक्ष में होगा जो कारोबार चला रहे हैं – वादी की तुलना में प्रतिवादियों को अधिक अपूरणीय क्षति होगी – वादी के हित की रक्षा करते हुए निदेश के साथ आदेश अपास्त – याचिका मंजूर।

Sameer Seth, for the petitioners.

Bramhadatt Singh, for the respondents.

ORDER

The Order of the Court was delivered by **R.S. GARG, J.** :–The petitioners/defendants being aggrieved by the order dated 10.4.2008 passed in Misc. Appeal No. 2/2008 decided by learned Third Additional District Judge (Fast Track) Katni reversing the order dated 17.1.2008 passed by Fourth Civil Judge, Class-I, Katni in Civil Suit No. 59A/2007 and granting injunction in favour of the respondent/plaintiff, have filed this petition under Article 227 of the Constitution of India.

2. The short facts necessary for disposal of the present petition are that the petitioners and the respondent/plaintiff settled into a partnership business vide partnership deed dated 11.2.2003, all the partners agreed to have 25% share in profit and loss. It appears that the present respondent/plaintiff felt aggrieved by conduct of the remaining three partners, therefore, filed the suit for dissolution of the firm/partnership and alongwith the plaint, filed an application for grant of injunction. The defendants appeared in the Court and submitted that the plaintiff had retired from the partnership firm with effect from 30.9.2004 and as on the date of the suit he had no right, interest or property in the firm, no injunction could be granted in his favour.

3. After hearing learned counsel for the parties, the learned trial Court rejected the plaintiff's prayer for grant of injunction but, however, in appeal the Appellate Court granted the injunction. It is to be seen that the Appellate Court granted the injunction restraining the defendants from using the name of firm, using its goodwill, its property with a further direction that they shall not transfer or alienate any property and if the plaintiff wants to have inspection of the accounts then the defendants would not cause any hindrance in the matter.

4. Learned counsel for the petitioners submitted that the learned Court below without appreciating the prima facie case, principles of balance of convenience and irreparable injury, has granted the injunction less appreciating that a running

business could not be brought to a standstill or a grinding halt. It is submitted by him that the Appellate Court if was of the opinion that the plaintiff has some prima facie case and his interest is to be protected, then instead of bringing the business to a halt, the Court has to put the defendants to terms.

5. Learned counsel for the respondent/plaintiff, however, submitted that in view of Section 53 of the Indian Partnership Act, a Partner is entitled to pray for an injunction and the Court is obliged to grant such injunction. In the alternative, it is submitted that if the defendants are allowed to proceed with the business then they are likely to create enumerable problems against the interest of the plaintiff. In the last, it was submitted that if the High Court is of the opinion that the injunction as granted by the trial Court could not be granted then the appropriate orders protecting the interest of the plaintiff be passed.

6. Section 53 of the Indian Partnership Act applies to a matter where firm is dissolved and in such a case every partner or his representative may, in the absence of a contract between the partners to the contrary, may restrain every partners from doing particular things. Undisputedly, the plaintiff has come to this Court with a submission that the partnership was not dissolved. The plaintiff, in fact had prayed for a decree for dissolution of the partnership. If the plaintiff himself says that present is not a case after dissolution of partnership then Section 53 would not apply. In a case like present where the plaintiff denies and the defendants assert the fact regarding retirement of a partner, a Court of competent jurisdiction without appreciating the allegations and counter allegations cannot bring the business to a standstill or to a grinding halt.

7. In the present matter, the trial Court did not make any effort to look into the issue of balance of convenience and irreparable injury likely to be cause by grant or refusal of injunction. The balance of convenience in such a case would always be in favour of the persons who are running the business. If an injunction is granted against the running business then the mischief of irreparable injury would be suffered more by the persons who have the control of the running business in comparison to the person who is out of the business or who comes with the allegations that he is not being allowed to take part in the business of the partnership firm. For bringing a running business to a grinding halt a very extra strong case is required to be made out by the plaintiff.

8. In the present case, except that the plaintiff is not being allowed to take part in the business of the firm and he is not being shown the account of the firm the plaintiff has nowhere said that for what other reason the business should be brought to an end.

9. In our considered opinion, the learned Appellate Court did not really appreciate the dispute in its true perspective and it was swayed away by the fact that the plaintiff was challenging his retirement from the partnership.

10. Taking into consideration the totality of the circumstances, we are of the opinion that the order passed by the learned Appellate Court cannot be allowed to stand. It deserves to and is accordingly quashed. However, to protect the interest of the plaintiff, it is hereby directed: (a) the appellants shall furnish solvent surety with their personal undertaking in a sum of Rs. Two lacs before the trial Court within one month from today clearly specifying that in case the suit is decreed and the plaintiff is held entitled to any amount then without any objection they shall pay amount as determined to the extent of Rs. Two lacs; (b) the petitioner shall be obliged to maintain regular accounts of the partnership and they shall also be obliged to furnish the accounts with the trial Court by 15th of each succeeding month.

11. The defendants/petitioners shall not transfer or alienate the fixed assets of the partnership firm. They however, would be entitled to run the business but without creating any charge against the interest of the present respondent/plaintiff.

12. The petition is allowed to the extent indicated above.

Petition allowed.

I.L.R. [2009] M. P., 2799
WRIT PETITION
Before Mr. Justice Abhay M. Naik
13 April, 2009 *

PRABHAT BALOTIYA & ors. ... Petitioners
Vs.
STATE OF M.P. & ors. ... Respondents

A. Dharma Swatantrya Adhiniyam, M.P. (27 of 1968), Section 5 - *Intimation to District Magistrate about conversion from one religion to another within 7 days of ceremony - Absence of intimation does not vitiate the conversion - It is only a forcible conversion and not merely conversion which is prohibited.* (Para 12)

क. धर्म स्वातंत्र्य अधिनियम, म.प्र. (1968 का 27), धारा 5 – एक धर्म से दूसरे में धर्मान्तरण के बारे में अनुष्ठान के 7 दिनों के भीतर जिला मजिस्ट्रेट को सूचना – सूचना का अभाव धर्मान्तरण को दूषित नही करता – यह केवल बलात् धर्मान्तरण है न कि मात्र ऐसा धर्मान्तरण जो प्रतिषिद्ध है।

B. Dharma Swatantrya Adhiniyam, M.P. (27 of 1968), Sections 3 & 5 - *Petition claiming handing over the dead body to perform funeral according to Hindu rites - No specific averments about forcible conversion - Deceased lived three years without objection after accepting Christianity - Relief of handing over for funeral can not be granted - Petition dismissed.* (Para 12)

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*W.P. No.7046/2008 (Jabalpur)

ख. धर्म स्वातंत्रय अधिनियम, म.प्र. (1968 का 27), धाराएँ 3 व 5 – हिन्दू रीतियों के अनुसार अन्त्येष्टि करने के लिए शव सुपुर्द किये जाने का दावा करते हुए याचिका – बलात् धर्मान्तरण के बारे में कोई विनिर्दिष्ट प्रकथन नही – मृतक ईसाई धर्म ग्रहण करने के बाद तीन वर्ष तक आपत्ति के बिना जीवित रहा – अन्त्येष्टि के लिए सुपुर्द किये जाने का अनुतोष प्रदान नही किया जा सकता – याचिका खारिज।

A.G. Dhande with *P.K. Kaurav*, for the petitioners.
Sudesh Verma, G.A., for the respondent Nos.1 to 5.
Pankaj Dubey, for the respondent Nos.6 to 8.
Brain Da Silva with *V. Bhide*, for the respondent No.9.

ORDER

ABHAY M. NAIK, J. :–A rare demand for handing over the dead body of the deceased Praveen Kumar Balotiya has been made by the parents and brothers of the deceased in order to enable them to perform funeral of the deceased according to Hindu religion with an allegation that he was wrongly cremated on account of alleged conversion to Christianity. A direction has also been sought for prosecution of respondent Nos.6 to 8 on the ground that their conduct allowed the last rites of the deceased to be performed by cremation according to another religion.

2. Briefly stated facts are that Praveen Kumar Balotiya, a Hindu by religion was married to Benzaliv (respondent No.8) on 10.9.2004. On 26.2.2006 Baptism was performed on him and he was converted to Christianity. On 18.4.2008 Praveen Kumar Balotiya died. It is alleged that due to intervention of Police, the dead body of Praveen Kumar Balotiya was allowed to be cremated according to Christian customs. It is alleged that during his life time, Praveen Kumar Balotiya as well as his wife were following customs of Hindu religion. Cremation was made according to Christian religion due to the intervention of police who allowed it to be cremated on the ground that the wife of the deceased had the first right over the dead body. It is stated that the factum of alleged conversion of Praveen Kumar Balotiya to Christianity was not intimated to the District Magistrate as required under Section 5 of M.P. Dharma Swatantrya Adhiniyam, 1968. According to the petitioners it amounted to forcible conversion which is prohibited by virtue of the provisions of the said Act and the Rules made thereunder.

3. Respondent Nos.6 to 8 and 9 submitted their separate returns. They contended that Praveen Kumar Balotiya accepted conversion to Christianity voluntarily as per his own will and faith. There was no forcible conversion. Accordingly, his dead body was rightly cremated as per Christian religion and the writ petition is liable to be dismissed.

4. Learned counsel for parties made their respective submissions which have been considered in the light of the record and the law governing the situation.

5. It has been contended on behalf of the petitioners that Praveen Kumar

Balotiya did not repose faith in Christianity. Praveen Kumar Balotiya was Hindu by birth and was follower of Hindu religion. He did not wish conversion at any point of time and was infact not converted. Conversion in the absence of any intimation as per Section 5 of the aforesaid Adhiniyam, means forcible conversion, therefore, his dead body is liable to be delivered to petitioners for funeral purpose, according to the rites and rituals of Hindu religion. It is further contended that his parents have a preferential right to claim the dead body of his son in comparison to the widow of the deceased.

6. Per contra Shri Brian Da Silva, learned Senior Advocate and Shri Pankaj Dubey, Advocate, it has been contended that there is no specific averment in the writ petition that there was forcible conversion of Praveen Kumar Balotiya from Hindu religion to Christianity. Similarly, there is no iota on record to establish that the conversion of Praveen Kumar was made forcibly. Accordingly, it is submitted that the provisions of M.P. Dharma Swatantrya Adhiniyam, 1968 have no application. Preferential riqht of parents to claim the dead body in comparison to the right of widow of the deceased is also denied.

7. After considering the rival submissions, this Court takes up first the issue of alleged preferential right of parents over the dead body of their son in comparison to his wife.

8. None of the Senior Advocates could point out a provision for claiming dead body of a family member for funeral purpose on preferential basis. This Court did not find any provision in specific in the codified and/or uncodified law wherein dead body of a deceased member of the family may be claimed in preferential manner. On due consideration, it may be observed that a child takes birth in a family not as per his choice but in natural course, whereas, marriage takes place as per choice. It may further be seen that the divorce may be obtained for bringing an end to the marital status with the wife whereas the status of the parents cannot be denuded by any manner known to law. Thus, prima facie it seems that the parents may have upper hand in the matter of claiming dead body of their deceased son. However, this point is being kept open for being decided in an appropriate case because the writ petition is being decided on other points.

9. On perusal, it is found that there is no specific averment in the writ petition that Praveen Kumar Balotiya was forcibly converted from Hindu religion to Christian religion. He had married to respondent No.8 under the provisions of Special Marriage Act as revealed in the marriage certificate Annexure/R-8-1 dated 10.9.2004. It is nowhere established that the marriage was performed against his wishes. It is also implicit in the certificate that marriage of Praveen Kumar Balotiya was not performed according to Hindu religion. Copy of the affidavit dated 21.9.2005 is on record as Annexure/R-8-2 which clearly goes to show that he was converted to Christianity in a voluntary manner according to his own wishes and that he was not forcibly converted.

10. At this juncture, Shri Dhande, learned Senior Advocate submitted that original of the affidavit was not produced. This objection was absolutely without any force because copy of the affidavit was submitted by respondent No.8 alongwith her return, but the petitioners did not choose to insist for production of original affidavit. In the absence of any such objection, this Court is of the considered opinion that the affidavit having been submitted alongwith return cannot be disbelieved and cognizance to the contents of the affidavit may be given. Similarly it is stated that the deceased was Baptimised after about 11 months on 18.4.2008. During the aforesaid period or even thereafter, Praveen Kumar Balotiya did not raise any objection about his conversion during his life time. Thus, it cannot be said that Praveen Kumar Balotiya was forcibly converted from Hindu religion to Christian religion. There is nothing on record to explain the absence of any objection about conversion on the part of the deceased Praveen Kumar Balotiya during the said period. Thus, in the exercise of powers under writ jurisdiction, moreso, in the absence of any specific pleadings about forcible conversion, plaintiffs are not entitled to the reliefs claimed by them.

11. Scheme of M.P. Dharma Swatantrya Adhiniyam, 1968 may now be examined. The Act has been enacted for prohibition from conversion from one religion to another by use of force or by allurement or by any fraudulent means thereto. Section 3 prohibits every person to convert or attempt to convert any person by the use of force or by allurement or by any fraudulent means. Abetment of conversion is also prohibited under this section. Section 4 provides for punishment for contravention of the provisions of section 3 i.e. forcible conversion. Section 5 makes it mandatory for a person to send an intimation to the District Magistrate of the district concerned of conversion. It further provides for punishment in case of failure to send an intimation. Prosecution for offence under the Act requires previous sanction of the District Magistrate or any other authorised authority. Section 8 gives rule making power to the State Government. In exercise of the same, M.P. Dharma Swatantrya Rules, 1969 are made. Rules of 1969 so made, prescribe limitation for intimation and obliges the District Magistrate to maintain a register for conversion. Here I may profitably quote the decision of the Constitutional Bench of the Hon'ble Supreme Court of India in the case of Rev. *Stainislaus Vs. State of Madhya Pradesh and others* AIR 1977 SC 908 wherein the following passage of this Court's decision was approved :-

> "What is penalised is conversion by force, fraud or by allurement. The other element is that every person has a right to profess his own religion and to act according to it. Any interference with that right of the other person by resorting to conversion by force, fraud or allurement cannot, in our opinion, be said to contravene Article 25 (1) of the Constitution of India, as the Article guarantees religious freedom subject to public health. As such, we do not find that the provisions of

Sections 3, 4 and 5 of the M. P. Dharma Swatantrya Adhiniyam 1968 are violative of Article 25 (1) of the Constitution of India. On the other hand, it guarantees that religious freedom to one and all including those who might be amenable to conversion by force, fraud or allurement. As such, the Act, in our opinion, guarantees equality of religious freedom to all, much less can it be said to encroach upon the religious freedom of any particular individual."

12. A mere look at the provisions of the Act as well as Rules makes it clear that although, it is provided that conversion is to be intimated by the person who converts from one religious faith to another and an intimation is to be mandatorily sent about such conversion within seven days of this ceremony, absence of intimation does not vitiate the conversion. Secondly, it is only a forcible conversion and not merely conversion which is prohibited. In the absence of specific averments about forcible conversion, it cannot be said that Praveen Kumar Balotiya was forcibly converted. Moreover, he married to respondent No.8 (Christian by religion) under the provisions of Special Marriage Act, 1954 and not according to Hindu rites and rituals under the Hindu Marriage Act on 10.9.2004. He submitted an affidavit on 21.9.2005 before Lutheran Church, Ranjhi, Jabalpur that he was voluntarily accepting Christianity and undergoing Baptism at his own free will and that he was not forced/threatened or allured. Baptism was performed after about five months as is revealed in Annexure/R-8-3. He died on 18.4.2008. During his entire life time, he did not raise any voice about the alleged forcible conversion. It is only after his death that the parents and brothers (petitioners) came forward in a writ petition to claim the dead body of the deceased Praveen Kumar Balotiya on assumption of his forcible conversion. It is nowhere stated in the writ petition that how did they draw a presumption about forcible conversion and what was the information gathered by them about it. Neither any such information nor its sources are on record. Thus, the petition is hopelessly without any foundation and no relief in respect of dead body of the deceased Praveen Kumar Balotiya may be granted on the basis of bald averments contained in the writ petition.

13. As regards direction for prosecution for the offence, the Pastor who Baptimised Shri Praveen Kumar Balotiya is reported to have died. As regards prosecution against other respondents, it may be seen that Praveen Kumar Balotiya is not found to have been forcibly converted, he appeared to be a Christian as per Annexure/R-8-3. Accordingly, respondent Nos.6 to 8 are not found to have committed any offence by allowing cremation according to Christianity.

14. In the result, writ petition being devoid of substance is hereby dismissed. No order as to costs.

Petition dismissed.

I.L.R. [2009] M. P., 2804
WRIT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice A.M. Sapre
28 April, 2009*

MANOHARLAL GOLE .... Petitioner
Vs.
DILIP & ors. ... Respondents

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 66-A Krishi Upaj Mandi Rules, M.P. 1974, Rules 15 & 43 - *Election of representation of agriculturist - Election Petition - Dismissal on the ground of presentation by counsel - Held - In the Rules for mode of presentation there is no command that election petitioner should present the election petition - In absence of any consequential mandate to the effect that non-presentation of the election petition filed by the election petitioner before the competent authority shall entail in dismissal of the petition, the provision can not be construed as mandatory - Order dismissing election petition quashed - Petition allowed.* (Paras 19 to 21)

कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 66–ए, कृषि उपज मण्डी नियम, म.प्र. 1974, नियम 15 व 43 – कृषकों के प्रतिनिधित्व का निर्वाचन – निर्वाचन याचिका – अधिवक्ता द्वारा प्रस्तुति के आधार पर खारिजी – अभिनिर्धारित – प्रस्तुति के ढंग के नियमों में ऐसा कोई समादेश नही है कि निर्वाचन याची को निर्वाचन याचिका पेश करनी चाहिए – इस प्रभाव के किसी पारिणामिक आदेश के अभाव में कि निर्वाचन याची द्वारा सक्षम प्राधिकारी के समक्ष पेश निर्वाचन याचिका की अप्रस्तुति याचिका की खारिजी में हो जायेगी, उपबंध का अर्थ आदेशात्मक के रूप में नही लगाया जा सकता – निर्वाचन याचिका खारिज करने वाला आदेश अपास्त – याचिका मंजूर।

Cases referred :

(2004) 12 SCC 73, AIR 1964 SC 1545, (1994) 4 SCC 274, (2003) 1 SCC 289, AIR 2005 SC 547, 1999(1) MPLJ 88, 2002(3) MPLJ 591, AIR 2002 SC 3105, 2006(3) MPLJ 98.

S.R. Saraf, for the petitioner.
P.V. Bhagwat, for the respondent No.1.
A.S. Kutumbale, Addl.A.G., for the respondent/State.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–In this writ petition preferred under Articles 226 and 227 of the Constitution of India the petitioner has prayed for issued of a writ of certiorari for quashing of the order dated 20.12.2007 (Annexure-P-l) passed by the Divisional Commissioner (Revenue), the Election Tribunal under the Madhya

*W.P. No.2093/2008 (Indore)

Pradesh Krishi Upaj Mandi Adhiniyam, 1972 (for brevity 'the Act') whereby the said Election Tribunal has declined to deal with the election petition on merits on the ground that the election petition was not presented by the petitioner himself but through his counsel which was against the mandate of Rule 43(6) of M.P. Krishi Upaj Mandi Rules, 1974 (for short 'the 1974 Rules').

2. The facts which are imperative to be stated for the purpose of adjudication of the writ petition are that the election was held for the purpose of representative of agriculturist of Krishi Upaj Mandi Samiti, Sendhwa in which the petitioner and the respondents No.2 to 6 were candidates. The respondent No. 1 was elected and his election was notified on 18.6.2005. Being grieved, the petitioner preferred an election petition on 06.7.2005 under section 66-A of the Act before the Election Tribunal questioning the election of the said respondent on many a ground. Before the Election Tribunal the respondents No.1 and 8 filed their reply and raised an objection that the election petition deserves to be rejected on the ground that it was presented through his counsel but not by himself.

3. An affidavit was filed by the petitioner stating, inter alia, that he was present with his counsel at the time of presentation of the election petition. The said affidavit has been brought on record as Annexure-P-4.

4. It is contended in the petition that the State Government has framed M.P. Krishi Upaj Mandi (Mandi Samiti Ka Nirvachan) Rules, 1997 (hereinafter referred to as 'the 1997 Rules') and the said Rules do not contemplate that the election petition should be presented by the petitioner himself and, therefore, the presentation through his counsel was valid. It is putforth that 1974 Rules are not applicable to the case at hand but the Prescribed Authority has erroneously come to hold that the said rule operates in the field. It is urged that there is no mandate in the Rule that the election petition should be presented by the petitioner.

5. We have heard Mr. S. R. Saraf, learned counsel for the petitioner, Mr. P. V. Bhagwat, learned counsel for the respondent No.1 and Mr.A.S.Kutumbale, learned Additional Advocate General for the respondent-State.

6. At the very outset we may state with profit that the issues that have emanated to be addressed in this writ petition can be compartmentalized into three heads, viz.(i) whether 1974 Rules or 1997 Rules would apply to the case at hand (ii) whether Rule 43 of 1974 Rules makes it mandatory that the election petition has to be presented by the election petitioner failing which the same has to be dismissed; and (iii) whether the filing of an affidavit at a later stage would save the election petition.

7. First we shall advert to the first issue. The State Legislature amended the Act by incorporating section 66-A with effect from 06.5.1999. The said provision reads as under:-

"66-A. Election petition- (1) An election under this Act shall be called in question only by a petition presented in the prescribed manner to the Commissioner of the Division.

(2) No such petition shall be admitted unless it is presented within thirty days from the date on which the election in question was notified.

(3) Such petition shall be enquired into or disposed of according to such procedures as may be prescribed. "

Prior to incorporation of the said provision a set of rules, namely, 1997 Rules had been framed.

8. In this context it would be appropriate to refer to the decision rendered in *Ashok KumarJain vs. Neetu Kathoria and others,* (2004)12 SCC 73 wherein the Apex Court interpreting Rule 90 of the 1997 Rules expressed the view as under:

"10. At this juncture, it may be indicated that the power to frame rules is vested in Section 79 of the Act. All the rules have been framed in exercise of the power conferred by the aforesaid provision. We may then peruse Rule 44 of the 1974 Rules which provides the manner in which and the grounds on which an election could be challenged. Whatever manner for presenting an election petition is provided under the Rules of 1974, which is not covered by the Rules of 1997, would continue to be operative but for the changes effected by Section 66-A, that is to say, the forum for challenging the election would be the Commissioner and the period of limitation would be thirty days for any election under the Act. The rest of the manner of filing/presenting an election petition if not provided under the 1997 Rules shall continue to be same as provided under the Rules of 1974. That being the position, we uphold the finding recorded by the Division Bench that an election petition was maintained and could be filed challenging the election of the Chairman of the Krishi Upaj Samiti."

9. In view of the aforesaid enunciation of law, the issue is no ore res integra that 1974 Rules would govern the field.

10. We may state with profit that number of decisions were cited that substantial compliance with the Rules would subserve the cause of justice. Our attention has been invited to the Constitution Bench decisions rendered in *Murarka Radhe Shyam Ram Kumar vs. Roop Singh Rathore,* AIR 1964 SC 1545: *T.M. JACOB VS. C. Poulose,* (1994) 4 SCC 274: *Ram Prasad Sarma vs. Mani Kumar Subba,* (2003) 1 SCC 289: and *Chandrakant Uttam Chodankar vs. Dayanand Rayu Mandrakar and others,* AIR 2005 SC 547.

11. In the aforesaid decisions the doctrine of substantial compliance and curability of defects have been dealt with. In the case at hand, we are not required to deal with the said facet. This Court, we are disposed to think, is only required to dwell upon whether Rule 43 of 1974 Rules makes the presentation an election petition by the candidate or the voter mandatory and by such non-presentation the election petition has to be dismissed.

12. Learned counsel for the respondent has placed heavy reliance has been placed on the decision rendered in *Suman Santosh Kumar Patel vs. Bhanwati Mahesh Pratap Patel and another,* 1999 (1) MPLJ 88 and *Tara vs. Dabla alias Lalita and others,* 2002(3) MPLJ 591, wherein it has been held that an election petition prescribed under Rule 3 of the M.P. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 [for short 'Rules 1995'] if not presented by himself and presented through a counsel without proper authorisation would entail in dismissal. In this context we may refer with profit to Rule 8 of 1995 Rules. It stipulates as under:

> *"8. Procedure on receiving petition. - If the provisions of rule 3 or rule 4 or rule 7 have not been complied with, the petition, shall be dismissed by the specified officer:*
>
> *Provided that the petition shall not be dismissed under this rule without giving the petitioner an opportunity of being heard."*

13. Thus, the aforesaid Rule makes it crystal clear that non- compliance of Rule 3 would result in dismissal of the election petition. The said Rule has been held to be mandatory. We have to analyse and see whether there is any kind of mandatory facet in the present set of rules with which we are concerned with. Rule 43 occurring in Chapter XI deals with election petition. Rule 43(1) provides that no election of a member shall be called in question except by a petition in writing. How reliefs should be couched have been provided therein. Sub-Rule (3) stipulates about the deposit of security. Sub-Rules (2) to (7) which are relevant for the present purpose are reproduced below:

> *"43. Election petition–* (1)
>
> xx xx xx xx
>
> *(2) The petition shall be presented to the Collector within fourteen days from the date on which the result of the election was published under sub-rule (3) of Rule 38.*
>
> *(3) The petition shall be accompanied by deposit of two hundred and fifty rupees as security for the costs of petition.*
>
> *(4) The petition shall-*
>
> *(a) contain a concise statement of the material facts on which the petitioner relies;*

(b) set forth with sufficient particulars, the ground or grounds on which the election is called in question;.

(c) be signed by the petitioner and verified in the manner prescribed in Code of Civil Procedure, 1908 (V of 1908), for verification of pleadings.

(5) Such petition may be presented by any candidate at such election or by a voter of the constituency concerned.

(6) A petition filed by any person other than those specified in sub-rule (5) shall not he accepted and it shall forthwith be dismissed.

(7) No petition shall be deemed to have been duly made unless such deposit as referred to in sub-rule (3) has been made and the Collector shall dismiss such petitions as are not accompanied by such deposit.

14. In this context we may refer with profit to Rule 3 of the 1995 Rules. It reads as under:

"3. Presentation of election petition. -(1) An election petition shall be presented to the Specified Officer during the office hours by the person making the petition, or by a person authorised in writing in this behalf by the person making the petition.

(2) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

15. If we see anatomy of the Rule 3 it really prescribes that an election petition shall be presented to the Specified Officer by the person making the petition. The said wordings are absent in Rule 43(5). Learned counsel for the respondent has drawn our attention to Section 81 of the Representation of Peoples Act to draw inspiration that unless it is presented by the candidate as election, the election petition is not to be entertained. It is worth-noting that Section 86 of the Representation of Peoples Act, 1951 enjoins dismissal of the petition if the presentation does not comply with the provisions of Section 81. In the present case, we are not required to advert to whether what proper presentation would be under Representation of Peoples Act or not. We have only referred to the said provisions to appreciate under what circumstances it has been held to be mandatory.

16. As we perceive; under the 1995 Rules Rule 8 mandates consequence and that is the dismissal of the election petition for non-compliance of Rule 3. Under

the Representation of Peoples Act Section 86 stipulates for dismissal. Rule 8 of the 1995 Rules has been held to be mandatory. Thus, question would be whether such a provision is present in the 1947 Rules.

17. In this regard it would appropriate to Rule 15 which is occurring in Chapter VIII that deals with nomination of candidates Sub-rule (1) of Rule 15 reads as under:

> *"15. Nomination Paper and Deposit. - (1) On the date fixed under clause (b) of sub-rule (2) of rule 14 for presenting nomination papers of the candidates, each candidate shall, either in person or by his proposer or seconder, present to the election authority a nomination paper completed in Form IV, subscribed by the candidate himself as assenting to the nomination and by two duly qualified voters of the constituency as proposer and seconder."*

18. We have referred to the said rule as it uses the terminology to the effect that each candidate while presenting the nomination paper shall either in person or by his proposer or seconder, present to the election authority a nomination paper in Form IV, subscribed by the candidate himself. In sub-rule (5) of Rule 43 the term 'himself' as well as 'present' is absent.

19. Submission of the learned counsel for the respondent is if Sub-Rule (6) of Rule 43 is understood in proper perspective the same makes the presentation by the election petitioner mandatory. On a reading of Sub-Rule (5) of Rule 43 we find that the petition is to be presented by any candidate of such election or by a voter of the constituency concerned. Sub-Rule (6) uses the word 'file'. It prescribes that a petition filed by any person other than those specified in Sub-Rule (5) shall not be accepted and it shall forthwith be dismissed. There may be circumstances the terms 'presentation' and 'flie' may have different connotation but it is well acceptable principle of law of interpretation the same words can be used in different connotation depending upon the context. Sub-Rule (6) the word must take its meaning from the text and context. On a keener scrutiny of the Rules, we are disposed to think it relates to the locus standi of the petitioner as on certain occasions the term 'file' refers to preferring of a petition. Had the rule-making authority thought of making presentation by the candidate mandatory it would have clearly and categorically so stated. It has not been so done. On the contrary, the Rule is couched in a manner which conveys with regard to the category of persons who can file the petition. It is pertinent to note that Sub- Rule (7) of Rule 43 unequivocally lays down that no election petition shall be deemed to have been duly made unless the deposit as referred to in Sub-Rule (3) has been made and the Collector shall dismiss such petitions. The language is clear as crystal. It does not allow any other kind of interpretation. On the contrary, Sub-Rule (6) does not cast such a mandate. The object of the rule-making authority, we are inclined to think, pertains

to the category of persons and not to presentation of election petition. In this context we may refer with profit to a three-judge Bench decision rendered in *M.Y. Ghorpade v. Shivaji Rao M. Poal and others*, AIR 2002 SC 3105 wherein their Lordships held as under:

> *"The requirement of making a security deposit of Rs.2,000/- is mandatory and the same has to be made while presenting an Election Petition, but the mode of deposit as well as the person who could make a deposit has to be complied with in accordance with the rules of the High Court in question and, as per Karnataka High Court Rules through whom the amount will be deposited etc. cannot be held to be mandatory. That being the position, and in the case in hand although petition was filed by agent of defeated candidate and the receipt of deposit of security issued in name of defeated candidate, when the evidence of the defeated candidate unequivocally pointing out that it is the Election Petitioner who deposited that amount of Rs.2,000/-, there has been compliance of S.117 of the Act and consequently the Election Petition is maintainable and could not be dismissed under S.86 on the ground of non compliance of S. 117 of the Act."*

20. In the aforesaid case the mode of security deposit could be different depending upon the Rules of the High Court. It is interesting to note that Sub-Rule (2) provides that a petition shall be presented to the Collector. The said power has been vested with the Commissioner after coming into force of the 1997 Rules. That has been so held in *Triyugi Narayan Shukla vs. State of M.P. and others*, 2006 (3) MPLJ 98. In the said Rule it has not been stipulated that the election petitioner means who presents the election petition. Such a stipulation, as has been indicated earlier is also absent in Sub-Rule (5). Thus, mode of presentation as we perceive, there is no command that the election-petitioner should present the election-petition to introduce such a facet to anatomy of rules on the basis of Sub-Rule (5) would not be correct interpretation as the language of Sub-Rule (6) conveys a different meaning. At the cost of repetition we may state with certitude that it only refers to categories of persons and has no nexus with the presentation of the election petition. Thus, in the absence of any consequential mandate to the effect that non-presentation of the election petition filed by the election-petitioner before the competent authority shall entail in dismissal of the petition, the provision cannot be construed as mandatory.

21. Resultantly the writ petition is allowed and the order passed by the Commissioner contained in Annexure-P/1 dismissing the election petition due to non-compliance of Rule 43(6) is quashed and the said authority is commanded to

proceed with the election petition as per law. In the peculiar facts and circumstances of the case, there shall be no order as to costs.

Petition allowed.

I.L.R. [2009] M. P., 2811
WRIT PETITION
Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava
30 April, 2009*

RAMLAKHAN ... Petitioner
Vs.
RAMBAHADUR ... Respondent

A. Stamp Act (2 of 1899), Schedule I-A Article 33, Exemption - *An agricultural lease for a period of one year - Such document is exempted from payment of stamp duty - Could not have been impounded in view of exemption under Article 33 of Schedule I-A of Act - Order of trial Court set-aside.* (Para 3)

क. स्टाम्प अधिनियम (1899 का 2), अनुसूची I-ए अनुच्छेद 33, छूट – कृषि पट्टा एक वर्ष की कालावधि के लिए – ऐसा दस्तावेज स्टाम्प शुल्क से छूट–प्राप्त – अधिनियम की अनुसूची I-ए के अनुच्छेद 33 के अन्तर्गत छूट को दृष्टिगत रखते हुए परिबद्ध (impound) नही करना चाहिए था – विचारण न्यायालय का आदेश अपास्त।

B. Stamp Act (2 of 1899), Schedule I-A Article 33 - *Exemption from payment of stamp duty - Lease for the purpose of cultivation for a period of one year or when the average annual rent reserved does not exceed one hundred rupees - Both the requirement should not be read together - In case lease does not exceed one year, may be that average annual rent reserved exceed one hundred rupees - Such lease would be exempted from payment of stamp duty.* (Para 4)

ख. स्टाम्प अधिनियम (1899 का 2), अनुसूची I-ए अनुच्छेद 33 – स्टाम्प शुल्क के संदाय से छूट – कृषि प्रयोजन के लिए एक वर्ष की कालावधि का पट्टा या जब आरक्षित औसत वार्षिक भाड़ा एक सौ रुपये से अधिक नही है – दोनों ही आवश्यकताएँ एक साथ नही पढ़ी जानी चाहिए – पट्टा एक वर्ष से अधिक न होने की दशा में आरक्षित औसत वार्षिक भाड़ा एक सौ रुपये से अधिक हो सकता है – ऐसे पट्टे को स्टाम्प शुल्क के संदाय से छूट प्राप्त होगी।

Cases referred :

1961 MPLJ Note 90, ILR 6 Bom 691.

Pranay Verma, for the petitioner.

None, for the respondents.

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*W.P. No.321/2003 (Jabalpur)

RAMLAKHAN Vs. RAMBAHADUR

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–The plaintiff/petitioner is assailing the order dated 26.2.2002 passed by First Civil Judge Class II Panna in C.S. No. 14-A/2001 by which the Trial Court has impounded the lease document and has ordered payment of stamp duty and penalty, consequently assailing the order the writ petition has been preferred.

2. It is submitted by Shri Pranay Verma, learned counsel appearing for petitioner that as per the exemption carved out under Article 35 of Schedule 1-A of Indian Stamp Act, 1899, an agricultural lease for a period of one year is exempt from the payment of stamp duty. The Trial Court has not correctly interpreted Art. 35. It is specifically provided in Art. 35 that when a definite term is expressed and such term does not exceed one year or when the average annual rent reserved does not exceed one hundred rupees. In the instant case the lease was only for the period of one year, thus the document could not have been impounded by the learned Trial Judge, the order being illegal, deserves to be set aside.

3. We have perused the document Ex.P-1. It is an agricultural lease for a period of one year though 19 quintal of wheat was agreed to be paid, in lieu of cultivating land for a period of one year, however, considering the exemption clause of Art. 35 contained in Schedule 1(a) of Indian Stamp Act, it is apparent that lease for a period of one year is exempted from payment of stamp duty. Exemption Clause of Art. 35 is quoted below :-

Description of Instrument Exemption	Proper Stamp-duty
Lease - Executed in the case of a cultivator and for the purposes of cultivation (including a lease of trees for the production of food or drink) without the payment or delivery of any fine or premium when a definite term is expressed and such term does not exceed one year or when the average annual rent reserved does not exceed one hundred rupees.	

It is apparent in the instant case that lease was given for the purpose of cultivation for a definite term i.e. for a period of one year, hence the lease in question is exempt from payment of stamp duty. The later requirement for exemption is that when the average annual rent reserved does not exceed one hundred rupees. Both the requirments should not be read together. In case lease does not exceed one year,may be that average annual rent reserved exceed Rs. 100/-,lease would

be exempted from payment of stamp duty as period does not exceed one year. The average annual rent does not exceed Rs. 100/- has to be read in alternative, these requirement cannot be said to be cumulative requirements. This Court in *Dharamdas vs. Babulal* 1961 JLJ SN 579 has taken the similar view that the lease for one year by cultivator of land for cultivation, does not require stamp duty. This Court has relied upon the decision rendered in *In re, Bhavan Badhar* - ILR 6 Bom. 691 by Full Bench of the High Court of Bombay in which following decision has been rendered:-

> *Per Curiam.*- We think that the language of clause (b), article 13, of Schedule II of Act I of 1879, exempts all leases executed in the case of a cultivator without the payment or delivery of any fine or premium, whatever there served or annual rent may be, provided it be for a definite term not exceeding one year, and also whatever the term may be, provided the annual rent reserved does not exceed Rs. 100.

In our opinion, the order passed by the Trial Court cannot be said to be sustainable, same is hereby set aside. Writ petition is allowed. No costs.

Petition allowed.

I.L.R. [2009] M. P., 2813
WRIT PETITION
Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava
7 May, 2009*

UNION OF INDIA & ors. ... Petitioners
Vs.
SMT. SHASHI BAI & anr. ... Respondents

Words & Phrases - ***Pension - Ex gratia - Employee resigned from service after rendering more than 26 years of service - Employee had opted for pension while she was in service - Voluntarily tendering resignation is an act by which employee voluntarily gives up his job - Such situation would be covered by expression voluntary retirement - Employee entitled for ex gratia pension - Order of CAT upheld - Petition dismissed.***

शब्द और वाक्यांश – पेंशन – अनुग्रहपूर्वक – कर्मचारी ने 26 वर्ष से अधिक सेवा करने के बाद सेवा से त्यागपत्र दिया – कर्मचारी ने, जब वह सेवा में थी, पेंशन का विकल्प चुना था – स्वेच्छया त्यागपत्र निविदत्त करना ऐसा कार्य है जिसके द्वारा कर्मचारी स्वेच्छया अपनी नौकरी छोड़ देता है – ऐसी स्थिति शब्द स्वैच्छिक सेवानिवृत्ति के अन्तर्गत आयेगी – कर्मचारी अनुग्रह पेंशन की हकदार – केन्द्रीय प्रशासनिक अधिकरण के आदेश की पुष्टि की गई – याचिका खारिज।

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*W.P. No.8366/2004(S) (Jabalpur)

UNION OF INDIA Vs. SMT. SHASHI BAI

Cases referred :

AIR 1990 SC 1808, (1996) 10 SCC 72.

P. Shankaran, for the petitioners.

K.S. Chauhan with *H.S. Verma,* for the respondent No.1.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–The writ petition has been preferred by Union of India through Secretary, Ministry of Railways and others assailing the order passed by the Central Administrative Tribunal, Jabalpur Bench, Jabalpur in OA No.154/2003. The Tribunal has directed to grant benefit of exgratia pension to Kamla Prasad who died during pendency of this petition and is succeeded by the widow.

2. The facts in short are that Kamla Prasad was appointed as Diesel Assistant on 28.9.1951 and he has resigned from the services of Railways on 17.11.1977. He has rendered more than 26 years services. He had opted for pension while in service,he had applied for exgratia pension, there was no response till 15.3.2001, he was advised by communication (A/1) dated 15.3.2001 that he was not entitled for exgratia pension because he had resigned from the services on 17.11.1977.Consequently,original application was preferred before the Tribunal. Petitioner relied upon the decision in *A.P.Shukla vs. UOI & Ors.* rendered by Central Administrative Tribunal, Jabalpur Bench,Jabalpur in OA No.623/1991, decided on 13th October, 1995 and decision of Apex Court in *M/s J.K.Cotton Spg.& Wvg.Mills Company Ltd., Kanpur vs. State of U.P. and others* AIR 1990 SC 1808. Prayer was made to treat the resignation as voluntary retirement and to release the pension in terms of Section 102 of Railway Pension Rules, 1950.

3. The case set up by the respondent is that its a case of resignation. In the case of resignation even ex-gratia pension is not admissible, employee had not opted for pension scheme otherwise he would not have received the benefit of SRPF(C) after his retirement. Thus, the claim for exgratia pension has rightly been rejected.

4. The Central Administrative Tribunal has held that resignation of the petitioner be treated as voluntary retirement and benefit of exgratia pension has been ordered to be extended. Aggrieved thereby, the instant writ petition has been preferred.

5. Shri P.Shankaran, learned counsel appearing for petitioners has submitted that case of *A.P.Shukla vs. UOI & Ors.*(supra) is different. A.P.Shukla had opted for pension scheme while he was in service, in the instant case the record is not available with the petitioners, acceptance of SRPF(C) after retirement indicates that benefit of pension scheme was not opted by the employee otherwise the employee would not have accepted the aforesaid benefit without any objection. There is difference between case of "resignation" and "voluntary retirement",

consequently the Tribunal has erred in deciding the application in favour of petitioner and has illegally ordered the benefit of exgratia pension to be released to the petitioner.

6. Shri K.S.Chauhan appearing with Shri H.S.Verma, for respondent no.1 have supported the order passed by Central Administrative Tribunal, Jabalpur Bench, Jabalpur.

7. It is not in dispute that employee had rendered the services for more than 26 years. It appears that he has submitted resignation instead of opting for voluntary retirement. He would have been entitled for pensionary benefits had he obtained the voluntary retirement. The benefit of SRPF(C) of Rs.6,976 was paid to him. However, employee has averred that he had opted for pension scheme while he was in service. Since he had submitted the resignation instead of applying for voluntary retirement the receipt of benefit of SRPF(C) would not come in the way in case resignation is treated as voluntary retirement.

8. The case of *A.P.Shukla vs. UOI & Ors.*(supra) decided by Central Administrative Tribunal vide Order (P.5) dated 13th October, 1995 is similar on facts. Shri A.P.Shukla had submitted the resignation on 11.5.71, he completed in all 17 years 9 months and 10 days service, the case of A.P.Shukla was that he had opted for pension scheme in the year 1969, but the same was not decided. It was also submitted that record was not available with the employer indicating whether he had exercised option in the pension scheme or not. Relying upon decision of Apex Court in *M/s J.K.Cotton Spg.& Wvg.Mills Company Ltd., Kanpur vs. State of U.P. and others* (supra) the Tribunal has held thus :-

> "6. Whether the resignation amounts to voluntary retirement. The Apex Court in the case of *M/s J.K.Cotton Spg.& Wvg.Mills Company Ltd., Kanpur* (supra)has held that when an employee voluntarily tenders his resignation it is an act by which he voluntarily gives up his job. Such a situation would be covered by the expression "voluntary retirement" within the meaning of clause (i) of Section 2(s) of the Industrial Disputes Act,1947. The case on which reliance was placed, the controversy was whether it was a "voluntary retirement" or "retrenchment". In any case, the only analogy is that the applicant intends to draw his pension within the meaning of the word "voluntary retirement".The question is whether Rule 311 of the Railway Pension Rules prohibits grant of pension after resignation from service. Rule 311 reads as under :-
>
> "Resignation from service- No pensionary benefit (or compassionate grant(s) and/or allowances) may be granted to a Railway servant who resigns from service.
>
> Voluntary retirement from service after completion of 30 years'

qualifying service etc. in terms of para 620 or para 622 does not, however, constitute resignation within the meaning of these rules."

With respect to availability of record, the Tribunal has considered in *A.P.Shukla vs. UOI & Ors.*(supra)thus :-

"12. Having considered the arguments of both the sides, it is found that the applicant even though he resigned in 1971, had earlier made an application for change of his option and the same was not allowed to him. The respondents have submitted that since the case of the applicant is very old, record of the case has been destroyed, no definite statement can be made whether any such option was exercised.

17. The applicant's option for pension having not been decided is entitled to receive pension by depositing the provident fund received by him within a month from today and the orders shall be passed by the Railways within three months from the date of receipt of the amount."

The decision in *A.P.Shukla vs. UOI & Ors.*(supra)was affirmed by the Apex Court is admitted at Bar. Case of employee is similar to that of A.P.Shukla. Thus, we find the order passed by the tribunal to be in accordance with law.

The Apex Court in *M/s J.K.Cotton Spg.& Wvg.Mills Company Ltd., Kanpur vs. State of U.P. and others* (supra) has laid down that when an employee voluntarily tenders his resignation it is an act by which he voluntarily gives up his job. Such a situation would be covered by the expression "voluntary retirement" within the meaning of clause (i) of Section 2(s) of U.P. Industrial Disputes Act,1947. Thus, it could not be said to be a case of "retrenchment" ,it was a case of "voluntary retirement" within the meaning of the first exception to S.2(s).

9. Grant of exgratia payment to surviving SRPF(C) retirees of the period 1.4.57 to 31.12.85 has been dealt with by Railway Board Establishment Circular No.19/98 dated 27.1.98. It provided that based on the recommendations of the Vth Central Pay Commission, the President is pleased to grant SRPF(C) beneficiaries who retired between the period 1st April,1957 to 31st December, 1985 at the rate of Rs.600 per month with effect from 1st November,1997, subject to the condition that such persons should have rendered at least 20 years of continuous service prior to their superannuation for becoming eligible to the exgratia payment. They will also be entitled to Dearness Relief at the rate of 5% w.e.f.1.11.97. The benefit will also be admissible in respect of SRPF(C) beneficiaries who were alive on 1.11.97 and died subsequent to that date for the period from 1.11.97 to the date of death. As we have held that Tribunal is right in treating the resignation as voluntary retirement, employee Kamla Prasad (since deceased) was entitled for the benefit of exgratia pension as envisaged under the aforesaid Railway Board Establishment

Circular No.19/98. Relevant portion of the circular is quoted below :-

" R.B.E.No.19/98

Subject- Grant of ex-gratia payment to surviving SRPF(C) retirees of the period 1.4.57 to 31.12.85

Based on the recommendations of the Vth Central Pay Commission, the President is pleased to grant SRPF(C) beneficiaries who retired between the period 1st April,1957 to 31st December, 1985 at the rate of Rs.600 per month with effect from 1st November,1997, subject to the condition that such persons should have rendered at least 20 years of continuous service prior to their superannuation for becoming eligible to the exgratia payment. They will also be entitled to Dearness Relief at the rate of 5% w.e.f.1.11.97.

2. The ex-gratia payment is not admissible to (a) those who were dismissed/removed from service and (b) those who resigned from service.

3. Arrears of ex-gratia payment will be payable w.e.f.1.11.97. Lifetime arrears of ex-gratia payment will also be admissible in respect of SRPF(C)beneficiaries who were alive on 1.11.97 and died subsequent to that date for the period from 1.11.97 to the date of death.

10. The Apex Court in *R.Subramaniam vs. Chief Personnel Officer, Central Railways Ministry of Railways* (1996) 10 SCC 72 has opined that R.Subramaniam having retired during the period specified by the Central Administrative Tribunal, opting for the Pension Scheme at later stage was held entitled for pension scheme subject to refund of the amount received by him under the Provident Fund Scheme. In the instant case, benefit of SRPF(C) is not to be refunded as per Railway Board Circular and recipients of such benefit are also entitled for exgratia pension as we have treated the "resignation" as "voluntary retirement". It is not necessary to refund the benefit.

11. In the present case petitioners ought to have extended the benefit of decision in *A.P.Shukla's case* to the employee. Decision of *A.P.Shukla vs. UOI & Ors.* (supra)having been affirmed by the Supreme Court, in all fairness, the benefit of exgratia pension should have been suo motu extended by the petitioners as every such employee need not to be dragged to the Court.

12. We find the order passed by the Central Administrative Tribunal, Jabalpur Bench, Jabalpur deserves to be upheld. The decision be implemented within a period of two months. The respondent would be entitled for interest at the rate of 7% per annum on the arrears of ex gratia pension which may be found to be payable.

13. Resultantly, the writ petition being devoid of merits is hereby dismissed. However, we leave the parties to bear their own costs as incurred of the petition.

C.c.as per rules.

Petition dismissed.

I.L.R. [2009] M. P., 2818
WRIT PETITION
Before Mr. Justice Sanjay Yadav
13 May, 2009*

RAVI DUBEY & ors. ... Petitioners
Vs.
STATE OF M.P. & ors. ... Respondents

Van Upaj Vyapar (Viniyaman) Adhiniyam, M.P. (9 of 1969), Sections 5 & 15 - *Confiscation* - *Trucks were seized for transporting timber - Trees were cut after sanction and timber was loaded in trucks in supervision of officials - Transit passes were also prepared - Held - It can not be said that timber was unauthorizedly carried out as transit passes were not in physical possession - There has to be a knowledge or connivance for holding a person guilty of an offence u/s 5 - Order of confiscation of trucks quashed - Petition allowed.* (Paras 15 & 16)

वन उपज व्यापार (विनियमन) अधिनियम, म.प्र. (1969 का 9), धारा 5 व 15 – अधिहरण – इमारती लकड़ी का परिवहन करने के लिए ट्रक अभिग्रहीत किये गये – वृक्ष मंजूरी के बाद काटे गये और इमारती लकड़ी अधिकारियों के पर्यवेक्षण में ट्रकों में लादी गयी – अभिवहन पास भी तैयार किये गये – अभिनिर्धारित – यह नही कहा जा सकता कि इमारती लकड़ी अप्राधिकृत रूप से ले जायी गयी क्योंकि अभिवहन पास भौतिक कब्जे में नही थे – किसी व्यक्ति को धारा 5 के अन्तर्गत अपराध का दोषी ठहराने के लिए ज्ञान या मौनानुकुलता होनी चाहिए – ट्रकों के अधिहरण का आदेश अभिखंडित – याचिका मंजूर।

Vijay Pandey, for the petitioners.
Jaideep Singh, Dy.G.A., for the respondent/State.
Praveen Verma, for the respondent No.5.

ORDER

SANJAY YADAV, J. :–The petitioners, being aggrieved of the seizure of their trucks bearing registration No.M.P.No.19-7900, M.P.26-D-1756, MBC-8041, MP-09-K-3555 and Truck No-M.P-L-3361 respectively, have visited this Court with this petition under Article 226/227 of the Constitution of India. The trucks were seized for the alleged offence of transporting timber wood from village Jadiya to Mohada without transit pass, wherefor a forest offence under section 5(1) and

*W.P. No.13152/2008 (Jabalpur)

15 of the M.P.Van Upaj (Vyapar Viniyaman) Adhiniyam 1969 Vide P.O.R. No.412/18 was registered. The petitioners seek quashment of P.O.R. 412/18 and the release of trucks seized.

2. Facts giving rise to the seizure of trucks and registration of forest offence, briefly are that, one Smt. Durpati W/o Nandlal Gavli R/o Village Jadiya, District Betul, owner of land bearing Khasra No.233,234 and 273 admeasuring 2.431 hectares at Patwari Halka No.7 having on it 149 Teak trees, applied for felling of trees as permissible under M.P. Lok Vaniki Niyam, 2002 and as per plan prepared therein, she was allowed to fell 60 trees standing over Khasra No.233,234 and 237 in the first phase, by the Divisional Forest Officer, West Betul, vide order No. 103 dated 7.6.2008. Whereafter the land was demarcated by the concerning Patwari and the trees were cut thereafter, as per sanction. She applied for transportation of timber to the Range Office, Mohda which was accorded and hammer impression were put on each timber piece. However, before the transit passes could be issued as the stung is put by the respondents, she arranged the trucks in question and got the timber transported from village Jadiya to Mohda, which, as stated, is at a distance of 17 Kms. These trucks when were taken to range office Mohda were apprehended by respondent No.5, Naib Tahsildar Bhimpuri, who caused their seizure on 18.7.2008 for want of transit passes.

3. To ascertain as to whether the trees in question were cut from proper place as permitted, a joint spot inspection by the revenue and forest authorities was carried out on 22.7.2008; whereupon, it was found that the Patwari had wrongly demarcated the land and out of 60 only 9 trees were found to be from the land belonging to Smt. Durpati Bai; whereas two trees were from the land of Shri Parasram owner of Khasra No.272 and 49 trees were from Khasra No.235/1 belonging to revenue department and recorded as "bade Jhad Ka Jangal". A case for illicit felling was prepared vide POR 811/16 on 8.8.2006. Furthermore, since it was found that the timber in question was transported without valid transit pass over a lead of 17 Kms village Jadiya to Modha an offence against the truck drivers was registered under Rules framed under section 41 of the Indian Forest Act, 1927 read with section 5(1) and 15 of M.P. Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969 vide POR. 412/18 on 4.11.2008. It is also pointed out that because of violation of Rule 8 of the M.P.Lok Vaniki Ahiniyam, 2002 an action is contemplated by Sub Divisional Magistrate, Bhaisdehi.

4. With these facts in the background the petitioner claims that, no offence is be committed while carrying a duly hammer marked teak wood, wherefor, the transit passes though issued but cancelled for other reasons. It is urged, that the felling was done by the owner of land in presence of the officials of the forest department and the hammer impressions were put by the forest department and even the loading was done in presence of the forest officer as per the list prepared

by them and over the transit passes in respect of said timber were prepared and merely because the passes were not in physical possession of the devices, it cannot be said that the timber was unauthorizedly carried from village Jadiya to the Range Office, Mohada. It is contended that there was neither a mens rea nor any connivance on the part of either of the owners of the truck to have transported the timber unauthorizedly.

5. It is accordingly, urged that the action of seizure is illegal and the initiation of the procedure for confiscation vide POR No.412/18 is bad in the eyes of law and is liable to be quashed.

6. The respondents however, have a different string to play. It is contended, inter alia, that no forest produce could be transported without proper and valid transit pass. And even if, as in the present case , the hammer marked timber was transported, it was obligatory for the transporter to have carried a valid transit pass. Since the trucks when apprehended on 18.7.2008 were not having valid transit pass, the authorities did not commit any error in causing their seizure and register a case for confiscation thereof.

7. To ascertain whether an offence under the Act of 1969 has been committed by the petitioners, opportune it would be to look in to the provisions under which the petitioners have been charged.

8. Section 5 of the Adhiniyam, 1969 stipulates as under:

> 1.Restriction on purchase or transport of specified forest produce.-
> (1) On the issue of a notification under sub-section (3) of section 1 with respect to any area, no person other than.-
>
> (a) the State Government;
>
> (b) an officer of the State Government authorised in writing in that behalf; or
>
> (c) an agent in respect of the unit in which the specified forest produce is grown or found;
>
> shall purchase or transport such specified forest produce in such area.
>
> **Explanation I.** Purchase shall include purchase by barter.
>
> **Explanation II-** Purchase of specified forest produce from the State Government or the aforesaid Government Officer or Agent or a licensed Vendor or purchase under Section 12-A shall not be deemed to be a purchase in contravention of the provisions of this Act.
>
> **Explanation III-** A person having no interest in the holding who has acquired to collect the specified forest produce grown or found

on such holding shall be deemed to have purchased such produce in contravention of the provisions of this Act.

(2) Notwithstanding anything contained in such-section (1)-

(a) a grower of forest produce other than Mahua may transport his produce from any place within the unit wherein such produce is grown or is found to any other place in that unit; and a grower of Mahua may possess and transport Mahua from any place within the district where such Mahua is grown or is found to any place within that district.

(b) any person may transport the specified forest produce not exceeding the quantity as may be prescribed from the place of purchase of such produce to the place where such produce is required for his bonafide use or for consumption.

(c) specified forest produce purchased from the State Government or any officer or agent specified in the said sub section by any person for manufacture of goods within the State in which such specified forest produce is used a as raw material or by any person for sale outside the State or by the licensed vendor may be transported by such person in accordance with the terms and conditions of a transit pass to be issued in that behalf by such authority in such manner and on payment of such fee as may be prescribed. Different rate of fee may be prescribed for different types of transport vehicle and

(d) any person having right of nistar in any forest in respect of any specified forest produce under any law for the time being in force, may transport such produce for his domestic use or consumption in such quantity and subject to such terms and conditions as may be prescribed.

(3) Any person desiring to sell the specified forest produce may sell them to the aforesaid Government officer or agent at any depot situated within the said unit:

Provided that the State Government, the Government Officer or agent shall not be bound to repurchase the specified forest produce once sold.

9. A close look at the aforesaid provision would reveal that a grower of forest produce other than Mahua may transport his produce from any place within the unit wherein such produce is grown or is found to any other place in that unit and any person may transport the specified forest produce not exceeding the quantity as may be prescribed from the place of purchase of such produce to the place where such produce is required for his bonafide use or for consumption.

10. Furthermore, any person having right of nistar in any forest in respect of any specified forest produce under any law for the time being in force, may transport such produce for his domestic use or consumption in such quantity and subject to such terms and conditions as may be prescribed.

11. In the case at hand, it is not in dispute that the said Smt. Durpati had the permission to cut 60 Teak wood standing over land bearing Khasra No.233,234 and 273 admeasuring 2.431 hectares at Patwari Halka No.7 village Jadiya District Betul. It was therefore, lawful on her part that she got those trees transported from village Jaidya to the Depot Mohda.

12. It is however, immaterial in the present case that subsequently it was found that on the basis of wrong demarcation of the land by respective Patwaris the trees were cut from the land belonging to the persons and from the Government land.

13. Section 15 of the Adhiniyam 1969:

15.Search and seizure of property liable to confiscation and procedure therefor.(1) Any Forest Officer as may be notified by the State Government or any Police Officer not below the rank of an Assistant Sub Inspector] or any other person authorised by the State Government may, with a view to securing compliance with the provisions of this Act or the rules made thereunder or to satisfying himself that the said provisions have been complied with-

(i) stop and search any person, boat , vehicle or respectable used or intended to be used for the transport of specified forest produce'

(ii) enter and search any place.

(2) When there is reason to believe that any offence under this Act has been committed in respect of any specified forest produce, any forest officer as may be notified by the State Government or any Police Officer not below the rank of Assistant Sub-Inspector] or any person authorised by the State Government in this behalf may, seize such specified forest produce along with all tools, boats, vehicles, ropes, chains or any other articles used in committing such offence under the provisions of this Act.

(3) Any officer or person seizing any property under this section shall place on all such property a mark indicating that the same has been so seized and shall, as soon as may be, either produce the property seized before the officer not below the rank of an Assistant Conservator of Forest authorised by the State Government in this behalf, by notification (hereinafter referred to as the authorised officer) or where it is having regard to quantity or bulk or other genuine difficulty, not practicable to produce the property seized before the authorised officer, make a report about the seizure to the authorised officer, or where it is intended to launch criminal proceedings against the offender immediately make report of such seizure to the Magistrate having jurisdiction to try the offence on account of which seizure has been made:

Provided that, when the specified forest produce with respect to which such offence is believed to have been committed is the property of

Government and the offender is unknown, it shall be sufficient if the officer makes as soon as may be a report of the circumstances to his official superior.

(4) Subject to the provisions of sub-section (6), where the authorised officer upon production before him of the specified forest produce or upon receipt of report about the seizure, as the case may be, is satisfied that offence has been committed in respect thereof, he may, by order in writing and for reasons to be recorded confiscate the specified forest produce so seized together with all tools, vehicles, boats, ropes, chains or any other articles used in committing such offence. A copy of order of confiscation shall be forwarded without any undue delay to the Conservator of Forest of the circle in which the specified forest produce has been seized.

(5) No order confiscating any property shall be made under sub-section (4) unless the authorised officer-

(a) sends an intimation in forms prescribed about initiation of proceedings for confiscation of property to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made;

(b) issues a notice in writing to the person from whom the property is seized , and to any person who may appear to the authorised officer to have some interest in such property;

(c) affords an opportunity to the persons referred to in clause (b) of making a representation within such reasonable time as may be specified in the notice against the proposed confiscation ; and

(d) gives to the officer or person effecting the seizure and the person or persons to whom notice has been issued under clause (b), a hearing on the date to be fixed for such purpose.

(6) No order of confiscation under sub-section (4) of any tools, vehicles, boats, ropes, chains or any other articles (other than specified forest produce seized) shall be made if any person referred to in clause (b) of sub-section (5) proves to the satisfaction of authorised officer that any such tools, vehicles, boats, ropes, chains or other articles were used without his knowledge or connivance or as the case may be, without the knowledge or connivance of his servant or agent and that all reasonable and necessary precautions had been taken against use of objects aforesaid for commission of an offence under this Act.

(7) The provisions of Sections 102 and 103 of the Code of Criminal Procedure, 1973 (No.2 of 1974) relating to search and seizures shall so far as may be apply to searches and seizures under this Section.

14. It is therefore, necessary that there has to be a knowledge or connivance, for holding a person guilty of an offence under section 5 of the Act of 1969.

15. The facts of the present case discloses that trucks of the petitioners were hired by one Smt. Durpati who had in her possession a valid sanction to cut 60 teak trees standing on her land. The trees were then cut in presence of forest officials who also supervised the loading thereof in respective trucks. These trucks were admittedly to be taken to the Depot at Mohda which is at the distance of 17 Kms. The transit pass were prepared and in the process thereof the trucks were taken to Mohda. It cannot therefore be gathered from these facts that there was any connivance for committing a forest offence.

16. Since the transit passes were being prepared in the Range Office, Mohda and after the instruction accorded by the DFO to issue transit pass the trucks were loaded with hammer impression in each teak wood and were being carried from the place where they were loaded, i.e., from village Jadiya to Range Office Mohda. All these activities were carried out under the supervision of forest officer who were present on the spot, i.e., in village Jadiya. Therefore, it cannot be said that the petitioners were unauthorizedly carrying away the forest produce as would invite a forest offence under section 5 of the Act of 1969.

17. Therefore, in the considered opinion of this Court no offence can be said to have been made out under section 5 of the Act of 1969 as would entitle the respondents to proceed with the confiscation of the petitioners' seized trucks.

18. In the result the petition is allowed. P.O.R. 412/18 is hereby quashed. Respondents are directed to forthwith return the trucks bearing Registration Nos. M.P.No.19-7900, M.P.26-D-1756, MBC-8041, MP-09-K-3555 and Truck No-M.P-L-3361 to respective petitioners under their acknowledgment .

19. The petition is allowed to the extent above. However no costs.

Petition allowed.

I.L.R. [2009] M. P., 2824
WRIT PETITION
Before Mr. Justice Sanjay Yadav
17 June, 2009*

UNION OF INDIA ... Petitioner
Vs.
CENTRAL INFORMATION COMMISSIONER & anr. ... Respondents

A. Right to Information Act (22 of 2005), Section 8(1) - *Exemption from disclosure of information - Department claiming exemption u/s 8(1) from disclosure of information regarding materials forming the basis for issuance*

*W.P. No.5704/2009 (Jabalpur)

of the charge-sheet and initiation of a D.E. - Held - A Govt. Servant have an access to the material forming basis of the charges and initiation of D.E., which can be utilized for his defence - It cannot be presumed that the D.E. gets impeded. (Para 8)

क. सूचना का अधिकार अधिनियम (2005 का 22), धारा 8(1) – सूचना के प्रकटीकरण से मुक्ति – विभाग ने आरोप–पत्र जारी किये जाने और विभागीय जाँच प्रारम्भ किये जाने का आधार बनाने वाली सामग्री से सम्बन्धित सूचना के प्रकटीकरण से धारा 8(1) के अन्तर्गत मुक्ति का दावा किया – अभिनिर्धारित – कोई शासकीय कर्मचारी आरोपों और विभागीय जाँच के प्रारम्भ का आधार बनाने वाली सामग्री तक पहुँच रखता है, जो उसकी प्रतिरक्षा के लिए उपयोगी हो सकती है – यह उपधारित नही किया जा सकता कि विभागीय जाँच रुकवायी गयी।

B. Right to Information Act (22 of 2005), Section 8(1)(e) - *Exemption from disclosure of information - Disclosure of vigilance investigation report - Department claiming exemption on the basis of fiduciary relationship - Held - Vigilance Department is not a private secrete service but an establishment operating under the rules - It, therefore, cannot be said that a fiduciary relationship exist between the Vigilance Department and other department of Union of India as would deprive an employee, who has been subjected to a D.E. on the basis of Vigilance Department's investigation report, to have an access to the information or the record.* (Para 11)

ख. सूचना का अधिकार अधिनियम (2005 का 22), धारा 8(1)(ई) – सूचना के प्रकटीकरण से मुक्ति – सतर्कता अन्वेषण रिपोर्ट का प्रकटीकरण – विभाग ने वैश्वासिक सम्बन्ध के आधार पर मुक्ति का दावा किया – अभिनिर्धारित – सतर्कता विभाग गैर–सरकारी गोपनीय सेवा नही है बल्कि नियमों के अन्तर्गत परिचालित एक स्थापना है – इसलिए यह नही कहा जा सकता कि सतर्कता विभाग और भारत संघ के अन्य विभाग के मध्य वैश्वासिक सम्बन्ध विद्यमान है, जिससे किसी कर्मचारी को, जिसे सतर्कता विभाग की अन्वेषण रिपोर्ट के आधार पर विभागीय जाँच के अधीन रखा गया है, सूचना या अभिलेख तक पहुँच से वंचित रखा जाए।

C. Right to Information Act (22 of 2005), Section 8(1)(g) - *Exemption from disclosure of information - Department claiming exemption on the basis that the disclosure of information sought for would endanger the life or physical safety of person associated with the investigation - Held - No such material is brought on record to justify the avermets - Since the investigation report forms the basis of initiation of a D.E. - It cannot be presumed that the report was submitted for law enforcement or for the security purposes.* (Para 12)

ग. सूचना का अधिकार अधिनियम (2005 का 22), धारा 8(1)(जी) – सूचना के प्रकटीकरण से मुक्ति – विभाग ने इस आधार पर मुक्ति का दावा किया कि चाही गई सूचना का प्रकटीकरण अन्वेषण से सम्बद्ध किसी व्यक्ति के जीवन या दैहिक सुरक्षा को संकट में डालेगा – अभिनिर्धारित – प्रकथनों को न्यायोचित ठहराने के लिए ऐसी कोई सामग्री अभिलेख पर नही लायी

गयी – चूंकि अन्वेषण रिपोर्ट विभागीय जाँच आरम्भ करने का आधार बनाती है – यह उपधारित नही किया जा सकता कि रिपोर्ट विधि प्रवर्तन या सुरक्षा प्रयोजनों के लिए पेश की गयी।

D. Right to Information Act (22 of 2005), Section 8(1)(h) - ***Exemption from disclosure of information - Department claiming exemption on the basis that grant of information would impede the powers of investigation or apprehension on prosecution of offenders and being the basic document on which charges were framed, will affect the prosecution. - Held - There is no chance for impeding of process of investigation as apprehended, because already a charge-sheeet has been framed and the D.E. is initiated.*** (Para 12)

घ. सूचना का अधिकार अधिनियम (2005 का 22), धारा 8(1)(एच) – सूचना के प्रकटीकरण से मुक्ति – विभाग ने इस आधार पर मुक्ति का दावा किया कि सूचना का दिया जाना अन्वेषण की शक्तियों पर अड़चन डालेगा या अपराधियों के अभियोजन पर आशंका डालेगा और आरोपों विरचित किये जाने का आधारीय दस्तावेज होने से अभियोजन को प्रभावित करेगा – अभिनिर्धारित – अन्वेषण की प्रक्रिया में अड़चन डालने की कोई संभावना नही है जैसा कि आशंकित है, क्योंकि एक आरोप–पत्र पहले ही विरचित किया जा चुका है और विभागीय जाँच प्रारम्भ की गई है।

Sudhir Shrivastava, for the petitioner.

ORDER

SANJAY YADAV, J. :–Claiming exemption from disclosure of information under section 8(1), (e), (g) and (h)of the Right to Information Act, 2005 (hereinafter referred to as Act of 2005), the petitioner, Union of India, through its General Manager, West Central Railway Jabalpur calls in question the legality of the order dated 1.6.2009 passed by the Central Information Commission in a second Appeal preferred by respondent No.2.

2. The following information on 1.12.2008 was sought by the respondents No.2, who has been subjected to a departmental enquiry on the alleged misconduct, formulated on the basis of the investigation report by the Chief Vigilance Officer:

1.1. The attested readable Xerox copy of complete Investigation Report of investigating Agency.

1.2 The attested readable Xerox copy of list of "allegations" on the basis of which the investigation was carried out.

1.3 The attested readable Xerox copy of Investigation Report on the basis of which the "allegations" were substantiated.

1.4 The attested readable Xerox copy of remarks of the CVO on the established allegations taken forwarding the documents for first stage advice of CVC as laid down. in terms of CVC's Circular NZ/PRC/1 dated 09-05-2005 (Office Order No.30/5/05).

1.5 The attested readable Xerox copy of remarks of the

Disciplinary Authority on the "allegations" offered before the case was sent to CVC as stated in terms of CVC's aforesaid circular dated 09-5-05.

1.6 The attested readable Xerox copy of pages wherein decision of CPO, SDGM, and GM was recorded on recommendation of SDGM after completion of investigation by CVI in my case after recording my clarifications and before the case was sent for first stage advice of CVC.

1.7. The attested readable Xerox copy of letters of SDGM, Railway Board & CVC whereby the case was referred to CVC for obtaining First Stage Advice of CVC.

1.8 The attested readable Xerox copy of Rule stating whether the recommendations/advices of CVC are of advisory nature OR mandatory & binding on Disciplinary Authority.

1.9 The attested readable Xerox copy of the First Stage Advice of CVC.

1.10 Whether in the charges proposed in my case has "Vigilance Angle" as defined in para 206.1 or 206.2 of Vigilance Manual. If it is of the nature of aforesaid Para 206.2, please give attested readable Xerox Copy of Noting of Files (indicating the No. of files) OR other correspondence complying with the following provisions:

"The Disciplinary Authority and the Chief Vigilance Officer should carefully study the case and conclude whether there is reasonable grounds to doubt the integrity of the officer".

3. The respondent vide letter dated 10/12/2008 was informed about item No.1.8 and 1.9 as under:

"Item No.1.8:- There is no such of rules available in the concerned file. However as per the CVC. Website cvc.nin.in CVC tenders independent & impartial advice to the disciplinary & other authorities.

Item No.1.9:- Certifled copy of the First Stage Advice of CVC is attached herewith please.

4. Whereas, for other information it was stated that, the information cannot be given because of the initiation of departmental enquiry. The grant of information would impede the powers of investigation or apprehension on prosecution of offenders, and being the basic documents on which charges were framed, will affect the prosecution. The exemption was claimed under section 8(1) (h) of the Act of 2005.

5. In the first appeal preferred by the respondent No.2, he did not get the desired information; therefore, he preferred a second appeal before the Central Information Commission, which has since been allowed by the impugned order calling upon the petitioner to give the complete information before 20.6.2009.

6. While challenging the order and not disputing the fact that initiation of a departmental enquiry against the petitioner is on the basis of the investigation report by the Chief Vigilance Officer, it is contended by the learned counsel for the petitioner that the Vigilance officials in Railway establishment are very often called upon to investigate matters of corruption against their superiors and colleagues which often create hostility and if the material collected by the Vigilance cell is allowed to be furnished to the delinquents, then there is a likelihood to victimization, harassment of these Vigilance officials, and therefore, their secrecy and non-disclosure is essential. It is further urged that since the respondent No 2 is subjected to a departmental enquiry on the basis of the investigation report of the Vigilance department, the parting with information would cause prejudice and will adversely affect the Department Enquiry. It is contended that the provisions contained under Section 8(1)(e)(g) & (h) exempts the petitioner from giving information pertaining to the investigation by the Vigilance Department.

7. After considering the submissions put forth by the learned counsel for the petitioner the question which falls for consideration is whether in the back drop of the facts adverted to the petitioner can claim exemption under section 8(1) of the Act of 2005 from disclosure of information regarding the materials forming the basis for issuance of the charge sheet and initiation of a departmental enquiry.

8. In service jurisprudence, it is a settled principle of law that, it is incumbent upon the prosecution to ensure the access of the charg sheeted employee,to the documents or the material relied upon in the charge sheet. There are however, materials which are taken into consideration during the fact finding enquiry or a vigilance investigation, as in the present case, and such material though form the basis of initiating a departmental enquiry, but may not be relied upon by the department and is held back because a charge can also be established on the basis of "preponderance of probability" and not on the rule of "strict proof". This leaves a vide gap between the reasonable opportunity afforded and actually available to the delinquent. Therefore, if while taking aid of the provisions contained in the Act of 2005, a Government Servant have an access to the material forming basis of the charges and the initiation of departmental enquiry, which he can utilize for his defence, it cannot be presumed that the departmental enquiry gets impeded, as has been contended by the petitioner, while denying the information.

9. Now coming to the provisions of the Act of 2005. The object of the Act is to "secure to the citizens access to information under the control of public authorities, order to promote transparency and accountability in the workings of every public authority".

10. Section 2(f) defines "information" to mean "any material in any form, including records, documents,memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force".

Whereas the "record" as defined under section 2(i) includes:

(i) any documents, manuscript and file;

(ii) any microfilm, microfiche and facsimile copy of a document;

(iii)any reproduction of image or images embodied in such microfilm (whether enlarged or not);

And the right to information under section 2(j) means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to -

(i) inspection of work, documents, records;

(ii) taking notes, extracts, or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;

Section 8(1) (e) (g) and (h) whereupon the reliance is placed by the petitioner stipulates:

(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the diclosure of such information;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

11. Though the expression "fiduciary relationship" as it exist in clause (e) of sub-section (1) of section 8 is not defined in the Act of 2005 but the same as defined in P. Ramanatha Aiyar: Law Lexicon: 1997 Edition means". The relationship between trustee and their cestui que trust" A relationship between the petitioner and the vigilance department, which is not a private Secret Service, but an

establishment operating under the Rules, it therefore cannot be said that a fiduciary relationship exist between the vigilance department and other department of the petitioner as would deprive a citizen and more particular an employee,who has been subjected to a departmental enquiry on the basis of Vigilance Department's investigation report; to have an access to the "information" or the "record". The interpretation which the petitioner intends to put to the expression would curtail the operation of the Act, 2005 and would defeat the very purpose and object for which the Act has been brought into existence. It is not the ambiguity but transparency which the Act of 2005 aims at.

12. Furthermore, no material is brought on record to justify the averments that the disclosures of information sought for would endanger the life or physical safety of any person who have associated with the investigation. And since the investigation report forms the basis of initiation of a departmental enquiry it cannot be presumed that the report was submitted for law enforcement or for the security purposes. Neither is there any chance for impeding of the process of investigation as apprehended, because already a charge sheet has been framed and the departmental enquiry is initiated.

13. Having thus considered, this Court is of the opinion that the impugned order does not suffer any infirmity,rather it is in conformity with the object and the provisions of Act of 2005.

14. In result the petition fails and is hereby dismissed in limine. However, no costs.

Petition dismissed.

I.L.R. [2009] M. P., 2830
WRIT PETITION
Before Mr. Justice S.C. Sharma
30 June, 2009*

AMAN TRADING COMPANY (M/S) ... Petitioner
Vs.
VYAVISAYIK EVAM AUDHYOGIK
SAHAKARI BANK & anr. ... Respondents

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Section 13(2), Constitution, Article 226 - *Writ Petition - Maintainability - Held - Proceeding under the Act and violation of guidelines framed by Reserve Bank of India in respect of a Cooperative Bank -Writ petition is not maintainable as an alternative remedy is available under the Act.* (Para 5)

*W.P. No.408/2009 (Gwalior)

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन, अधिनियम (2002 का 54), धारा 13(2), संविधान, अनुच्छेद 226 – रिट-याचिका – पोषणीयता – अभिनिर्धारित – अधिनियम के अन्तर्गत कार्यवाही और भारतीय रिजर्व बैंक द्वारा कॉपरेटिव बैंक के सम्बन्ध में विरचित गाइडलाईनों का उल्लंघन – रिट याचिका पोषणीय नही है क्योंकि अधिनियम के अन्तर्गत वैकल्पिक उपचार उपलब्ध है।

Cases referred :

AIR 2007 SC 1585, AIR 2008 Kerala 137 (DB), AIR 2008 MP 193, AIR 2008 (NOC) 44 (Bom).

J.P. Mishra, G.S. Sharma & Sandeep Dubey, for the petitioners.

Gajendra Bhargava, for the respondents.

ORDER

S.C. SHARMA, J. :–Regard being had to the similitude of the controversy involved in this batch of writ petition they were heard analogously together and disposed of by this singular order. For the sake of convenience the facts in Writ Petition No.408/2009 are exposited herein.

2. The petitioner before this Court has filed this present writ petition being aggrieved by the action of the respondent Bank in issuing notice under Section 13(2) under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The contention of the petitioner is that the petitioner Company has availed financial assistance from the respondent Bank and as the account became irregular a notice was issued on 02-09-2008 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 directing him to discharge his full liability by depositing Rs. 10,14,811/-. The petitioner has further stated that the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are not at all applicable in the case of petitioner and learned counsel for the petitioner has relied upon a judgment delivered by the Apex Court in the case of *Greater Bombay Co-operative Bank Ltd. V. M/s. United Yarn Tex. Pvt. Ltd. & Ors.* 2007 AIR SC 1585. Learned counsel for the petitioner has also stated before this Court that the action of the respondent Bank is par se illegal and arbitrary and they have violated the guidelines framed by the Reserve Bank of India and the account of the petitioner cannot be classified as NPA. The petitioner has also contended that the action of the respondent Bank is an unilateral action and without deciding the objection raised by the petitioners, the Bank is proceeding ahead in the matter. Besides this other grounds have also been raised regarding maintainability of the proceeding under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The petitioner has prayed for following reliefs before this Court:-

(i) In view of the facts and grounds mentioned in the writ

petition and further in view of the document annexed thereto the humble petitioners most respectfully prays that this Hon'ble Court may kindly be allowed the writ petition and issue a writ of mandamus and or/any other appropriate writer or direction against the Respondents and quashing the impugned notice of 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 dated, 02.09.2008 and Annexure P-3 and the entire proceeding/ action initiated against the petitioner under the act 2002 with the further directions to the respondent to allow the petitioner to repay the loan amount in installment.

(ii) That passing any other order or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(iii) That the respondents be directed not to auction or took possession of the petitioner's house and time to deposit the balance amount may kindly be granted.

(iv) That the respondent be directed to recalculate the amount of interest on the basis of circular and guidelines issued by the RBI and RRB and also directed to adjust the amount which was deposited by the petitioner with the respondent Bank.

(v) That the cost of petition may kindly be allowed to the petitioner.

3. A reply has been filed on behalf of respondent No. 2 Bank and it has been stated in the reply that the respondent No. 2 Bank a cooperative Bank and it is the Bank for the purpose of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The respondents have further stated that the proceedings were initiated against the petitioner under sub section 3 and 4 of the Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the petitioner is certainly having an alternative remedy under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the present writ petition is not at all maintainable before this Court. The respondents have also stated that the account of the petitioner became irregular and was declared as NPA and the respondent Bank has demanded the outstanding dues from the petitioner for closing the entire account. It has also been stated that inspite of repeated requests the petitioner did not deposited the amount and

therefore, a notice under Section 13(2) was issued to the petitioner on 02-09-2008 for depositing outstanding dues of Rs. 9,73,228/- as on 31-08-2008. It has been further stated that the petitioner did not deposited the aforesaid outstanding amount and therefore, after expiry of 60 days period as provided in the said notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, further notice was issued to the petitioner under Section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for taking peaceful possession of the relevant property under the security of said account. The respondents have further stated that the present writ petition was filed by the petitioner and by virtue of an interim order passed by this Court on 30th January, 2009, no further action has been taken in the matter. The respondents have prayed for dismissal of the writ petition and have relied upon a judgment delivered by the Division Bench of Kerala High Court in the case of *George Kutty Abraham and others Vs. Secretary, Kottayam District Co-operative Bank Ltd. and others* AIR 2008 Kerala 137 (DB). The respondents have also relied upon a judgment delivered by the Division Bench of this Court in the case of *Hafiz Zakir Hussain Vs. Akola Janta Commercial Co-operative Bank Ltd.* AIR 2008 Madhya Pradesh, 193. Learned counsel for the respondents has also relied upon a judgment delivered by a Division Bench of Bombay High Court in the case of *M/s. Khaja Industries & etc. Vs. State of Maharashtra & Anr. etc.* AIR 2008 (NOC) 44 (Bom.). In the aforesaid case the Division Bench has dismissed the writ petition filed challenging the Constitutional validity of Section 13 and 17 of the Act, 2002 and has also held the action of the Bank in consonance with the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Division Bench has also held that the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is applicable in respect of the Cooperative Bank. and respondents have prayed for dismissal of the writ petition.

4. Heard learned counsel for the parties at length and perused the record.

5. In the present case, the petitioner has not disputed the financial assistance extended by the respondent Bank which is certainly a Cooperative Bank registered under the provisions of M.P. Cooperative Societies Act, 1960. It is also not been disputed by the petitioner that the account of the petitioner became NPA and a notice was issued to the petitioner under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The return filed by the Bank reflects that a notice was initially issued under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 on 02-09-2008 directing the petitioner to deposit the outstanding amount of Rs. 9,73,228/-, however, the same amount

was not deposited by the petitioner, therefore, a notice was issued under Section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for taking peaceful possession of the relevant property. The Apex Court while dealing with the case of *Greater Bombay Co-operative Bank Ltd. Vs. M/s. United Yarn Tex. Pvt. Ltd & Ors.* AIR 2007 SC 1584 has held as under:-

> *"59. The RDB Act was passed in 1993 when Parliament had before it the provisions of the BR Act as amended by Act No. 23 of 1965 by addition of some more clauses in Section 56 of the Act. The Parliament was fully aware that the provisions of the BR Act apply to co-operative societies as they apply to banking companies. The Parliament was also aware that the definition of 'banking company' in Section 5 (c) had not been altered by Act No. 23 of 1965 and it was kept intact, and in fact additional definitions were added by Section 56(c). "Co-operative bank" was separately defined by the newly inserted clause (cci) and "primary co-operative bank" was similarly separately defined by clause (ccv). The Parliament was simply assigning a meaning to words; it was not incorporating or even referring to the substantive provisions of the BR Act. The meaning of 'banking company' must, therefore, necessarily be strictly confined to the words used in Section 5(c) of the BR Act. It would have been the easiest thing for Parliament to say that 'banking company' shall mean 'banking company' as defined in Section 5 (c) and shall include 'co-operative bank' as defined in Section 5 (cci) and 'primary co-operative bank' as defined in Section 5 (ccv). However, the Parliament did not do so. There was thus a conscious exclusion and deliberate commission of co-operative banks from the purview of the RDB Act. The reason for excluding co-operative banks seems to be that co-operative banks have comprehensive, self-contained and less expensive remedies available to them under the State Co-operative Societies Acts of the States concerned, while other banks and financial institutions did not have such speedy remedies and they had to file suits in civil courts."*

A Division Bench of this Court while dealing with a similar issue wherein action was initiated by the Cooperative Bank by invoking provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has held that Section 2(c) of Section 13 includes a Cooperative Bank within the definition of Bank by virtue of the notification of the Central Government and a

Cooperative Bank can take action under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for recovery of advance loan. The Division Bench of this Court in the case of *Hafiz Zakir Hussain Vs. Akola Janta Commercial Co-operative Bank Ltd.* AIR 2008 Madhya Pradesh, 193 in paragraphs 6, 7, 8, 9, 10, 11, 12 & 13 had held as under:-

"6. From the aforesaid rival submissions raised at the Bar it is luminescent that the centripodal question that emerges for that emerges for adjudication whether the learned Single Judge is justified in holding that the respondent a co-operative bank, is entitled under law to take action under the 2002 Act against the appellant herein. Submission of Mr. Yadav, learned counsel for the appellant is that if the principles laid down in Manoj Tarwala (supra) are properly understood and appreciated there can be no trace of doubt that a co-operative bank being not a banking company cannot take recourse to the provisions engrafted under 2002 Act. In the case of Manoj Tarwala (supra) a Division Bench of this Court while answering the reference made by the learned Single Judge in respect of the issue whether the co-operative Bank comes within the ambit and sweep of the 1993 Act has opined as under:

"We agree with the aforesaid reasons of the Division Bench of the Rajasthan Hihg Court and hold that Parliament did not intend to include recovery of debts due to the co-operative bank within the ambit and sweep of the 1993 Act. With great respect, we are unable to persuade ourselves to accept the view of the Division Bench of the Bombay High Court in the case of Shamrao Vithal Co-operative Bank Ltd. (AIR 2003 Bom 205) (supra) and the view of the Full Bench of the Bombay High Court in the case of Narendra Kantilal Shah (AIR 2004 Bom 166) (supra) that debts due to a co-operative bank would also come within the ambit and sweep of the 1993 Act. The conclusions in the Division Bench and the Full Bench judgments of the Bombay High Court are based on Section 56 in Part V of the 1949 Act, but as we have held above, by Section 56 in Part V of the 1949 Act only are made applicable to co-operative societies carrying on banking business and the said Section 56 of the 1949 act cannot be construed to mean that the provisions of the 1993 Act are also applicable to co-operative societies carrying on a banking business. For the aforesaid reasons, we are also unable to persuade ourself to accept the conclusions of the Full Bench of the Andhra

Pradesh High Court in M. Babu Rao, AIR 2005 (NOC) (AP) 661 (supra) that recovery of debt to Rs. 10 lakhs or more by a co-operative bank is within the exclusive jurisdiction of the Tribunal constituted under the 1993 Act. The first question of law referred to us is answered accordingly."

7. In Greater Bombay Co-operative Bank Ltd. [AIR 2007 SC 1584] (supra) the Apex Court was dealing with the facet whether debts due to the co-operative banks constituted under the Co-operative Societies Act of the Maharashtra and Andhra Pradesh could be covered under the provisions of the 1993 Act. Their Lordships in paragraphs 88 and 89 have expressed the opinion as under:

> *"88. For the reasons stated above and adopting pervasive and meaningful interpretation of the provisions of the relevant Statutes and Entries 43, 44 and 45 of List I and Entry 32 of List II of the Seventh Schedule of the Constitution, we answer the Reference as under:-*
>
> *Co-operative banks' established under the Maharashtra Co-operative Societies Act, 1960 [MCS Act, 1960]; the Andhra Pradesh Co-operative Societies Act, 1964 [APCS Act, 1964] and the Multi-State Co-operative Societies Act, 2002 [MSCS Act, 2002] transacting the business of banking, do not fall within the business of banking, do not fall within the meaning of "banking company" as defined in Section 5(c) of the Banking Regulation Act, 1949 (BR Act). Therefore, the provisions of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993 (RDB Act) by invoking the Doctrine of incorporation are not applicable to the recovery of dues by the co-operatives from their members.*
>
> *89. The field of Co-operative societies cannot be said to have been covered by the Central Legislation by reference to Entry 45, List I of the Seventh Schedule of the Constitution. Co-operative Banks constituted under the Co-operative Societies Act enacted by the respective States would be covered by co-operative societies by Entry 32 of List II of Seventh Schedule of the Constitution of India."*

8. Form the aforesaid decision is it vivid that the Co-operative Bank is not a banking company and therefore, it cannot recover its debts or dues by taking recourse to the 1993 Act as it is not a bank within the dictionary clause and the scheme of the 1993 Act. The fulcrum of the matter is whether the said decision can be taken aid of by learned counsel for the appellant to build an edifice for the conclusion that the 2002 Act is not applicable. Mr. Vipin Yadav, learned counsel for the appellant has invited our attention to paragraphs 30 and 31 of the decision rendered in Greater Bombay Co-operative Bank Ltd. (supra) in which their Lordships were dealing with the 2002 Act. For the proper appreciation it is thought appropriate to reproduce both the paragraphs:

> *"30. The Parliament had enacted the Securitistion and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ['the Securitisation Act'] which shall be deemed to have come into force on 21st day of June 2002. In Section 2(d) of the Securitisation Act same meaning is given to the word 'banking company' as is assigned to it in clause (e) of Section 5 of the BR Act. Again the definition of 'banking company' was lifted from the BR Act but while defining 'bank', Parliament gave five meanings to it under Section 2(c) and one of which is 'banking company'. The Central Government is authorized by Section 2 (c)(v) of the Act to specify any other bank for the purpose of the Act. In exercise of this power, the Central Government by Notification dated 28.01.2003, has specified "co-operative bank" as defined in Section 5 (cci) of the BR Act as a "bank" by lifting the definition of 'co-operative bank' and 'primary co-operative bank' respectively from Section 56 Clauses 5(cci) and (ccv) of Part V. The Parliament has thus consistently made the meaning of 'banking company' clear beyond doubt to mean 'a company engaged in banking, and not a co-operative society engaged in banking' and in Act No. 23 of 1965, while amending the BR Act, it did not change the definition in Section 5 (c) or even in 5(d) to include co-operative banks; on the other hand, it added a separate definition of 'co-operative bank' in Section*

5 (cci) and 'primary co-operative bank' in Section 5 (ccv) of Section 56 of Part V of the BR Act. Parliament while enacting the Securitisation Act created a residuary power in Section 2(c)(v) to specify any other bank as a bank for the purpose of that Act and in fact did specify 'co-operative banks' by Notification dated 28.01.2003. The context of the interpretation clause plainly excludes the effect of a reference to banking company being construed as reference to a co-operative bank for three reasons: firstly, Section 5 is an interpretation clause; secondly, substitution of 'co-operative bank' for 'banking company' in the definition in Section 5 (c) would result in an absurdity because then Section 5 (c) would read thus: "co-operative bank" means any company, which transacts the business of banking in India; thirdly, Section 56 (c) does define "co-operative bank" separately by expressly deleting/inserting clause (cci) in Section 5. The Parliament in its wisdom had not altered or modified the definition of 'banking company' in Section 5 (c) of the BR Act by Act No.23 of 1965.

31. As noticed above, "Co-operative bank" was separately defined by the newly inserted clause (cci) and "primary co-operative bank" was similarly separately defined by clause (ccv). The meaning of 'banking company' must, therefore, necessarily be strictly confined to the words used in Section 5(c) of the BR Act. If the intention of the Parliament was to define the 'co-operative bank' as 'banking company, it would have been the easiest way for the Parliament to say that 'banking company' shall mean 'banking company' as defined in Section 5(c) and shall include 'co-operative bank' and 'primary co-operative bank' as inserted in clauses (cci) and (ccv) in Section 5 of Act 23 of 1965."

9. Submission of Mr. Alok Aradhe, learned Senior Counsel for the respondent is that the said paragraphs in fact, support the contention of the respondent-bank. It is urged by him that the Central Government has been authorised under Section 2(c)(v) of the 2002 Act to specify any other bank for the

purpose of the Act and in exercise of the said power the Central Government by notification dated 28-1-03 has specified co-operative bank' as defined in Section 5(c)(cci) of the BR Act bank by lifting definition of the "co-operative bank".

10. Section 2(c) of the 2002 Act defines 'bank' as under:-

(i) a banking company; or

(ii) a corresponding new bank; or

(iii) the State Bank of India; or

(iv) a subsidiary bank; or

(v) such other bank which the Central Government may by notification, specify for the purpose of this Act."

11. Thus clause (v) empowers the Central Government by a notification to specify any other bank for the purposes of this Act. Thus, power has been conferred on the Central Government in the 2002 Act for including any other bank within the definition by issuing a notification and the Central Government has issued a notification and included co-operative banks for the purposes of the said Act. In this context, we may refer with profit to a Division Bench judgment of the Bombay High Court in M/s. Khaja Industries (supra) wherein the Division Bench after referring to the decision rendered in Greater Bombay Co-operative Bank Ltd. (supra) and after referring to paragraphs 30, 34 and 59 has expressed the opinion to the effect that the co-operative banks can take action under the 2002 Act.

12. We are in entire agreement with the view expressed in the said decision.

13. In view of the aforesaid premises, we are of the considered opinion that the view expressed in Manoj Tarwala (supra) is not applicable as it was not a case relating to 2002 Act but with regard to forum under the 1993 Act and the status of the bank. In the case at hand the power has been exercised by the Central Government under the 2002 Act and the Apex Court has clearly stated that the Central Government is authorised by Section 2(c)(v) of the Act to specify any other bank for the purpose of the said Act."

It has been held by the Division Bench of this Court that the Central Government is authorised by Section 2(c) to specify any bank for the purposes of

the Act, 2002. A similar view has been expressed by a Division Bench of Kerala High Court in the case of *George Kutty Abraham and others Vs. Secretary, Kottayam District Co-operative Bank Ltd. and others* AIR 2008 Kerala 137 (DB) paragraphs 7 and 8 of the aforesaid judgment reads as under:-

"7. The main contention of the learned counsel for the appellants was that the decision in Greater Bombay Co-operative Bank Ltd.'s case (AIR 2007 SC 1584) will, on all fours, apply to the provisions of the Securitisation Act. We find it difficult to accept the said contention. In the said case, the Apex Court found that the co-operative bank is not a bank as defined under S. 2(d) of the RDDB Act and therefore, the provisions of the said Act and therefore, the provisions of the said Act are not applicable. The definition of bank in the said Act contained in S. 2(d) thereof reads as follows:-

"bank means-

(vi) a banking company;
(vii) a corresponding new bank;
(viii) State Bank of India;
(ix) a subsidiary bank; or
(x) a Regional Rural Bank."

Unless a co-operative bank comes under clause (1) of the above definition, the provisions of the Act are not applicable to it. Analysing the provisions of the RDDB Act, the Apex Court held a co-operative bank can never be treated as a banking company. But, as noticed by the Apex Court, in the said decision itself, in the definition of bank in S. 2(1)(c) under the Securitisation Act, which we have already quoted above, there is clause (v), which enables the Central Government to notify other banks also as banks for the purposes of the Act. The Central Government, in fact invoked the said power and issued a notification to the effect that a co-operative bank is also a bank for the purpose of the Securitisation Act. The said notification dated 28-01-2003 reads as follows:

"S. O. 105 [H]- In exercise of the powers conferred under item (v) of clause (c) of sub-section (1) of Section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), the Central Government hereby specifies "Co-operative Bank" as defined in clause (cct) of Section 5 of Banking

Regulation Act, 1949 (10 of 1949) as 'bank' for the purpose of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002)".

In the absence of any challenge to the said notification, the contention of the appellants that the provisions of the Securitisation Act are not applicable to co-operative banks, cannot be accepted . The remedy of filing a petition under S. 17 of the Securitisation Act can be invoked by the loanee aggrieved by the actions of the secured creditor under S. 13(4) of the Securitisation Act. Always, it is the loanee, who invokes the said provision, while enacting the Securitisation Act, the Parliament has provided a remedy of filing a petition under S. 17 of the Securitisation Act to the aggrieved persons. Instead of providing a separate machinery, the Parliament in its wisdom provided that the aggrieved party can move the machinery provided under the RDDB Act. The decision of the Apex Court in Greater Bombay Co-operative Bank Ltd.'s case (AIR 2007 SC 1584) disables a co-operative bank from moving the DRT for the recovery of loans. The said decision cannot, in any way, affect the remedy provided under S. 17 of the Securitisation Act. Therefore, the contention in this regard are plainly untenable.

8. In the absence of any challenge to any of the provisions of the Securitisation Act or the notification issued thereunder, we feel that it is unnecessary to consider the contentions raised by the learned senior counsel for the appellants concerning legislative competence etc. Since the point whether a writ will lie against a co-operative bank was not seriously raised or canvassed, we are leaving the said question open. But, even assuming a writ will lie against a co-operative bank this Court can decline jurisdiction in view of the alternative remedy available to the aggrieved loanee under the provisions of S.17 of the Securitisation Act. In this case, since a substantial question of law concerning the applicability of the Securitisation act to Co-operative Banks has been raised for the consideration of this Court, we did not relegate the appellants to invoke the statutory remedy at the threshold and decided the question by ourselves. In the result, the writ appeals fail and they are accordingly dismissed. But, it is clarified that this Judgment will not affect the rights, if any,

of the appellants to invoke the statutory remedy available to them. No costs."

The Division Bench of Kerala High Court has held that an alternative remedy is available to the loanee/ person aggrieved under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and therefore, even if a writ will lie against a Cooperative Bank, the High Court can decline to exercise jurisdiction in view the alternative remedy available to the aggrieved loanee under the provisions of Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in the facts and circumstances of the case. The Division Bench of Kerala High Court has also considered the judgment delivered by the Apex Court in the case of *Greater Bombay Co-perative Bank Ltd. Vs. M/s. United Yarn Tex. Pvt. Ltd & Ors.* AIR 2007 SC 1584. The definition of Bank as defined under Section 2(c) empowers the Central Government to notify such other Bank which the Central Government may, by notification, specify for the purpose of the Act and the Central Government has specified cooperative Bank as defined in Section 5(c)(cci) of the Bank Regulation Act, 1949 (10 of 1949) Bank vide notification dated 28th January 2003 published in the gazette dated 28th January 2003 and therefore, there remains no manner of doubt that the respondent Bank though a cooperative Bank is a Bank within the meaning of Bank as defined under Section 2(1)(c) of the Act, 2002. Resultantly, no case for interference is made out in the matter especially keeping in view the fact that the petitioner is having an alternative remedy under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The present writ petition stands disposed of with a liberty to the petitioner to avail the alternative remedy available to him in accordance with law.

6. With the aforesaid observation, the present writ petition is disposed of. No order as to costs.

Petition disposed of.

I.L.R. [2009] M. P., 2842
WRIT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta
3 July, 2009*

M. ISHAQ M. GULAM (M/S) ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Commercial Tax Act, M.P., 1994 (5 of 1995), Section 70 - *Reference to High Court on substantial question of law* - *Reference to High Court on*

*W.P. No.5876/2007 (Jabalpur)

substantial question of law rejected on the ground of delay of 1 month and 17 days - Held - Court of law unless finds that the litigation is absolutely frivolous or is filed with the motive to procrastinate the proceeding, it should adopt a liberal approach while dealing with the application for condonation of delay - When there is some delay and it has been acceptably explained - The legal forum should not adopt a hyper-technical approach to throw the lis on the threshold. (Para 11)

वाणिज्यिक कर अधिनियम, म.प्र., 1994 (1995 का 5), धारा 70 – विधि के सारवान प्रश्न पर उच्च न्यायालय को निर्देश – विधि के सारवान प्रश्न पर उच्च न्यायालय को निर्देश 1 माह 17 दिन के विलम्ब के आधार पर खारिज किया गया – अभिनिर्धारित – न्यायालय जब तक यह नही पाते कि मुकदमा आत्यंतिकतः तुच्छ है या कार्यवाही को बिलम्बित करने के उद्देश्य से पेश किया गया है, उन्हें विलम्ब माफी के आवेदन पर कार्यवाही करते समय उदार दृष्टिकोण अपनाना चाहिए – जब कुछ विलम्ब है और वह स्वीकार्य रूप से स्पष्ट कर दिया गया है – विधिक फोरम को वाद को प्रारम्भ में फेंकने के लिए अति तकनीकी दृष्टिकोण नही अपना चाहिए।

Cases referred :

AIR 1987 SC 1353, AIR 1988 SC 897, AIR 1996 SC 1623.

H.S. Shrivastava with *Sandeep Tiwari*, for the petitioner.

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

ORDER

The Order of the Court was delivered by

DIPAK MISRA, J. :–Invoking the extra-ordinary jurisdiction of this Court under Article 226 and 227 of the Constitution of India, the petitioner has called in question the defenciability and legal substantiality of the order dated 17.4.2009 passed by the M.P. Commercial Tax Appellate Board, Bhopal (for short, 'the Board') whereby the Board has declined to condone the delay of one month and 17 days in filing the application under Section 70 of the M.P. Commercial Act. 1994 (for brevity, '1994 Act'), to make a reference to the High Court on certain questions of law.

2. The facts which are requisite to be stated are that for the assessment year 1976-77 and 1978-79 the assessee-petitioner was assessed to entry tax by the concerned assessing officer. Being dissatisfied with the order of assessment, the petitioner preferred the appeal before the Deputy Commissioner who by order dated 24.3.1998 rejected the appeal. Being aggrieved by the aforesaid order, the assessee preferred the second appeal before the Board of Revenue. After constitution of the Appellate Board, the appeals were transferred to the Appellate Board. The appellate board by Order dated 28.5.2005 rejected the appeals bearing registration nos.A 1533 / CTT / 03 (Entry Tax) and A 15341 /CTT / 03 (Entry Tax).

3. After the appeals were dismissed, an application was filed under Section 70 of 1994 Act seeking reference on certain questions of law to the High Court.

As there was delay of one month and 17 days, the application under Section 66 of the Act was filed for condonation of delay. Be it noted, section 66 of the Act clearly stipulates that the Section 5 of the Limitation Act shall apply to application for revision and reference. After dealing with the application for reference, the Board came to hold that there was no justification or warrant to condone the delay inasmuch as the assessee-petitioner has been extremely negligent of his own interest and he can not ask for relief on the basis of such conduct on his part. Being of this view, he declined to extend the period of limitation and rejected the application preferred under Section 70 of the Act.

4. We have heard Mr. H.S. Shrivastava, learned Senior Counsel along with Mr. Sandesh Jain, learned counsel for the appellant and Mr. Deepak Awasthy, learned Government Advocate.

5. Questioning the correctness of the order, it is contended by Mr. Shrivastava, learned counsel that the Board has erroneously expressed the view that the assessee-petitioner was negligent of his own interest, though the appropriate steps were taken to file the application under Section 70 along with the application under Section 66 of the Act seeking condonation of delay. It is submitted by Mr. Shrivastava, learned senior counsel that in the application under Section 66 of the Act is appropriate and adequate reasons were ascribed but the exception has been taken to the facts and credence has not been given to the fact that letters sent by the advocate were misplaced. It is urged by him that the Board has taken an ultra- technical view whereas there has to be liberal approach as regards the entertainment of application under Section 5 of the Limitation Act for the purpose of condonation of delay.

6. Mr. Deepak Awasthy, learned Government Advocate resisting the aforesaid submission contended that the Board has ascribed the adequate reasons while refusing the application for condonation of delay and this Court should not exercise its extra-ordinary jurisdiction to interfere with the same. It is proponed by Mr. Awasthy that the plea that the letters sent by the counsel of the assessee were misplaced, it is difficult to lend credence and hence, the reasonings given by the Board are absolutely flawless.

7. To appreciate the rivalised submissions, raised at the bar, it is condign to refer to the application filed under Section 66 of the Act. It is submitted in the petition that the order of the Board was communicated on 15.6.2005 to the counsel for the applicant and counsel had sent the intimation on 20.6.2005 to the petitioner about the receipt of the order passed in the appeal by the Board and asked him to come to his office to file a reference. The Board, as is manifest, after narrating the facts in paragraphs 3 and 4 of the order, has held as follows:

> *"3. It is laid down under Section 70 of the Act that an application for reference should be made within 60 days from*

the date of communication of the order of the Board. According to his own admission the order of the Board was communicated to the counsel of the applicant on 15.6.2005. The applicant's case is that communications sent by the counsel to him were misplaced and only the last communication on 19.9.2005 was noticed and acted upon.

4. We have heard both the parties. Clearly the applicant has been extremely negligent of his own interest and he can not ask for relief on the basis of such conduct on his part. There has been considerable substantial time log between preparation of papers and their submission. We, therefore, decide that the limitation for this application under Section 70 of the Act can not be extended since there are neither any extenuating circumstances nor a reasonable ground for doing so.

8. The question that emanates for consideration is whether the Board is justified in refusing to condone the delay in filing the application. In this context, we may refer with profit to the decision rendered in *Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and ors.* AIR 1987 SC 1353 wherein their Lordships have held thus:

"3. The legislature has conferred the power to condone delay by enacting S. 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression 'sufficient cause' employed by the legislature is adequately elastic to enable the Court to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that : -

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that

a pedantic approach should be made. Why not every hou's delay, every second delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. *When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non deliberate delay.*

5. *There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.*

6. *It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.*

9. In *G. Ramegowda, Major Vs. The Special Land Acquisition Officer, Bangalore* AIR 1988 SC 897, a two-Judge bench of the Apex Court has expressed thus:

"The law of limitation is, no doubt, the same for a private citizen as for Governmental authorities. Government, like any other litigant must take responsibility for the acts or omissions of its officers. But a somewhat different complexion is imparted to the matter where Government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers agents and where the officers were clearly at cross-purposes with it. Therefore, in assessing what, in a particular case, constitutes 'sufficient cause' for purposes of S. 5 it might, perhaps, be somewhat unrealistic to exclude from the considerations that go into the judicial verdict, these factors which are peculiar to and characteristic of the functioning of the Government. Governmental decisions are proverbially slow encumbered, as they are, by a considerable degree of procedural-red-tape in the process of their making. A certain amount of latitude is, therefore, not impermissible.

(quoted from the placitum)"

10. In *State of Andhra Pradesh and ors. Vs. McDowell and Co. and ors* AIR 1996 SC 1623, a three Judge Bench of the Apex Court while dealing with the conception of the condonation of delay has expressed the view as under:

"....When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on the -buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the state represents collective cause of the community. It is axiomatic that decisions are taken by officer/agencies proverbially at slow pace and encumbered process of pushing the file from table to table and keeping it on table for considerable time causing delay-intentional or otherwise-is a routine. Considerable delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the state are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression 'sufficient cause' should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and require adoption of pragmatic approach injustice oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the Courts or whether cases require decision or give appropriate permission settlement. In the event of decision to file appeal needed responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants

11. True it is, the last decision was rendered in the context of latitude to be shown by the State Government because of the methodology imbued with the

process of filing of appeal but the fact remains that their Lordships have expressed that there has to be justice-oriented approach in the matter of condonation of delay. The Court of law unless finds that the litigation is absolutely frivolous or is flied with the motive to procrastinate the proceeding it should adopt a liberal approach while dealing with the application for condonation of delay because the litigant comes to the court to get the lis to be adjudicated. The Court would also duty bound to deal with the factum of delay. To elaborate, if there is enormous delay and there is no acceptable explanation which would come in the realm of 'sufficient cause', needless to emphasise, the application for condonation of delay has to pave the path of dismissal but when there is some delay and it has been acceptably explained, the legal forum should not adopt a hyper-technical approach to throw the lis on the threshold. In the case at hand, the application for reference to the High Court was filed. There is delay of one month and 17 days. The explanation was given that the letters sent by the counsel were misplaced. Regard being had to the explanation proferred in regard to the delay; we are of the considered opinion the Board would have been well advised to condone the delay and address itself to the merits of the case and that would have been in the fitness of thing.

12. In view of the aforesaid reasons, we quash the order dated 17.4.2009 passed in Ref. Appli. No.63/CTAB/05(E T) as contained in Annexure P-I and direct the Board to deal with the application under Section 70 of the Act on merits. There shall be no order as to costs.

C.C. as per rules.

Order accordingly.

I.L.R. [2009] M. P., 2848

WRIT PETITION

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

15 July, 2009*

FIROZ KHAN ... Petitioner

Vs.

SECRETARY, BOARD OF SECONDARY EDUCATION & ors. ... Respondents

Madhyamik Shiksha Adhiniyam, M.P. (23 of 1965), Section 28(4), Board of Secondary Education (M.P.) Regulations, 1965, Regulation 97, Proviso - ***Eligibility of private candidates to appear in Higher Secondary School Examination*** - *Board rejected the application for appearing as private candidate in HSS Examination as candidates have not completed 2 years after passing the HSC Examination - Held - The candidates who have*

*W.P. No.1705/2009 (Jabalpur)

completed four academic years from the date of passing the Class VIII Examination satisfy the conditions in Regulation 97 - This interpretation of the proviso does not destroy the main provision of Regulation 97 but is consistent with the main provision in Regulation 97. (Para 10)

माध्यमिक शिक्षा अधिनियम, म.प्र. (1965 का 23), धारा 28(4), माध्यमिक शिक्षा मण्डल (म.प्र.) विनियम, 1965, विनियम 97, परन्तुक – स्वाध्यायी अभ्यर्थियों की उच्चतर माध्यमिक परीक्षा में बैठने की पात्रता – बोर्ड ने उच्चतर माध्यमिक परीक्षा में स्वाध्यायी अभ्यर्थी के रूप में बैठने का आवेदन खारिज किया क्योंकि अभ्यर्थियों ने हाईस्कूल परीक्षा उत्तीर्ण करने के बाद 2 वर्ष पूर्ण नही किये – अभिनिर्धारित – ऐसे अभ्यर्थी, जिन्होंने कक्षा 8 की परीक्षा उत्तीर्ण करने की तारीख से चार शैक्षणिक सत्र पूर्ण कर लिये हैं, विनियम 97 में दी गई शर्तों को पूरा करते हैं – परन्तुक का यह निर्वचन विनियम 97 के मुख्य उपबंध के अस्तित्व को समाप्त नही करता है बल्कि विनियम 97 के मुख्य उपबंध से संगत है।

Cases referred :

AIR 1961 SC 1596, (1994) 5 SCC 672, AIR 1991 SC 1406, AIR 1991 SC 1538, AIR 2004 SC 3946, 2003 AIR SCW 4233.

R.P. Mishra, for the petitioner.

Naman Nagrath, for the respondent Nos.1 & 2.

O R D E R

The Order of the Court was delivered by **A.K. PATNAIK, C. J.** :–This batch of writ petitions relates to eligibility of students who have passed the High School Certificate Examination (Class X) conducted by the Madhya Pradesh State Open School, Bhopal in December, 2007 to appear in the Higher Secondary Examination of the Board of Secondary Education in March, 2009.

2. W.P. No.270/2009, W.P. No.1521/2009, W.P. No.1881/2009, W.P. No.1945/2009, W.P. No.2423/2009, W.P. No.2438/2009, W.P. No.2448/2009 and W.P. No.2644/2009 are writ petitions filed by students who have passed the High School Certificate Examination conducted by the Madhya Pradesh State Open School, Bhopal in December, 2007 and W.P. No.1705/2009 is a Public Interest Litigation filed on behalf of the students. After the results of the High School Certificate Examination conducted by Madhya Pradesh State Open School, Bhopal were published on 14.4.2008, these students submitted applications to the Madhya Pradesh Board of Secondary Education (for short **'the Board')** for taking the Higher Secondary School Examination (Class XII) in March, 2009 but their applications were rejected by the Board. Aggrieved, the petitioners have filed these writ petitions under Article 226 of the Constitution of India for appropriate reliefs.

3. In its reply, the Board has taken a stand that the Madhya Pradesh State Open School is a highly flexible pattern of examination for which neither regular

course of study is required nor the students are required to take admission in any school and under the State Open School system, several opportunities are available to the student and even if he may fail several times, he can appear under Open School pattern and is given as many as nine chances to pass High School Certificate Examination and this is entirely different from the High School Certificate Examination conducted by the Board. The Board has further taken a stand that Regulation 97 of the Board of Secondary Education (Madhya Pradesh) Regulations, 1965 (for short **'the Regulations'**) made under sub-section (4) of Section 28 of the Madhya Pradesh Madhyamik Shiksha Adhiniyam, 1965 provides that no student can be permitted to appear at the High School or Higher Secondary School Examination as a private student in a year earlier than that in which he would appear if he had continued his studies at a recognised institution and a student who continued his studies at a recognised institution has to complete two years after the High School in Class XI and Class XII before he takes the Higher Secondary School Examination conducted by the Board. The case of the Board is that since the students in the present batch of writ petitions have completed less than a year from the date of publication of the results of their High School Examinations on 14.4.2008, they are not eligible to take the Higher Secondary School Examination scheduled in March, 2009 under Regulation 97 of the Regulations.

4. In the rejoinder filed on behalf of the petitioners, the petitioners have relied on the proviso to Regulation 97 which states that at least four academic years shall have elapsed since the date of passing VIII Class Examination and the year in which the candidate intends to appear in the Higher Secondary Examination of the Board as a private candidate. The case made out in the rejoinder is that since the students in the present batch of writ petitions have completed four academic years from the date of passing VIII Class Examination, they are eligible to appear at the Higher Secondary School Examination of the Board as private candidates in March, 2009.

5. At the hearing of the writ petitions, Mr. Vivek Rusia, learned counsel on behalf of petitioner in W.P. No.270/2009, submitted that the main provision in the Regulation 97 will not apply to private candidates but only to regular students and instead the proviso to Regulation 97 which states that at least four academic years shall have elapsed from the date of passing VIII Class Examination and the year in which the candidate intends to appear in the Higher Secondary School Examination of the Board as a private student will apply and the students in the present batch of writ petitions have completed four academic years from the date of passing VIII Class Examination by March, 2009 as stated in the rejoinders supported by affidavits and therefore they are eligible to take the Higher Secondary School Examination conducted by the Board held in March, 2009. Mr. Rusia cited the decision in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory vs.*

Subhash Chandra Yograj Sinha, AIR 1961 SC 1596 in which the Supreme Court has held that as a general rule, a Proviso is added to an enactment to qualify or create an exception to what is in the enactment. He submitted that the proviso to Regulation 97 is thus an exception to what is in the main provision in favour of those candidates who have completed four years from the date of passing VIII Class Examination and makes such students eligible to take the Higher Secondary School Examination of the Board as a private candidate. He also relied upon the decision in *Kerala State Housing Board and others vs. Ramapriya Hotels (P) Ltd. and others,* (1994) 5 SCC 672 in which the Supreme Court has reiterated that the scope of the proviso is to carve out an exception to the main enactment and it excludes something which otherwise would have been within the general rule.

6. Mr. Pushpendra Yadav, learned counsel appearing for the petitioner in W.P. No.1881/2009, Mr. Anuj Singh, learned counsel appearing for the petitioners in W.P. No.1521, Mr. Surendra Verma, learned counsel appearing for the petitioners in W.P. No.2423/2009, Mr. Bhoop Singh, learned counsel appearing for the petitioners in W.P. No.2438/2009, Mr. R.P. Mishra, learned counsel appearing for the petitioner in W.P. No.1705/2009 and Mr. Paritosh Gupta, learned counsel appearing for the petitioners in W.P. No.2448/2009 and W.P. No.2644/2009 adopted the aforesaid arguments of Mr. Vivek Rusia.

7. Mr. Naman Nagrath, learned counsel appearing for the Board, on the other hand, submitted that Regulation 97 of the Regulations is clear that no student can be permitted to appear in the Higher Secondary School Examination as a private candidate in a year earlier than that in which he would have appeared if he had continued his studies at a recognised institution. He submitted that a student who continued his studies at a recognised institution has to complete two years after the High School in Classes XI and XII before he can take the Higher Secondary School Examination conducted by the Board. He submitted that proviso to Regulation 97 that at least four academic year shall have elapsed since the date of passing VIII Class Examination and the year in which the candidate intends to appear in the Higher Secondary Examination of the Board as a private student is not an exception to the main provision in Regulation 97 but is an additional requirement that a private candidate has to fulfil to be eligible to take the Higher Secondary Examination of the Board as a private student. He cited the decisions of the Supreme Court in *A.N. Sehgal v. Raje Ram Sheoram,* AIR 1991 SC 1406 and *Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal,* AIR 1991 SC 1538 in which it has been held that where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms and that the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the

enactment clearly says nor set at naught the real object of the main enactment, unless the words of the proviso are such that it is its necessary effect. He also cited *Maulavi Hussein Haji Abraham Umarji v. State of Gujarat,* AIR 2004 SC 3946 to contend that normally, a proviso does not travel beyond the provision to which it is a proviso. He argued that the proviso to Regulation 97 cannot therefore nullify the effect of the main provision in Regulation 97 that no student shall be permitted to appear at the Higher Secondary School Examination as a private candidate in a year earlier than that in which he would have appeared if he had continued his studies at a recognised institution. He relied upon *Regional Officer, C.B.S.E. vs. Ku. Sheena Peethambaran and others,* 2003 AIR SCW 4233, in which the Supreme Court has held that condoning the lapses or overlooking the legal requirements and considering only sympathy for the students disturbs the discipline of the system and ultimately affects academic standards. Mr. Nagrath submitted that as the students in the present batch of writ petitions admittedly have not completed two years after their High School Certificate results, they could not have completed Classes XI and XII at a recognised institution and therefore are not eligible under Regulation 97 to appear in the Higher Secondary Examination of the Board in March, 2009.

8. Chapter XVI of the Regulations is titled "Private Candidates" and Regulations 92, 97 and 135 of this Chapter, which are relevant for these cases, are quoted hereinbelow:

> *"92 Private candidates shall be eligible to appear at the Board's examination, on the conditions laid down in these Regulations.*
>
> *97. No student shall be permitted to appear at the High School or Higher Secondary School Examination as a private candidate in a year earlier than that in which he would have appeared, if he had continued his studies at a recognised institution:*
>
> *Provided that at least four academic years shall have elapsed since the date of passing VIII Class examination and the year in which the candidate intends to appear at the Higher Secondary Examination of this Board as a private candidate."*
>
> *135. Before entering upon the courses of study prescribed for High School Examination, every candidate shall be required to have passed VIII Class examination held by an Institution recognised for the High School or Higher Secondary Examination of the Board, or an equivalent departmental examination conducted by the Education Department of the State or the corresponding examination of a similar institution*

situated outside Madhya Pradesh provided that such an institution is recognised by an examining body whose examination are recognised by the Board."

9. Regulation 92 quoted above makes it crystal clear that the private candidates shall be eligible to appear at the Board's examination on the conditions laid down in the Regulations. Hence unless the private candidates satisfy the conditions laid down in the Regulations they will not be eligible to appear in the Board Examination. The petitioners of Writ Petitions No.270, 1521, 1881, 1945, 2423, 2438, 2448 and 2644 of 2009 who applied as private candidates in Higher Secondary Examination of the Board in March, 2009 must therefore satisfy the conditions laid down in Regulation 97 of the Regulations to be eligible to appear in the examinations.

10. Regulation 97 provides that no student shall be permitted to appear at the High School or Higher Secondary School Examination as a private candidate in a year earlier than that in which he would have appeared, "if he had continued his studies at a recognised institution". The phrase "if he had continued his studies at a recognised institution" implies that the student was pursuing his studies at a recognised institution but at some stage had discontinued his studies at the recognised institution and for this reason wants to appear at the High School or Higher Secondary School Examination as a private candidate. A student may have discontinued his studies in any class of High School or Higher Secondary School and if such a student wants to appear at the High School Examination of the Board as a private candidate, he can do so only in the year in which he would have completed Class X, but if such a student wants to appear in the Higher Secondary School Examination as a private candidate, he can do so if he has completed at least four academic years since the date of passing of Class VIII Examination as stated in the proviso to Regulation 97. Date of passing of Class VIII Examination is taken as the starting point of the period of four years to be completed for a candidate to be eligible to appear at the Higher Secondary Education presumably because under Regulation 135 of the Regulations quoted above, every candidate entering upon courses of study prescribed for High School Examination and thereafter Higher Secondary Examination shall have to pass the Class VIII Examinations. There is nothing in Regulation 97 to indicate that the student who wants to take the Higher Secondary Examination as a private candidate must complete two years equivalent to the period of study in Class XI and class XII as contended by Mr. Naman Nagrath. In case a student has discontinued his study at a recognised institution, he would have appeared in the Higher Secondary School Examination if he had continued his study at a recognised institution for a period of four academic years from the date of passing VIII Class Examination. This interpretation of the proviso does not destroy the main provision of Regulation 97 but is consistent with the main provision in Regulation 97. Thus, those amongst the students in the present batch of writ petitions who have completed four

academic years from the date of passing the Class VIII examination satisfy the conditions in Regulation 97 of the Regulations.

11. We therefore dispose of this batch of writ petitions by a direction to the Board to forthwith publish the results of those students who have taken the Higher Secondary Examinations of the Board in March, 2009 pursuant to interim orders of this Court and who have completed four years between the date of passing the Class VIII Examinations and the date of commencement of the Higher Secondary Examinations in March, 2009. No costs.

Petition disposed of.

I.L.R. [2009] M. P., 2854
WRIT PETITION
Before Mr. Justice R.K. Gupta
30 July, 2009*

MUNNA LAL KAROSIYA ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - Municipalities Act, M.P. (37 of 1961), Section 94, Municipal Employees Recruitment and Conditions of Service Rules, M.P. 1968, Rule 12 - *Promotion - Absorbtion - Competent Authority - Promotion of an employee of Municipal Council from feeder post to higher post can be considered by any other Municipal Council and not by a particular Municipal Council to which he belongs - Absorption of such employee can be made with the approval of State Government.* (Paras 8 to 13)

सेवा विधि – नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 94, नगरपालिका कर्मचारी भर्ती तथा सेवा की शर्तें नियम, म.प्र. 1968, नियम 12 – पदोन्नति – संविलयन – सक्षम प्राधिकारी – नगरपालिका परिषद् के किसी कर्मचारी की मरक पद से, उच्चतर पद पर पदोन्नति पर किसी अन्य नगरपालिका परिषद् द्वारा विचार किया जा सकता है न कि किसी विशिष्ट नगरपालिका परिषद द्वारा जिससे वह सम्बद्ध है – राज्य सरकार के अनुमोदन से ऐसे कर्मचारी का संविलयन किया जा सकता है।

Gaurav Samadia, for the petitioner.
Vishal Mishra, G.A., for the respondent Nos.1 & 2/State.
Shashank Indapurkar, for the respondent No.3.
K.N. Gupta with *Anmol Khedkar*, for the respondent No.4.

ORDER

R.K. Gupta, J. :–Present petition is filed by the petitioner challenging the order Annexure P/1 dated 30.10.2002, by which the State Government has directed that the respondent No. 4 shall be given promotion on the post of Revenue Inspector

*W.P. No.1388/2003 (Gwalior

and he be posted along with lien with Municipal Council, Sabalgarh. By this order, it is also directed that till the respondent No. 4 is not retired from the services of the Municipality or promoted to next higher post, the post of Revenue Inspector shall not be treated as vacant for any purpose.

2. Facts leading to the present case are that the petitioner is working on the post of Revenue Sub-Inspector and is an employee of Municipal Council, Sabalgarh. So far as the respondent No. 4 is concerned, he is working as Revenue Sub-Inspector at Municipal Council, Kannod. The State Government has posted respondent No. 4 by granting promotion on the post of Revenue inspector with Municipal Council, Sabalgarh with a direction that he will continue to hold the lien with the Municipal Council, Sabalgarh and the post of Revenue Inspector would not be treated as vacant for the purpose of promotion.

3. The petitioner who is working as Revenue Sub Inspector at Municipal Council, Sabalgarh aggrieved by the State Government's decision on the ground of posting of respondent No.4 along with lien because the promotion avenues of the petitioner are adversely affected.

4. By virtue of Section 94 of sub-section (1) of M.P. Municipalities Act, 1961 every council having an annual income of five lakhs of rupees or more shall, subject to rules framed under Section 95, appoint a Revenue Officer and an Accounts Officer and may appoint such other officers and servants as may be necessary and proper for the efficient discharge of its duties. Sub-section (2) of Section 94 of the Act provides that every council not falling under sub-section (1) shall, subject to rules framed under section 95, appoint a Sanitary Inspector, a Sub-Engineer, a Revenue Inspector and an Accountant and may appoint such other officers and servants as may be necessary and proper for the efficient discharge of its duties. Sub-section (7) of Section 94 of the Act further empowered the State Government to transfer any officer or servants of a Council mentioned in sub-sections (1) and (2) and in receipt of total emoluments exceeding one hundred rupees to any other Council Sub-sections (1), (2) & (7) of Section 94 of the Act makes crystal clear that power of appointment is vested with every Council and by virtue of sub-section (1) if the annual income of five lakhs of rupees or more and by virtue of sub-section (2) if the annual income is less than five lakhs of rupees then the power to appoint is vested with the Council on the basis of it power to appoint such officers.

5. In the present case, respondent No. 4 was an employee of Municipal Council, Kannod, therefore, in view of Section 94 of the Act, sub-section (1) and sub-section (2), the power to appoint by way of promotion is vested with the Municipal Council framed under section 95 of the Act and no power is vested with the State Government to promote any employee on the post of Revenue Inspector.

6. On behalf of respondent No 4, learned senior counsel Shri Gupta heavily

relied on Rule 12 of Madhya Pradesh Municipal Employees Recruitment and Conditions of Service Rules, 1968. According to this Rule, method of recruitment is provided that the recruitment by promotion shall be made on consideration of merits, seniority being taken into account where merits are equal. By virtue of sub-section (2) of Rule 12 of the Act promotion shall be given on the basis of followings -

(i) tact and energy,

(ii) intelligence and ability,

(iii) integrity, and

(iv) previous record of service.

7. On the basis of this, it is contended by learned senior counsel for the respondent No 4 that by virtue of Rule 12, the respondent No 4 is fit for promotion to the post of Revenue Inspector and respondent No 4 has rightly been promoted on the said post at Municipal Council, Sabalgarh.

8. Rule 12 of the Act which provides method of recruitment shall alone be applicable to the incumbent who is within the zone of consideration for his promotion to the post of Revenue Inspector after consideration by the Council to which he belongs. Thus, Rule 12 plays an important and effective role. Meaning thereby, even for a person who does not belong to Municipal Council and yet another Municipal Council will have no right to promote such an incumbent on the higher post. The aforesaid Rule has to be applied by the same Municipality. If an employee is said to be considered for higher post of promotion and is working on the feeder post and promotion to an employee be considered within the same Municipal Council. It has to be understood in the light of the word "every Council" applied to sub-section (1) and sub-section (2) of Section 94 of M P Municipalities Act, 1961.

9. The arguments are to be appreciated of the learned senior counsel for respondent No 4 that every Council has to be understood in the context that where the promotion are to be effected then any Council will have right to consider the case of such incumbent, and not the Council to which he belongs. The arguments as such would result in anomalous situation because even though on the feeder post an employee not belonging to such Municipal Council where he was appointed and if promotion is to be effected as Revenue Inspector, then the employee who belongs to another Municipal Council then the word "every municipal council" would become redundant In sub-section (2) of Section 94 of the Act reasonable meaning of the word "every municipal council" has to be understood with reference to the employee of such Municipal Council to which he belongs and not to any other Municipal Council.

10. It is also to be understood that the power with the State Government under sub-section (7) of Section 94 of the Act is only with respect to transfer of the employee from one Municipal Council to another Municipal Council. Sub-section

(7) of Section 94 of the Act does not empower the State Government to direct for absorption of the incumbent but only provides for transfer. The word "transfer" itself connotes and carry the meaning of temporary and not permanent posting along with lien.

11. Learned senior counsel for the respondent No. 4 in this reference has also relied upon Rule 8 of Municipal Services (Scale of Pay and Allowances) Rules, 1967. This rule is made with reference to sub-section 4 of Section 94 of M P Municipalities Act, 1961. Sub-section 4 of Section 94 of the Act provides that the appointment of Revenue Officer, Accounts Officer, Sanitary Inspector, Revenue Inspector and Accountant shall be subject to confirmation by the State Government and no such post or the post of any other officer or servant as may be specified by the State Government in this behalf shall be created or abolished and no alteration in the emoluments thereof shall be made without the previous approval of the State Government, and every appointment to, and dismissal from such post, shall be subject to a like approval. If this Rule 8 is considered in the light of sub-section 4 of Section 94 of the Act then the power to absorb is with the State Government in pursuance to Rule 7 is available subject to equation of the post. In the present case, the petitioner is not absorbed on the equal post. On the contrary, in the present case, it is directed for the promotion of respondent No 4 on the post of Revenue Inspector and then it is also directed to absorb him in Municipal Council, Sabalgarh.

12. Rule 8 of Municipal Services (Scale of Pay and Allowances) Rules, 1967 also provides that the absorption of an employee would depend upon the applicability of the Rule. No other Rule has been shown on behalf of the respondent No. 4 wherein the State Government is empowered under M.P. Municipalities Act, 1961 to absorb a person by giving him promotion to a Municipal Council to which he does not belong.

13. In view of the aforesaid discussions, it is difficult to give legal sanction to the order Annexure P/1 dated 30.10.2002. Consequently, the order Annexure P/1 dated 30.10.2002 passed by the State Government is hereby quashed. Respondent No. 3 Municipal Council is directed to consider the case of the petitioner and other eligible candidates by constituting DPC and holding the meeting to consider the cases of promotion to the post of Revenue Inspector and the continuation of respondent No. 4 shall not come in a way of respondent No. 3 for not holding DPC for promotion to the post of Revenue Inspector.

14. Accordingly, petition stands allowed.

Petition allowed.

Oct.-09 (First)

MAYADEVI KUKREJA (SMT.) Vs. MEERA AGRAWAL

I.L.R. [2009] M. P., 2858

WRIT PETITION

Before Mr. Justice Abhay M. Naik & Mr. Justice A.P. Shrivastava

3 August, 2009*

MAYADEVI KUKREJA (SMT.) ... Petitioner

Vs.

MEERA AGRAWAL & anr. ... Respondents

A. Civil Procedure Code (5 of 1908), Order 17 Rule 1(1) Proviso, Order 18 Rule 4 - *Recording of evidence - It is not obligatory on the part of a litigant to produce evidence of a fresh witness before cross-examination of the previous witness is concluded - After cross-examination the litigant may decide whether to produce further evidence or not - However, adjournment for this purpose may be refused in exercise of powers conferred by virtue of proviso to Order 17 Rule 1(1) CPC.*

> "Thus if a litigant before closure of his evidence submits an affidavit containing chief examination of a fresh witness and keeps such witness available for cross-examination without seeking adjournment for this purpose, the trial Court shall have to take the affidavit on record and allow opponent to cross-examine the witness. In such a situation, the trial Court has no power to refuse the affidavit by invoking the proviso to Order XVII Rule 1 CPC. It is further made clear that if a party submits affidavit alone and prays for adjournment to make deponent available for cross-examination, the trial Court shall have power to refuse to accept the affidavit by invoking such proviso." (Para 10)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 17 नियम 1(1) परन्तुक, आदेश 18 नियम 4 – साक्ष्य का अभिलेखन – किसी वादकारी के लिए यह बाध्यकारी नही है कि नये साक्षी की साक्ष्य पूर्ववर्ती साक्षी की प्रतिपरीक्षा पूर्ण होने से पूर्व पेश करे – प्रतिपरीक्षा के बाद वादकारी यह विनिश्चय कर सकता है कि वह आगे साक्ष्य पेश करे या नहीं – तथापि, सि.प्र.सं. के आदेश 17 नियम 1(1) के परन्तुक के आधार पर प्रदत्त शक्तियों के प्रयोग में इस प्रयोजन के लिए स्थगन से इंकार किया जा सकता है।

B. Civil Procedure Code (5 of 1908), Order 17 Rule 1(1) Proviso - *Trial Court refused to take on record the affidavit containing chief-examination of plaintiff's witness in the light of proviso to Order 17 Rule 1 CPC on the ground that three opportunities of evidence were already granted to the plaintiff - Held - Proviso empowers the Court to refuse adjournment if availed by a party for more than three times during hearing of the suit - Plaintiff had submitted the affidavit of her witness but didn't pray for adjournment - Thus, proviso to sub-rule (1) of Order 17 Rule 1 CPC has no application.* (Para 9)

*W.P. No.2631/2009 (Gwalior)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 17 नियम 1(1) परन्तुक – विचारण न्यायालय ने वादी के साक्षी का मुख्य परीक्षण का शपथपत्र सि.प्र.सं. के आदेश 17 नियम 1 के परन्तुक के आलोक में इस आधार पर अभिलेख पर लेने से इंकार कर दिया कि वादी को साक्ष्य के तीन अवसर पहिले से दिये गये थे – अभिनिर्धारित – परन्तुक न्यायालय को स्थगन से इंकार करने के लिए सशक्त करता है यदि पक्षकार द्वारा वाद की सुनवाई के दौरान तीन अवसरों से अधिक बार लाभ उठा लिया हो – वादी ने अपने साक्षी का शपथपत्र पेश किया था किन्तु स्थगन के लिए प्रार्थना नही की – इस प्रकार सि.प्र.सं. के आदेश 17 नियम 1 के उपनियम (1) का परन्तुक लागू नही होता।

Sarvesh Sharma, for the petitioner.

R.S. Bansal, for the respondents.

ORDER

The Order of the Court was delivered by ABHAY M. NAIK, J. :–Briefly stated facts relevant for the purposes of this writ petition are that the plaintiff/petitioner instituted a suit for specific performance of an agreement of sale. Suit is being opposed by the defendants. After raising issues, learned trial Judge proceeded with recording of evidence. Plaintiff/petitioner in her evidence submitted affidavits containing chief examination of herself as well as of few of witnesses. Since Ex-P/3 marked in ptaintiff's chief examination was not available, cross-examination on the plaintiff as well as her witnesses could not be conducted.

2. On 25-04-09, learned trial Judge directed the plaintiff to make available Ex-P/3 in original for cross-examination on the next date of hearing on 27-06-09. However, on 25-04-09 itself an affidavit containing chief examination of one Parasram Kukreja as plaintiff's additional witness was submitted which was not accepted by the trial Court on the ground that three opportunities for evidence were already exhausted by the plaintiff. Aggrieved by this denial, plaintiff/petitioner has approached this Court under Article 227 of Constitution of India by way of the present writ petition.

3. It is contended on behalf of the petitioner that impugned order causes manifest injustice inasmuch as plaintiff/petitioner is deprived of her valuable right to adduce evidence which was being exercised with promptness in lawful manner.

4. Per contra, Shri Bansal, learned counsel for the respondents contended that in view of the proviso contained in Sub Rule 1 of Order XVII CPC, plaintiff/petitioner having already availed three opportunities for evidence, is not entitled to have more opportunity for submitting affidavit containing chief examination of a fresh witness.

5. Considered the submissions in the light of legal provisions governing the situation and perused the record.

6. Order XVI of CPC contains provision for summoning and enforcing attendance of the witnesses. Order XVII CPC empowers the Court for grant of

adjournment. Order XVIII CPC contains provision for hearing of the suit and examination of witnesses. Rule 4 of Order XVIII CPC earlier provided that evidence of the witness in attendance shall be taken oral in open Court in the presence and under the personal direction and superintendence of the Judge. Rule 4 later-on was substituted w.e.f. 01-07-02 by virtue of Code of Civil Procedure (Amendment Act) 2002. Relevant substituted provision which is in force w.e.f. 01-07-02 is as follows:

4. Recording of evidence:-(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed alongwith affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re - examination) of the witness in attendance, whose evidence (examination -in - chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit:

(3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner, he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:

Provided that any objection raised during the recording of evidence before the commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the

date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions of rules 16, 16-A, 17 and 18 or Order XXVI, in so far as they are applicable, shall apply to the issue, execution any return of such commission under this rule.

7. Order-sheet dated 25-04-09 of the trial Court is on record being impugned order marked as Annexure P/1, which reveals that learned trial Judge adjourned the suit for producing Ex-P/3 in original and for report of Commissioner after recording additional chief examination of the plaintiff and cross- examination of plaintiff and her witnesses Vasudev and Parmanand. Thus, the evidence of the plaintiff was still going on 25-04-09.

8. Learned trial Judge by the impugned order refused to take on record the affidavit containing chief examination of plaintiff's witness Parasram Kukreja in the light of proviso to Order XVII Rule 1 CPC on the ground that three opportunities for evidence were already granted to the plaintiff. This provision reads as under:

(1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing.

Provided that no such adjournment shall be granted more than three times to a party during hearing of the suit.

9. A bare look on the aforesaid makes it clear that the said proviso empowers the Court to refuse adjournment if availed by a party for more than three times during hearing of the suit. Plaintiff/petitioner had submitted the affidavit of her witness Parasram Kukreja which contained the chief examination. She did not pray for adjournment. Thus, proviso to Sub Rule 1 of Order XVII CPC had no application on 25-04-09. It comes into play only if a party seeks adjournment after having availed the same for more than three times during hearing of the suit.

10. In view of the aforesaid, this Bench is of the considered opinion that the impugned order is not sustainable in law for the simple reason that Order XVII Rule 1 CPC empowers the Court to refuse grant of more than three adjournments to a party during hearing of the suit. In the case in hand, plaintiff/petitioner did not seek adjournment on 25-04-09 but submitted an affidavit of a fresh witness which

contained chief examination. Moreover, other affidavits of the plaintiff as well as of other witnesses containing their chief examination were on record and such witnesses were required to be cross-examined. It is not obligatory on the part of a litigant to produce evidence of a fresh witness before cross- examination of the previous witness is concluded. It is only after conclusion of cross-examination of a particular witness that the litigant may decide whether to produce further evidence or not. This is an absolute choice of a party which cannot be curtailed by the Court in the impugned manner. However, adjournment for this purpose may be refused in exercise of powers conferred by virtue of proviso to sub-rule 1 of Order XVII Rule 1 CPC. Thus if a litigant before closure of his evidence submits an affidavit containing chief examination of a fresh witness and keeps such witness available for cross-examination without seeking adjournment for this purpose, the trial Court shall have to take the affidavit on record and allow opponent to cross-examine the witness. In such a situation, the trial Court has no power to refuse the affidavit by invoking the proviso to Order XVII Rule 1 CPC. It is further made clear that if a party submits affidavit alone and prays for adjournment to make deponent available for cross- examination, the trial Court shall have power to refuse to accept the affidavit by invoking such proviso.

11. In the instant case, evidence of the plaintiff was admittedly going on and the same was obviously not closed, cross-examination on plaintiff and her other witnesses was yet to be recorded. This being so, learned trial Judge could not have invoked the said proviso to prevent the plaintiff from submitting affidavit containing chief examination of a fresh witness. Accordingly, it would result in manifest injustice because plaintiff would be deprived of adducing evidence at the stage when the suit itself was fixed for plaintiff's evidence.

12. In this view of the matter, impugned order is not found sustainable in law and the same is hereby set aside. Learned trial Judge is directed to take the said affidavit of plaintiff's witness Parasram Kukreja on record. It is needless to say that defendants shall have a right to cross-examine and to adduce evidence in rebuttal.

No order as to costs.

Order accordingly.

I.L.R. [2009] M. P., 2863

WRIT PETITION

Before Mr. Justice Viney Mittal

7 August, 2009*

MALWA I.T. PARK LTD. & ors. ... Petitioners

Vs.

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

A. Land Acquisition Act (1 of 1894), Section 5-A - *Hearing of objections - Held - Simply because a person is entitled to seek compensation for the acquired land, would be no ground to rule out an objection raised by him pleading relevant facts.* (Para 57)

क. भूमि अर्जन अधिनियम (1894 का 1), धारा 5–ए – आपत्तियों की सुनवाई – अभिनिर्धारित – केवल इसलिए कि कोई व्यक्ति अर्जित भूमि के लिए प्रतिकर की माँग करने का हकदार है उसके द्वारा सुसंगत तथ्यों का अभिवचन करते हुए उठायी गई आपत्ति को अपवर्जित करने का कोई आधार नही होगा।

B. Land Acquisition Act (1 of 1894), Section 5-A - *Hearing of objections - It is well settled principle of law that when a statute requires an act to be done, an order to be passed or a duty to be performed by a statutory authority, in a particular manner, then that act must be done, order passed and duty performed in strict compliance with the statutory provisions, and the manner envisaged thereunder.* (Para 61)

ख. भूमि अर्जन अधिनियम (1894 का 1), धारा 5–ए – आपत्तियों की सुनवाई – विधि का यह सुस्थापित सिद्धांत है कि जब कोई कानून अपेक्षा करता है कि किसी कानूनी प्राधिकारी द्वारा किसी विशिष्ट तरीके से कोई कार्य किया जाए, कोई आदेश पारित किया जाए या कर्तव्य का पालन किया जाए, तब कानूनी उपबंधों के साथ कठोर अनुपालन में और उसके अन्तर्गत परिकल्पित ढंग से वह कार्य किया जाना चाहिए, आदेश पारित किया जाना चाहिए और कर्तव्य का पालन किया जाना चाहिए।

C. Land Acquisition Act (1 of 1894), Section 5-A - *Hearing of objections - Held - The objections, at no stage, had ever been decided by the appropriate authority and therefore a mere approval granted to the report of the Collector by the Commissioner, could neither be treated to be a decision of the objections by the appropriate Government, nor the said order reflects due application of mind.* (Para 60)

ग. भूमि अर्जन अधिनियम (1894 का 1), धारा 5–ए – आपत्तियों की सुनवाई – अभिनिर्धारित – समुचित प्राधिकारी द्वारा कभी भी किसी प्रक्रम पर आपत्तियों का विनिश्चय नही किया गया था और इसलिए कमिश्नर द्वारा कलेक्टर की रिपोर्ट का किया गया मात्र अनुमोदन न तो समुचित सरकार द्वारा आपत्तियों का विनिश्चय माना जा सकता था और न ही उक्त आदेश मस्तिष्क का सम्यक् प्रयोग करना प्रतिबिम्बित करता है।

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*W.P. No.2146/2009 (Indore)

Cases referred :

1993 MPWN 214, 1989 JLJ 501, (1992) 2 SCC 168, (1986) 4 SCC 251, (2005) 9 SCC 164, (1996) 11 SCC 462, AIR 2004 SC 956, (2004) 8 SCC 14, (2005) 7 SCC 627, AIR 1952 SC 16, (2005) 8 SCC 296.

G.M. Chaphekar, B.L. Pavecha, A.K. Sethi, Piyush Mathur, Vijay Assudani, Meena Chaphekar, Paresh Joshi, Chetan Nigam & Sarvar Parvez Khan, for the petitioners (in all cases).

R.N. Singh with *Sunil Jain, Arpan J. Pawar & Saurabh Sunder,* for the M.P. Housing Board.

A.S. Kutumbale, Addl.A.G. with *Vivek Phadke, G.A.,* for the State

Anand Agrawal, for Indore Municipal Corporation.

Sudarshan Joshi, for the Indore Development Authority.

Shekhar Bhargav with *Amit Upadhyay,* for the intervenor/Omi Khandelwal.

ORDER

VINEY MITTAL, J. :–This order shall dispose of eleven writ petitions being WP No. 2146 of 2009, WP No. 2147 of 2009, WP No. 2180 of 2009, WP No. 2221 of 2009, WP No. 2292 of 2009, WP No. 2320 of 2009, WP No. 2321 of 2009, WP No. 2322 of 2009, WP No. 2608 of 2009, WP No. 2829 of 2009, WP No. 2830 of 2009, as a common challenge has been raised by all the writ petitioners to the process of acquisition of their lands. A specific challenge has been raised to a report dated March 19, 2009, submitted by the Collector/Land Acquisition Officer, Indore, recommending the rejection of the objections filed by the petitioners, under Section 5-A of the Land Acquisition Act, 1894 (hereinafter referred to as the Act), and also an order dated March 24, 2009, passed by the Commissioner, Indore Division, Indore, (exercising the powers of the State Government), whereby the report submitted by the Collector has been approved. Although in all writ petitions, the acquisition proceedings have been challenged, in some of the writ petitions, a specific challenge has also been raised to the notification issued under Section 4 of the Act on April 4, 2008. For the sake of convenience, the facts are borrowed from WP No. 2146 of 2009.

2. A notification under Section 4(1) of the Act was issued on April 4, 2008, whereby 41.939 hectares of land in village Khazrana Jagir, Tehsil and District Indore, was proposed for acquisition for a public purpose, which was indicated as —To provide plots and for the housing scheme under Jawaharlal Nehru National Urban Renewal Mission (JNNURM). A copy of the said notification has been appended as Annexure P-10 with the petition. The Executive Engineer of the Housing Board was indicated as the authorised officer in terms of Section 4(2) of the Act. Urgency provisions under Section 17(1) of the Act were invoked, thereby dispensing with the provisions of Section 5-A of the Act, and taking away the right of the land owners to file objections thereunder.

3. All the writ petitioners felt aggrieved against the said notification and approached this Court through various writ petitions. Besides challenging the process of the acquisition, a primary grievance was raised that there being no urgency in the matter, the provisions of Section 17(1) of the Act had wrongly been invoked. This Court took up all the aforesaid writ petitions together for hearing and the main order was passed in WP No. 2696 of 2008. During the course of arguments in the said writ petitions, the learned Advocate General, who had appeared for the State, as well as the Housing Board, made an offer before the Court, that with a view to avoid unnecessary controversy, qua the dispensing with the right of the writ petitioners to file objections under Section 5-A of the Act, the State Government could hear the objections filed by the various land owners, if the aforesaid objections were to be then filed. It was also assured by the learned Advocate General that objections filed by such land owners would be decided, in accordance with law. Consequently, the said offer made by the learned Advocate General, having been accepted by the writ petitioners, all the aforesaid writ petitions were disposed of on June 25, 2008. A liberty was granted to the land owners to file objections under Section 5-A of the Act, on or before July 18, 2008, in the office of the Land Acquisition Officer. Corresponding directions were issued to the Authorities, that in case, any such objections were received, then the same be decided by following the due procedure, in accordance with the provisions of the Act. A copy of the order passed by this Court in WP No. 2696 of 2008 on June 25, 2008 is available on record as Annexure P-12, with the petition.

4. In terms of the liberty granted to the land owners, each one of them filed either collective or independent objections, on July 17, 2008. The objections filed by the petitioners in WP No. 2146 of 2009 are appended as Annexure P-13 with the petition. A very large number of objections, some on facts, and some on law, were raised.

5. Although in some cases, some individual objections were also raised by the land owners, most of objections raised by them were almost in identical terms. To notice the tenor of objections raised by the land owners, it would be relevant to notice some of the objections raised by the land owners as follows.

(i). The project in question i.e. "providing plots and the housing scheme under JNNURM" had not even been sanctioned by the Central Government and the Central Sanctioning and Monitoring Committee constituted by the Ministry of Housing and Urban Poverty Alleviation. Consequently, the public purpose indicated in the notification under Section 4(1) of the Act had yet to come into existence.

(ii). Indore Municipal Corporation had been indicated as the Nodal Agency. On a specific query put by the land owners, it had

informed by the Housing Board that no scheme had been received by it from JNNURM.

(iii). There was no sanctioned scheme of M.P. Housing Board also, as was mandatorily required under the provisions of Madhya Pradesh Grih Nirman Mandal Adhiniyam, 1972, before acquiring the land.

(iv). Various directions issued through the circulars/orders issued by the State Government, from time to time, had not been followed, in as much as, it had been clearly mandated by the Government that till there was a sanctioned scheme in existence, no acquisition proceedings could be initiated.

(v). There was an I.T. policy formulated by the State Government, and the acquisition in question was in complete violation of the said policy.

(vii). The land owners had entered into various Memorandums of Understanding (MOUs) with the State Government, under the provisions of the Special Economic Zone Act, 2005. The petitioners had obtained various clearances required from the Competent Authorities under various enactments in the month of October 2007 itself, and even a viability report had been submitted in the year 2007 itself. An inspection etc. had been carried out on the land in question by the officers of the Commerce and Industries Department, so much so, even a single window had been set up for the purpose to facilitate the land owners to set up the I.T. park.

In WP Nos. 2180 of 2009 (Smt. Rekha Mehta) and 2221 of 2009 (M/s Shanti Infrastructure), it had been specifically maintained by the said landowners that the petitioner-Rekha Mehta had purchased the land in question in the year 2006, and even a mutation had been entered in her name in the year 2006 itself. Thereafter, she had collaborated with M/s Shanti Infrastructure for construction of a multiplex over the land in question. The aforesaid land owners claimed that sanctions for construction of the multiplex had been granted to the previous owner on October 28, 2005 and December 27, 2005 i.e. even before the purchase of the land by the present land owner. It was also maintained that the aforesaid sanction granted earlier, having lapsed in the meantime, was again issued by the Competent Authority on February 3, 2007. It was also stated that the building permission for the said multiplex had been sanctioned by the Competent Authorities on January 8, 2008. A

reliance was placed on a diversion order issued by the Competent Authority for using the land for the said purpose. According to the said land owners, they had already commenced the construction of the multiplex, and in the entire process for obtaining the diversion order and sanctions etc. and by commencing the construction of the multiplex, they had incurred huge expenses.

(vii) Various other land-owners also filed identical objections before the Land Acquisition Officer, relying upon either the sanctions for construction for multiplexes, or on some MOUs with the State Government, for certain projects. It was maintained that in view of the aforesaid sanctions granted by the State Government, and in view of the MOUs having been entered into between the land owners and the State Government, the said land could not be later on acquired for the purposes of the project of JNNURM. In these circumstances, a plea of promissory estoppal was also raised.

(viii). An objection was raised that the project in question was not feasible or viable.

(ix). It was also maintained by some of the land owners that there was an initial proposal mooted in the office of the Housing Board, to acquire 43.654 hectares of land, but later on 1.715 hectares of land was not included, while issuing the notification under Section 4(1) of the Act, and not only that, even survey numbers, which were originally proposed to be acquired, as per the record in the Housing Board, were changed. On account of the said fact, it was maintained that the entire procedure adopted by the respondents was arbitrary and even malafide.

(x). Another objection was raised that the Executive Engineer of the Housing Board, Indore, had absolutely no jurisdiction or authority to issue a request letter to the Collector, Indore, for acquiring the land in question, since such a request, if at all, could have been made by the Housing Board itself, after passing an appropriate resolution in this regard.

(xi). It was further maintained that the project in question, for which the land of the land owners was sought to be acquired, was in complete violation of the Master Plan of Indore.

6. The aforesaid objections were clubbed together for adjudication by the Land Acquisition Officer/Collector, Indore. Replies to the objections were filed by the Housing Board. The objectors also filed rejoinders and submitted various documents, in support of the objections.

7. The Land Acquisition Collector, after categorizing all objections, formulated ten objections (issues), for adjudication. Vide a report dated March 19, 2009, all the objections filed by various land owners were found to be without any basis. A report in this regard was submitted by the Land Acquisition Officer/Collector, Indore, to the Commissioner, Indore Division, Indore, (exercising the powers of the State Government), for approval. On March 24, 2009, the Commissioner, Indore Division, Indore, while exercising the powers of the State Government, has granted his approval to the report submitted by the Collector. The report dated March 19, 2009 submitted by the Land Acquisition Officer/Collector, Indore, along with the approva order passed thereupon by the Commissioner, Indore Division, Indore, on March 24, 2009, has been appended as Annexure P-29 with WP No. 2146 of 2009.

8. As noticed above, it is with the identical challenge to the said report of the Land Acquisition Officer, along with the approval order passed by the Commissioner that all writ petitioners have approached this Court through present bunch of writ petitions.

9. The grievance raised by the petitioners, in all these writ petitions is, that while submitting the report, the Collector had taken irrelevant facts into consideration and as such had erred in law, as well as on facts, in rejecting the genuine objections raised by the land owners. It has been maintained by the writ petitioners that the land owners had obtained the requisite sanctions for development of IT park; construction of the multiplexes; and various other projects, much prior to the notification dated April 4, 2008 had been issued under Section 4(1) of the Act, and therefore, when there were diversion orders qua the land in question passed by the Competent Authorities; various sanctions had been granted under various provisions of different Acts; MOUs had been signed between the land owners/developers and the State Government, then all the aforesaid facts were required to be taken into consideration by the Authorities, while considering the objections filed by the land owners under Section 5-A. According to the petitioners, sufficient material had been placed by them on record, to prove the said facts, but the said material had almost been brushed aside by the Authorities, without due application of mind.

10 It has also been pleaded that the public purpose in question, for which the land was proposed to be acquired viz. for providing plots and for housing scheme of JNNURM, no such project had been granted the requisite sanction by the Central Government and even by the Central Sanctioning and Monitoring Committee, constituted by the Ministry of Housing and Urban Poverty Alleviation, and therefore, on April 4, 2008, on the date when the notification in question had been issued under Section 4(1), the said public purpose had, infact, not even come into existence. According to the petitioners, there was not even a sanctioned scheme of the Housing Board, which could justify a proposal for the acquisition.

11. All other objections, raised by the land owners before the Collector/Land Acquisition Officer, have been reiterated in the writ petitions.

12. A very serious challenge has been raised in all writ petitions to the report submitted by the Collector on March 19, 2009, and the approval thereof granted by the Commissioner on March 24, 2009, by maintaining that the report had been submitted by the Collector, taking into consideration the extraneous and irrelevant material, but the relevant material/evidence, brought on record by the landowners had not been kept in view and therefore, the aforesaid report could not be treated to be a valid report/recommendation on the objections filed by the land owners under Section 5-A. Additionally, a challenge has been raised to the order dated March 24, 2009 passed by the Commissioner, (exercising the powers of the State Government). It has been maintained that the aforesaid order passed by the State Government, could not be treated to be in conformity with the requirements of Section 5-A, in as much as, various objections raised by the land owners were required, infact, to be decided by the State Government itself, whereas in the present cases, the Commissioner, while exercising those powers, had merely approved the report submitted by the Collector. According to the petitioners, the order dated March 24, 2009, passed by the Commissioner, could not be treated to be a legal and valid order, in terms of the provisions of the Act, and could not even be treated to be passed with the appropriate and due application of mind.

13. The claim made by the petitioners has been contested by the respondents. Two separate replies have been filed. A detailed reply has been filed by the M.P. Housin Board, on behalf of respondents No. 5 and 6. A reply has also been filed by respondents No. 1 to 4. In the reply filed by the Housing Board, it has been maintained that the objections filed by various land owners under Section 5-A of the Act, had been duly considered by the Land Acquisition Officer/Collector, and thereafter the Commissioner, while exercising the powers of the State Government, had also given a decision thereupon. The existence of public purpose for the acquisition of the land in question has been asserted. It has been maintained that the pre-existence of a sanctioned scheme by the Housing Board was not even the requirement of law. According to the Housing Board, the major portion of the housing scheme, under the project, is meant for the persons of lower income group and economically weaker sections, and therefore, is a valid public purpose. The Housing Board has also, strangely, maintained that most of the land in question is in the hands of only few land owners, who are infact developers, and have their own hidden agenda. The Housing Board has also pleaded that the project of JNNURM was only one of the purposes for acquisition, whereas the acquired land could also be used for a housing scheme of the Housing Board.

14. It may be noticed that almost identical pleas have been raised by the Housing Board in all the writ petitions.

15. A reply on behalf of respondents No. 1 to 4 has been submitted by Shri Shielendra Singh, Land Acquisition Officer, Indore (OIC of the case). He has defended the report submitted by the Collector, and also the order passed by the Commissioner. It has been maintained that the Collector had heard the objections by granting a reasonable opportunity of hearing to all concerned, and the appropriate government, thereafter, had examined the grounds for rejection shown in the report, and after due application of mind, had recorded that there was no reason to disagree with the findings recorded in the report.

16. The arguments on behalf of the petitioners have been addressed by Shri G.M. Chaphekar, learned senior counsel appearing for the writ petitioners in WP No. 2146 of 2009 and WP No. 2221 of 2009, Shri A.K. Sethi, learned senior counsel appearing in WP No. 2147 of 2009, Shri A.K. Chitale, learned senior counsel appearing in WP No. 2292 of 2009, Shri B.L. Pavecha, learned senior counsel appearing in Writ Petitions No. 2320 of 2009, 2321 of 2009 and 2322 of 2009 and Shri Piyush Mathur, learned counsel, who has appeared in WP No. 2180 of 2009. However, the learned counsel appearing in the remaining writ petitions have adopted the arguments of the learned counsel in the above said cases.

17. On behalf of the respondents, the Housing Board has been represented by Shri R.N. Singh, learned senior counsel, and Shri A.S. Kutumbale, learned Additional Advocate General has addressed the arguments on behalf of respondents No. 1 to 4.

18. Shri Shekhar Bhargav, learned senior counsel has appeared on behalf of an intervenor-Omi Khandelwal, in writ petitions 2146 of 2009 and 2147 of 2009. Although, I do not find any locus-standi of the intervenor, to intervene in the matter of challenge to the acquisition of the private lands of the land owners, since I find that the controversy is essentially between the land owners and the Acquiring Authorities, but with a view to obtain assistance, I have also heard the learned senior counsel for the intervenor.

19. All the learned senior counsel for the petitioners have reasserted, during the course of arguments, the various pleas raised by the petitioners in the writ petitions, and various objections raised by the objectors in their objections filed under Section 5-A of the Act.

20. Shri G.M. Chaphekar, learned senior counsel, has argued that the project in question, proposed by JNNURM had yet not been sanctioned by the Central Government or by the committee constituted by the Ministry of Housing and Urban Poverty Alleviation, on the day when the notification under Section 4(1) of the Act had been issued on April 4, 2008. On that basis, it has been maintained tht no public purpose could be taken to have even come into existence on that date, and therefore, the notification in question under Section 4(1) and initiation of the proceedings for acquisition was clearly illegal. Shri Chaphekar has also stressed

on the fact that no scheme had been sanctioned even by the Housing Board as yet, and therefore, the land in question could also be not proposed to be acquired for the said purpose as well.

21. Learned senior counsel has relied upon a Division Bench judgment of this Court in 1993 MPWN 214 *Sharif Patel Vs. State of M.P.*, to contend that various circulars issued by the State Government, from time to time, were required to be followed, while initiating the acquisition proceedings, and since on the date of issuance of the notification in question, no sanctioned scheme had come into existence, therefore, as per the said circulars, no land could be acquired.

22. Shri Chaphekar has also referred to the I.T. policy framed by the State Government and MOUs between the landowners and the State Government and argues that since the projects being undertaken by the land owners had been sanctioned under the aforesaid policy, therefore, the said projects could not be aborted for such a public purpose, which was yet to come into existence.

23. Shri Chaphekar has also referred to the report under Section 5-A submitted by the Collector and the order of approval passed by the Commissioner, thereupon, to contend that the said report and the order could not be treated to be in conformity with the mandatory provisions of Section 5-A of the Act.

24. Shri A.K. Sethi, learned senior counsel appearing for the writ petitioners has adopted the aforesaid arguments addressed by Shri Chaphekar. Additionally, it has been argued by the learned senior counsel that description of the land proposed to be acquired had not been given in the notification under Section 4(1) of the Act, and therefore, the notification in question was to be treated as vague. According to the learned senior counsel, the notification in question was liable to be set aside on this ground alone. Shri Sethi relies upon a Division Bench Judgment of this Court in the case of *Mohammad Shafi Vs. State of M.P.and others*, 1989 JLJ 501, wherein an identical view had been taken by this Court, and it was held that in a big village, to enable the land owners to raise objections effectively, particulars of the area should be mentioned in the notification, under Section 4(1) of the Act. Shri Sethi informs the Court that the aforesaid judgment of the Division Bench had even been upheld by the Apex Court, when a challenge raised thereto by the Housing Board had been rejected. In this regard, my attention has been drawn to the case of *M.P. Housing Board Vs. Mohammad Shafi* 1992(2) SCC 168.

25. Shri Sethi has vehemently argued that objections filed under Section 5-A by a land owner are required to be heard by the Collector/Land Acquisition Officer, after affording an opportunity of hearing and for leading evidence to the land owner, and thereafter a report is required to be submitted by the said Authority to the appropriate Government, making his recommendation on various objections. Shri Sethi asserts that final decision on the objections is, in any case, required to be taken by the appropriate Government, on consideration of the report, and on

consideration of the entire record. According to the learned senior counsel, neither the report submitted by the Collector/Land Acquisition Officer in the present cases, could be treated to be in conformity with the provisions of Section 5-A of the Act, nor in any case, the order of approval passed by the Commissioner, could be treated to be a decision of the objections by him. Thus, maintains the learned senior counsel, that the mandatory provisions of Section 5-A had been given a complete go bye, by the Authorities, required to deal with the objections.

26. Shri Sethi has also referred to the provisions of Sections 31 and 34 of Madhya Pradesh Grih Nirman Mandal Adhiniyam, 1972. A specific reliance has been placed on Secion 33 (a) of the Adhiniyam, and it has been maintained that existence of a Housing Scheme, as per the provisions of the said Adhiniyam is an essential pre-requisite, before even a proposal for acquiring any land for such a scheme could be visualized.

27. Raising another objection against the impugned report submitted by the Collector, Shri Sethi has referred to certain observations made therein. The objections had been raised by the land owners that requisite sanctions/approvals had been obtained by the land owners, much prior to the issuance of the notification under Section 4(1) on April 4, 2008, and even the diversion orders had been passed earlier to the said notification, and MOUs had been entered into and duly signed between the land owners and the State Government. However, all the aforesaid facts have been ruled out of consideration by the Collector/Land Acquisition Officer, by merely observing that all the aforesaid facts had actually come into existence after December 27, 2005, when a proposal was mooted by the Housing Board for acquisition. Learned senior counsel vehemently argues that the aforesaid date December 27, 2005, has unnecessarily been taken into consideration by the Land Acquisition Officer, though not relevant at all, in as much as, the only date which was relevant for the purposes of determination of the objections was the date of issuance of the notification, which was April 4, 2008. It is thus argued, that the Collector, while submitting the report, had taken irrelevant facts and material into consideration, and therefore, the report was entirely vitiated, on this ground alone.

28. Another fact, which has been pointed out by the learned senior counsel is that on the objections submitted by various land owners, an order had been passed by the Collector, directing the Tehsildar to submit a report, after conducting a spot inspection, to determine the factual position at the site. Shri Sethi has also referred to the report of the Collector, in which, it has been observed while dealing with the objection No. 2, that such a spot inspection report to be submitted by the Tehsildar, was not available on record. Thus, it has been maintained that the Collector/Land Acquisition Officer, had actually failed to exercise the jurisdiction vested in him, because earlier having directed the spot inspection of the site, the objections had been adjudicated without availability of the said spot inspection report.

29. The order passed by the Commissioner on March 24, 2009 has also been seriously criticized by learned senior counsel. It has been maintained that under the provisions of Section 5-A of the Act, decision on the objections raised by a land owner was required to be given by the appropriate Government only, on the basis of a report submitted by the Collector. According to Shri Sethi, however, on perusal of the order passed by the Commissioner, it is apparent that it had been observed that there was no infirmity in the recommendations made by the Collector and therefore, the said report had been merely approved. It has been argued that the said approval of the report of the Collector could not be treated to be a decision on the objections by the appropriate Government i.e. the Commissioner. A plea of promissory estoppal has also been raised by learned senior counsel. It has been maintained that in view of the earlier MOUs with the State Government with regard to the certain projects, such as the I.T. park etc., the land owners had spent considerable amount on the said projects. In these circumstances, the State Government was estopped from acquiring the land in question.

30. Shri Piyush Mathur, learned counsel, who has appeared in WP No. 2180 of 2009 (which also appears to be connected with WP No. 2221 of 2009 since it has been claimed by both the petitioners that they have collaborated for execution of the project of a multiplex), has adopted the aforesaid arguments raised by Shri Chaphekar and Shri Sethi. Additionally, Shri Mathur has vehemently stressed that the petitioner-Rekha Mehta had purchased the land inquestion in the year 2006 from one Ram Chandra Kulmi and thereafter the mutation of the said land had been entered in the name of the purchaser-Rekha Mehta. Shri Mathur points out that the erstwhile owner Ram Chandra Kulmi had been granted the requisite permission by the Joint Director, Town and Country Planning Department, Indore, through an order dated October 28, 2005, appended as Annexure P-25 with the writ petition No. 2180 of 2009. The learned counsel also points out that the said permission had been granted to the erstwhile owner, on an application filed by him on October 21, 2005. It was after the said permission had been obtained by the seller, that the land in question was purchased by the present petitioner-Rekha Mehta. Learned counsel further points out that earlier sanction having lapsed, a fresh sanction was issued on February 3, 2007, and even the building permission to construct the multiplex had been granted to the present owners on January 8, 2008. Learned counsel has also referred to an objection raised by the said writ petitioners, that on the date when the notification in question had been issued, they had already commenced the construction of the multiplex. According to the learned counsel, all the aforesaid facts had been completely ignored by the Collector, while submitting the report.

31. Shri Mathur, specifically elaborates that while rejecting the objection No. 2, the Collector had observed that all the approvals/sanctions had been obtained by the land owners after December 27, 2005, and although even the said date was

totally irrelevant for rejecting the said objection of the land owners, but in the case of the present petitioners Rekha Mehta and her collaborator, the requisite sanction for construction of the multiplex had, infact, been granted on October 28, 2005 i.e. even prior to the said date December 27, 2005. Shri Mathur has thus argued that the said distinguishing fact in the case of present objectors had not been even adverted to by the Authorities, while submitting the report and passing the order thereupon.

32. Shri A.K. Chitale, learned senior counsel who was appeared in WP No. 2292 of 2009, has addressed similar arguments, as have been addressed by the other learned senior counsel for the petitioners. Additionally, it has been maintained by him that the acquisition of the land in question is violative of the Master Plan of Indore, 2021, and the notification in question is vague. It has also been argued that the project in question is not even viable.

33. Shri B.L. Pavecha, learned senior counsel appearing in three writ petitions, being WP No. 2320 of 2009, WP No. 2321 of 2009 and WP No. 2322 of 2009, has also addressed identical arguments before the Court, as have been addressed by the learned senior counsel for other petitioners. However, he has laid a lot of stress on the fact that in absence of the duly sanctioned scheme, the entire process of acquisition could not survive, and the notification in question is liable to be set aside on this short ground alone.

34. Shri Pavecha has also pointed out that the petitioners had obtained the sanction for construction of a multiplex on March 7, 2006, i.e. much prior to the issuance of the notification on April 4, 2008, and therefore, the said fact could not have been ignored, while proposing the acquisition of the land of the petitioners.

35. Shri Pavecha has also referred to the documents, Annexures P-13, P-14 and P-15 appended with the said writ petitions, and has maintained that some survey numbers, which were originally proposed for aequisition had been later on, excluded, and new numbers belonging to the said writ petitioners were included. Learned senior counsel maintains that although the said fact had been taken note of by the Collector, but while dealing with the said objection raised by the writ petitioners, the said objection has been overruled, without any justifiable ground and by merely observing that for the aforesaid error, the official who had committed the mistake, would be suitably dealt with departmentally. The learnd senior counsel argues that, as a matter of fact, the change of the survey numbers in the original proposal was a serious matter, which clearly reflected discrimination and arbitrariness of the proposal.

36. All the aforesaid contentions have been refuted by Shri R.N. Singh, learned senior counsel for the Housing Board. Shri Singh, during the course of arguments,has reiterated the pleas raised by the Housing Board, in its reply.

37. It has been maintained by the learned senior counsel that there was no

requirement of the pre-existence of a sanctioned scheme of the Housing Board, and therefore, the said objection raised by the land owners was without any basis. According to Shri Singh, even if the land had been ordered to be diverted through various diversion orders; layout plans sanctioned thereupon; and even the permission of construction of multiplexes and I.T. park had been given, the said facts were of no relevance, in as much as, while assessing the market value payable for the acquired land, a land owner would be entitled to raise the pleas in this regard for claiming more compensation. It has been maintained that even when the constructed areas could be acquired, the question of excluding land having merely sanctioned projects, would not even arise. In this regard, the learned senior counsel has placed reliance upon the judgments rendered by the Apex Court in the cases *State of UP Vs. Pista Devi* (1986) 4 SCC 251, *Anand Buttons Vs. State of Haryana* (2005) 9 SCC 164 and *Meerut Development Authority Vs. State of UP* (1996) 11 SCC 462.

38. Learned senior counsel for the respondent-Board has further vehemently argued that the Board has specifically clarified before the Collector that if after acquisition of the land, the requisite permission etc. for JNNURM project was not forthcoming, then the Housing Board would proceed with its own Housing Scheme.

39. The report submitted by the Collector, as well as the order passed by the Commissioner, have been defended by Shri Singh, and it has been contended that the report had been submitted after affording an opportunity of hearing to all the concerned parties, and the said recommendation submitted by the Collector had been duly taken into consideration by the Commissioner, who did not find any material to disagree with the same, and therefore, an approval was granted. The learned senior counsel has maintained that the aforesaid approval granted by the Commissioner was in complete conformity with the provisions of Section 5-A of the Act.

40. Shri A.S. Kutumbale, learned Additional Advocate General, appearing on behalf of respondents No. 1 to 4 has also adopted the arguments addressed by Shri R.N. Singh, learned senior counsel for the Housing Board. It has been contended by the learned Additional Advocate General that since the various land owners had filed objections under Section 5-A, therefore, the omission to indicate the survey numbers of the lands in the notification under Section 4(1) was of no consequence, in as much as, no prejudice, whatsoever, had ever been caused to any of the land-owners. The learned Additional Advocate General has also supported the acquisition proceedings, initiated by the respondents, for the project in question and defended the report submitted by the Collector and the order passed thereupon by the Commissioner.

41. Shri Shekhar Bhargav, learned senior counsel has appeared on behalf of the intervenor-Omi Khandelwal in Writ Petitions No. 2146 of 2009 and 2147 of

2009. As noticed above, the challenge in the present writ petitions is by the land owners/persons interested, to the acquisition of their lands in question by the official respondents. The aforesaid controversy is essentially between the writ petitioners and the official respondents. The intervenor has not pleaded any personal right or interest in the lands in question. Consequently, I find that the intervention applications filed by the aforesaid intervenor are absolutely without any justification, and need to be rejected. However, with a view to obtain assistance, the learned senior counsl for the intervenor has also been heard in the matter.

42. Learned senior counsel for the intervenor, has argued that a proposal had been mooted by the Housing Board in December 2005 itself, when it was proposed that the land be acquired for a Housing Scheme. Shri Bhargav maintains that the aforesaid proposal was well within the knowledge of the residents of the area, including the present petitioners, and therefore, the land in question had been purchased by them with an ulterior purpose i.e. to make undue profits. According to Shri Bhargav, the projects in question are infact in larger public interest and therefore, the personal and individual interests of the writ petitioners must yield to the aforesaid larger public interest.

43. Having given my thoughtful consideration to the aforesaid pleas, being raised on behalf of the intervenor, I do not find any justification to take the said facts into consideration. Whether or not a person is owner of the land in question or has any interest therein, is the only issue, which is to be considered on the relevant date, i.e. the date of issuance of Section 4 notification. How and why the said land was purchased by a person, prior to Section 4(1) of notification, is a matter, which is totally extraneous for adjudication of the present controversy. The extent of title/ interest of a person, when some land had been acquired, would be determinable at the time when an award is passed, for assessing the market value of the acquired land. At this stage, it would be not appropriate for this Court to offer any comments on the rights/title of the writ petitioners qua the land in question.

44. I have duly considered the rival contentions raised by learned senior counsel for the contesting parties. I have also gone through the record of the case.

45. To adjudicate the controversy in question, at the outset, it would be relevant to extract the provisions of Section 5-A of the Act.

> "5A. Hearing of objections.- (1) Any person interested in any land which has been notified under Section 4, sub-section(1), as being needed or likely to be needed for a public purpose or for a company may, within thirty days from the date of the publication of the notification, object to the acquisition of the land or of any land in the locality, as the case may be.
>
> (2) Every objection under sub-section(1) shall be made to the Collector in writing, and the Collector shall give the objector an

opportunity of being heard in person or by any person authorised by him in this behalf or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, either make a report in respect of the land which has been notified under section 4, sub-section(1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government. The decision of the appropriate Government on the objections shall be final.

(3) For the purposes of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act."

46. The provisions of the Land Acquisition Act are in recognition of the power of eminent domain of the Sovereign (the State), and as such the appropriate Government is the Authority to acquire lands, thereunder, for a public purpose and for the purposes of a company. The Act provides for acquisition of the land of persons, without their consent, though compensation is paid for such acquisition. The fact, however, remains that the land is acquired, without the consent of the owner, and that is a circumstance, which must be born in mind, while construing the provisions of the Act. In such a situation, the provisions of the Act are required to be strictly construed (refer to *State of M.P. and others Vs. Vishnu Prasad Sharma and others* AIR 1966 SC 1593 and *Khub Chand and others Vs. State of Rajasthan and others,* AIR 1967 SC 1074).

47. Even in the case of *Collector of Central Excise Ahmedabad Vs. Orient Fabrics (P) Ltd.* AIR 2004 SC 956, it was held by the Apex Court that the provisions of an expropriatory legislation should be strictly construed.

48. In the backdrop of the aforesaid principle, it is clear that the provisions of the Land Acquisition Act, including the provisions of Section 5-A of the Act, have to be strictly construed. Provisions of Section 5-A have infact to be treated as mandatory, and any deficiency in following the procedure laid therein, has to enure for the benefit of the land owners.

49. It has been held in the case of *Union of India and others Vs. Mukesh Hans, Etc.* (2004) 8 SCC 14.

"35. At this stage, it is relevant to notice that the limited right given to an owner/person interested under Section 5-A of the Act to object to the acquisition proceedings is not an empty formality and is a substantive right, which can be taken away for good and valid reason and within the limitations prescribed under Section 17(4) of the Act. The object and importance of Section 5-A inquiry

was noticed by this Court in the case of *Munshi Singh Vs. Union of India* (1973) 2 SCC 337 wherein this Court held thus:

"Section 5-A embodies a very just and wholesome principle that a person whose property is being or is intended to be acquired should have a proper and reasonable opportunity of persuading the authorities concerned that acquisition of the property belonging to that person should not be made. The legislature has made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A".

36. It is clear from the above observation of this Court that right of representation and hearing contemplated under Section 5-A of the Act is a very valuable right of a person whose property is sought to be acquired and he should have appropriate and reasonable opportunity of persuading the authorities concerned that the acquisition of the property belonging to that person should not be made. Therefore, in our opinion, if the appropriate Government decides to take away this minimal right then its decision to do so must be based on materials on record to support the same and bearing in mind the object of Section 5A."

(underlining supplied)

50. Certain observations made by the Apex Court in the case of *Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and others* (2005) 7 SCC 627, may also be extracted with advantage.

"6. It is not in dispute that Section 5-A of the Act confers a valuable right in favour of a person whose lands are sought to be acquired. Having regard to the provisions contained in Article 300-A of the Constitution, the State in exercise of its power of "eminent domain" may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and reasonable compensation therefor must be paid.

7. Indisputably, the definition of public purpose is of wide amplitude and takes within its sweep the acquisition of land for a corporation owned or controlled by the State, as envisaged under sub-clause (iv) of clause (f) of Section 3 of the Act. But the same would not mean that the State is the sole judge therefor and no judicial review shall lie." (underlining supplied)

It was further observed.

"9. It is trite that hearing given to a person must be an effective one and not a mere formality. Formation of opinion as regards the public purpose as also suitability thereof must be preceded by application of mind as regards consideration of relevant factors and rejection of irrelevant ones. The State in its decision-making process must not commit any misdirection in law. It is also not in dispute that Section 5-A of the Act confers a valuable important right and having regard to the provisions contained in Article 300-A of the Constitution it has been held to be akin to a fundamental right." (Emphasis Supplied)

51. With regard to the procedure to be followed under Section 5-A of the Act, the Apex Court held.

"15. Section 5-A of the Act is in two parts. Upon receipt of objections, the Collector is required to make such further enquiry as he may think necessary whereupon he must submit a report to the appropriate Government in respect of the land which is the subject-matter of notification under section 4(1) of the Act. The said report would also contain recommendations on the objections filed by the owner of the land. He is required to forward the records of the proceedings held by him together with the report. On receipt of such a report together with the records of the case, the Government is to render a decision thereupon. It is now settled in view of a catena of decisions that the declaration made under Section 6 of the Act need not contain any reason (See *Kalumiya Karimmiya Vs. State of Gujarat and Delhi Admn. Vs. Gurdip Singh Uban* (2000) 7 SCC 296.

16. However, considerations of the objections by the owner of the land and the acceptance of the recommendations by the Government; it is trite, must precede a proper application of mind on the part of the Government. As and when a person aggrieved questions the decision-making process, the court in order to satisfy itself as to whether one or more grounds for judicial review exist, may call for the records whereupon such records must be produced. The writ petition was filed in the year 1989. As noticed herein before, the said writ petition was allowed. This Court, however, interfered with the said order of the High Court and remitted the matter back to it upon giving an opportunity to the parties to raise additional pleadings.

17. Contention of Mr Chaudhari to the effect that for long the additional ground relating to non-application of mind on the part of

the State had not been raised and, thus, it might not be necessary for the State to file a counter-affidavit, does not appeal to us. When rule nisi was issued, the State was required to produce the records and file a counter-affidavit. If it did not file any counter-affidavit, it may, subject to just exceptions, be held to have admitted the allegations made in the writ petition.

18. In view of the fact that the action required to be taken by the State Government is distinct and different from the action required to be taken by the Collector; when the ultimate order is in question it was for the State to satisfy the court about the validity thereof and for the said purpose the counter-affidavit filed on behalf of a Collector cannot be held to be sufficient compliance with the requirements of law. The job of the Collector in terms of Section 5-A would be over once he submits his report. The Land Acquisition Collector would not know the contents of the proceedings before the State and, therefore, he would be incompetent to affirm an affidavit on its behalf.

19. Furthermore, the State is required to apply its mind not only on the objections filed by the owner of the land but also on the report which is submitted by the Collector upon making other and further enquiries therefor as also the recommendations made by him in that behalf. The State Government may further inquire into the matter, if any case is made out therefor, for arriving at its own satisfaction that it is necessary to deprive a citizen of his right to property. It is in that situation that production of records by the State is necessary." (Emphasis Supplied)

52. In the light of the law laid down by the Apex Court, as noticed above, it would be now an appropriate stage to examine the impugned report dated March 19, 2009, submitted by the Collector to the appropriate Government. A perusal of the aforesaid report indicates that various objections filed by the land owners have been clubbed and have been categorized as ten objections, which were treated as the issues arising in the objections.

53. Objections No. 1 and 7, pertain to non-sanctioning of the requisite project by the Central Government and the other Competent Authorities and non-existence of a sanctioned scheme of the Housing Board. The aforesaid objections have been rejected by the Collector. It has been observed that an approval in principle had been granted on May 15, 2006 to the scheme of the Housing Board. While dealing with objection No. 7, with regard to the non grant of the requisite sanction to the JNNURM project by the Central Government and other Competent Authorities, the Collector has held that in case of the aforesaid project, being not

approved, the Housing Scheme of the Housing Board would be executed in the acquired land. However, a perusal of the notification dated April 4, 2008 issued under Section 4(1) of the Act indicates that the public purpose mentioned therein is *"to provide and to execute a housing scheme under Jawarharlal Nehru National Urban Renewal Mission"*.

54. In view of the fact that a specific public purpose had been mentioned in the notification issued under Section 4(1), the Collector was required to determine as to whether the execution of a Housing Scheme of the Housing Board would be a purpose, included in that public purpose. As a matter of fact, the public purpose as given in the notification under Section 4 of the Act, is the starting point of the acquisition proceedings, and cannot be deviated from, by the Acquiring Authorities, at any stage, nor while dealing with the objections under Section 5-A of the Act, the Collector has any power to accept and treat any alternative purpose as the public purpose, for which the land is sought to be acquired. The aforesaid legal aspect of the matter, appears to have escaped the notice of the Collector, while dealing with objections No. 1 and 7.

55. All the writ petitioners, who had filed objections under Section 5-A before the Collector, had asserted independent facts, to maintain that they had, much prior to the issuance of the notification on April 4, 2008, had obtained diversion orders qua the user of the land, which after the said diversion orders, could no longer be treated to be agricultural; obtained approvals/sanctions from various Competent Authorities for the projects of multiplexes, IT parks and such other projects. However, on a mere plea raised by the Housing Board, that all the aforesaid sanctions etc had been obtained by the land owners after December 27, 2005, the date on which some proposal was mooted by the Housing Board for a Housing Scheme, objections raised by the land owners have been rejected, by accepting the said stand of the Housing Board.

56. As noticed earlier, the process of acquisition of the land of a person gets initiated for the first time through a notification under Section 4 of the Act. Rights of the owners/occupants etc., existing in the said land, are to be treated as crystallized, on the date of issuance of the said notification. Anything happening prior thereto would be wholly extraneous and irrelevant for the purpose of process of acquisition. In these circumstances, when the objectors had specifically placed the requisite material before the Collector that all the Competent Authorities, under the various enactments, had granted approvals/sanctions and passed diversion orders, much prior to the year 2008, infact in the year 2006 etc., then the said facts were bound to be considered by the Land Acquisition Collector. Simply because a person was entitled to seek compensation for the acquired land, would be no ground to rule out an objection raised by him pleading relevant facts. Recommendation made by the Collector on objection No. 2, thus, also cannot be sustained.

57. At this stage, it would not be out of place to notice the specific instance of landowners in the case of WP No. 2180 of 2009 (Rekha Mehta) and WP No. 2221 of 2009 (M/s Shanti Infrastructure), it has been pleaded by them that the land in question had been purchased by Rekha Mehta in the year 2006 from the erstwhile owner Ram Chand Kulmi, who had already obtained a sanction on October 28, 2005 for construction of a multiplex. The said sanction was renewed on February 3, 2007. The building permission was also granted even to the present land owners (purchasers) on January 8, 2008. In these circumstances, even if the reasoning adopted by the Collector were to be countenanced, still it is apparent that the requisite sanction for the multiplex had been granted to the erstwhile owner, much prior to December 27, 2005. The said fact has also been completely ignored and lost sight of by the Collector, while rejecting the objections filed by the said land owners. On that ground alone, the rejection of the objections, qua the said land owners, cannot be legally sustained.

58. Another objection, which had been raised by various land owners was with regard to the existing MOUs between the land owners and the State Government, entered into prior to issuance of the notification. Concededly, the land owners had claimed MOUs with the State Government. On the basis of the MOUs they had also obtained various other sanctions/approvals. The MOUs with the State Government cannot be treated to be on the same footing, as a private transaction between two individuals. The transaction between the land owner and another private person could be ignored under some circumstances, but definitely, more weightage was required to be given to the MOUs between the State Government and the land owners. Obviously, the aforesaid distinction has also been lost sight of by the Authorities, while rejecting the objections filed by the land owners.

59 A very serious grievance has been raised by the writ petitioners to the order dated March 24, 2009, rendered by the Commissioner, in exercise of the powers to the State Government, when the report submitted by the Collector has been approved. It has been maintained that the objections, at no stage, had ever been decided by the appropriate Authority, and therefore, a mere approval granted to the report of the Collector by the Commissioner, could neither be treated to be a decision of the objections by the appropriate Government, nor the said order reflects due application of mind.

60 It is well settled principle of law that when a statute requires an act to be done, an order to be passed or a duty to be performed by a statutory Authority, in a particular manner, then that act must be done, order passed and duty performed in strict compliance with the statutory provisions, and the manner envisaged thereunder.

61 Certain observations made by the Apex Court in the case of *Commissioner of Police Bombay Vs. Gordhandas Bhanji* AIR 1952 SC 16, may be noticed.

"10.....If the Commissioner of Police had the power to cancel the license already granted and was the proper authority to make the order, it was incumbent on him to say so in express and direct terms. Public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order."

It was further observed.

"26. We have held that the Commissioner did not in fact exercise his discretion in this case and did not cancel the license he granted. He merely forwarded to the respondent an order of cancellation which another authority had purported to pass. It is evident from these facts that the Commissioner had before him objections which called for the exercise of the discretion regarding cancellation specifically vested in him by R. 250. He was therefore bound to exercise it and bring to bear on the matter his own independent and unfettered judgment and decide for himself whether to cancel the license or reject the objections. That duty he can now be ordered to perform under S. 45."

(Emphasis given)

62. Again in the case of *State of West Bengal and another Vs. Alpana Roy and others* (2005) 8 SCC 296, it was observed by the Apex Court.

"6.....It is the function of the body granting approval to examine whether in a particular case, approval is to be accorded. The approving authority's function is not a formal one. It has a duty to decide whether approval is to be accorded, taking into account governing statutes. The High Court has proceeded as if approval is an empty formality....."

(emphasis given)

It was further observed.

"8. Even in respect of administrative orders Lord Denning, M.R. In *Breen Vs. Amalgamated Engg.* Union observed: "The giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. Vs. Crabtree it was observed: "Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision

reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."

(emphasis supplied)

63. The aforesaid observations made by the Apex Court in *Gordhandas Bhanji's case* (supra) and in Alpana Roy's case (supra), apply on all fours to the facts and circumstances of the present cases.

64. It is apparent that under the provisions of Section 5-A of the Act, the Commissioner, exercises the powers of the appropriate Government, and is the Competent Authority to decide the objections filed by a land owner. However, before the matter is to be decided by the Commissioner (appropriate Government), the objectors are to be heard by the Land Acquisition Officer, who is required to examine the material with regard to the said objections. The Land Acquisition Officer is merely required to submit a report, recommending the acceptance of the objections or rejection thereof. Along with the report of the Collector, the entire record is required to be forwarded to the appropriate Government. It is for the appropriate Government, to take into consideration the objections raised by the objectors, the recommendation made by the Collector, and the record forwarded by the Collector, containing the material placed on record by the objectors. In these circumstances, it is for the appropriate Government to deal with the various objections filed by a land owner, after due application of mind, to each one of them. Obviously, the order passed by the Commissioner on March 24, 2009, in the present cases cannot be treated to be a decision on the objections of the landowners by the Commissioner. A mere approval granted to the report submitted by the Collector, even if the said report were to be accepted as such, cannot be taken to be a substitute for a decision on objections by the appropriate Government. The order dated March 29, 2009 passed by the Commissioner is in complete violation of the mandatory provisions of Section 5-A of the Act, and as such cannot be legally sustained.

65. It has already been noticed by this Court that the procedure indicated in Section 5-A is mandatory and the adjudication of the said objections can not be treated to be merely an empty formality.

66. Since this Court has found that the report submitted by the Collector cannot be treated to be a proper adjudication of the objections filed by the land owners, and it has been further held that the order of the Commissioner dated March 24, 2009, cannot be sustained, therefore, although the arguments have been addressed by the learned senior counsel for the contesting parties, for and against various other objections raised by the land owners before the Collector (which have already been noticed in the earlier portion of this order), and have also relied upon various judgments in support of their contentions, it would be wholly unnecessary to notice the aforesaid issues, or offer any opinion on the sustainability or otherwise of the said objections, since I deem it appropriate that the objections filed by the land owners, should be adjudicated afresh by the Authorities, in accordance with law.

67. While adjudicating the matter afresh, a note would be taken of the fact of the diversion orders, the sanctions/approvals obtained by the land owners, signing of the MOUs, and any other steps taken by them in furtherance to the said projects, for which the sanctions had been granted, prior to the issuance of the notification under Section 4 of the Act, i.e. April 4, 2008. As noticed by the Court in earlier portion of the order, the case of the writ petitioners, WP No. 2180 of 2009(Smt. Rekha Mehta) and WP No. 2221 of 2009 (M/s Shanti Infrastructure), with regard to there being a requisite sanction, even prior to the date of proposal mooted by the Housing Board, shall also be kept in view.

68. Since at an earlier stage, the Land Acquisition Collector had directed a spot inspection by the Tehsildar and submission of the report by him, it would be appropriate for the Collector, to now require the aforesaid spot inspection and thereafter to consider the report submitted by the Tehsildar, before proceeding any further in the matter.

69. At this stage, it would be pertinent to note a statement made by Shri R.N. Singh, learned senior counsel for the Housing Board. It has been informed by Shri Singh that after the order dated March 24, 2009 had been passed by the Commissioner, a notification under Section 6 of the Act had been signed by the State Government on March 31, 2009 and had been sent for publication thereof to the government press. However, in the meantime, on account of the interim directions issued by this Court, the said notification has not been published in the government gazette, as yet. Shri Singh further informs that in one of the newspapers, the said notification had been published on April 1, 2009, on which date, the interim orders itself were passed by this Court. Keeping in view the aforesaid statement made by learned senior counsel, it is apparent that the notification under Section 6 of the Act, cannot be legally treated to have come into existence, since it has not been published in the official gazette, as yet. Consequently, no directions are required to be issued qua the said notification. Needless to say that after the directions issued by this court, as above, are carried out, and the objections filed by the land owners under Section 5-A of the Act, are

decided afresh by the Authorities, in accordance with law, further proceedings in accordance with other provisions of the Act, shall have to be followed from that stage i.e. from the stage of passing the said orders.

70. Consequently, in view of the aforesaid discussion, the present petitions are allowed. The report dated March 19, 2009, forwarded by the Collector, Indore, recommending the rejection of objections filed by the land owners under Section 5-A of the Act, and the order dated March 24, 2009, passed by the Commissioner, Indore Division, Indore, are hereby set aside. The objections filed by the land owners under Section 5-A of the Act shall be deemed to be alive before the Collector. The said objections shall now be decided afresh by the Collector, in accordance with law.

71. Needless to say that while undertaking the aforesaid process, the law laid down by this Court and the Apex Court in various judgments, including the judgment in *Hindustan Petroleum's case* (supra) and also the observations made by this Court in present judgment, on the issues of law, shall be kept in view.

72. Before parting with this order, it must be clarified that, however, any observations made by this Court in this order, which may have the effect of touching the merits of the objections, in any manner, shall not be treated to be an expression of opinion by this Court on the said objections. The objections filed by the land owners shall be adjudicated, in accordance with law, independently, by the appropriate Authorities.

C.c. as per rules.

Petition allowed.

I.L.R. [2009] M. P., 2886
WRIT PETITION
Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice P.K. Jaiswal
20 August, 2009*

JULIOUS PRASAD ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. **Public Trusts Act, M.P. (30 of 1951), Sections 5, 6 & 7** - *Registrar directed that the registered society of disciples of Christ Church be registered as a Public Trust - Held* - *All societies registered under the M.P. Society Registrikaran Adhiniyam, 1973 and formed for charitable purposes are not Public Trusts and the provisions of Act, 1951 are not applicable - Order passed by Registrar, Public Trusts quashed.* (Para 17)

क. लोक न्यास अधिनियम, म.प्र. (1951 का 30), धाराएँ 5, 6 व 7 – रजिस्ट्रार

*W.P. No.3623/2007 (Jabalpur)

ने निदेशित किया कि मसीह गिरजाघर अनुयायियों की रजिस्ट्रीकृत सोसायटी लोक न्यास के रूप में रजिस्ट्रीकृत की जाए – अभिनिर्धारित – म.प्र. सोसायटी रजिस्ट्रीकरण अधिनियम, 1973 के अन्तर्गत रजिस्ट्रीकृत और पूर्त प्रयोजनों के लिए सृष्ट सभी सोसायटियाँ लोक न्यास नही हैं और अधिनियम, 1951 के उपबंध लागू नही होते – रजिस्ट्रार, लोक न्यास द्वारा पारित आदेश अभिखंडित।

B. Public Trusts Act, M.P. (30 of 1951) vis a vis Society Registrikaran Adhiniyam, M.P. 1973 - *Distinguished - Held - Under the Adhiniyam, 1973, the Registrar and the State Government exercise more powers of control over a registered society in comparison to powers exercised by the Registrar under the Act, 1951 over a registered Public Trust - The object of the Act, 1951 was to provide for control over the affairs of a Public Trust - The same object is achieved in case of societies by elaborate provisions contained in the Adhiniyam, 1973.* (Para 15)

ख. लोक न्यास अधिनियम, म.प्र. (1951 का 30) के मुकाबले में सोसायटी रजिस्ट्रीकरण अधिनियम, म.प्र. 1973 – सुभिन्न किये गये – अभिनिर्धारित – रजिस्ट्रार द्वारा अधिनियम, 1951 के अन्तर्गत रजिस्ट्रीकृत लोक न्यास पर प्रयोग की जाने वाली शक्तियों की तुलना में अधिनियम, 1973 के अन्तर्गत रजिस्ट्रार और राज्य सरकार रजिस्ट्रीकृत सोसायटी पर नियंत्रण की अधिक शक्तियों का प्रयोग करते हैं – अधिनियम, 1951 का उद्देश्य लोक न्यास के कार्यों पर नियंत्रण का उपबंध करना था – सोसायटियों के मामले में वही उद्देश्य अधिनियम, 1973 में अन्तर्विष्ट विस्तृत उपबंधों द्वारा प्राप्त किया जाता है।

C. Public Trusts Act, M.P. (30 of 1951) - *Review by a Quasi-Judicial Authority - Permissibility - Registrar reviewed its earlier order and recorded a finding that the Church should be registered as a Public Trust and declared the Church property as a public trust property - Held - A Quasi-Judicial Authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction - Provisions of Act and the rules made thereunder do not confer any power of review on the Registrar - Order of review quashed.* (Para 13)

ग. लोक न्यास अधिनियम, म.प्र. (1951 का 30) – अर्ध–न्यायिक प्राधिकारी द्वारा पुनर्विलोकन – अनुज्ञेयता – रजिस्ट्रार ने अपने पूर्व के आदेश का पुनर्विलोकन किया और यह निष्कर्ष अभिलिखित किया कि गिरजाघर को लोक न्यास के रूप में रजिस्ट्रीकृत किया जाना चाहिए और गिरजाघर की सम्पत्ति को लोक न्यास सम्पत्ति घोषित किया – अभिनिर्धारित – कोई अर्ध–न्यायिक प्राधिकारी अपने स्वयं के आदेश का पुनर्विलोकन नही कर सकता, जब तक उसे, उस कानून द्वारा जिसके अन्तर्गत वह अपनी अधिकारिता प्राप्त करता है, अभिव्यक्त रूप से पुनर्विलोकन की शक्ति प्रदान नही की जाती – अधिनियम और उसके अन्तर्गत बनाये गये नियमों के उपबंध रजिस्ट्रार को पुनर्विलोकन की कोई शक्ति प्रदान नही करते – पुनर्विलोकन का आदेश अभिखंडित।

Cases referred :

1976 JLJ 465, AIR 2005 SC 2544, 1983 JLJ 469.

Shashank Shekhar, for the petitioner.
Vijay Shukla, Dy.A.G., for the respondent Nos.1 to 3.
Prashant Singh, for the respondent Nos.4 & 5.
Praveen Dubey, for the respondent No.6.

ORDER

The Order of the Court was delivered by P.K. JAISWAL, J.:-This order will dispose of two writ petitions, they being writ petitions No.3623 and 10326 of 2007. In both the writ petitions, the petitioner challenges the order dated 13.2.2007 passed by the Registrar, Public Trust, Damoh in Revenue Case No.3-B/113(1)/2002-2003, wherein the Registrar declared the Disciples of Christ Church, Committee, Damoh as Public Trust.

2. Petitioner-Julious Prasad of W.P. No.3623 of 2007 is the Secretary of Disciples of Christ Church, Committee, Damoh (M.P.) which is affiliated to Indian Church Council Disciples of Christ, a society registered under the M.P. Societies Registrikaran Adhiniyam, 1959, having Registration No.286. The entire affairs of the Society are being managed by the Council. It consists of nine members who are known as elders , who have been managing the affairs of the Church. Somewhere in the 1895 the Church was constructed on Nazul Sheet No.41, Plot No.86 situated at Damoh. As per revenue record, out of total area of 3.82 acres, an area of 2.48 acre was recorded in the name of Secretary, Christian Missionary Society vide Revenue Case No.57-7/2 year 1940-41 and an area of 1.34 acre was recorded in the name of Secretary, Convention of Chris. Church, Damoh. On 24.4.1973 an application for renewal of lease over the aforementioned area of 3.82 acre was filed by Indian Church Council Disciples of Christ Church (for short 'the ICCDC') through Shri Henry Imanual, Chairman, Disciples of Christ Church, Damoh. The respondent No.2 i.e. Collector, Damoh after considering all the objections and after hearing all of them decided the matter of renewal of lease vide order dated 10.7.2006 and granted renewal over an area of 1.32 acre of plot No.86/2 in favour of Disciples of Christ Church, Damoh.

3. During the pendency of renewal application, there arose a serious dispute with regard to management of Disciples of Christ Church, Damoh.

4. On 31.3.2003 respondents No.4 and 5 filed an application under Section 5 of M.P. Public Trust Act, 1951 (for short 'the Act') before respondent No.3 and prayed that they belong to Christian community and they since their ancestors are residents of district Damoh and their community has a Church situated at Motor Stand, Railway Station Road, Damoh known as Disciples of Christ Church and prayed that the properties situated at Nazool Sheet No. 41, plot No.86 having total area 3.82 acres be declared as a Public Trust. The petitioner and respondent Nos. 6, 7 and 8 were impleaded as non-applicant No.4, non-applicant No.1, non-applicant No.2 and non-applicant No.3. The Registrar issued public notice which

was published in the M.P.Gazette and invited objections in Form-IV of Rule 5(1) of M.P. Public Trust Rules, 1962 (for short 'the Rules') on 9.1.2004. The petitioner and respondents No.6 to 8 filed their objections and contended that ICCDC is a Society of Disciples of Christ Church constituted in the year 1960-61 and is registered under M.P. Societies Registrikaran Adhiniyam, 1959 on 13.12.1962 vide registration No.286/1962 and it is this Society which is managing the affairs of the Church and paying taxes to the local authorities and the provisions of M.P. Public Trust Act is not applicable to it. The petitioner also contended that the affairs and the properties of a registered Society are administered under the Registration Adhiniyam and, therefore, a registered Society will fall within the Exemption contained in Section 36 (1) (b) of the M.P. Public Trust Act, 1951. With the above they prayed for dismissal of the application.

5. The Registrar after considering the oral and documentary evidence came to the conclusion that no evidence has been brought on record substantiating that the respondents No.4 and 5 are having any title over the property whereas the petitioner and respondents No.6 to 8 have brought on record the evidence to the effect that Damoh Church Society is part of ICCDC which bears registration No.286/1962. The Registrar also held that the Society works in a transparent manner as per the regulations of the Society and being a society registered under M.P.Societies Registrikaran Adhiniyam, 1959 it need not be registered under Public Trust nor it need be registered under M.P. Public Trust Act, 1951. The Registrar further held that the application has not been presented as per rule 4 of M.P. Public Trust Rules, 1962. With these findings the learned Registrar rejected the application by order 28.3.2005 (Annexure P/5).

6. After the Registrar had given findings in the case, he is required to enter the findings in the prescribed register and to publish copies of those findings upon the Notice Board in his office and those entries become final subject to the provisions of Section 7 of the Act. If respondents Nos. 4 and 5 were aggrieved by any finding of the Registrar recorded under Section 6 of the Act, they could challenge such finding by instituting a civil suit in a Civil Court within six months of publication of notice under sub section (1) of Section 7 of the Act to have such finding set aside or modified. The respondents No.4 and 5 instead of challenging the findings of the Registrar filed an application before the respondent No.2, Collector, challenging the order of the Registrar dated 28.3.2005. Respondent No.2 rejected the application vide order dated 9.11.2006 (Annexure P/7) by holding that it was not open to the Collector to entertain the application and record his own finding and held that under the Act there is no provision to examine the order passed by the Registrar, Public Trust and rejected the same.

7. Respondent No.2 while rejecting the application also held that under the Act, he has no power to review or modify his own order. Respondents No.4 and

5 instead of filing a civil suit under Section 8 of the Act, filed a writ petition challenging the order dated 9.11.2006 (Annexure P/7) and also prayed for issuance of writ of mandamus directing the Registrar to comply with the provisions of Section 6 and 7(1) of the Act and to supply desired documents to them. In the said writ petition, petitioner No.1 and respondents No.6 to 8 were not impleaded. Learned Single Judge vide order dated 14/12/2006 disposed of the writ petition at motion hearing stage and directed that Registrar, Public Trust shall make compliance of Sections 6 and 7 of the Act and shall further supply certified copies of the entries of the register in accordance with law within a reasonable time. The order dated 14.12.2006 passed by the learned Single Judge in W.P. No.18499/2006 is relevant which reads as under:

"14.12.2006

Shri Prashant Singh, counsel for the petitioners.

Shri Vinod Mehta, G.A. for Respondents/State.

Grievance of the petitioner is that an enquiry was held under section 5 of the M.P. Public Trusts Act, 1951 and the application under Section 5 was dismissed vide order dated 28.3.2005 contained in Annexure P/5. Section 6 of the said Act makes it compulsory for the Registrar to record his findings with reason at completion of the enquiry under Section 5. Thereafter, by virtue of section 7 Registrar is obliged to cause entries in the register in accordance with the finding and to publish the same on the notice board of the Office. Section 6 enables an aggrieved person to institute a suit in Civil Court for setting aside such findings.

Shri Prashant Singh, learned counsel for the petitioners stated that the Registrar has not made entries of the findings in the register, as required under section 7 and consequently, the petitioner has been unable to institute the civil suit.

In view of the aforesaid provisions of MP Public Trusts, 1951, this petition is disposed of with the direction that respondent no.3 shall make compliance of sections 6 and 7 of the said Act and shall further supply certified copies of the entries of the register against Annexure P/6 or otherwise in accordance with law within a reasonable time.

The writ petition, accordingly, stands disposed of.

8. The respondent No.3, Registrar instead of recording his findings with reasons and making entries in the Register in accordance with the findings recorded under Section 6, as per final order dated 28.3.2005 (Annexure P/5) directed the parties to submit their affidavits, thereafter, objections and reply prepared by the parties

were considered by the Registrar and after considering the decision of the Apex Court in the case of *Churches of North India Versus Lavaji Bhai Ratan Ji Bhai and others*, AIR 2005 SC 2544, has arrived at the conclusion that the church can be registered as public trust under the M.P. Public Trust Act and in compliance with the order dated 14.12.2006 passed by the learned writ court directed that the "Disciples of Christ Church, Damoh" be registered as Public Trust under Section 6 of the M.P. Public Trust Act, 1951 and the trust property situated at Civil Station Damoh Nazool Sheet No.41, 42, plot No.86/2 area 1.30 acre be registered as immovable property of the Trust. It is this action which is impugned in this petition on the ground that under the Act, Registrar has no power to re-open or review the matter nor there was any direction by the writ court to decide the matter afresh.

9. It has been urged by Mr. Choudhary, learned counsel appearing on behalf of the petitioner, that the Registrar had no power of review under the provisions of M.P., Public Trust Act, 1951 and, as such, the Registrar acted wholly without jurisdiction in entertaining an application filed by the respondents No.4 and 5. Further it is submitted that the order passed by the Registrar is wholly without jurisdiction and there is no provision under the Act, whereby Registrar can reverse the finding given by his predecessor vide order dated 28.3.2005.

10. On the other hand, Mr. Shukla and Prashant Singh, learned counsel appearing for the respondents No.1 to 5, supported the impugned action of the Registrar, Public Trust and submitted that the order has been passed in compliance with order dated 14.12.2006 passed in W.P. No.18499/2006 and the impugned order of the Registrar is legal and valid.

11. We have heard learned counsel for the parties and perused the record of the case. Sections 4, 5, 6, 7 and 8 of the M.P. Public Trusts Act, 1951 are quoted herein below :

> **"4. Registration of public trusts.** - (1) Within three months from the date on which this section comes into force in any area or from the date on which a public trust is created, whichever is later, the working trustee of every public trust shall, apply to the Registrar having jurisdiction for the registration of the public trust.
>
> (2) Such application shall be accompanied by such fees, if any, not exceeding five rupees as may be prescribed.
>
> (3) The application shall be in such form as may be prescribed and shall among other things contain the following particulars, namely :-
>
> (i) the origin, nature and object of the public trust;
>
> (ii) the place where the principal office or the principal place of

business of the public trust is situate;

(iii) the names and addresses of the working trustee and the manager;

(iv) the mode of succession to the office of the trustees;

(v) the list of the movable and immovable trust property in the State and such description and particulars as may be sufficient for the identification thereof;

(vi) The approximate value of the movable and immovable property.

(vii) The income derived from movable and immovable property and from any other source, if any, based on the gross annual income during the three years immediately preceding the date on which the application is made or of the period of which has lapsed since the creation of trust whichever period is shorter and in the case of newly created public trust the estimated income from such sources;

(viii) Amount of the average annual expenditure in connection with such public trust estimated on the expenditure incurred within the period to which the particulars under clause (vi) relate;

(ix) The address to which any communication to the working trustee or manager in connection with the public trust may be sent; and

(x) Such other particulars as may be prescribed:

Provided that the rules may provide that in the case of any or all public trusts it shall not be necessary to give the particulars of the trust property of such value and such kind as may be specified therein.

(4) No Registrar shall proceed with any application for the registration of a public trust in respect of which an application for registration has been filed previously before any other Registrar and the Registrar before whom the application was filed first shall decide which Registrar shall have jurisdiction register the public trust.

(5) An appeal against the order of the Registrar under sub-section (4) may be filed within thirty days of the order before such officer as the State Government may, by notification, appoint and, subject to the decision in such appeal, the order of the Registrar under sub-section (4) shall be final.

(6) Every application made under sub-section (1) shall be signed and verified in accordance with the manner laid down in the Code of Civil Procedure, 1908 (V of 1908), for signing and verifying plaints. It shall be accompanied by a copy of an instrument of trust if such instrument had been executed and in existence and where the trust property includes immovable property, about which record is kept, a copy of the entries relating to such property in such record of rights.

5. Inquiry for registration.- (1) On receipt of an application under section 4 or upon an application made by any person having interest in a public trust or on his own motion, the Registrar shall make an inquiry in the prescribed manner for the purpose of ascertaining.-

(i) Whether the trust is a public trust;

(ii) Whether any property is the property of such trust;

(iii) Whether the whole or any substantial portion of the subject - matter of the trust is situated within his jurisdiction;

(iv) The names and addresses of the trustee and the manager of such trust;

(v) The mode of succession to the office of the trustee of such trust;

(vi) The origin, nature and object of such trust;

(vii) The amount of gross average annual income and the expenditure of such trusts; and

(viii) The correctness or otherwise of any other particulars furnished under sub-section (3) of section 4.

(2) The Registrar shall give in the prescribed manner public notice of the enquiry proposed to be made under sub-section (1) and invite all persons interested in the public trust under inquiry to prefer objections, if any, in respect of such trust.

6. Findings of the Registrar.- On completion of the inquiry provided for under section 5, the Registrar shall record his findings with reasons therefor as to the matters mentioned in the said section.

7. Registrar or make entries in the Register.- (1) The Registrar shall cause entries to be made in the register in accordance with the findings recorded by him under section 6 and shall publish on the notice board of his office the entries made in the register.

(2) The entries go made shall, subject to the provisions of this Act and subject to any change recorded under any provision of this Act or a rule made thereunder, be final and conclusive.

8. Civil Suit against the finding of the Registrar.- (1) Any working trustee or person having interest in a public trust or any property found to be trust property, aggrieved by any finding of the Registrar under section 6 may, within six months from the date of the publication of the notice under sub-section (1) of section 7, institute a suit in a civil Court to have such finding set aside or modified.

(2) In every such suit, the Civil Court shall give notice to the State Government through the Registrar, and the State Government if it so desires, shall be made party to the suit.

(3) On the final decision of the suit, the Registrar shall if necessary, correct the entries made in the register in accordance with such decision."

12. The provisions of Section 4, 5 and 8 clearly show that the enquiry is to be made by the Registrar with a view to ascertain the existence of a public trust, on an application by the working trustee or any person interested in a public trust or on his own motion. The scheme of the Act shows that after holding an enquiry, as provided under Section 5, the Registrar has to record his findings with reasons therefor and Section 7 enjoins making of entries in the register in accordance with the findings recorded under Section 6. Sub-section (2) of Section 7 lays down that the entries so made shall, subject to the provisions of the Act, be final and conclusive. Section 8 confers a right upon a person who is aggrieved by any finding of the Registrar under Section 6 to institute a suit in a Civil Court within six months to have such finding set aside or modified. In view of these provisions the order dated 28.3.2005 in which it was held that Damoh Church Society is part of ICCDC registered under the M.P. Societies Registrikaran Adhiniyam, and it was neither needed to be registered under Public Trust, nor needed to be registered under M.P. Public Trust Act, 1951 had become final and conclusive and the only remedy available to respondents No.4 and 5 was to institute a civil suit under Section 8 of the Act for setting aside the said finding. As per order dated 14.12.2006 in W.P. No.18499/2006 which is re-produced herein before, there was no direction by the learned Single Judge to re-consider the application under Section 5 of the Act afresh. The only direction of the learned Single Judge was that respondent No.3 shall make compliance of Section 6 and 7 of the Act and shall further supply certified copies of the entries of the register to respondents No.4 and 5 in accordance with law within a reasonable time.

13. It is now well established that a quasi-judicial authority cannot review its

own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. It is not disputed that the provisions of the M.P. Public Trust Act, 1951 and the Rules made thereunder do not confer any power of review on the Registrar. In these circumstances, it was not open to the Registrar to record a finding that the Church should be registered as a Public Trust and to declare the Church property as a Public Trust property.

14. ICCDC is a society registered under the M.P. Society Registrikaran Adhiniyam, 1959. The Madhya Pradesh Societies Registration Act, 1959 was repealed by the Madhya Pradesh Societies Registrikaran Adhiniyam, 1973. This 1973 Act in Section 3 (e) defines a society to mean "a society registered or deemed to have been registered under this Act". The 1973 Act further contains a provision that the societies registered under the Act repealed would be deemed to be registered under the 1973 Act. The 1973 Act also contain many provisions which give extensive powers of control to the Registrar over the affairs of a Society. Section 11 empowers the Registrar to amend the memorandum, regulations and bye-laws of a society if he considers that the amendment is necessary in the interest of the society. Section 21 provides that a society cannot acquire or transfer any immovable property without the prior permission of the Registrar. Section 25 enumerates the books of account which are to be kept by a society. Section 26 empowers the Registrar to seize records, registers or the books of account of a society. The Registrar can also take possession of funds and property of the society through a duly authorized person. Section 28 authorizes the Registrar to order a special audit. Section 32 empowers the Registrar to hold an enquiry into the constitution, working and financial position of a society and states that the decision of the Registrar is binding on the society. The 1973 Act also authorizes the State Government under Section 33 to supersede society in case of mis-management and to remove the Governing Body and appoint a person to manage the affairs of a society.

15. From the above narration it is clear that a registered society in Madhya Pradesh is governed by the Madhya Pradesh Society Registrikaran Adhiniyam, 1973, which is the Act currently in force. This Act contains many provisions which confer extensive powers upon the Registrar and the State Government over the affairs of the Society. If the provisions of the 1973 Act are compared with the provisions contained in the Public Trust Act, it will be seen that the Registrar and the State Government exercise more powers of control over a registered society than exercised by the Registrar under the Public Trust Act over a registrar public trusts. The object of the Public Trust Act was to provide for control over the affairs of a Public Trust. The same object is achieved in case of societies by elaborate provisions contained in the 1973 Act.

16. In the case of *Shankersingh & others v. Sanstha Sonabai Shravikashram, Khurai & another*, 1976 JLJ 465 it was held that a registered society formed for religious and charitable purpose is no doubt a public trust, but

as it is administered under the Madhya Pradesh Society Registrikaran Adhiniyam, 1973, it is a public trust administered under any enactment for the time being in force within the exemption contained in Section 36 (1)(b) of the Public Trust Act. The provisions of Madhya Pradesh Society Registrikaran Adhiniyam, 1973 are quite clear that the properties of a registered society are administered under that Act and, therefore, a registered society will fall within the exemption contained in Section 36(1)(b) of the Public Trusts Act.

17. In the case of *Shri Nabhi Nandan Digamber Jain Hitopdeshani Sabha v. Rameshchand*, 1983 JLJ 469, the learned Single Judge following the decision of the Division Bench in the case of *Shankersingh Vs. S.S. Shravikashram* (supra) has held that all societies registered under the M.P. Societies Registration Act and formed for charitable purposes are not Public Trusts and the provisions of Public Trust Act are not applicable. In the present case the learned Registrar without any evidence to show that ICCDC is a Trust having trustees and beneficiaries had committed an error in directing that the Society of Disciples of Christ Church be registered as a Public Trust and that too by modifying its earlier order dated 28.3.2005.

18. The Registrar while passing the impugned order dated 13.2.2007, relied on the decision of the Apex Court in the case of *Church of North India v. Lavajibhai Ratanjibhai and others*, AIR 2005 SC 2544 wherein the Church was registered both as Society and religious Trust and the dispute was in relation to the management of the Church as religious Trust and not as a Society. The facts of that case are quite different and, therefore, the said decision of the Hon'ble Apex Court will not be applicable in the present facts and circumstances of the case. In the facts of the present case, in the order dated 14.12.2006 passed in W.P. No.18499/2006, the learned Single Judge has nowhere directed the Registrar to consider the application fresh. By the said order the learned Single Judge has only directed the Registrar, Public Trust to comply with Sections 6 and 7 of the Madhya Pradesh Public Trusts Act, 1951 and to supply certified copies of the entries of the register but the Registrar instead of making entries in the register re-opened the entire matter and by passing the impugned order dated 13.2.2007 acted wholly without jurisdiction in reviewing the earlier order dated 28.3.2005 and proceeded to allow the application of respondents No.4 and 5 for declaring the Church as a Public Trust and also committed a grave error in directing that the Disciples of Christ Church be registered as a Public Trust.

19. For the reasons stated above, both these writ petitions are allowed. The order dated 13.2.2007 passed by the Registrar, Public Trust, Damoh in Revenue Case No.3-B/113(1)/2002-2003 is hereby quashed. However, in the circumstances, there shall be no order as to costs.

Petition allowed.

RUBINA DANIAL (SMT.) Vs. STATE OF M.P.

I.L.R. [2009] M. P., 2897

WRIT PETITION

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

20 August, 2009*

RUBINA DANIAL (SMT.) & ors. ... Petitioners

Vs.

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

Constitution, Articles 26 & 226 - P.I.L. - *Freedom to manage religious affairs - Petitioners belonging to Christian community approached the High Court for a direction that the State be directed to permit the registered society to construct a Church as the earlier Church was in a dilapidated condition and was thus demolished - Held - In the absence of a Church, all the necessary rituals and religious functions which are carried out in Church cannot be carried out - High Court exercising powers under Article 226 to enforce the rights guaranteed under Article 26 must pass orders keeping in view the right of local Christian community of a particular district guaranteed under Article 26.* (Para 17)

संविधान, अनुच्छेद 26 व 226 – लोक हित वाद – धार्मिक कार्य का प्रबंध करने की स्वतंत्रता – ईसाई समुदाय के याचियों ने उच्च न्यायालय से इस निदेश के लिए निवेदन किया कि गिरजाघर का निर्माण करने के लिए रजिस्ट्रीकृत सोसायटी को अनुमति देने हेतु राज्य सरकार को निदेशित किया जाए क्योंकि पूर्ववर्ती गिरजाघर जीर्ण–शीर्ण दशा में था और गिरा दिया गया – अभिनिर्धारित – किसी गिरजाघर के अभाव में सभी आवश्यक कर्मकाण्ड और धार्मिक समारोह, जो गिरजाघर में किये जाते हैं, नही किये जा सकते – उच्च न्यायालय को अनुच्छेद 26 के अन्तर्गत प्रत्याभूत अधिकारों को प्रवर्तित करने के लिए अनुच्छेद 226 के अन्तर्गत शक्तियों का प्रयोग करते हुए अनुच्छेद 26 के अन्तर्गत प्रत्याभूत किसी विशिष्ट जिले के स्थानीय ईसाई समुदाय के अधिकार को दृष्टिगत रखते हुए आदेश पारित करने चाहिए।

Cases referred :

AIR 1963 SC 1909.

Akash Choudhary, for the petitioners.

Vijay Shukla, Dy.A.G., for the respondents.

Prashant Singh, for interveners (Ajay Masih & S.K. Das).

Anshuman Singh, for Municipal Council, Damoh.

O R D E R

The Order of the Court was delivered by P.K. JAISWAL, J. :–Petitioners are protestants believing in Christianity and are permanent residents of district Damoh. They have no personal or vested interest in the Management of the Church but due to rivalry between two groups of Christian community, they have been deprived of sole Church which was

*W.P. No.6338/2008 (Jabalpur)

demolished some where in Feb-March,2005. This writ petition as Public Interest Litigation under Article 226 of the Constitution of India has been filed by the community at large with a sole prayer for construction of Church building so that the marriages and other religious ceremonies can be performed in the Church and they may offer their prayers in the Church building where they were offering their prayers prior to the year 2005.

2. Facts briefly stated are that an area of 3.82 acres of Sheet No.41, Plot No.86, situated at Damoh was granted on lease on 5.10.1942, in revenue Case No.57-7/2 year 1940-41 to Secretary, Christian Missionary Society. As per revenue record an area of 2.48 acre of plot No.86/1 was recorded in the name of Christian Mission, Damoh and rest of the area i.e. 1.32 acre of plot No.86/2 was recorded in the name of Secretary, Convention of Christ Church Damoh. On 24.9.1973, an application for renewal of lease over the aforementioned area of 3.82 acre was filed by Indian Church Council Disciples Of Christ Church through Shri Henry Imanual, Chairman, Disciples of Christ Church, Damoh. During the pendency of the renewal application, United Christian Missionary/United Church Of Northern Indian Trust Association, Napier Town, (UCMS) Jabalpur, Central India Christian Mission (CICM), Damoh, Ajay Masih and S.K.Das filed their objections before the respondent No.3 and prayed that the lease be renewed in their name. Respondent No.3 after hearing all of them decided the matter of renewal of lease vide order dated 10.7.2006 and granted renewal over an area of 1.32 acre of plot No.86/2 out of total area of 3.82 acres in favour of Disciples of Christ Church, Damoh.

3. Indian Church Council Disciples of Christ Church, Damoh (for short 'ICCDC') is a Society of Disciples of Christ Church constituted in the year 1960-61 and registered under the M.P. Societies Registration Act, 1959. The said Society was registered on 13.12.1962 vide registration No.286/1962. It is this Society which is managing the Church and paying taxes to the local authority.

4. An old Church was constructed over an area of 1.32 acres of plot No. 86/2, somewhere in the year 1895. When ICCDC took the decision to demolish the Church and started demolition in February, 2005, the present intervener Ajay Masih and S.K.Das challenged the said action by filing writ petition which was registered as W.P.No.2333/2005, praying therein that Chairman, Disciples of Christ Church, Damoh be restrained from demolishing the Church. On 29.4.2005 interim order was passed restraining the demolition of Church. ICCDC through its Chairman filed an application for modification of the order dated 29.4.05 and pointed out to the learned writ Court that the old Church was demolished on or before 29.4.2005 and construction of new Church is going on. The learned writ Court vide order dated 13.5.2005 directed the respondent No.3 to verify the aforesaid facts and further directed that if the respondent No.3 forms an opinion

that the Church was demolished on or before 29.4.2005, he shall permit to continue with the construction. Order dated 13.5.2005 is relevant which reads as under:

"13.5.2005

Shri Amit Shukla, Advocate for petitioners.

Shri Shashank Shekhar, Advocate for respondent No.4.

Learned counsel for respondent No.4 submits that before 29.4.2005 when this Court passed an order restraining the demolition of the Church, the church had already been demolished and the construction is going on. It is submitted by the respondent no.4 that as the church was already demolished, respondent no.4 may be permitted to make construction.

Considering the aforesaid, it is directed that the respondent no.3 shall verify the aforesaid fact and if the respondent no.3 forms an opinion that the church was demolished on or before 29.4.2005, respondent no.3 shall permit the petitioner to continue with the construction. In case respondent no.3 finds that it is not appropriate for continuation of the aforesaid construction, respondent no.3 shall pass an appropriate order in this regard.

A copy of this order be communicated to respondent no.3 for compliance."

5. On 7.7.2005 writ petition filed by the interveners (Ajay Masihi and S.K.Das) was permitted to be withdrawn by this Court. After withdrawal of writ petition, MCC No.2632/2005 was filed for correction of order dated 13.5.2005. The said MCC was disposed of by order dated 16.12.2005 making the correction in the order dated 13.5.2005 and directing the Collector, Damoh who was seized with the matter to consider the contentions raised by the parties and grant permission to Disciples of Christ Church, Damoh, if he finds it appropriate, after hearing both the parties. This order was passed by the learned Single Judge because an objection was raised before the learned Single Judge that the lease in respect of the land on which the church was to be constructed, has not been renewed and an objection for renewal has been submitted by them and further, without any permission of the Municipal Council, no construction can be permitted on the land by the Disciples of Christ Church, Damoh. Order dated 16.12.2005 passed in M.C.C. No.2632/2005 is relevant which reads as under:

"16.12.2005

Shri Shashank Shekhar, learned counsel for the petitioner;

Shri Prashant Singh, counsel for respondents nos. 4 & 5.

Petitioner has filed this application for correction in the order

dated 13.5.2005, by which this Court has issued following directions:-

"Learned counsel for respondent No.4 submits that before 29.4.2005 when this Court passed an order restraining the demolition of the Church, the church had already been demolished and the construction is going on. It is submitted by the respondent no.4 that as the church was already demolished, respondent no.4 may be permitted to make construction.

Considering the aforesaid, it is directed that the respondent no.3 shall verify the aforesaid fact and if the respondent no.3 forms an opinion that the church was demolished on or before 29.4.2005, respondent no.3 shall permit the petitioner to continue with the construction. In case respondent no.3 finds that it is not appropriate for continuation of the aforesaid construction, respondent no.3 shall pass an appropriate order in this regard.

A copy of this order be communicated to respondent no.3 for compliance."

It is submitted by the petitioner that in 2nd para of the order in 4th line, this Court has permitted to continue with the construction, while in place of "petitioner', 'respondent no.4' should have been typed. It is submitted that the aforesaid error is apparent on the face of the record.

Learned counsel for respondents nos.4 & 5 opposed the prayer and submitted that in fact the order dated 13.5.2005 was an interlocutory order and subsequently the writ petition was dismissed vide order dated 7.7.2005 and the interim order has merged into the final order and even if order dated 13.5.2005 is corrected the petitioner would not get any benefit of correction. Apart from this the lease which was in favour of Secretary, Christian Mission and Secretary, Convention of Church expired in the year 1963. The petitioner though has filed an application for renewal of the lease, but respondents nos. 4 and 5 have objected to it. The State Government on the representation of respondents nos. 4 & 5 permitted respondents nos. 4 and 5 to object the renewal of lease. For construction of building a due permission from the Municipal Council is required. The petitioner without obtaining any permission of Municipal Council has started construction which is not permissible under the law. Apart from his by order dated 2.7.2005 the Collector Damoh also sought direction from this Court.

To appreciate rival contention of the parties from the perusal

of order dated 13.5.2005, it is apparent that there is some typing mistake in the order. The entire order shows that the such permission was sought by respondent no.4, who is applicant herein and this Court directed that Collector shall permit respondent no.4 to continue with the construction as at the relevant time the construction was going on by respondent no.4, who is petitioner herein.

In the aforesaid circumstances the order dated 13.5.2005 is corrected and in 2nd para in fourth line where it is has been typed as 'shall permit the petitioner to continue', it shall be read as 'shall permit the respondent no.4 to continue'.

So far as the objection raised by respondents nos. 4 & 5 are concerned that the lease has still not renewed and respondents nos. 4 & 5 have submitted their objection for renewal and without any permission from the Municipal Council no construction will be permitted to the petitioner or the matter is seized by the Collector, Damoh as reflects from the order dated 2.7.2005 Annexure P-6 filed in W.P. No.6978/2005, in which the Collector considering the contention of the parties found that the construction has been started by the petitioner and because of anomaly in the order dated 13.5.2005 a specific direction is necessary by the Court no directions are needed at this stage. As the matter is seized by the Collector, it will be appropriate that all the contentions raised by the parties herein, may be considered and decided by the Collector after hearing both the parties. The Collector shall be within his jurisdiction to grant renewal to the petitioner, which is Disciples of Christ Church, Damoh, if he finds it appropriate after hearing both the parties.

With the aforesaid direction, this application is finally disposed of."

6. The grievance now made before us by the present petitioners is that although in the meanwhile the lease of the land has been renewed in favour of the Disciples of Christ Church, Damoh and permission has also been granted by the Municipal Council, Damoh for construction of Church on the land leased out in favour of Disciples of Christ Church, the Collector, Damoh is not granting permission for construction of Church though sufficient funds are available with the Church Council of Disciples of Christ Church, Damoh.

7. The respondents/State have filed their return and have taken a stand that the matter regarding grant of permission to construct the Church is pending before the Collector, Damoh. Some of the petitioners are participating in the proceedings

and matter is sub judice before the Collector, Damoh. It is also pointed out by the learned counsel for the respondents that the present interveners, namely, Ajay Masih and S.K.Das had filed W.P. No.18499/2006 which was disposed of on 14.12.2006 and on the basis of certain observations made in the said order the Registrar, Public Trust registered the Society of Disciples of Christ Church, Damoh as Public Trust in the name of "Disciples Christ of Church, Damoh vide order dated 13.2.2007, but this order dated 13.2.2007 has been challenged in Writ Petition No.3623/2007 and W.P. No.10326/2007 and the learned Single Judge has passed an order on 14.3.2007 staying the operation of the impugned order dated 13.2.2007 passed by the Registrar Public Trust, Damoh, registering Disciples of Christ Church, Damoh as a Trust and until the order dated 14.3.2007 is vacated or the dispute in the said writ petition is decided, the Collector, Damoh could not grant permission to Disciples of Christ Church, Damoh for construction of the Church.

8. On 5.8.2008 this Court after hearing the learned counsel for the parties and after taking note of the subsequent developments and events in the matter and also of the fact that there is a serious dispute with regard to management of Disciples of Christ Church, Damoh, while one group is keen that the management should be in the hands of the trustees of the Trust registered by the order dated 13.2.2007 of the Registrar Public Trust, Damoh, the other group is opposed to the Disciples of the Christ Church, Damoh being managed by the trustees of the trust registered by the order dated 13.2.2007 passed by the Registrar, Public Trust, Damoh, observed that such disputes with regard to the management of Disciples of Christ Church, Damoh should not stand in the way of construction of the Church which is a place of worship for the Christian Community and accordingly directed that the respondent No.3- Collector, Damoh or any other Officer of the Administration or the Police will not restrain the Church Council of Disciples of Christ Church, Damoh to construct the Church on the land measuring 1.30 acres in accordance with the permission granted by the Municipal Council, Damoh. The relevant part of interim order dated 5.8.2008 reads as under :

> "We, accordingly direct that the Collector, Damoh or any other Officer of the Administration or the Police will not restrain the Church Council of Disciples of Christ Church, Damoh to construct the Church on the land measuring acre 1.30 in accordance with the permission granted by the Municipal Council, Damoh.
>
> The dispute with regard to the management of Disciples of Christ Church will be decided at a later stage when the writ petitions will be heard finally by the Division Bench analogously."

9. After passing of order dated 5.8.2008, Municipal Council, Damoh filed an application for intervention stating that sanction/permission for construction of Church on 21.12.2005, has subsequently been stayed by the Municipal Council,

Damoh because of deviation from the permission of sanction vide order dated 1.2.2006. This Court after taking note of the said fact in its order dated 14.8.2008 directed that the Church Council of Disciples of Christ Church, Damoh will continue to construct the Church in accordance with the permission/sanction granted by the Municipal Council, Damoh and liberty was granted to the Municipal Council, Damoh that in case there is any deviation from the permission/sanction, it will be open for the Municipal Council, Damoh to move this Court by appropriate application.

10. Ajay Masih and S.K.Das, the interveners challenged the interim order dated 5.8.2008 by filing Civil Appeal No.1604-1605/2009 before the Apex Court. The Apex Court by order dated 2.3.2009 set aside the interim order on the ground that the interim order as passed by the High Court during the pendency of the writ petition was not appropriate as that was in essence granting final relief claimed in the writ petitions and observed that the three writ petitions i.e. W.P.No.6338/2008, W.P. No.3632/2007 and W.P. No.10326/2007 be disposed of as early as practicable, preferably within a period of four months from the date of receipt of the Supreme Court order.

11. According to the petitioners, the lease of the land on which the Church building is being constructed has been renewed in favour of Disciples of Christ Church Damoh, there is valid permission and sanction from the Municipality of Damoh in favour of Disciples of Christ Church for construction of the Church building, but without any rhyme or reason the construction has been stopped. The petitioners are aggrieved by the multiplicity of the litigations regarding the Church building and are more aggrieved that the members of their community have been deprived to offer services and prayers in Church building, which was in existence prior to its demolition in the month of February, 2005. The petitioners have also submitted that at present there is no Church building in the entire District of Damoh and, therefore, they may be permitted to construct the new Church as per permission granted by the Municipal Council, Damoh.

12. Shri Vijay Shukla, learned Dy. Advocate General submitted that as per order dated 16.11.2005 passed in MCC No.2632/2005 the matter regarding grant of permission to construct the Church is pending before the Collector, Damoh and some of the petitioners are participating in the proceeding and there is no order for grant of permission for construction of Church. He further submitted that the issue regarding registration of Trust is also pending in W.P. No.3632/2007 and W.P. No.10326/2007 and unless these issues are decided, no permission for construction of Church can be granted by the Collector, Damoh. When we asked the learned Dy. Advocate General under which provision of law permission for construction of Church is required from respondent No.2-Collector, Damoh, he expressed his ignorance and rightly submitted that for construction of Church permission is required from Municipal Council, Damoh, under Section 187 of M.P.

Municipalities Act, 1961. He also pointed out that for the construction of Church, Municipal Council, Damoh granted permission on 21.2.2005 and sanctioned the plan.

13. Shri Prashant Singh, learned counsel appearing for the interveners (Ajay Masih and S.K. Das) submitted that the Disciples of Christ Church, Damoh is not a Trust under the M.P. Public Trusts Act, 1951 and cannot be allowed to construct the church building because pursuant to order dated 14.12.2006 passed by the learned Single Judge in W.P. No.18499/2006, the Registrar under the M.P. Public Trusts Act, 1951 has directed that the Disciples of Christ Church, Damoh be registered as a Public Trust under the M.P. Public Trusts Act, 1951 and the Trust property situated at Civil Station, Damoh Nazul Sheet No.41, 42, plot No.86/2 measuring 1.30 acre be registered as immovable property of the Trust.

14. The order passed by the Registrar under the M.P. Public Trusts Act, 1951 on 13.2.2007 directing that the Disciples of the Christ Church, Damoh be registered as a Public Trust and that the trust property situated at Civil Station Damoh Nazul Sheet No.41, 42, plot No.86/2 measuring 1.30 acre be registered as immovable property of the Trust has been challenged in W.P. No.3623/2007 and W.P. No.10326/2007 which we have heard analogously with the present writ petition and in our separate order delivered today in the said two writ petitions we have held that the Disciples of Christ Church, Damoh was already registered as a Society under the M.P. Society Registration Act, 1959 and was deemed to be registered under the M.P. Society Registration Adhiniyam, 1973 and was governed by the various provisions of the M.P. Society Registration Adhiniyam, 1973 and it was not necessary that the Society be again registered as a Public Trust. In our aforesaid order delivered today in W.P. No. 3623/2007 and W.P. No.10326/2007, we have also held that by the order dated 14.12.2006 of the learned Single Judge in W.P. No.18499/2006, the learned Single Judge had disposed of the writ petition with only a direction that the Registrar of Public Trusts shall comply with Sections 6 and 7 of the M.P. Public Trusts Act, 1951 and shall supply the certified copies of the entries of the register to enable the petitioners in the said writ petitions to file a suit but the petitioners have not filed the suit challenging the earlier order passed by the Registrar that the Society of Disciples of Christ Church, Damoh was already registered as a Society under the M.P. Society Adhiniyam, 1973 on 13.12.1962 and was exempted under Section 36(1)(b) of the M.P. Public Trusts Act, 1951 for further registration as a Trust under the Act of 1951. In our order delivered today in W.P. No.3623/2007 and in W.P. No.10326/2007 we have also found that the Registrar did not have any power under the Act of 1951 to review its earlier order and the remedy of the interveners was to file a civil suit but the interveners have not filed the civil suit. By the separate order delivered in W.P. No.3623/2007 and W.P. No.10326/2007, we have also quashed the order dated 13.2.2007 passed by the Registrar, Public Trust, Damoh in Revenue Case No.3-B/113(1)/2002-2003.

The result is that the disputes raised by the interveners (Ajay Masih and S.K. Das) with regard to non-registration of the church as a Trust under the M.P. Public Trusts Act, 1951 and the Church properties as Trust properties no longer survive.

15. We further find that the Collector by order dated 10.7.2006 has renewed the lease over an area of 1.32 acre in plot No.86/2 in favour of the Disciples of Christ Church, Damoh and the Damoh Municipality has already given permission in favour of the Disciples of Christ Church, Damoh to construct the church and has also sanctioned the plan for construction of the church. The only snag for construction of church is non-grant of permission for construction of church by the Collector, Damoh. The Collector, Damoh has no powers under any Act to grant or withdraw permission for construction of a building in a municipal area and the power is that of the Municipal Council under Section 187 of the Municipality Act, 1961. It however appears that by the orders passed in W.P.2333/2005 and M.C.C. No.2632/2005 a learned Single Judge of this Court conferred a jurisdiction on the Collector, Damoh to permit construction or not to permit construction of the church on the land in question. We further find that the Collector is sitting over the matter and for considerations which are not relevant withholding permission for construction of Church. Therefore, to prevent miscarriage of justice, we recall the earlier orders passed by the learned Single Judge in W.P.2333/2005 and M.C.C. No.2632/2005 directing the Collector to permit or not to permit construction of the church.

16. In *Shivdeo Singh and others vs. State of Punjab and others*, AIR 1963 SC 1909, a writ petition was first filed by a party for cancellation of the order of allotment in favour of another party and the High Court cancelled the order in favour of the other party though it was not party in the writ petition. Subsequently the party in whose favour the allotment had been made filed an another writ petition under Article 226 of the Constitution and the High Court reviewed its order passed in the first writ petition, and the Supreme Court held that the second writ petition was maintainable and the High Court has not acted beyond jurisdiction. The Supreme Court further observed :-

> "It is sufficient to say that there is nothing in Art. 226 of the constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it."

17. Church is a place of public worship where the persons having Christian faith perform their prayers, ritual, ceremonies for marriage, and other discourses and religious functions. Article 26 guarantees to a religious denomination the right to acquire movable and immovable property. It is an admitted position that

there existed an old Church which was in a dilapidated condition and was demolished in February-March 2005. In its place construction of new Church building has been started, after due sanction from the Municipality. The question whether it is in accordance with the sanctioned plan or not is a matter to be examined by Municipality. The Church is a place of worship and is required badly by Christian community of the area since there does not exist any Church building in Damoh District. The group of persons in whose favour the permission to build was granted have to be allowed to construct the Church. Admittedly, ICCDC is in possession of Church building and has started construction of the new building of the Church, and should be allowed to complete the construction of the Church. The interveners or the State should not be allowed to interfere with the right guaranteed to a religious denomination to construct its place of worship on a land leased out to the religious denomination. In the absence of a Church, all the necessary rituals and religious functions which are carried out in Church cannot be carried out. Thus, the High Court exercising powers under Article 226 of the Constitution to enforce the rights guaranteed under Article 26 of the Constitution must pass orders keeping in view the right of local Christian community of Damoh District guaranteed under Article 26 of the Constitution.

18. Thus we direct that construction of the Church over an area of 1.30 acres of plot No.86/2 on the basis of permission granted by the Municipal Council, Damoh shall go on and respondent No.3 i.e. Collector, Damoh or any other Officer of the Administration or the Police will not restrain them from constructing the Church in accordance with the permission/sanction granted by the Municipal Council, Damoh.

19. With the aforesaid directions, writ petition is allowed and disposed of. No costs.

Petition allowed.

I.L.R. [2009] M. P., 2906
WRIT PETITION

Before Mr. Justice S. Samvatsar & Mr. Justice A.P. Shrivastava
21 August, 2009*

RAJESH SINGH & ors. ... Petitioners
Vs.
MANOJ KUMAR ... Respondent

A. **Civil Procedure Code (5 of 1908), Section 10, Accommodation Control Act, M.P. 1961, Sections 12(1)(a), (c) & (n) -** *Stay of suit - Applicability - Earlier suit for declaration of title and subsequent suit for*

*W.P. No.2751/2009 (Gwalior)

ejectment u/s 12(1)(a), (c) & (n) of Act for same property - Application u/s 10 CPC filed for staying the subsequent suit that in both the suits issue about ownership of the suit property was common - Held - S. 10 would apply only if there is identity of matter in issue in both the suits, meaning thereby, that the whole of subject matter in both the proceedings is identical - Since for getting a decree of eviction on the grounds u/s 12(1)(a), (c) & (n) of Act ownership of the suit property is not required to be proved - Trial Court rightly refused to stay the subsequent suit. (Para 13)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 10, स्थान नियंत्रण अधिनियम, म.प्र. 1961, धाराएँ 12(1)(ए), (सी) व (एन) – वाद की रोक – प्रयोज्यनीयता – एक ही सम्पत्ति के लिए पूर्ववर्ती वाद स्वत्व घोषणा के लिए और पश्चात्वर्ती वाद अधिनियम की धारा 12(1)(ए), (सी) व (एन) के अन्तर्गत बेदखली के लिए – पश्चात्वर्ती वाद को रोकने के लिए सि.प्र.सं. की धारा 10 के अन्तर्गत आवेदन पेश किया गया कि दोनों वादों में वादग्रस्त सम्पत्ति के स्वामित्व संबंधी विवाद्यक समान था – अभिनिर्धारित – धारा 10 केवल तभी लागू होगी यदि दोनों वादों में विवाद्य विषय समान हो, जिसका अर्थ है कि दोनों कार्यवाहियों में सम्पूर्ण विषयवस्तु समान हो – चूंकि अधिनियम की धारा 12(1)(ए), (सी) व (एन) के आधारों पर बेदखली की डिक्री अभिप्राप्त करने के लिए वादग्रस्त सम्पत्ति का स्वामित्व साबित किया जाना आवश्यक नही है – विचारण न्यायालय ने पश्चात्वर्ती वाद रोकने से उचित रूप से इंकार किया।

B. Civil Procedure Code (5 of 1908), Section 10 - *Stay of suit - Applicability - The fundamental test to attract S. 10 is whether on final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit - S. 10 applies only in cases where whole of the subject matter in both the suits is identical.* (Para 13)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 10 – वाद की रोक – प्रयोज्यनीयता – धारा 10 को आकृष्ट करने के लिए मूलभूत परीक्षण यह है कि क्या पूर्ववर्ती वाद में अंतिम विनिश्चय पर पहुंचने पर ऐसा विनिश्चय पश्चात्वर्ती वाद में पूर्व न्याय के रूप में प्रवर्तित होगा – धारा 10 केवल उन मामलों में लागू होती है जहाँ दोनों वादों में सम्पूर्ण विषय वस्तु समान हो।

C. Civil Procedure Code (5 of 1908), Section 10 - *Stay of suit - Applicability - The key words in S. 10 are "the matter in issue directly and substantially in issue" in the previously instituted suit - Words "directly & substantially in issue" are used in contra-distinction to the word "identically or collaterally in issue."* (Paras 13)

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 10 – वाद की रोक – प्रयोज्यनीयता – धारा 10 में आधार शब्द हैं पूर्वतन संस्थित वाद में "विवाद्य विषय प्रत्यक्षतः और सारतः विवाद्य" – शब्द "समरूपतः या प्रसंगतः" के प्रति–विभेद में शब्द "प्रत्यक्षतः और सारतः विवाद्य" प्रयोग किये गये हैं।

RAJESH SINGH Vs. MANOJ KUMAR

Cases referred :

1962 JLJ SN 60, 1962 JLJ 120, 1979 MPLJ SN 66, 1982 MPRCJ 123; AIR 1881 SC 1113, (2003) 11 SCC 759, AIR 2005 SC 242.

P.C. Chandil, for the petitioners.

Aniket Naik, for the respondent.

ORDER

The Order of the Court was delivered by S. SAMVATSAR, J. :–This writ petition is filed by the defendant challenging the order dated 15/4/2009 passed by Second Additional District Judge to the Court of First Additional District Judge, Gwalior in Civil Suit No.59A/06 whereby the trial court has rejected the application filed by the present petitioner defendant under section 10 of the Code of Civil Procedure for stay of subsequent suit.

2. Facts of the case, briefly stated are that the respondent plaintiff had filed a civil suit for declaration in respect of the property in dispute against the present defendant in the month of November, 2005. Present petitioner filed his written statement in the said suit denying the title of the plaintiff. Plaintiff, therefore, filed another suit under section 12 (1) (a)(c) and (n) of the M.P. Accommodation Control Act, 1961 against the present petitioner for ejectment. In that suit, the defendant filed his written statement and again denied the title of the plaintiff. In such circumstances, in both the suits, one of the issues was common that whether the plaintiff is the owner of the suit property. In view of this common issue, present petitioner defendant filed an application under section 10 C.P.C. for staying the subsequent suit, i.e. the suit for ejectment. Said application stood dismissed by the order which is impugned in this petition under Article 227 of the Constitution of India.

3. Shri P.C.Chandil, learned counsel for the petitioner - defendant contended that for staying a suit under section 10 of C.P.C., issue in two suits must be substantially the same. In the present case, substantial issue which is common in both the suits is the owner of the property in question. Since this substantial issue is common in both the suits, the subsequent suit filed by the plaintiff deserves to be stayed. To buttress his argument, learned counsel lay hands on a decision of this Court in the case of *Munnalal vs. Purushottamlal,* 1962 JLJ SN 60 wherein this Court has held that for staying the suit under section 10 of C.P.C. complete identity of the two suits is not necessary and substantial identity of the subject matter or material issue is sufficient to attrack the provisions of section 10 of C.P.C.; if said section is attracted, then it is mandatory for the court to stay the proceedings in the subsequent suit.

4. Another judgment in the case of *M.G.Upadhyaya vs. R.Verma,* 1962 JLJ 120 is relied upon by the learned counsel for the petitioner in which this Court has held that the real question is whether the matter in issue in the subsequent suit is

directly and substantially in issue in the earlier suit. The test for determine whether or not the matter is directly and substantially in issue in both the suits, in case a decision is given in the first suit determining the issue whether that would operate as res judicata for the subsequent suit.

5. In the case of *Parvatibai vs. Ram Prasad,* 1979 MPLJ SN 66, this Court has again laid down that when decision in the previous suit operates as res judicata in the subsequent suit, then section 10 of C.P.C. is attracted.

6. In case of *Bhalchand v. Shrichand,* 1982 MPRCJ 123, this Court has again held that when in both the suits the parties are the same and material issues involved are practically identical, then the suit should be stayed.

7. Thus, according to the learned counsel for the petitioner - defendant, present suit be stayed because in previous suit, if it is held that the plaintiff is not the owner of the property, then in subsequent suit, decree cannot be passed against him.

8. In reply to the arguments raised by the learned counsel for the petitioner, Shri Aniket Naik, learned counsel for the respondent - plaintiff contended that in a suit for ejectment, title is incidental and for passing a decree under section 12 (1)(a)(c)(n) of the M.P. Accommodation Control Act, 1961 (for brevity, the "Act"), it is not necessary that the plaintiff should be the owner of the property. He contended that for getting a decree for ejectment on these grounds, the plaintiff must be landlord and it is not required that he should be the owner of the property.

9. To support his contention, learned counsel for the respondent plaintiff has drawn attention of this Court to the definition of "landlord" as defined in section 2 (b) of the Act. As per the said definition, "landlord" means a person, who, for the time being, is receiving, or is entitled to receive, the rent of any accommodation, whether on his own account or on account of or on behalf of or for the benefit of, any other person or as a trustee, guardian or receiver for any other person or who would so receive the rent or be entitled to receive the rent, if the accommodation were let to a tenant and includes every person not being a tenant who from time to tile derives title under a landlord.

10. Thus, according to the learned counsel for the respondent plaintiff, the definition of landlord is wider than the owner and the person who is collecting rent is also a landlord. So according to the learned counsel, even if in the previous suit it is held that the plaintiff is not the owner of the property, still, a decree for ejectment can be passed in favour of the respondent plaintiff, if it is proved that he is the landlord within the meaning of Section 2 (b) of the Act.

11. The Apex Court in the case of *M.M.Quasim vs. Manohar Lal Sharma,* AIR 1981 SC 1113 has considered the definition of "landlord" and held that the definition of landlord in section in section 2 (d) of the Bihar Building (Lease, Rent

and Eviction) Control Act is couched in very wide language; however, this wide amplitude of expression has been cut down in case of personal requirement whether the provision of law requires that for getting a decree on the ground of personal requirement, plaintiff should be owner of the property. But so far as other grounds are concerned, if it is held that the plaintiff is a landlord, he is entitled to a decree for ejectment against a tenant.

12. Similarly, the Apex Court in the case of *Radha Devi vs. Deep Narayan Mandal and others*, (2003) 11 SCC 759 has held that if the eviction proceedings are initiated during the pendency of the title suit filed in respect of other premises between the same parties, then the subsequent suit cannot be stayed under section 10 of C.P.C. According to the Apex Court, in a suit filed by the landlord against a tenant the question of title is not substantial but is incidental for passing a decree for ejectment and in such circumstances, the suit for ejectment cannot be stayed.

13. In the case of *National Institute of Mental Health and Neuro Sciences v. C. Parameshwara*, AIR 2005 SC 242 the Apex Court has laid down that the object of S. 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract S. 10 is, whether on final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject matter in both the suits is identical. The key words in S. 10 are "the matter in issue is directly and substantially in issue" in the previously instituted suit. The words "directly and substantially in issue" are used in contra-distinction to the words "incidentally or collaterally in issue". Therefore, S. 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of subject matter in both the proceedings is identical.

14. In a suit for ejectment which is not filed under section 12 (1) (e) and (f) of the Act, the question of title is not directly and substantially in issue but is incidental and collateral and therefore, section 10 of CPC will not be attracted.

15. In view of the aforesaid discussions, the court below has rightly refused to stay the suit filed by the landlord for ejectment on the ground of section 12(1)(a)(c)(n) of the Act since for getting a decree for eviction of these grounds, plaintiff is not required to prove that he is the owner of the property. He can get a decree for ejectment if it is proved that he is the landlord within the definition of section 2(b) of the Act.

16. Resultantly, present petition is without any merit and is dismissed.

Petition dismissed.

I.L.R. [2009] M. P., 2911
WRIT PETITION
Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh
15 September, 2009*

KUMER SINGH BHATI ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Constitution, Article 226 - P.I.L. - *Misappropriation of public money in construction of canals - Lokayukt was requested for enquiry of mis-appropriation of fund - Benefit for which dam was constructed is not reaching the villagers after two decades of its completion - State Government directed to immediately consider and take decision so that construction of canals is completed without any further delay - Petition allowed.* (Paras 9 & 11)

संविधान, अनुच्छेद 226 – लोकहित वाद – नहरों के निर्माण में लोकधन का दुर्विनियोग – लोकायुक्त से निधि के दुर्विनियोग की जाँच का निवेदन किया गया – जिन ग्रामीणों के लाभ के लिए बांध का निर्माण किया गया था, निर्माण पूर्ण होने के दो दशक बाद भी उन्हें इसका लाभ नहीं मिल रहा है – राज्य सरकार को निदेशित किया गया कि तत्काल विचार करे और निर्णय ले ताकि नहरों का निर्माण बिना किसी अतिरिक्त विलम्ब के पूर्ण हो जाए – याचिका मंजूर।

R.K. Samaiya with *Shailendra Samaiya*, for the petitioner.
Kumaresh Pathak, Dy.A.G., for the respondent/State.

ORDER

The Order of the Court was delivered by AJIT SINGH, J. :–This public interest litigation has been filed by the petitioner, who is an agriculturist from village Chapar, Tahsil Astha, District Sehore. He has prayed for a direction against the respondents to construct the canals for which lands of villagers were acquired and irrigation cess collected from the farmers be refunded. The petitioner has also prayed for an inquiry against the erring officers who have misappropriated huge amount of Government money by wrongly showing on papers that the construction work of canals was completed.

2. Briefly stated the facts are these. A pilot project for the construction of dam and canals was prepared by the State Government under a Rehabilitation of Minor Irrigation Tank Scheme. The project was given administrative approval on 29.11.1977 and 311.33 acres of land of different villagers in Tahsil Astha was acquired. The State Government also sanctioned Rs.43.75 lakh for the project. The project provided for the construction of dam in village Chapar and canals to extend irrigation facilities to 520 acres of land in the command area. Under the project, 200 chains of Right Bank Canal, 110 chains of Left Bank Canal and 60 chains of Minor Canal were to be constructed. The farmers to be benefited by the

*W.P. No.4259/1997 (Jabalpur)

construction of dam and canals for irrigation were of villages Chapar, Killod, Dhankhedi, Deoli, Kelapani and Arniya Johri, all in Tahsil Astha.

3. The case of petitioner is that although dam in Chapar was constructed in the year 1979, the canals were never constructed and, therefore, the farmers have been deprived of irrigation facilities proposed for them under the project. According to him, in the year 1994-95 the State Government sanctioned Rs.43.65 lakh for the construction of canals but the concerned officers, without constructing canals, misappropriated the amount by preparing a false report that construction work of canals had been completed. The petitioner has also averred that the officers of Water Resources Department, in order to cover up their misdeeds, have illegally recovered irrigation cess from him and other farmers vide receipts, Annexures P13 and P14. The grievance of petitioner is that although various representations and complaints were made to the State Government for the construction of canals, as provided in the project and also for taking action against the erring officers of Irrigation/ Water Resources Department, none of them was met with a positive response and hence he was constrained to file the present petition.

4. The respondents in their return filed on 19.5.2001 have stated that the construction work of 103 chains of Right Bank Canal, 110 chains of Left Bank Canal and 60 chains of Minor Canal was completed by the year 1995-96 and by constructing these canals irrigation facilities were being provided to lands 82.99 hectares in village Chapar, 10.63 hectares in village Kelapani and 161.38 hectares in village Arniya Johri i.e. during the year 1993-94 total 255.00 hectares were irrigated in these three villages. The respondents have also stated that up to 1995-96 Rs.43.75 lakh was spent in the construction of dam and canals and after 1995 no construction work was undertaken due to paucity of funds and a proposal for the sanction of Rs.75.60 lakh was pending with the State Government for completion of remaining work.

5. As the above claim of respondents regarding construction of canals was seriously disputed by the petitioner, we, by our order dated 2.2.2009, directed the Registrar (Vigilance) (I) of this Court to make a spot inspection in the presence of representatives of the petitioner and State Government and submit a report.

6. The Registrar (Vigilance) (I), visited the spot on 20.2.2009 in the presence of all concerned and submitted his report dated 25.2.2009. The report states that there is an earthen canal on the eastern end at right side of dam, which is not in a running condition. The report indicates that canal, after the distance of about 25 to 30 feet from the dam, is divided into two sub-canals i.e. Right Bank Canal and Left Bank Canal and the existence of Right Bank Canal was found only up to 500 meters whereas the Left Bank Canal was in a form of small drain and its existence was visible only up to 45 meters. Beyond this limit, the report says that the visibility of both these sub-canals was lost amidst big grasses and thorny bushes and virtually they ceased to exist any further. The report further states that the above canal

structures were on lands which partly belong to village Kelapani and partly to village Arniya Johri and the agricultural fields of only 8 to 10 persons of village Kelapani and 10 to 15 persons of village Arniya Johri were being irrigated. The report also clearly mentions that no canals were found in existence nor was there any visible evidence of any such construction having ever been undertaken for irrigation of agricultural fields of villages, Chapar, Killod, Dhankhedi and Deoli.

7. A copy of the report was ordered to be given to the Principal Secretary of Water Resources Department who responded by filing an affidavit dated 22.8.2009 stating that lining work in the canals and their maintenance could not be done due to non-allocation of funds and only earthwork to some extent was executed. According to him, with the passage of time due to silting and filling of canals and because of non-maintenance, the canal work had deteriorated and lost its original section in some portions. The Principal Secretary has further stated in the affidavit that a proposal for the sanction of Rs.143.90 lakh to complete the project was pending and as soon as the proposal would be approved, project work will be completed. Since we found the affidavit of Principal Secretary to be inconsistent with the earlier stand taken before this Court in the return that the canal work was completed and irrigation facilities through such canals were provided, we directed him and Executive Engineer to explain as to what extent canal was completed out of the fund of Rs.43.75 lakh.

8. On 3.3.2009 the respondents filed an additional return and stated that out of Rs.43.75 lakh, the amount spent in the construction of dam was Rs.36.61 lakh and only Rs.7.14 lakh was spent in the construction of canals. The additional return also states that although the canals were constructed, as stated in the first return, no cement and concreting work was done in the canals as neither the work of cement lining nor concreting was sanctioned and in the absence of any budget for maintenance, the maintenance of canals could not be done.

9. We intend to first examine whether there is sufficient material for directing an inquiry or investigation on the allegation that a huge amount of Government money has been misappropriated by the officers of Water Resources Department. The petitioner has alleged that although the dam was constructed in the year 1973, the canals were never constructed and the officers misappropriated the amount of Rs.43.65 lakh meant for the construction of canals after preparing a false report that its construction work had been completed. The respondents in their first return denied the allegation and took a stand that the canal work was completed in the Right Bank Canal up to 103 chains, in Left Bank Canal up to 110 chains and Minor Canal up to 60 chains in the year 1995-96 and irrigation facilities were provided to a total of 255 hectares of land in villages Chapar, Kelapani and Arniya Johri. A report dated 25.2.2009 of the Registrar (Vigilance) (I) of this Court clearly indicates that the canals are virtually non-existent after some distance from the dam and the lands of only very few persons of villages Kelapani and

Arniya Johri were getting irrigation facilities. After the report of Registrar (Vigilance) (I), the respondents have now taken a stand that since no lining and concreting work was done in the canals and maintenance fund was not allocated, the canal work deteriorated and lost its original section in some portions. It is to be noted that Registrar (Vigilance) (I) has also reported that neither the canals were found in existence nor were they found constructed for irrigation of agricultural fields in villages Chapar, Killod, Dhankhedi and Deoli. These averments, particularly the stand taken by the respondents after the receipt of report of Registrar (Vigilance) (I), create a serious doubt in our mind that the canals were ever constructed as per the project. And the truth must be unearthed which, in the present case, can only be done by an inquiry or investigation through an independent agency. We accordingly request the Lokayukt of the State of Madhya Pradesh to have the allegation of misappropriation of Rs.43.75 lakh by the officers of Water Resources Department inquired or investigated and take such necessary action which he may deem proper after the receipt of report of inquiry or investigation.

10. As regards the prayer of petitioner that irrigation cess collected from the farmers be directed to be refunded, we are of the considered view that no general direction of such nature can be ordered in this petition. The respondents have taken a stand that irrigation cess was collected only from those farmers who were provided irrigation facilities through the dam and canals. Rule 139 of the Madhya Pradesh Irrigation Rules, 1974 provides for refund or adjustment of excess recovery of irrigation cess by the Superintending Engineer. Thus, if any individual farmer has a grievance against illegal or excess recovery of irrigation cess, he can apply for the refund or adjustment of the same before the Superintending Engineer who, on receiving such an application, will decide the same on its merit.

11. Lastly, the petitioner has prayed for a direction against the respondents to construct the canals so that irrigation facilities which were proposed to villagers under the project be extended to them. We find that 311.33 acres of land in Tahsil Astha was acquired to provide irrigation facilities to 520 acres of land. This was done as far back as in the year 1977 and the dam was constructed in the year 1979. But the canals are virtually non-existent and a proposal for completing the construction of canal work is pending since long. In the result, the villagers are being deprived of irrigation facilities. We, therefore, direct the respondents to immediately consider and take a decision on the proposal so that construction work of canals is completed without any further delay. We are constrained to give this direction because the benefit for which the dam was constructed is not reaching the villagers even after two decades of its completion.

12. The petition is allowed as indicated in paragraphs 9 and 11 of the order.

Petition allowed.

I.L.R. [2009] M. P., 2915
ELECTION PETITION
Before Mr. Justice R.C. Mishra
31 July, 2009*

RAM PAL SINGH .... Petitioner
Vs.
DEVENDRA PATEL & ors. ... Respondents

Civil Procedure Code (5 of 1908), Order 6 Rule 17, Representation of the People Act, 1951, Section 87 - *Amendment in the election petition - Permissibility - Held - The election petition can not be allowed to be amended, under Order 6 Rule 17 CPC r/w S. 87 of the Act, by inserting a new claim that had already become barred by limitation on the date of the corresponding application.* (Para 15)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17, लोक प्रतिनिधित्व अधिनियम, 1951, धारा 87 – निर्वाचन याचिका में संशोधन – अनुज्ञेयता – अभिनिर्धारित – सि.प्र.सं. के आदेश 6 नियम 17 सहपठित धारा 87 के अन्तर्गत, नया दावा शामिल करके, जो पहिले से तत्संबंधी आवेदन की तारीख को परिसीमा से वर्जित हो चुका था, निर्वाचन याचिका संशोधित किये जाने की अनुमति नहीं दी जा सकती।

Cases referred :

1996(I) MPWN 101, AIR 1954 SC 440, AIR 1957 SC 444, AIR 1954 SC 210, AIR 1982 SC 983, AIR 1974 SC 480, AIR 1969 SC 677.

O R D E R

R.C. Mishra, J. :–This order shall govern disposal of I.A. No.7/2009, which is an application, under Order 6 Rule 17 of the Code of Civil Procedure read with Section 87 of the Representation of the People Act, 1951, (for short 'the Act') for amendment by adding an additional relief of declaration that the petitioner himself has been duly elected to the State Legislative Assembly from Silvani Constituency.

2. In this petition, under Section 80 read with Section 80-A of the Act, the validity of the election of the returned candidate viz. respondent no.1 has been challenged on the ground of an incorrect counting of votes. The result of the election was declared on 8.12.2008. Having lost the election by a narrow margin of votes, the petitioner, within the prescribed period of 45 days, presented the petition wherein the following reliefs have been claimed –

(i) declaration that election of the returned candidates is void.

(ii) direction for a recounting of votes.

3. According to the petitioner, he is also entitled to claim a further declaration that he has been duly elected but it was due to sheer over-sight that the relief was left out of the Petition.

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*Eelection Petition No.16/2009 (Jabalpur)

4. The prayer has been vehemently opposed on the ground that the additional relief sought to be incorporated in the petition had already become time barred on 15.2.2009 i.e. the date of filing of the amendment application. To fortify the objection, learned counsel for the respondent no.1 has made reference to the decision of Apex Court in *Munilal v. Oriental Fire & General Insurance Co. Ltd.* 1996 (I) M.P.W.N. [101].

5. Learned counsel for the petitioner, while placing strong reliance on the following observations made by a Constitution Bench in *T.C. Basappa v. T. Nagappa* AIR 1954 SC 440, has strenuously contended that there is no bar whatsoever to introduce the declaratory relief even after the expiry of the statutory period of limitation to call the election in question : -

> Coming now to the question of amendment, the High Court, after an elaborate discussion of the various provisions of the Act, came to the conclusion that the Election Tribunal which is a special court endowed with special jurisdiction has no general power of allowing amendment of the pleadings, and that the express provision of Section 83(3) or the Act, which empowers the Tribunal to allow amendments with respect to certain specified matters, impliedly excludes the power of allowing general amendment as is contemplated by Order 6 Rule 17, of the Civil Procedure Code. Here again the discussion embarked upon by the High Court seems to us to be unnecessary and uncalled for. The only amendment applied for by the petitioner was a modification in the prayer clause by insertion of an alternative prayer to the original prayer in the petition. No change whatsoever was sought to be introduced in the actual averments in the petition and the original prayer, which was kept intact, was repeated in the application for amendment. The alternative prayer introduced by the amendment was not eventually allowed by the Tribunal, which granted the prayer of the petitioner as it originally stood. In these circumstances the mere fact that the Tribunal granted the petitioner's application for amendment becomes altogether immaterial and has absolutely no bearing on the actual decision in the case. We are unable to hold therefore that the Tribunal acted without jurisdiction in respect to either of these two matters.

Attention has also been invited to a subsequent decision of the Apex Court on the point in *Harish Chandra Bajpai v. Triloki Singh* AIR 1957 SC 444.

6. As reproduced in *Harish Chandra Bajpai's case* (above), Section 83(3) [prior to its substitution by Act 27 of 1956] read as under -

> The Tribunal may upon such terms as to costs and otherwise as

it may direct at any time, allow the particulars included in the said list to be amended or order such further and better particulars in regard to any matter referred to therein to be furnished as many in its opinion be necessary for the purpose of ensuring a fair and effectual trial of the petition".

7. This provision, in substance, corresponds to the first part of sub-section (5) of Section 86 of the Act as inserted by Act 47 of 1996 whereas the second part creates a positive bar in the following terms -

"but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition".

8. Further, by virtue of the Amending Act, 1966, Section 90(2) was, in essence, substituted by Section 87(1) of the Act. Thus, the law relating to amendment of pleadings in an election petition, as explained in *Harish Chandra Bajpai's case* (supra), still holds the field with the only modification that if the amendment sought relates to corrupt practice, it would be subject to the rider placed by second part of Section 86(5). Accordingly, -

(i) this Court has power to allow particulars in respect of illegal or corrupt practices to be amended, provided the petition itself specifies the grounds or charges.

(ii) this Court has power under Order 6 Rule 17 to order amendment of a petition, but that power cannot be exercised so as to permit new grounds or charges to be raised or to so alter its character as to make it in substance a new petition, if a fresh petition on those allegations will then be barred.

9. *T.C. Basappa's case* (supra) is primarily an authority for the proposition that it is a patent error which can be corrected by certiorari but not a mere wrong decision. The effect of observations relied upon by learned counsel for the petitioner has, therefore, to be understood in the context that the Constitution Bench had refused to interfere, after noticing that the amendment of relief clause, though permitted even after expiry of the prescribed period, had become altogether immaterial and had absolutely no bearing on the actual decision in the case. In this view of the matter, the ratio in *T.C. Basappa's case* is of no avail to the petitioner, particularly in the wake of the principles deducible from the subsequent decisions on the subject.

10. It is true that sub-section (1) of Section 87 of the Act lays down that every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits, subject to the provisions of this Act and of any rules made thereunder but,

as laid down by a five Judge Bench of the Apex Court in *Jagan Nath v. Jaswan Singh* AIR 1954 SC 210, an Election Petition is not an action at common law or equity but is a purely statutory proceedings. As explained by M.C. Mahajan, C.J., while speaking for the Bench : -

> "The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the Court possesses no common law power."

11. The view was re-affirmed in *Jyoti Basu v. Debi Ghosal* AIR 1982 SC 983 in the following terms -

> Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act.

12. This apart, it was held in *Hukumdev Narain Yadav v. Lalit Narain Mishra* AIR 1974 SC 480 that even by virtue of Section 29(2) of the Limitation Act, the provisions thereof would not become applicable to an Election Petition under the Act, which itself is a self-contained Code.

13. In a subsequent case of *Mohan Raj v. Surendra Kumar Taparia* AIR 1969 SC 677, the Supreme Court, while rejecting the argument that O.6 R.17 and O.1 R.10 enable the High Court respectively to order amendment of a petition and to strike out parties even after expiry of the period of limitation, held that these provisions of Civil Procedure Code cannot be used as curative means to save election petition.

14. There is yet another aspect of the matter. In case, for the argument's sake, the declaratory relief sought to be claimed by way of amendment is permitted to be incorporated, it would entitle the returned candidate or any other party to file a recrimination petition to the effect that election of the petitioner would have been void if he had been the returned candidate and a petition had been presented calling in question his election and as an obvious consequence, the scope of inquiry in this election trial would be enlarged. However, as explained by the Apex Court

in *Harish Chandra Bajpai's case* (supra), the power under Order 6 Rule 17 cannot be exercised to permit new grounds or charges to be raised or to so alter its character as to make it in substance a new petition, if a fresh petition or those allegations will then be barred. [Emphasis supplied]

15. Thus, viewed from any angle, the election petition can not be allowed to be amended, under Order 6 Rule 17 of the Code of Civil Procedure read with Section 87 of the Act, by inserting a new claim that had already become barred by limitation on the date of the corresponding application.

16. In the result, I.A. No.7/2009, therefore, stands dismissed.

Order accordingly.

I.L.R. [2009] M. P., 2919
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik
15 April, 2009*

SARASWATI BAI & ors. ... Appellants
Vs.
ASGAR ALI & ors. ... Respondents

Motor Vehicles Act (59 of 1988), Section 166 Proviso - *Without impleading minor children of deceased earlier claim petition filed by widow which was compromised - Subsequent claim petition filed by minor children - Held - Since the right to demand compensation u/s 166 flows in favour of minor children being legal representatives of deceased - Can not be denied on the basis of compromise entered into with opposite party by widow of deceased - Subsequent claim petition to be adjudicated independently on its merit - Appeal allowed.* (Paras 5 & 6)

मोटर यान अधिनियम (1988 का 59), धारा 166 परन्तुक – मृतक की अवयस्क संतानों को पक्षकार बनाये बिना पूर्व दावा याचिका विधवा महिला द्वारा पेश की गई जिसमें समझौता हो गया – पश्चात्वर्ती दावा याचिका अवयस्क संतानों द्वारा पेश की गयी – अभिनिर्धारित – चूंकि मृतक के विधिक प्रतिनिधि होने से प्रतिकर की माँग करने का अधिकार अवयस्क संतानों के पक्ष में प्रवाहित होता है – मृतक की विधवा द्वारा विरोधी पक्षकार के साथ किये गये समझौते के आधार पर इंकार नही किया जा सकता – पश्चात्वर्ती दावा याचिका उसके गुणदोषों पर स्वतंत्र रूप से न्यायनिर्णीत की जाए – अपील मंजूर।

B. **Motor Vehicles Act (59 of 1988), Section 166(1) Proviso** - *Duty of claims tribunal - Claim application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and who have not so joined shall be impleaded as respondents - It was the bounden duty of the*

*M.A. No.925/2000 (Jabalpur)

claims tribunal to ascertain the position of all legal representatives of the deceased and to get them impleaded in claim case. (Para 5)

ख. मोटर यान अधिनियम (1988 का 59), धारा 166(1) परन्तुक – दावा अधिकरण का कर्तव्य – दावा आवेदन मृतक के सभी विधिक प्रतिनिधियों की ओर से या उनके लाभ के लिए किया जायेगा और जो इस प्रकार संयोजित नही किये गये हैं, प्रत्यर्थी के रूप में पक्षकार बनाये जायेंगे – दावा अधिकरण का यह बाध्यकारी कर्तव्य है कि मृतक के सभी विधिक प्रतिनिधियों की स्थिति अभिनिश्चित करे और दावा मामले में उन्हें पक्षकार बनवाये।

R.K. Patel, for the appellant.

None, for the respondents though served.

ORDER

ABHAY M. NAIK, J. :–Facts relevant for the purposes of this appeal are in very narrow compass. Maniram Gond, father of claimants/ appellants was accompanying Vinod Shukla, on a Motorcycle on 16.7.1992, when he was hit by a bus bearing registration No.MKI-1654, belonging to respondent No.2 which was being driven in a rash and negligent manner by respondent No.1. It was a head on collision. Due to the accident Maniram fell down from the motorcycle and was crushed by the bus, causing his death. A Claim Petition under Section 166 of the Motor Vehicles Act, was submitted by the minor children of Maniram through their grand-mother Mannobai. It was resisted inter alia on the ground that mother of the claimants who happened to be the widow of Maniram had submitted a Claim Case No.24/92, which terminated into a compromise for a sum of Rs.30,000/- accepted by the Motor Accident Claims Tribunal, Mandla, on 22.11.1992.

2. Learned Addl. Motor Accident Claims Tribunal, Dindori, Camp Mandla, vide the impugned order dated 18.1.2000 passed in Motor Accident Claim Case No.38/99, dismissed the Claim Petition of claimants/appellants on the ground that their mother has already received Rs. 30,000/- as compensation on account of death of Maniram by way of compromise recorded in earlier claim Case No.24/92 and, therefore, there is no legal propriety in again claiming the amount of compensation.

3. Shri Patel, learned counsel for appellants contended that claimants are entitled to amount of compensation on account of death of their father which arose out of the use of motor vehicle and they cannot be deprived of the same merely on account of their mother having received the amount of compensation for her on.

4. Sub-section (1) of Section 166 of the Motor Vehicles Act, 1988, provides for an application for compensation which runs as under :-

> "166(1) Application for compensation- An application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 may be made :-

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person, injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application."

5. Accordingly, respondent No.3, who happened to be the mother of claimants was within her rights to submit an application for compensation being a legal representative of the deceased. However, proviso to sub-section (1) of Section 166 of the Act, makes it clear that an application for compensation ought to have been made on behalf of or for the benefit of all the legal representatives. It further provides that legal representatives who have not joined as claimants, shall be impleaded as respondents. Certified copy of the order dated 22.11.1992 recording and accepting thereby the compromise in earlier Motor Accident Claim Case No.24/92 is on record which reveals that the earlier Claim Petition was submitted by respondent No.3 alone on her own behalf and it was not submitted on behalf of all the legal representatives. It is not disputed that claimants/ appellants are children of deceased Maniram. In Claim Petition No.24/92 present claimants were not joined as applicants or further were not impleaded as respondents. Thus, the compromise between respondents interse was accepted by the Court in earlier Claim Case No.24/92 on 22.11.1992, without ascertaining the position of other legal representatives of the deceased e.g. present claimants/appellants. In view of the aforesaid proviso, it was the bounden duty of the Claims Tribunal to ascertain the position of other legal representatives of the deceased and to get them impleaded in the claim case. Moreover, the claimants/appellants being minors, respondent No.3 could not have entered into a compromise on their behalf without leave of the Court as required under Order 32 Rule 7 of Code of Civil Procedure. Application for such leave was required to be filed along with an affidavit of the next friend or guardian to the effect that the agreement of compromise proposed is for the benefit of minors. No such procedure seems to have been followed in the order sheet dated 22.11.1992 in earlier claim Case No.24/92. Thus, by no stretch of imagination, the compromise recorded and accepted vide order dated 22.11.1992 may be legally treated as on behalf of minor claimants. Since the right to demand compensation

under Section 166 of the Motor Vehicles Act, flows in favour of claimants being legal representatives of deceased, it cannot be denied on the basis of a compromise entered into with the opposite party by another legal representative of the deceased. Application for compensation submitted by the Claimants/appellants is, therefore, to be adjudicated independently on its own merit, in accordance with law, without getting influenced by the earlier order dated 22.11.1992.

6. Learned Claims Tribunal has, thus acted with illegality in dismissing the claim for compensation of the minor claimants/appellants on the basis of the earlier compromise to which the minor claimants/appellants were not party and further for the reason that the compensation is found to have been received by respondent No.2 in her own capacity.

7. In the result, the appeal is, hereby, allowed. Impugned award dated 18.1.2000 is, hereby, set aside. Learned Claims Tribunal is directed to redecide the Claim Petition afresh on its own merit, within a period of four months from the date of receipt of this order, in accordance with law, without getting influenced by the earlier order dated 22.11.1992.

8. Appeal accordingly stands allowed with the aforesaid direction. Claimants/ appellants are directed to appear before the trial Court on 4 May 2009.

No order as to costs.

Appeal allowed.

I.L.R. [2009] M. P., 2922
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
14 July, 2009*

ADIM JATI SEVA SAHAKARI SAMITI MARYADIT ... Appellant
Vs.
KODAR & ors. ... Respondents

A. Cooperative Societies Act, M.P. 1960 (17 of 1961), Sections 64 & 82 - *Bar of jurisdiction of Courts* - *Civil suit filed for restraining the Bank from recovering loan amount - Held - Bank was a registered cooperative society -There is a clear bar u/s 82 of the Act - Civil suit not maintainable.* (Para 12)

क. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धाराएँ 64 व 82 – न्यायालयों की अधिकारिता का वर्जन – बैंक को ऋण राशि वसूल करने से अवरुद्ध करने के लिए सिविल वाद पेश – अभिनिर्धारित – बैंक रजिस्ट्रीकृत सहकारी सोसाइटी थी – अधिनियम की धारा 82 के अन्तर्गत स्पष्ट वर्जन है – सिविल वाद पोषणीय नहीं।

B. Cooperative Societies Act, M.P. 1960 (17 of 1961), Sections 64 & 82 - *Lack of jurisdiction* - *Decree of civil Court for restraining the*

*S.A. No.294/1997 (Indore)

cooperative bank from recovering loan amount - There is inherent lack of jurisdiction of civil Court - Question of jurisdiction can be raised at any time and at any stage even in collateral proceedings. (Para-12)

ख. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धाराएँ 64 व 82 – अधिकारिता का अभाव – सहकारी बैंक को ऋण राशि वसूल करने से अवरुद्ध करने के लिए सिविल न्यायालय की डिक्री – सिविल न्यायालय की अधिकारिता का अन्तर्निहित अभाव है – अधिकारिता का प्रश्न किसी भी समय और किसी भी प्रक्रम पर आनुषंगिक कार्यवाहियों में भी उठाया जा सकता है।

Cases referred :

1970 MPLJ 770, AIR 1954 SC 340.

Sanjay Sharma, for the appellant.

None, for the respondents though served.

J U D G M E N T

A.K. SHRIVASTAVA, J. :–This second appeal has been filed by the defendant against impugned judgment and decree passed by the learned First Appellate Court decreeing the suit of the plaintiff by reversing the judgment and decree passed by the Trial Court dismissing his suit.

2. In brief, the case of plaintiff-respondent is that he obtained loan on 29.3.1986 to the tune of Rs.14,500/- from defendant no.2-Dhar District Cooperative Central Bank Maryadit Dahi. According to the plaintiff the State of M.P. has framed a scheme namely Madhya Pradesh Agriculture Debt Relief Scheme, 1990 and under this scheme the Bank is not entitled to recover the debt amount and also the interest. Plaintiff hence filed a suit praying that the amount of loan of Rs.14,800/- and interest Rs.10,000/- which is to be recovered by defendant-Bank cannot be realized from him under the said scheme.

3. The defendants though they were served did not appear in the Trial Court and hence the Trial Court proceeded ex-parte against them. The learned Trial Court after recording the evidence of plaintiff dismissed his suit. An appeal was filed by the plaintiff against the judgment and decree passed by learned Trial Court dismissing the suit and the learned First Appellate Court by the impugned judgment and decree has allowed the appeal and decreed the suit.

4. In this manner this second appeal has been filed by the defendant no.1-Society challenging the judgment and decree of learned First Appellate Court.

5. The plaintiff/respondent no.1 had died during the pendency of this second appeal and his legal representatives have been brought on record, however, nobody is appearing on their behalf though they are served.

6. This second appeal was admitted by this Court on 13.1.1998 on the following substantial question of law:

"Whether the jurisdiction of Civil Court was barred u/s. 64 of the M.P. Co-operative Societies Act."

7. The contention of Shri Sanjay Sharma, learned counsel for appellant is that the claim of plaintiff is that defendants are not entitled to realize the amount from the plaintiff which he took towards the loan from the Dhar District Cooperative Central Bank on the insistence of the defendant no.1-Society registered under the M.P. Cooperative Societies Act, 1960 (in short, "the Act"), and therefore, not realizing the loan amount from the District Cooperative Central Bank would come under the ambit of any dispute touching the constitution, management or business as envisaged under section 64 of the Act and if that is the position, since there is a specific bar to bring a civil suit under section 82 of the Act the instant suit filed by the plaintiff is not maintainable.

8. In this appeal despite respondents who are the legal representative of the plaintiff were served have not put their appearance through any counsel.

9. Regarding substantial question of law :

On going through the averments made in the plaint para 1 to 3 this Court finds that plaintiff on 29.3.1986 took a sum of Rs.14,500/- towards loan from the defendants in order to install a motor pump in the well.Further it has been pleaded by the plaintiff that State of Madhya Pradesh has framed a scheme namely "Madhya Pradesh Agriculture Debt Relief Scheme, 1990" in which the exemption up to the extent of Rs. 10,000/- has been permitted and the said scheme is also applicable to the plaintiff. It has also been pleaded that the benefit under the scheme would also include the debt which was taken by the plaintiff from defendants, and therefore, under the said scheme defendants are not entitled even to realize the amount of interest. Thus, a suit for declaration has been filed that defendants are not entitled to realize the amount of loan Rs. 14,800/- and interest thereupon from the plaintiff. A decree of injunction has also been sought that defendants be restrained from realizing the said amount from plaintiff.

10. If the aforesaid pleadings of the plaintiff is tested on the touchstone and anvil of section 64 of the Act which speaks about the disputes', I am of the view that the pleadings may come within the term 'any dispute touching the constitution, management or business' legislated in Section 64 of the Act. Thus, the claim of plaintiff would come under the term "disputes" as envisaged under Section 64 of the Act and if that is the position, the Registrar is the competent authority to resolve the said dispute.

11. Section 82 of the said Act speaks about the bar of jurisdiction of Courts and according to this section no civil or revenue Court shall have any jurisdiction in respect of any dispute, required to be referred to the Registrar or his nominee or board of nominees. For better understanding it would be condign to rewrite section 82 of the Act, which reads as under:

82 Bar of jurisdiction of Courts.- (1) Save as provided in this Act, no civil or revenue Court shall have any jurisdiction in respect of-

(a) the registration of a society or of bye-laws or of an amendment of a bye-law;

(b) the removal of a committee and the management of the society after such removal;

(c) any dispute, required to be referred to the Registrar or his nominee or board of nominees;

(d) any matter concerning the winding up and the dissolution of a society.

(2) While a society is being wound up, no suit or other legal proceedings relating to the business of such society shall be proceed with, or instituted against, the liquidator as such or against the society or any member thereof, except by leave of the Registrar and subject to such terms as he may impose.

(3) Save as provided in this Act, no order, decision or award made under this Act shall be questioned in any Court on any ground whatsoever." (emphasis supplied)

On analyzing the aforesaid provision, I am of the view that the claim of plaintiff since it comes under the ambit and sweep of section 64 of the Act which relates to disputes and since there is a clear bar under section 82 of the said Act that the Civil Court was not having jurisdiction to try the suit, and therefore, learned First Appellate Court erred in law in decreeing the suit of plaintiff. The Supreme Court in *Keshav Narayan (Plaintiff) Vs Mandal Co-operative Marketing Society and others*, 1970 MPLJ. 770 has categorically held that the civil Court's jurisdiction to entertain the suit was barred, as the dispute was one "touching the business of the society". In that case plaintiff of that case filed a suit against a society for the price of wheat, pulses etc. supplied by him to the Society and in that situation the Supreme Court has held that in view of section 82 of the Act as the claim relates to the dispute-"touching the business of the society", the civil suit was held to be not maintainable.

12. For the reasons stated hereinabove, I am of the view that since there is a clear bar under section 82 of the Act the civil suit filed by the plaintiff is not maintainable. No doubt it is true that defendants did not appear in the Trial Court and did not file any written statement and the Trial Court proceeded ex-parte against them, but this would not be a ground to hold that civil Court is having jurisdiction. The Supreme Court in *Kiran Singh and others Vs. Chaman Paswan and others*, AIR 1954 SC 340 has categorically held that if there is inherent lack

of jurisdiction the same can be raised at any time and at any stage even in collateral proceedings. In this view of the matter, I am of the view that the point which goes to the root of the matter and since there is inherent lack of jurisdiction, it can be raised in this second appeal.

13. For the reasons stated hereinabove this appeal is hereby allowed. The impugned judgment and decree passed by the learned First Appellate Court is hereby set aside and suit of the plaintiff is hereby dismissed as barred under the law. Looking to the facts and circumstances parties are hereby directed to bear their own costs of this appeal.

Appeal allowed.

I.L.R. [2009] M. P., 2926
APPELLATE CIVIL
Before Mr. Justice Prakash Shrivastava
14 July, 2009*

RESHAM BAI (SMT.) ... Appellant
Vs.
JABBAR & ors. ... Respondents

A. **Motor Vehicles Act (59 of 1988), Section 147(1)(b)(i)** - *Claimants have specifically pleaded that the deceased was travelling in the vehicle on payment of fare along with the vegetables which he was taking for sale - Claimants produced oral as well as documentary evidence - Insurance Co. has not denied the fact specifically and not produced any contrary evidence in rebuttal - Held - It is established that deceased was travelling in the vehicle along with his goods (vegetables) for which he had paid the charges - Insurance Co. cannot escape from its liability.* (Paras 11 & 16)

क. मोटर यान अधिनियम (1988 का 59), धारा 147(1)(बी)(i) – दावेदारों ने विनिर्दिष्ट रूप से अभिवचन किया कि मृतक वाहन में किराये के भुगतान पर सब्जियों के साथ यात्रा कर रहा था जो वह विक्रय के लिए ले जा रहा था – दावेदारों ने मौखिक तथा दस्तावेजी साक्ष्य पेश की – बीमा कम्पनी ने तथ्य से विनिर्दिष्ट रूप से इंकार नही किया और खण्डन में कोई प्रतिकूल साक्ष्य पेश नही की – अभिनिर्धारित – यह साबित होता है कि मृतक वाहन में अपने माल (सब्जियों) के साथ यात्रा कर रहा था जिसके लिए उसने शुल्क का भुगतान किया था – बीमा कम्पनी अपने दायित्व से बच नही सकती।

B. **Motor Vehicles Act (59 of 1988), Section 173** - *Insurance Co. at the stage of appeal raised a plea that deceased was not travelling in the cabin of the vehicle - No such defence was raised before the tribunal - Insurance Co. cannot be permitted to raise the factual issue for the first time in the appeal.* (Para 14)

*M.A. No.1744/2004 (Indore)

ख. मोटर यान अधिनियम (1988 का 59), धारा 173 – बीमा कम्पनी ने अपील के प्रक्रम पर अभिवचन किया कि मृतक वाहन के केबिन में यात्रा नही कर रहा था – ऐसा बचाव अधिकरण के समक्ष नही उठाया – बीमा कम्पनी को प्रथम बार अपील में तथ्यात्मक विवाद्यक उठाने की अनुमति नही दी जा सकती।

C. **Motor Vehicles Act (59 of 1988), Section 166** - *Claim Petition - Supreme Court in Sarla Verma's case [2009 ACJ 1298] has laid down the guidelines in respect of application of multiplier and determining personal expenses for maintaining uniformity - Deceased aged 35 years - Number of dependents are 7 - As per guidelines - Multiplier 16 would be applied and deduction towards personal and living expenses of deceased would be 1/5 - Compensation enhanced accordingly - Appeal allowed.* (Paras 18 to 23)

ग. मोटर यान अधिनियम (1988 का 59), धारा 166 – दावा याचिका – उच्चतम न्यायालय ने एकरूपता बनाये रखने के लिए सरला वर्मा के मामले {2009 एसीजे 1298} में गुणक प्रयोग और व्यक्तिगत खर्च का निर्धारण करने के सम्बन्ध में गाइडलाईन निर्धारित की हैं – मृतक की उम्र 35 वर्ष – आश्रितों की संख्या 7 – गाइडलाईन के अनुसार – 16 का गुणक लागू होगा और मृतक के व्यक्तिगत और निर्वाह खर्च के सम्बन्ध में कटौती 1/5 होगी – तदनुसार प्रतिकर में वृद्धि की गई – अपील मंजूर।

Cases referred :

2004 ACJ 428, 2007 ACJ 1550, 2007(II) MPWN 108, 2009 ACJ 1077, 2006 ACJ 1964, I (2008) ACC 225 (SC), 2008 ACJ 2144, III (2007) ACC 415, 2008 ACJ 2385, 2009 ACJ 1298.

G.K. Neema, for the appellant.
T.C. Jain, for the respondent Nos.1 to 3.
C.P. Singh, for the respondent No.4.

ORDER

PRAKASH SHRIVASTAVA, J. :–THIS appeal has been filed by the claimants under section 173 of the Motor Vehicles Act, against the award dated 22.3.04, passed by the Motor Accident Claims Tribunal, Indore, in Claim Case No.244/03.

2. The facts in narrow compass are that the deceased Prakash on 16.06.02 was travelling in vehicle no. M.P.13-E-1227 which turned turtle due to the accident as a result of which Prakash received injuries and died in the hospital. The appellants filed claim petition claiming compensation of Rs. 10,00,000/-. The claim was opposed by the respondents.

3. Motor Accident Claims Tribunal passed the award dated 22.03.04. The Tribunal in the impugned award has found that the claimants failed to establish that the deceased was engaged in the business of sale and purchase of cattle or retail sale of vegetable. The Tribunal found that the income of the deceased was not proved, and presumed Rs. 15,000/- annual income as per the Schedule, age of

the deceased was found to be 35 years and after deducting the 1/3rd towards personal expenses of the deceased, the Tribunal calculated the contribution to the family as Rs. 10,000/- and on applying the multiplier of 15 calculated the compensation of Rs. 1,50,000/-. The Tribunal granted Rs.2000/- as funeral expenses, Rs.5000/- for loss of consortium, Rs.2000/- for loss of estate and Rs.8000/- for loss of love and affection to the children and Rs. 16000/- towards medical expenses. In this way the Tribunal granted Rs. 1,67,000/- wrongly totaled as Rs. 1,62,000/- along with 6% simple annual interest from the date of the application. The Tribunal exonerated the Insurance Company on the ground that the claimants failed to establish that the deceased was travelling in the vehicle with his goods (vegetables) for the purpose of sale and since he was not travelling as owner of the goods in the goods vehicle, therefore, the Insurance Company was not liable.

4. Learned counsel appearing for the appellants submitted that the Tribunal has recorded perverse finding in respect of the business of the deceased, income of the deceased and in respect of the fact that the deceased was not travelling in the vehicle as owner of the goods. He further submitted that the Tribunal has committed an error in rejecting the positive evidence on record in respect of the income of the deceased and presuming the income as Rs. 15,000/-, as per the Schedule. He submitted that the Insurance Company is liable to pay the compensation in terms of various judgments of the Supreme Court and the High Courts.

5. As against this learned counsel appearing for the respondent Insurance Company submitted that the Insurance Company has rightly been absolved of the liability since the appellants failed to establish that the deceased was travelling in the vehicle alongwith goods as owner of the goods. He further submitted that in the case of this nature Insurance Company cannot be held liable to pay the compensation. Learned counsel appearing for the other respondent has also opposed the appeal on the ground that the income of the deceased has rightly been fixed by the Thbunal and there is no scope of enhancing the compensation amount.

6. I have heard the learned counsel for respective parties and perused the original record.

7. It is not in dispute that Prakash has died in the accident caused by the vehicle No.M.P.13-E-1227. It is also not in dispute that the vehicle in question was a goods vehicle and ensured with the respondent no.4 New India Insurance Co. Ltd during the relevant time.

8. The finding of Tribunal that the appellants have failed to establish that the deceased Prakash on the date of the accident was travelling in the vehicle alongwith his goods (vegetable) for sale in the market meaning thereby the deceased was not travelling in the vehicle alongwith the goods as owner of goods has been challenged as perverse by the appellants.

9. A perusal of the award indicates that while arriving at this finding the Tribunal has not elaborately discussed the evidence. Tribunal has dealt with this issue along with the issue of involvement of the deceased in the business of sale of vegetables. The two issues though may have some connection but are separate issues. Therefor, for the purpose of deciding as to whether the deceased was travelling in the vehicle with his goods as owner of the goods, the evidence adduced by the parties on this basis needs to be considered.

10. A perusal of the claim petition indicates that the claimants have specifically pleaded in the claim petition that the deceased was travelling in the vehicle along with the vegetables which he was taking to Dharampuri for sale. This specific pleading contained in paragraph 23 of the claim petition has been denied by the respondent no.4 generally for want of proof. There is no averment in the written statement that Insurance company is not liable because the deceased was not travelling in the vehicle along with his goods as owner of the goods. The written statement of Insurance Company is silent on this aspect.

11. Now coming to evidence adduced by the parties on this issue, the appellant no.1 Resham Bai i.e. wife of the deceased has been examined as (P.W- 1), who specifically stated that the deceased was taking the green vegetable for sale to Dharampuri market in the vehicle in question on the date of the accident. In the cross- examination she has stated that her husband was engaged in the business of sale of vegetable and he used to go in metador to the market and used to pay charges for the same. (P.W-3) Vakil Khan, who was a co-traveller and the eye witness stated that the deceased was taking the vegetable for sale in market and he had paid fare for himself as well as for the vegetable. He has even stated that the deceased had probably paid Rs. 100/- as fare since his goods were more. (P.W-4) Kamal Kishore, who is the whole seller of the vegetables has stated that he used to sale the vegetables to the deceased for business. The respondents have failed to adduce any contrary evidence before the Tribunal. (P.W-4) Kamal Kishore had proved the bills Ex. P/23 to Ex.P/26 issued by him. Tribunal has disbelieved this bills. Even if these bills are ignored then also on the basis of the pleadings and oral evidence on record it is established that on the date of the accident the deceased was travelling in the vehicle in question along with his goods (vegetables) for which he had paid the charges and he was taking these vegetables to the market for sale. In view of the aforesaid analysis, it is found that the Tribunal committed an error in recording that no evidence was produced to prove that the deceased had booked his goods for transportation in the goods vehicle or had paid the charges for that. The Tribunal has recorded the perverse finding that the deceased was not travelling in the truck as owner as his goods (vegetables). This finding of the Tribunal is not supported by evidence and while recording this finding Tribunal has ignored the evidence on record.

12. Section 147 (1) (b) (i) covers the liability in respect of the death or bodily

injury to any person including owner of the goods or his authorised representative carried in the vehicle. The Supreme Court in the matter of *National Insurance Co. Ltd. Vs. Baljit Kaur and Others* reported in 2004 ACJ 428 has held that term 'any person' included in Section 147 (1) by way of amendment in 1994 includes a third party as also the owner of goods or his authorised representative carried in a goods vehicle. Following the Judgment of the Supreme Court in the matter of *Baljit Kaur* (Supra) Division Bench of this Court in the matter of *Kesari Bai and Others Vs. Dhanna and Others* reported in 2007 ACJ 1550 held the Insurance Company liable in the case of death of person travelling in goods vehicle along with his bag of wheat when the vehicle met with an accident. The Division Bench of this Court in the matter of *Umrao Singh Vs. Bharatlal and Others* reported in 2007 (II) MPWN 108, held the Insurance Company liable to pay compensation to the claimants travelling in trolley with his goods. In some what similar circumstances the Division Bench of this Court in the matter of *Indarlal and others Vs. Vijay Kumar and Others* reported in 2009 ACJ 1077, held the Insurance Company liable in case of death of passenger in metador, who was travelling with his load of vegetables.

13. It is worth noting that in the present case neither the Insurance Company pleaded that in the written statement that the deceased was not travelling in the metador in question as owner of the goods nor did it lead any evidence to establish this fact. The Division Bench of this Court, while examining the similar issue in the similar circumstances in the matter of *United India Insurance Co Ltd. Vs. Begumbai and Others* reported in 2006 ACJ 1964 held that -:

> "5. In our considered opinion on facts found and the findings recorded, insurance company cannot escape from its liability. There is ample evidence to support the stand taken by the claimants that deceased had hired the vehicle in question for carrying his goods, i.e., wheat/soyabean. It has come in the evidence of Begumbai, wife of the deceased, P.W-1, Jakir Khan, son of deceased P.W-2, Shankar Lal, P.W-3, a person who also had hired the vehicle for carrying his goods (wheat) and was travelling along with his goods. In the absence of any evidence tendered by non applicants in rebuttal, we have no hesitation in upholding the finding recorded by the Tribunal on this issue and accept the version of P.W-1, P.W-2 and P.W-3. This fact is also duly corroborated by the report of investigation dated 1.4.1998, Exh. D2-C."
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> "6. Once it is held that the deceased was travelling in goods vehicle alongwith his goods as an owner then in such case the insurance company cannot escape from its liability. In other words, the law laid down by Apex Court in the case of *National Insurance Co. Ltd. V. Baljit Kaur,* 2004 ACJ 428 (SC), will apply against the

insurance company and in favour of claimant and insured. We are unable to hold in favour of insurance company for want of any factual evidence that the deceased was travelling as gratuitous passenger in vehicle. Neither there is any factual foundation nor evidence to sustain such finding."

14. Learned counsel for the respondent has relied upon the judgment of the Supreme Court in the matter of *National Insurance Co. Ltd Vs. Cholleti Bharatamma & Ors.* reported in I (2008) ACC 225 (SC) and submitted that the Insurance Company is not liable because the deceased was not travelling in the cabin of the vehicle. Such a submission cannot be accepted at this stage since no such defence was raised by the Insurance Company before the Tribunal and it did not plead or adduce any evidence to show that the deceased was not travelling in the cabin of the vehicle, therefore, the tribunal did not frame any issue on this point and no finding has been recorded. Thus, in the appeal Insurance Company cannot be permitted to raise the factual issue for the first time. Even otherwise, the evidence on record establish that the deceased was travelling in the metador as owner of the goods along with his goods, therefore, Insurance Company cannot escape the liability.

15. The reliance of the counsel for the respondent on the judgment of the Supreme Court in the matter of *National Insurance Company Ltd. Vs. Kaushalaya Devi and Others* reported in 2008 ACJ 2144 is also misplaced since in that case the , deceased who was a vegetable dealer was travelling in the truck for collecting empty vegetable boxes, therefore the Supreme Court held he was not travelling in the truck as owner of the goods i.e. vegetable. Similarly, the judgment of the Karnataka High Court in the matter of *United India Insurance Company Ltd. Vs. Lalithabai & Ors* reported in III (2007) ACC 415, relied upon by the counsel for the Insurance Company is of no help since in that case the Court held that the personal effects or personal luggage carried by person in motor car or passenger travelling in vehicle will not come within the ambit of definition of goods. The judgment of the Andhra Pradesh High Court in the matter of *Anasuyamma and another Vs. B. Narsinga Rao and another* reported in 2008 ACJ 2385, relied upon by the counsel for the Insurance Company is also distinguishable on facts since in that case, it was found that the deceased was not transporting any goods and was not accompanying them in the lorry at the time of the accident and he was not found to be the owner of the goods at the time of the accident. Thus, none of the judgment relied upon by the Counsel for the Insurance Company help the respondent.

16. Thus, I find that the deceased was travelling in the vehicle in question as owner of the goods along with his goods and the requirement of Section 147 (1) (b) (i) of the Motor Vehicles Act, 1988 is satisfied.

17. So far as the income of the deceased is concerned the Tribunal has held that the deceased was not engaged in the business sale of vegetable. This finding of the Tribunal has also been challenged as perverse. The appellants in their claim petition pleaded that the deceased was in the business of the sale of vegetable. They have pleaded that on the date of the accident the deceased was taking the vegetables from Sawer to Dharampuri for sale. The appellants have adduced the oral evidence in support of their claim. (P.W.- 1) Resham Bai, who is the wife of the deceased has categorically stated that at the time of the accident the deceased was engaged in the business of sale of vegetables and on the date of the accident he was taking green vegetable to the Dharampuri market from Sawer. In the cross-examination she has stated that her husband was doing the business of sale of vegetables (P.W-3) Vakil Khan has supported the version of P.W-2. He has stated that the deceased was travelling in the vehicle and was taking the vegetables for retail sale. (P.W-4) Kamal Kishore, who is in business of wholesale vegetables has stated that the deceased used to purchase the wholesale green vegetables from him for sale in the market. He has also stated that deceased used to purchase the vegetables from him during the market days. He has also proved the bills issued by him for sale of the vegetables. The respondents have failed to adduce any evidence to show that the deceased was not involved in business of sale of vegetables. The Motor Accident Claims Tribunal, only by disbelieving the bills Ex.P19 to Ex.P/12 produced by the appellants held that the deceased was not involved in the business of sale of vegetables. Tribunal did not properly appreciated the oral evidence led by claimants in this regard. Even if bills Ex.P/9 to Ex.P/12 are ignored then also from the oral evidence adduced by the claimants, it is established that the deceased was engaged in the business of retail sale of vegetables.

18. Since this court has found that the deceased was engaged in the business of sale of vegetable, therefore, the evidence led by the claimants in respect of the income of the deceased from the business of sale of vegetable becomes relevant. In the claim petition, the claimants pleaded that the monthly income of the deceased was Rs. 8000/-, in the oral evidence (P.W-1) Resham Bai, stated that the deceased was earning Rs 300/- from the business of sale of vegetable. Since there is no documentary evidence of the income of the deceased on record and the only evidence is the statement of P.W.-2 and in the appeal the appellants have restricted their claim to Rs. 5 Lacs/- therefore, it can be safely held that the deceased was earning atleast Rs. 100/- per day, therefore, his monthly income was Rs. 3000/- and annual income was Rs. 36000/-. Therefore, Tribunal committed an error in presuming the income of the deceased as 15000/- per annum.

19. The Tribunal has calculated the contribution of deceased to the family as 2/3rd of his income by holding that the appellant must be spending 1/3rd as his income on himself. The Supreme Court in a recent judgment in the matter of *Sarla Verma and Others Vs. Delhi Transport Corporation and another* 2009

ACJ 1298 has laid down the guidelines for determining personal expenses for maintaining uniformity by holding that-:

> "14. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in *Trilok Chandra's case,* 1996 ACJ 831 (SC), the general practice is to apply standardized deductions. Having considered several subsequent decisions of this court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased should be one-third (1/3 where the number of dependent family members is 2 to 3; one-fourth (1/4th) where the number of dependent family members is 4 to 6; and one-fifth (where the number of the dependent family members exceed six.
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> "15 Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally 50 per cent is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as dependent and the mother alone will be considered as a dependent. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependents, because they will either be independent and earning or married, or be dependent on the father. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependent and 50 per cent would be treated as the personal and living expenses of the bachelor and 50 per cent as the contribution to the family. However, where family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

20. In the present case, the deceased was married person having seven dependents including his wife aged parents and four minor children, therefore, in view of the judgment of the Supreme Court in *Sarla Verma* (Supra) the deduction towards personal and living expenses of the deceased will be 1/5th and not 1/3rd The Tribunal committed an error in deducting 1/3rd towards personal and living expenses of the deceased.

21. So far as the multiplier is concerned the age of the deceased has been found to be 35 years by the Tribunal. The Supreme Court in the matter of *Sarla Verma* has settled the controversy in respect of application of multiplier by holding that -:

> "We, therefore, hold that the multiplier to be used should be as mentioned in column 4 of the Table above (prepared by applying *Susamma Thomas, Trilok Chandra and Charlie*), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is, M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

22. As per the table given in paragraph 19 of the judgment by the Supreme Court in the *Sarla Verma case* (Supra), multiplier of 16 will be applicable when the age of the deceased is between 31 to 35 years which is appropriate multiplier applicable in the present case, when deceased is found to be 35 yeas of age by Tribunal.

23. In view of the aforesaid analysis, the calculation of the compensation amount will be as under-:

a) Monthly income of the deceased: Rs.3000/-.

b) 1/5th Deduction towards personal and living expenses of the deceased: Rs.600/-.

c) Monthly Contribution to the family (Rs.3000 - Rs600) = Rs.2400/-.

d) Total annual contribution to the family Rs.2400 x 12 Rs.28800/-.

e) Compensation amount (Rs.28800 x 16= Rs.4,60,800/-).

24. In terms of the judgment of the Supreme Court in the matter of *Sarla Verma* (Supra) on the conventional heads the amount awarded for loss of estate is enhanced to Rs.7500/- for loss of consortium, enhanced to Rs.7500/ The amount of Rs.2000/- for funeral expenses and Rs.8000/- to the children for loss of love and affection granted by Tribunal is maintained.

25. In view of the aforesaid, the appellants are entitled to total compensation of Rs.4,85,800/- (Rs.1,67,000/- compensation granted by Tribunal + Rs.3, 18,800/- enhanced by this Court). They will also be entitled for interest on the compensation at the rate of 6% per annum from the date of the application. Out of the enhanced amount of compensation the appellant no.1 will receive Rs.60,000/-, appellants no.2 and 3 together will receive 55,000/- and balance amount of Rs.2,03,800/- will

be received by appellants no.4 to 7 in equal proportion, which will be deposited in any nationalised bank and given to them on attaining majority.

26. The appeal is accordingly disposed of.

Appeal disposed of.

I.L.R. [2009] M. P., 2935
APPELLATE CIVIL

Before Mr. Justice K.K. Lahoti & Mr. Justice K.S. Chauhan

16 July, 2009*

KARUNA CHATURVEDI (SMT.) & ors. ... Appellants
Vs.
SMT. SAROJINI AGARWAL & ors. ... Respondents

Civil Procedure Code (5 of 1908), Order 9 Rule 9 - *Earlier suit for declaration of title dismissed under Order 9 Rule 8 - In subsequent suit cause of action is based on same set of facts - Held - Plaintiff is precluded from filing fresh suit on same cause of action in view of Order 9 Rule 9 - Judgment of the trial Court affirmed - Appeal dismissed.* (Para 6)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 9 – स्वत्व घोषणा का पूर्ववर्ती वाद आदेश 9 नियम 8 के अन्तर्गत खारिज – पश्चात्वर्ती वाद में वाद कारण तथ्यों के उसी समूह पर आधारित – अभिनिर्धारित – वादी आदेश 9 नियम 9 को दृष्टिगत रखते हुए उसी वाद कारण पर नया वाद लाने से प्रवारित है – विचारण न्यायालय के निर्णय की पुष्टि की गयी – अपील खारिज।

Cases referred :

AIR 1965 SC 265, (2009) 1 SCC 689.

A.K. Choubey, for the appellant.
A.K. Jain, for the respondent No.4.
None, for others.

JUDGMENT

The Judgment of the Court was delivered by K.K. LAHOTI, J. :–This appeal is directed against the order dated 3.8.2004 in Civil Suit no.1-A/2003 by which the suit filed by Prakash Nath Chaturvedi, the predecessor of the appellants, was dismissed by the trial Court on the ground that the plaintiff was precluded from filing such suit under Order 9 rule 9, Code of Civil Procedure(hereinafter referred to as 'the Code').

2. The learned counsel for the appellants submitted that:

(a) The cause of action for filing earlier suit was an order passed by the Tehsildar in mutation proceedings while the cause of action

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*F.A. No.563/2004 (Jabalpur)

for filing present suit arose on 17/18.7.2001 when the defendants 1,2&3 executed a registered sale deed in favour of defendant no.4. Because of this execution of the sale deed in favour of respondent no.4, a fresh cause of action arose to the plaintiff for filing present suit. In these circumstances, the provision of Order 9 rule 9 of the Code were not applicable, the trial Court erred in dismissing the suit filed by the appellants.

(b) Reliance was placed to the Supreme Court judgments in *Suraj Ratan Thirani vs. Azamabad Tea Co.Ltd.* AIR 1965 SC 295 (para 30) *State of U.P. Vs. Jagdish Sharan Agrawal* (2009)1 SCC 689 and submitted that this appeal be allowed, the impugned order be set aside and the case be remanded back to the trial Court to decide it on merits.

3. Shri A.K.Jain, the learned counsel appearing for respondent no.4, opposed the contention and submitted that cause of action is bundle of facts which have to be ascertained from the pleadings of the case.The contention of the appellant that earlier suit was filed because of order passed by the Tehsildar in mutation proceedings, and subsequent suit was filed because of the sale deed executed by defendants 1,2 and 3 in favour of defendant no.4 on 17.7.2001, is misconceived. The cause of action in the earlier suit was based on certain facts on the basis of which, the plaintiff sought relief of declaration of title and in the present case also, the plaintiff claimed declaration of the title on same set of facts, though new reliefS in respect of the sale deed dated 17.7.2001, possession over the property etc. were sought, but the fact remains that the earlier suit seeking declaration of the title was dismissed under Order 9 rule 8 of the Code and the plaintiff was precluded from filing a subsequent suit on the basis of same cause of action. The trial Court rightly dismissed the suit in view of specific provision under Order 9 rule 9 of the Code in which there is no error. He had also placed reliance to the Apex Court judgment in *Suraj Ratan Thirani* (supra) and submitted that this appeal itself is liable to be dismissed in view of the law laid down by the Apex Court in para 31 of the judgment of *Suraj Ratan Thirani* (supra).

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

(a) The present suit was filed before the trial Court by Prakash Nath Chaturvedi ,who died during the pendency of this appeal. The same plaintiff Prakash Nath Chaturvedi earlier filed a suit before Additional Civil Judge Class-I,Katni which was registered as Civil Suit No.65-A/1991-92 claiming relief of declaration of title against Rajendra Kumar, Virendra Kumar, Surendra Kumar & Smt. Laxmi Devi Wd/o Kedar Prasad Agrawal. In the earlier

plaint, the plaintiff specifically pleaded in paras 2,3 and 4 that he was the owner of land S.No.1126/1 area 1.586 hectares of village Mudwara. In para 5 of the plaint, it was pleaded by the plaintiff that though he was the owner of the property, but the defendants got their names recorded in the revenue record. The plaintiff moved an application before the Tehsildar for recording his name in the revenue record, but the Tehsildar rejected the application on the ground that the plaintiff may get his title declared from the Civil Court. Thereafter the suit was filed for such relief. In para 10 , the plaintiff prayed that he be declared bhumiswami of the land of which particulars were furnished in para 4 of the plaint.

(b) In para 14 of the present suit, the plaintiff has specifically pleaded that the plaintiff in the year 1992 filed a civil suit before the Civil Judge registered as Civil Suit No.65-A/1991-92 against the defendant seeking declaration in respect of title of bhumiswami in the disputed land but the aforesaid suit was dismissed because of the sickness of the plaintiff in the year 1999. In the said suit, the defendants appeared and filed written statement. The plaintiff claimed title on the basis of the same set of fact, which were leaded in earlier suit. The plaintiff has also claimed Maurashi Krishik rights under Section 190 of the M.P.Land Revenue Code and pleaded that the possession of the plaintiff over the disputed land was in the knowledge of the defendant since 1906-07, but had not claimed adverse possession against the defendant. The plaintiff has also pleaded in para 30 that on 6.6.2001, the plaintiff moved an application before the Tehsildar that he is the bhumiswami of the land and his name be recorded in the revenue record. The notice was issued to defendants 1 to 3 in which the defendants filed their reply. In para 31, the plaintiff pleaded that during the pendency of the proceedings, a sale deed was executed in favour of defendant no.4 by defendants 1 to 3 which was violative of Section 52 of the Transfer of Property Act. In para 33 the plaintiff pleaded that a civil suit was filed by defendant no.4 against the plaintiff in the Court of Civil judge registered as Civil Suit No.144-A/2000, and on 24.6.2002, the plaintiff became aware in respect of execution of the sale deed by defendants 1,2 and 3 in favour of defendant no.4. On these facts, the plaintiff sought declaration of the title in respect of disputed land and also prayed that the sale deed executed by defendants 1,2 and 3 in favour of defendant no.4 be declared as null and void. The plaintiff has also prayed perpetual injunction against the defendants.

© On notice, the respondent no.4 filed an application before the trial Court under Order 7 rule 11 of C.P.C. dated 28.3.2003 in which in para 3, defendant no.4 raised an objection that the earlier suit filed for declaration and perpetual injunction on the same cause action was dismissed in 1999. So a fresh suit on the same cause of action was barred by law.

(d) The appellant filed reply of the application in which he admitted partly averments made in para 3 of the application.

(e) The parties also filed documentary evidence before the trial Court by filing pleadings of the earlier suit.

(f) The trial in this case on the basis of admission that the earlier suit was dismissed after appearance of the defendant and filing of written statement, in default of appearance of the plaintiff, found that the earlier suit was dismissed under Order 9 rule 8 of the Code and the subsequent suit was barred under Order 9 rule 9 of the Code, rejected the plaint under Order 7 rule 11(d) of the Code.

5. Now, in the light of the aforesaid facts, the legal position in the case may be looked into. The earlier suit was dismissed by the trial Court under Order 9 rule 8 of the Code. Order 9 Rule 8 and Order 9 rule 9 of the Code may be referred, which read thus:

"**8. Procedure where defendant only appears.**-Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit.-(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from brining a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

Order 9 rule 9 specifically provides that where a suit is wholly or partly

dismissed under rule 8 , the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but he may apply for an order to set aside the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non appearance, when the suit was called on for hearing ,the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. But in the present case, the later provision was not invoked by the plaintiff and the dismissal under Order 9 rule 8 attained finality. The plaintiff never approached to the trial Court under Order 9 rule 9 C.P.C.. In this background, the subsequent suit based on same cause of action was barred and the plaintiff was precluded from filing a fresh suit in respect of same cause of action. The Apex Court in *Suraj Ratan* (supra)considering the legal position held thus:

> 30. We consider that the test adopted by the Judicial Committee for determining the identity of the causes of action in two suits in *Mohammed Khalil Khan v. Mahbub Ali Mian*, 75 Ind App 121 : (AIR 1949 PC 78) is sound and expresses correctly the proper interpretation of the provision. In that case Sir Madhavan Nair, after an exhaustive discussion of the meaning of the expression "same cause of action" which occurs in a similar context in para (1) of O. II, R. 2 of the Civil Procedure Code observed :
>
> "In considering whether the cause of action in the subsequent suit is the same or not, as the cause of action in the previous suit, the test to be applied is are the causes of action in the two suits in substance - not technically - identical?"
>
> 31. The learned Judge thereafter referred to an earlier decision of the *Privy Council in Soorjomonee Dayee v. Suddanund*, 12 Beng LR 304 at p. 315 and extracted the following passage as laying down the approach to the question :
>
> "Their Lordships are of opinion that the term 'cause of action' is to be construed with reference rather to the substance than to the form of action...."
>
> Applying this test we consider that the essential bundle of facts on which the plaintiffs based their title and their right to relief were identical in the two suits. The property sought to be recovered in the two suits was the same.
>
> The title of the persons from whom the plaintiffs claimed title by purchase, was based on the same fact viz., the position of Md. Ismail quoad his co-heirs and the, beneficial interests of the latter not being affected or involved in the mortgages, the mortgage

decree and the sale in execution thereof. No doubt, the plaintiff set up his purchases as the source of his title to sue; but if as we have held the bar under O. IX, R. 9, applies, equally to the plaintiff in the first suit and those claiming under him, the allegations regarding the transmission of title to the plaintiffs in the present suit ceases to be material. The only new allegation was about the plaintiffs getting into possession by virtue of purchase and their dispossession. Their addition, however, does not wipe out the identity otherwise of the cause of action. It would, of course, have made a difference if, without reference to the entecedent want of full title in Ismail which was common to the case set up in two plaints in Suit 58 of 1931 and Suit 18 of 1943, the plaintiffs could on the strength of the possession and dispossession or the possessory title that they alleged have obtained any relief. It is, however, admitted that without alleging and proving want of full title in Md. Ismail the plaintiffs could be granted no relief in their present suit. The question is whether the further allegations about possession in October, 1934 have really destroyed the basic and substantial identity of the causes of action in the two suits. This can be answered only in the negative. The learned Judges of the High Court therefore correctly held that the suit was substantially barred by O. IX, R. 9."

6. Considering the legal position settled in para 31 of the judgment, the cause of action to be construed with reference to the substance and the principle has to be applied in determining the cause of action and if a subsequent suit is based on same cause of action, the Apex Court held that under Order 9 rule 9, the plaintiff was precluded to file a second suit. In this case, the cause of action for filing of the suit was based on same facts on the basis of which the plaintiff had claimed declaration of his title and the earlier suit was dismissed under Order 9 rule 8 of the Code. So the plaintiff was precluded from filing a fresh suit in view of the specific provision contained in Order 9 rule 9 of the Code.

7. So far as judgment of the Apex Court in *Jagdish Sharan Agrawal* (supra) is concerned, the Apex Court found that the earlier suit was not dismissed under Order 9 rule 8 of the Code and the provisions of Order 9 rule 9 of the Code were not applicable. Earlier suit was filed by the Municipal Board Nagar Palika, Lalitpur and subsequent suit was filed by the State though on same set of facts the earlier suit was dismissed for non prosecution, but was not dismissed under Order 9 rule 8 of the Code. The Apex Court held that the State was entitled to file a suit and dismissal of the subsequent suit by the trial Court was not justified and remanded the matter to the trial Court for deciding the suit on merits in peculiar facts and circumstances of the case. The judgment of the Supreme Court in the case of

Jagdish Sharan Agrawal (supra) is not applicable in the present case. The present suit was based on same cause of action on which earlier suit was dismissed.

8. In view of the aforesaid, the trial Court rightly held that the plaintiff was precluded from filing subsequent suit on the basis of same cause of action, in which we do not find any error warranting our interference under Section 96 of the Code. This appeal is found without merit and is dismissed with no order as to cost.

A decree be drawn accordingly. Counsel's fee as per schedule.

Appeal dismissed.

I.L.R. [2009] M. P., 2941
APPELLATE CIVIL
Before Mr. Justice Rajendra Menon
17 July, 2009*

MARBLE CITY HOSPITAL & RESEARCH CENTRE PVT. LTD. (M/S) & ors. ... Appellants
Vs.
MR. SARABJEET SINGH MOKHA ... Respondent

A. **Companies Act (1 of 1956), Section 10-F** - *Jurisdiction of High Court - Appeal u/s 10-F only deals with questions of law involved therein - A question of fact may give rise to a question of law, if the finding of fact is perverse or contrary to the material available on record - At the same time, if the finding based on some evidence available on record and is a possible finding that can be arrived at in the given set of circumstances, then the same need not and will not give rise to a question of law.* (Para 17)

क. कम्पनी अधिनियम (1956 का 1), धारा 10–एफ – उच्च न्यायालय की अधिकारिता – अधिनियम की धारा 10–एफ के अन्तर्गत अपील केवल उसमें अन्तर्ग्रस्त विधि के प्रश्नों पर विचार करती है – तथ्य के प्रश्न से विधि का प्रश्न पैदा हो सकता है, यदि तथ्य का निष्कर्ष विपर्यस्त या अभिलेख पर उपलब्ध सामग्री के प्रतिकूल है – साथ ही साथ यदि निष्कर्ष अभिलेख पर उपलब्ध किसी साक्ष्य पर आधारित हो और दी गई परिस्थितियों में निष्कर्ष संभव हो, तब उससे विधि का प्रश्न पैदा नही होगा।

B. **Companies Act (1 of 1956), Sections 53 & 286** - *Presumption of service of notice sent by UPC - Permissibility - Held - Onus of proving the fact that the notice was sent, was on the company - Mere production of the certificate of posting is not and cannot be a conclusive proof of having served the notice upon the addressee - In the facts and circumstances of the case, company have failed to discharge this onus by adducing cogent, legal and admissible evidence -Accordingly, sending of the notice for the five Board meetings and its service on the respondent is not proved.* (Para 31)

*M.A. (Company) No.1/2007 (Jabalpur)

ख. कम्पनी अधिनियम (1956 का 1), धाराएँ 53 व 286 – यू.पी.सी. से भेजे गये सूचनापत्र की तामील की उपधारणा – अनुज्ञेयता – अभिनिर्धारित – इस तथ्य को साबित करने का भार कि सूचनापत्र भेजा गया, कम्पनी पर था – केवल डाक प्रमाणपत्र पेश करना प्रेषिती पर सूचनापत्र तामील किये जाने का निश्चायक सबूत नही है और न हो सकता है – मामले के तथ्यों और परिस्थितियों में, कम्पनी अकाट्य, वैध और ग्राह्य साक्ष्य पेश करके इस भार को उन्मोचित करने में विफल रही – तदनुसार, बोर्ड की पाँच बैठकों के लिए सूचनापत्र भेजना और प्रत्यर्थी पर उसकी तामील साबित नही।

C. **Companies Act (1 of 1956), Section 400** - *Non-service of notice to Central Government - Held - There is nothing under law to indicate that non-compliance with the aforesaid provision renders the proceeding vitiated in all cases, even when no public interest or right of any other member of the company, unrepresented.* (Para 40)

ग. कम्पनी अधिनियम (1956 का 1), धारा 400 – केन्द्र सरकार को सूचनापत्र की तामील न होना – अभिनिर्धारित – विधि के अन्तर्गत यह उपदर्शित करने के लिए कुछ नही है कि उक्त उपबंध का अननुपालन सभी मामलों में कार्यवाही को दूषित करता है, लोक हित या कम्पनी के किसी अन्य सदस्य का कोई अधिकार प्रतिनिधित्व के बिना न रहने पर भी।

Cases referred :

AIR 1959 Bom 176, 1976 MPLJ 734, 1990 Company Cases 45 (Vol. 67), (2005) 1 SCC 172, (2006) 7 SCC 613, AIR 1968 SC 1413, 2001(4) MPLJ 92, (2002) 4 SCC 316, (2006) 7 SCC 613, (2004) 9 SCC 204, 2003 (Vol. 116) Company Cases 465, 1996 (Vol. 86) Company Cases 842, 1986 (Vol. 60) Company Cases 1075, AIR 1959 Bom 176.

P.R. Bhave with *R.K. Sanghi & S.A. Khan*, for the appellants.

Ajay Mishra with *Pankaj Dubey & Mrs. Dubey*, for the respondent.

ORDER

RAJENDRA MENON, J. :–This appeal under section 10-F of the Companies Act, 1956 assails the order-dated 19.7.2007 passed by the Company Law Board [Principal Bench, New Delhi] in Company Petition No.117/2005 (Shri Sarabjeet Singh Mokha Vs. M/s Marble City Hospital and Research Centre Private Limited and others).

2. M/s Marble City Hospital and Research Centre Private Limited, Jabalpur having its Registered Office at 21, North Civil Lines, Near 2nd Bridge, Jabalpur is a Private Limited Company incorporated under the provisions of the Companies Act, 1956 (hereinafter referred to as the 'Act'). Appellants Dr. S.M. Hastak, Dr. (Mrs) Shobha Soni and Dr. Sanjay Nagraj alongwith respondent Shri Sarabjit Singh Mokha are the subscribers to the Memorandum of Association of this Company, which was incorporated in the year 1997. The Company carries on with the activities of providing medical and health care facility in the city of Jabalpur and a

Hospital is established for the said purpose. The Company as indicated hereinabove was jointly promoted by the three appellants and respondent, who became Directors from the date of incorporation of the Company. It is averred that at the time when the dispute in the present case arose, apart from the appellants and the respondent, there were no other Directors in the Company. The authorized share capital of the Company as on 31.3.2005 was Rs.25 Lacs consisting of 25,000 shares of Rs.10/- each. The issued share capital was Rs. 10 Lacs comprising of 1 Lac shares of Rs.10/- each. All the share-holders namely, the appellants and the respondent, have subscribed in equal proportions i.e. 25% each and the share holding of the Company as on 31.3.2005 was 25,000 shares held by each of them amounting to Rs.2,50,000/- i.e.. 25%. Being aggrieved by his deemed cessation as Director of the Company with effect from 31.1.2005 in terms of Section 283(1)(g) of the Act, respondent Sarabjit Singh Mokha filed a petition purported to be under sections 397, 398, 237(b) read with 399, 402 and 402 of the Act before the Company Law Board, Principal Bench, New Delhi. Alleging that his removal with effect from 31.1.2005, communicated to him vide notice-dated 18.11.2005 amounts to an act of oppression, a company petition was filed by the respondent for declaring the same to be null and void.

3. It was further pointed out by the company petitioner/respondent that in the communication that took place between the parties, it has been disclosed that from the existing share capital, further 1,50,000 equity shares have been issued and after allocation of these shares, the share percentage of the company petitioner Shri Sarabjit Singh Mokha is reduced from 25% to 10%. Challenge to this allocation of shares was also in the company petition. It was the case of the company petitioner that right from inception of the company in the year 1997, he and the appellants had equal percentage of shares, had loaned equal amount to the company and were functioning as Directors and were getting equal remuneration. The establishment of the Company and the hospital premises was in the leased out building held by the company petitioner and his family, for a consideration of Rs.1.6 Lacs per month. All the appellants, who were Doctors by profession, have given their skill and equipments to the hospital on charge basis and till the date when the dispute arose, they have recovered 90% of the cost. It was further the case of the company petitioner that he had arranged for loans for the company by giving his personal guarantee, the entire building, fixtures and fittings belonged to him, he was incharge of all legal matters and administration of the company and in particular the hospital, but since September 2004 his remunerations were stopped and without any communication and intimation to him vide letter dated 18.11.2005, he has been informed that as he has not attended the requisite number of meetings, he ceases to be Director of the company with effect from 31.1.2005. It was the grievance of the company petitioner that the mode, provision of law and the manner in which he ceased to be Director was not communicated to him in this letter-dated 18.11.2005. When the company petitioner sought for information and

explanation vide his communication dated 20.11.2005, vide letter-dated 28.11.2005 he was informed that inspite of serving notices to him, which were sent by post and information communicated to his residence and office, the petitioner had not attended five Board meetings consecutively and, therefore, by operation of law i.e. section 283(1)(g) of the Act, he ceased to be a Director. According to the company petitioner it was for the first time that vide letter-dated 28.11.2005, he was informed about cessation of his Directorship, in accordance to the statutory provision, holding of the Board meetings and issuance of notice to him. According to the company petitioner, vide notice dated 1.12.2005 when he sought for details of the Board meetings, allegedly not attended by him, he was informed about these proceedings on 28.11.2005, after receiving all the particulars, he had filed the petition. Copies of the communications dated 20.11.2005, 28.11.2005 and 1.12.2005 are filed as Annexures E, F and G to the company petition and the communication dated 18.11.2005 informing the petitioner about cessation as Director with effect from 31.1.2005 is Annexure D.

4. Assailing the action of the respondents/appellants in proceeding to take action against him, as has been unfolded hereinabove, and pointing out various instances of mis-management and oppression in the company so also contending that the further shares issued were never communicated to the company petitioner and the distribution of these shares have been done detrimental to his interest without informing him, reducing his share holding in the company by 15%, challenge was made to the entire action before the Company Law Board.

5. On notice being issued, the appellants hereinabove filed a joint reply/written statement, refuted the contentions of the company petitioner and came out with a case that since 23.5.2004 when a First Information Report was lodged against the respondent/company petitioner for offences under sections 395, 397 and 120-B, he was absconding, he was not available to the civil society for a long period, it was only on 1.7.2005 that he surrendered and thereafter was released on bail on 16.11.2005 when he surfaced. It was the case of the respondent that due to his implication in the criminal case, for a long period right from August-September 2004 upto July 2005 and till his release on bail on 16.11.2005, respondent was not available to the civil society, he was not discharging any functions in connection with the affairs and activities of the company, he was underground, was trying to get anticipatory bail, in which he did not succeed and, therefore, inspite of sending him notices by post i.e. under certificate of posting (UPC) and by personal service, when he did not attend five consecutive meetings, by virtue of the statutory provision i.e. section 283(1)(g), he ceased to be a Director of the Company.

6. As far as distribution of further share and non-grant of the same to the company petitioner is concerned, it was pointed out that offer in this regard was made to the petitioner vide UPC letter-dated 30.4.2005 (Annexure R/19), he did

not respond to the same and, therefore, vide resolution passed by the Board on 5.7.2005; the further share capital was distributed amongst the three appellants reducing the share capital of the respondent by 15%. By pointing out that company petitioner did not attend meetings continuously inspite of service, his claim put forth before the Company Law Board was resisted by the appellants. Records indicate that certain documents were filed, which included the notice sent for the Board meeting and the under posting certificates. However, no resolution of the Board of Directors were filed before the Company Law Board, affidavits of certain persons were filed by the company petitioner to show that the notices were never served on him, counter affidavits were filed by the appellants in rebuttal and on the basis of the evidence and material that came on record, by the impugned order-dated 19.7.2007 the learned Company Law Board came to the conclusion that the Board meetings, five in number in which the respondent/company petitioner is alleged to have been absent, were held without proper notice to him, sending of notice by UPC is not properly proved and, therefore, treating the company petitioner to be absent, even when notice was not issued, was not proper and the provisions of section 283(1)(g) could not be applied. Further holding that the allocation of further shares made is without proper notice to the respondent/company petitioner, the allocations were made in a Board meeting that was held on 5.7.2005 when the company petitioner was already in jail with effect from 1.7.2005, notice of the meeting in which the allocation took place was not properly served, the allocation has been interfered with and each of the member directed to surrender such number of shares so as to restore the original holding of the company petitioner to 25%. However, finding allegations of financial mis-management not proved, the company petition is decided and the direction is to restore the company petitioner to his original position as Director in the Company

7. Being aggrieved by the aforesaid order of the Company Law Board, this petition under section 10-F of the Act is filed by the three appellants.

8. Shri P.R. Bhave, learned Senior Advocate, assisted by Shri R.K. Sanghi and Shri S.A. Khan, Advocates, took me through various documents that have been filed, which included the notices sent by UPC for the Board meetings, the proceedings of the Board meetings, the affidavits filed, the correspondence between the parties and emphasized that the findings recorded by the Company Law Board in its order-dated 19.7.2007 is a perverse finding, contrary to the evidence and material that came on record and, therefore, the appeal under section 10-F was maintainable. It was pointed out by Shri Bhave, learned Senior Advocate, that meetings of the Board were held on 1.9.2004, two meetings at 11.00 AM and 4.00 PM respectively; 14.9.2004, 31.12.2004 and 31.1.2005. For all these five meetings, requisite notices under posting certificate (UPC) were sent to the respondent, but inspite of service by post, the company petitioner/respondent did not attend any of the meetings.

9. For the convenience of hearing, two paper books have been filed by the parties. One is a red paper-book, consisting of the company petition, rejoinder and the affidavits; and, the other is a black paper-book, consisting of the reply, written synopsis, reply to the rejoinder and affidavits. The red paper-book is marked as Paper Book No.1 and the black paper-book is marked as Paper Book No.2.

10. Shri Bhave, learned Senior Advocate, elaborately dealt with each and every documents available in the paper-book, took me through the FIR filed against the company petitioner on 23.5.2004, offences registered against him, the orders of bail, the communications made between the parties vide letters dated 2.10.2004, 28.10.2004, the notice of cessation – Annexure D dated 18.11.2005, the certificate of posting (UPC), the provisions of section 283, the provisions of section 53, the affidavits filed particularly that of one Shri Rajesh Tadas and emphasized that notices sent by postal certificates are deemed to be served on the company petitioner, inspite of the same he did not appear in five consecutive Board meetings, even personal service effected by Shri Tadas were not responded to and there is nothing to indicate that since April 2004, the company petitioner was working for the company and has done any work. It was emphasized by him that infact he was not available to the civil society and when he did not attend five consecutive meetings, by operation of law his Director-ship came to an end. Contending that the Company Law Board approached the entire matter in a very peculiar fashion, adopted a policy of pick and choose in appreciating the documents and evidence, and recorded a perverse finding against the appellants, It was pointed out by Shri Bhave, learned Senior Advocate, that the respondent was not available for doing any work to the Company between May 2004 to November 2005, he was absconding and when by filing adequate evidence in the form of postal certificates and affidavit of Shri Tadas, appellants have proved that respondent company petitioner failed to attend five consecutive meetings inspite of intimation, a perverse finding is recorded by the Company Law Board holding the notice to be not served. This according to Shri Bhave is a perverse and improper finding, contrary to material available on record, devoid of any merits and, therefore, gives rise to an important question of law, which can be interfered with exercising jurisdiction under section 10-F of the Act.

11. Shri P.R. Bhave, learned Senior Advocate, further argued that the company petitioner in his petition had only come out with a case that no notice with regard to holding of the meetings were served on him. It was never his case that the Board meetings on the five dates, as alleged, were never held. As no allegation with regard to not holding of the meetings were pleaded or canvassed, the appellants herein did not produce the minutes of the Board meeting held on the five dates, however, in a very peculiar manner, it was emphasized by Shri Bhave that the Company Law Board has drawn an adverse inference and has held that even holding of the five Board meetings are not proved. Shri Bhave pointed out that

when it was never the case of the respondent company petitioner that the meetings were not held, a finding recorded in this regard is wholly unwarranted and perverse. Referring to the affidavits of Shri Tadas and two other persons i.e. Elvin Thomas and Shri Satyendra Thakur, available on record, Shri Bhave tried to build up an argument to canvass his point that a perverse finding is recorded and the Company Law Board has decided the matter in a cryptic manner, on presumptions and assumptions. Shri Bhave, learned Senior Advocate, emphasized that the entire burden of proving issuance of notice and holding of meetings is shifted from the respondent company petitioner to the appellants, which is not proper.

12. Placing reliance on the following judgments: *Bilasrai Joharmal and others Vs. Akola Electric Supply Company Pvt. Ltd,* AIR 1959 BOMBAY 176; *Budhulal Kasturchand Vs. Chhotelal Kastoorchand and others*, 1976 MPLJ 734; *Parmanand Choudhary Vs. Smt. Shukla Devi,* 1990 Company Cases 45 (Vol.67); *J.P. Shrivastava & Sons (P) Ltd. and others Vs. Gwalior Sugar Co. Ltd. and others,* (2005) 1 SCC 172; and, *Kamal Kumar Dutta and another Vs. Ruby General Hospital Ltd. and Others,* (2006) 7 SCC 613, Shri Bhave, learned Senior Advocate, emphasized that a finding perverse in nature and inconsistent to the material available on record, is recorded by the Company Law Board and, therefore, interference in the matter is sought for. In sum and substance, the submissions of Shri Bhave can be categorized in the following manner:

(a) Findings of the Company Law Board are perverse and contrary to the evidence and material available on record;

(b) The burden of proof is shifted from the company petitioner to the appellants and based on surmises and conjectures, findings are recorded to the effect that the notice of the meetings are not served and the meetings are not at all held;

(c) Even though it was never the case of the company petitioner that the Board meetings on the five dates were not held, adverse inference is drawn for not producing the documents pertaining to the meetings held and the finding recorded is that the meetings were not held or that holding of the meetings are not proved. This according to Shri Bhave is a perverse finding and not at all warranted;

(d) It was further submitted by Shri Bhave that for non-production of accounts showing payment of postage stamps, adverse inference is drawn, which is improper when the under posting certificates were available on record.

(e) Accordingly, on the basis of the aforesaid the final submission by Shri Bhave was that the appellants herein are Doctors by profession; respondent was not available to the Company for

discharging his functions, his whereabouts were not known; adopting a prudent man's conduct appellants have acted against the respondent, who is involved in various criminal activities and is a mischievous person and by assuming certain things, the Company Law Board has recorded a finding, which is impermissible.

(f) It was thus argued by Shri Bhave, learned Senior Advocate, that an approach with regard to conduct of a prudent man in the facts and circumstances should have been adopted for seeing as to whether sending of the notice by UPC was a correct step or not.

(g) Referring to Section 400of the Act, and contending that notice to the Central Government is necessary, this statutory provision is violated and placing reliance on a judgment of the Bombay High Court, in the case of *Bilasrai Joharmal* (supra), it was argued that the mandatory provisions having been violated, the company petition was liable to be dismissed.

Accordingly Shri Bhave, learned Senior Advocate, summed up his argument by contending that in the totality of the facts and circumstances, a perverse finding is recorded by the Company Law Board against the appellants, which cannot be sustained.

13. Shri Ajay Mishra, learned Senior Advocate, assisted by Shri Pankaj Dubey and Mrs. Dubey, Advocates, referred to the provisions of sections 53, 193(1), 194, 195, 283(10(g) and section 400 refuted the aforesaid contentions and emphasized that the requirement of Section 53 is that the notice with regard to Board meeting should be sent by post, it can be sent by UPC or registered post only if instruction is given by the Member concerned and the amount for the same deposited. Contending that service of notice by post is not proved in the present case and the finding recorded by the Company Law Board is proper, Shri Mishra emphasized that under section 193, records pertaining to the meeting are to be maintained in accordance with the statutory provisions contemplated under this section. Under section 194, a presumption can be drawn only if the provisions in the statute are complied with and in the present case as the minutes of the Board meetings held are not produced and proved to have been maintained in accordance to the requirement of law, the presumption drawn is correct. Taking me through the certificate of posting, discrepancies in the same, pointing out defects in the seal and contending that the UPC are fabricated documents, created subsequently only to defend the present proceedings, learned Senior Advocate argued that the holding of the meeting is not proved, service of the notice is also not established and under the provisions of law particularly section 53 and section 283(10(g), it

was for the appellants to establish that they had sent the notice as per requirement of law, it was received by the respondent company petitioner and inspite thereof he has not attended and, therefore, by operation of the provisions of section 283(1)(g), he ceased to be a Member of the Company. Taking me through the notices that are available on record, the agendas for the meeting, the postal certificates and pointing out discrepancies in the agendas, so also the infirmities in the statement of Shri Rajesh Tadas, as indicated in his affidavit available at page 196 of Paper Book No.2, Shri Ajay Mishra, learned Senior Advocate, argued that service of notice by both personal service and by postal service are not proved, records of postal expenses incurred, dispatch register are not produced, even the address on which Shri Tadas went to serve notices personally and the person on whom he tried to serve the notice are not clear from the affidavit. Contending that the learned Company Board has proceeded in the matter in accordance with law and has recorded an appropriate finding based on due appreciation of the evidence and material that came on record Shri Ajay Mishra, learned Senior Advocate, refuted each and every contention put forth by Shri Bhave. It was further argued by learned Senior Advocate that the share allocation made reducing the share capital of the company petitioner was also effected without proper notice and, therefore, the Company Law Board has not committed any error in interfering with the matter.

14. As far as non-compliance of Section 400 is concerned, it was argued by learned Senior Advocate that the compliance has to be made by the Company Law Board, which is not made a party in these proceedings and, therefore, the said ground cannot be raised at this stage. That apart, if the Company Law Board has committed any breach, the company petitioner/respondent herein cannot suffer for the same. Accordingly placing reliance on the following judgments: *Gopal Krishnaji Ketkar Vs. Mohammed Haji Latif and Others,* AIR 1968 SC 1413; *J.P. Srivastava and sons (Rampur) Pvt. Ltd. and others Vs. Gwalior Sugar Co. Ltd and others,* 2001 (4) MPLJ 92; *Commissioner of Customs, Mumbai Vs. Virgo Steels, Bombay and Another,* (2002) 4 SCC 316; and, *Kamal Kumar Dutta and another Vs. Ruby General Hospital Ltd. and Others,* (2006) 7 SCC 613, Shri Ajay Mishra, learned Senior Advocate, emphasized that this is a case where the finding recorded by the Company Law Board is a proper finding based on due appreciation of the evidence that came on record and the same does not warrant any interference.

15. I have heard learned counsel for the parties at length and have perused the records.

16. Even though during the course of hearing of this company petition on various dates Shri P.R. Bhave, learned Senior Advocate, and Shri Ajay Mishra, learned Senior Advocate, had referred to various documents and had tried to point out that the finding of the Company Law Board with regard to a particular question is

a perverse finding or is a proper finding. I don't think it is necessary to refer to each and every factual aspect of the matter in a detailed manner, as I am of the considered view that the same may not be necessary.

17. This is a case where the respondent company petitioner is proceeded against and by operation of law i.e. section 283(1)(g), it is alleged that he is deemed to have vacated the office. This Court while exercising jurisdiction in an appeal under section 10-F of the Act does not deal with questions of fact. It only deals with questions of law involved in an appeal. A question of fact may give rise to a question of law, if the factual assertions made by the parties culminate in a finding of fact, which is perverse or contrary to the material available on record. At the same time if the finding recorded by the competent authority is based on some evidence available on record and is a possible finding that can be arrived at in the given set of circumstances, then the same need not and will not give rise to a question of law. That being so, it is not necessary for the present to refer to each and every factual aspect canvassed at the time of hearing, instead it is more appropriate to deal with the matter by taking note of the statutory provisions, the question with regard to service of notice, for holding of the Board meetings and the findings recorded in this regard by the learned Company Law Board, after evaluating the legal principles applicable.

18. The scope and power of this Court while exercising appellate jurisdiction in a proceeding under section 10-F of the Act, is, as indicated in the preceding paragraph. Section 10-F contemplates that 'any person aggrieved by any decision or order of the Company Law Board may file an appeal to the High Court within sixty days from the date of communication of the decision or order on any question of law arising out of such an order'. It is, therefore, clear that an appeal contemplated under section 10-F is not an appeal on fact. The appeal is only on a "question of law" and, therefore, it can be safely construed that a finding of fact recorded by the Company Law Board is final and against such a finding no appeal lies. Under law the jurisdiction of this Court in an appeal under section 10-F is confined only to determination of any substantial question of law and, therefore, a finding of fact arrived at cannot be reversed by this Court until and unless it is apparent from the face of the record that the finding, even on factual aspects, is erroneous or perverse to such an extent that the same could not be arrived at in the given set of circumstances. It is keeping in view the aforesaid limited jurisdiction conferred to this Court that the matter has to be proceed with and considered.

19. It would be appropriate now to refer to the statutory provisions which are applicable in the present case. The first provision, which has to be taken note of, is section 53 pertaining to service of document on members by a Company. As one of the moot question, which requires consideration in this appeal is with regard to service of notice for the five Board meetings held, in which respondent is said to be absent, so also for the meeting held in which the allocation of shares were

made, the statutory procedure contemplated under the Act for service of notice is to be taken note of and the same is provided for in Section 53. Sub-sections (1) and (2), which are-relevant in this regard, are reproduced hereinunder:

> "53. **Service of documents on members by company** –
>
> (1) A document may be served by a company on any member thereof either personally, or by sending it by post to him to his registered address, or if he has no registered address in India, to the address, if any, within India supplied by him to the company for the giving of notices to him.
>
> (2) Where a document is sent by post -
>
> (a) service thereof shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, provided that where a member has intimated to the company in advance that documents should be sent to him under a certificate of posting or by registered post with or without acknowledgement due and has deposited with the company a sum sufficient to defray the expenses of doing so, service of the document shall not be deemed to be effected unless it is sent in the manner intimated by the member; and,
>
> xxx xxx xxx xxx
>
> xxx xxx xxx xxx
>
> (Emphasis supplied)

20. The next provisions to be taken note of are sections 193, 194 and 195. Section 193 provides as to how the minutes of the proceedings of general meeting and the meeting of the Board of Directors are to be recorded and the period after conclusion of the meeting within which the minutes are to be recorded, the manner of recording them in the minutes book and entries being made in the same. Section 194 contemplates that minutes of the meeting kept in accordance with the provisions of section 193 shall be evidence of the proceedings recorded therein. It is, therefore, clear that, if minutes of any Board meeting held, is recorded in accordance to the provisions of section 193, then a presumption can be drawn under section 194 that the proceedings as indicated in the minutes were held. Section 195 contemplates that where the proceedings of any general meeting of the company or of any meeting of its Board of Directors or committees of the Board have been kept in accordance with section 193 then until and unless the contrary is proved, the meeting shall be deemed to have been called and held and all proceedings to have been duly taken place in the manner as indicated and valid.

21. Section 283 contemplates a provision pertaining to vacation of office by a

Director. This section indicates various eventualities, which would result in vacation of office by a Director and as far as the present case is concerned sub-section (1)(g), which is relevant, reads as under:

> "283. Vacation of office by directors – (1) The office of a director shall become vacant if –
>
> xxx xxx xxx xxx
>
> xxx xxx xxx xxx
>
> (g) he absents himself from three consecutive meetings of the Board of directors, or from all meetings of the Board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the Board;
>
> xxx xxx xxx xxx"

According to the aforesaid provision, if a director absents himself for three consecutive meetings of the Board of directors or from all the meetings of the Board for a continuous period of three months without obtaining leave, he is deemed to have vacated his office.

22. Finally, section 400 of the Act contemplates that if applications are filed before the Company Law Board under sections 397 and 398, the Board shall give notice of every application made to it under section 397 or 398 to the Central Government and thereafter if any representation is made by the Central Government, the same shall be taken into consideration before passing a final order in the proceedings under section 397 and 398. Section 397 provides for application to the Company Law Board for relief in case of oppression and section 398 deals with application to the Board for relief in case of mis-management. There is no dispute that cessation of director under section 283(1)(g) can be agitated in a proceeding under these sections.

23. The main question which requires consideration in this appeal is as to whether notice for the meetings held were properly served on the respondent and inspite of service, he remained absent for five consecutive meetings. This would be the moot question on which the entire decision of this appeal would depend?

24. Apart from the aforesaid question, the question of adverse inference being drawn for not producing the minutes of the meetings has to be taken note of, so also the conduct of the parties and a prudent man's approach to be adopted keeping in view the bonafides of the appellants in proceeding in the matter, as canvassed by Shri P.R. Bhave, learned Senior Advocate, further effect of not sending notice to the Central Government is also to be considered.

25. Section 286 of the Act contemplates that 'notice of every meeting of the Board of Directors of the company shall be given in writing to every director' and the method of service of this notice is contemplated under section 53. Section

53(1) of the Act contemplates that the 'documents may be served by a company on any of its member either personally or by sending by post to him in his registered address'. Sub-section (2) of Section 53 pertains to 'drawing of a presumption'. It contemplates that where the document is sent by post, service thereof shall be deemed to be effected by properly addressing, prepaying and posting the letter containing the document. In the present case, it is the contention of the appellant that the five notices for attending the meetings were sent under posting certificate (UPC) to the respondent/company petitioner. The five meetings in which the respondent was absent are alleged to have been held on 1.9.2004 (two meetings); 14.9.2004, 31.12.2004 and 31.1.2005. The first notice for the meeting, which was to be held on 1.9.2004, at 11.00 AM, is dated 25.8.2004 and is at page 187 of Paper Book No.2. The agenda for the meeting is also indicated therein and the UPC for the same is at page 186. Similarly, the notice for the second meeting to be held on 1.9.2004 at 4.00 PM is at page 188 and the UPC is at page 189. At page 190 is the notice for the meeting to be held on 14.9.2009 and the UPC is at page 191. Similarly, at page 192 and 194 are the notices for the meetings to be held on 31.12.2004 and 31.1.2005 and the UPC are at pages 191 and 193 respectively.

26. During the course of hearing, on behalf of the respondent certain discrepancies were tried to be pointed out in the posting certificates at pages 189 and the difference in the agendas and mistakes committed in the agendas to contend that these would indicate that the documents are fabricated. For the present, this Court does not deem it proper to enter into the aforesaid factual enquiry. For the present, it would be appropriate to consider as to whether service of notice for the five meetings, under certificate of posting, is a proof of service of notice on the company petitioner.

27. The presumption to be drawn under section 53(2)(a) of the Act contemplates fulfillment of certain conditions, they are properly addressing the documents, prepaying and posting the letter. The learned Company Law Board has refused to accept the posting certificates as proof of service of notice mainly on the ground that the UPC alone cannot be enough for drawing the presumption, in the absence of collateral evidence like dispatch register, register showing payment of postage stamps, account books being adduced. Even though by relying upon a judgment of this Court in the case of *Parmanand Choudhary* (supra), Shri Bhave tried to emphasize that if a notice is sent by UPC, service of notice is deemed to be effected, it would be appropriate and profitable at this stage to refer to a judgment of the Supreme Court on the question. In the case of *M.S. Madhusoodhanan and another Vs. Kerala Kaumadi (P) Ltd and others*, (2004) 9 SCC 204, the matter has been dealt with. In the said case also notice to a director was sent by UPC and apart from producing the postal certificates, a delivery book was adduced as evidence to contend that the notice was served on the personal assistant of the

director. Both these pieces of evidence adduced i.e. UPC and delivery book alongwith affidavit of the personal assistant Mohan Raj was discarded by the Supreme Court and the matter has been dealt with in paragraphs 115 onwards in the following manner:

> "115. As far as the certificate of posting is concerned, it is not explained why it does not record the dispatch of notices to any other shareholder. When the relationship between the parties was already so embittered, proof of service of notice by certificate of posting must be viewed with suspicion. Judicial notice has been taken that certificates of posting are notoriously "easily" available. What was seen as a possible but rare occurrence in 1981 *(L.M.S. Ummu Saleema v. B. B. Gujaral,* (1981) 3 SCC 317) is now seen as common. Thus in *Shiv Kumar v. State of Haryana*, 1994 (4) SCC 445, this Court said :
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> > "We have not felt safe to decide the controversy at hand on the basis of the certificates produced before us, as it is not difficult to get such postal seals at any point of time."
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> 116. Despite this ground reality and on a misinterpretation of the provisions of Section 53, the Appellate Court came to the indefensible conclusion that "evidence regarding dispatch of a communication under certificate of posting attracts the irrebuttable statutory presumption under Section 53 (2)(b) that the notice had been duly served", that "it is not open now to project a plea of absence of service of notice and a substantiation thereof by evidence" and that even if it were proved that the notice did not reach the addressee, the evidence could not be "formally accepted and formally acted upon by the Court" such contrary evidence "being necked (sic) out at the threshold".
>
> 117. This Court in *Ummu Saleema's case* (supra) said that a certificate of posting might lead to a presumption if the letter was addressed and was posted, that it, and in due course, reached the addressee:
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> > "But, that is only a permissible and not an inevitable presumption. Neither Section 16 nor Section 114 of the Evidence Act compels the Court to draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of case, the Court may refuse to draw the presumption. On the other hand the presumption may be drawn initially but on a consideration of the evidence

the Court may hold a presumption rebutted and may arrive at the conclusion that no letter was received by the addressee or that no letter was ever dispatched as claimed".

118. This general rule regarding certificates of posting has not been changed upon Section 53 of the Companies Act, although it does provide that if a document is sent by post in the manner specified, "service thereof shall be deemed to be effected". The word "deemed" literally means "thought of" or, in legal parlance "presumed".

119. There is a distinction between "pre-sumption" and "proof". A presumption has been defined as

"an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from some-thing proved or taken for granted" (*Izhar Ahmad v. Union of India,* AIR 1962 SC 1052, at page1060, paragraph 18).

They are rules of evidence which attempt to assist the judicial mind in the matter of weighing the probative or persuasive force or certain facts proved in relation to other facts presumed or inferred (ibid). Sometimes a discretion is left with the Court either to raise a presumption or not as in Section 114 of the Evidence Act. On other occasions, no such discretion is given to the Court so that when a certain set of facts are proved, the Court is bound to raise the prescribed presumption. But that is all. The pre-sumption may be rebutted.

120. While construing Section 28-B of the U.P. Sales Tax Act which inter alia provides that if a transit pass is not produced at the checkpost on entry and at the point of exit. "it shall be presumed that the goods carried thereby have been sold within the State" (emphasis supplied), the contention that the phrase "it shall be presumed that" meant that "it shall be conclusively held" was negatived. After referring to Section 4 of the Evidence Act it was held by this Court in *M/s, Sodhi Trans-port Co. v. State of U. P.,* AIR 1986 SC 1099, at page 1105) :

"The words "shall presume" require the Court to draw a presumption accordingly, unless the fact is disproved. They contain a rule of rebuttable presumption. These words i.e. "shall presume" are being used in the Indian judicial lore for over a century to convey that they lay

down a rebuttable presumption in respect of matters with reference to which they are used and we should expect that the U.P. legislature also has used them in the same sense in which Indian Courts have understood them over a long period and not as laying down a rule of conclusive proof. In fact these presumptions are not peculiar to the Evidence Act. They are generally used wherever facts are to be ascertained by the judicial process".

121. It was accordingly held that the words "shall presume" contained in Section 28-B of the U.P. Sales Tax Act only require the authorities concerned to raise a rebuttable presumption that the goods must have been sold in the State if the transit pass is not handed over at the check post at point of exit and that it was open to the transporter to still prove that the goods had been disposed of in a different way. (See also *Syad Akbar v. State of Karnataka,* AIR 1979 SC 1848; *State of Madras v. Vaidyanatha,* AIR 1958 SC 61).

122. Raising of a presumption, therefore, does not by itself amount to proof. The result of a mandatory requirement for raising a presumption cast on Court, as there is under Section 53 (2) of the Companies Act, is that the burden of proof is placed on the person against whom the presumption operates for disproving it. It is only if such person is unable to discharge the burden, that the Court will act on the presumed fact. (See: *Dahyabhai Chhagganbhai v, State of Gujarat,* AIR 1964 SC 1563). A presumption however is of course not always rebuttable. But the mere use of the word "shall" before the word "presume" or other like word does not mean that the presumption is irrebuttable or conclusive. An irrebuttable presumption is couched in different language, normally indicating that proof of one set of facts shall be "conclusive proof" of a second set. An example of this is Rule 3 of the Rules framed in 1956 under Section 18 of the Citizenship Act, 1955 which was the subject matter of challenge in *Izhar Ahmad's case* (supra). Section 53 (2) contains no such language.

123. Consequently, the words "shall pre-sume" in section 53 sub-section (2) means a rebuttable presumption which the Court must raise provided the basic facts namely the due posting of the document is proved, the onus being on the addressee to show that the document referred to in the certificate of posting was not received by him.

124. In the present case, the certificate of posting is suspect.

Assuming that such suspicion is unfounded, it does not in any event amount to conclusive proof of service of the notice on Madhusoodhanan or on any of the other addressees mentioned in the certificate as held by the Division Bench. Except for producing the dispatch register and the certificate of posting, no one on behalf of the respondents came forward to vouch that they had personally sent the notice through the post to Madhusoodhanan and his group Madhusoodhanan had written two letters contemporaneously dated 4-8-86 and 8-8-86 (Ex. P-24 and Ex. P. 35) to Srinivasan, the General Manager of Kerala Kaumudi and to Madhavi complaining that he was not receiving any mail at all. These letters were admittedly received but not replied to by the respondents. It is also apparent from a perusal of those letters that Madhusoodhanan had no knowledge whatsoever of the notice for application for allot-ment of additional shares. Had there been such notice it is improbable that Madhusoodhanan who was fighting for retaining his control over Kerala Kaumudi, would have risked losing such control by abstaining from applying for the additional shares."

(Emphasis supplied)

28. A perusal of the aforesaid principle laid down by the Supreme Court clearly indicates that raising of a presumption contemplated under section 53(2) does not by itself amounts to conclusive proof. If the facts of the present case are analyzed in the backdrop of the aforesaid legal principle, it would be seen that in the present case except for filing the postal certificates and the letters, the only piece of evidence with regard to service of notice is an affidavit of one Shri Rajesh Tadas, who is said to have personally gone to the residence of the company petitioner for serving the notice. The said aspect of the matter with regard to personal service shall be dealt with separately.

29. For the present, the question of service through UPC is being considered. For service of notice by UPC the only evidence adduced is the postal certificates. Other supporting documents/evidences like the dispatch register, the proof with regard to postage stamp affixed or the affidavit of the person concerned, who had actually gone to the post office and dispatched the notices are not available on record. Merely the postal certificates are filed and it is prayed that a presumption be drawn that the notices are served. If the principle governing drawal of such a presumption in the light of the law laid by the Supreme Court, in the case of *Madhusoodhanan* (supra) is taken note of, them I am afraid the presumption to the extent of proving the service of notice cannot be drawn. In the case of *Madhusoodhanan* (supra) before the Supreme Court, apart from producing the postal certificates, the local delivery book of the company and affidavit of one Mohan Raj were filed. The Supreme Court discarded these evidence and refused

to accept it in the absence of dispatch register, amount spent for stamp etc being proved. When the Supreme Court has laid down the principle that judicial notice has to be taken to the effect that certificate of posting are "notoriously easily available", then in a case like the one in hand, burden lay heavily on the appellants herein to prove by adducing adequate cogent evidence the fact with regard to dispatch of notice to the respondent for the meetings to be held. The question as to whether presumption of dispatch or receipt of a letter sent under certificate of posting could be drawn or not would depend upon the facts and circumstances of each case. The presumption can be drawn and the same can be held as proof of dispatch of notice if it could be seen that the notice was sent after prepaying the postage stamps, the person who has effected the dispatch should come forth and say that he has dispatched the notices by going to the post-office and had paid for the requisite stamps. The presumption has to be drawn based on the evidence that comes on record. When the principle evidence regarding posting of the notice i.e.. the dispatch register of the company, the books of account showing expenses incurred for posting of the letter, the person who has posted the letter are not filed nor any affidavit of the person dispatching the notice filed, then the presumption under section 53(2) cannot be drawn. Until and unless the primary evidence in the nature of dispatch register, accounts book, affidavit of the person who dispatched the notices are not tendered, the secondary question of drawing presumption would not arise. It is only if the document is sent by post after fulfilling the requisite formalities as detailed hereinabove that a presumption under section 53 can be drawn. In the present case, there is no evidence regarding posting of the letter or documenting its posting or affixing adequate stamps. In the absence of the aforesaid facts being established, this Court does not deem it appropriate to draw the presumption and hold the postal certificates to be proof of sending the notice to the respondent.

30. Even though by placing reliance on the judgment of *Parmanand Choudhary* (supra) Shri Bhave, learned Senior Advocate, had tried to emphasize that the notices have been dispatched, but keeping in view the law laid down by the Supreme Court in the case of *Madhusoodhanan* (supra), this Court cannot record a finding to the effect that notices in question were dispatched to the company petitioner. In this regard, the principles laid down by the Madras High Court in the case of *Microparticle Engineers Private Limited and others Vs. Mrs. Senthamarai Munusamy*, 2003 (Vol.116) Company Cases 465; by the Punjab and Haryana High Court, in the case of *Bhankerpur Simbhaoli Beverages P. Ltd and another Vs. Sarabhjit Singh and others*, 1996 (Vol.86) Company Cases 842, may be taken note of. All these cases pertain to issuance of notice with regard to meetings of a company and dispatch of the same under postal certificates, the consistent view in all the cases are that in the absence of corroborative evidence being produced, showing actual dispatch of the notice and its stamping, service or

dispatch of notice cannot be presumed. Reference may also be made in this regard to another judgment of the Punjab and Haryana High Court, in the case of *Col. Kuldip Singh Dhillon and others Vs. Paragaon Utility Financiers (P) Limited and others*, 1986 (Vol.60) Company Cases 1075.

31. On a complete scanning of the documents and evidence that has come on record, this Court is of the considered view that the onus of proving dispatch of notices for the meetings in question i.e..., five in number, rested with the appellants' sender, who had to establish it by sufficient corroborative evidence that the notices were sent. Mere production of the certificate of posting issued by the postal authority is not and cannot be a conclusive proof of having served the notice upon the addressee as indicated in the UPC. Under law, the onus of proving the fact that the notice was sent was on the company, consequently the appellants herein, and in the facts and circumstances of the case, company have failed to discharge this onus by adducing cogent, legal and admissible evidence. Accordingly, a finding has to be recorded to the effect that sending of the notice for the five Board meeting and its service on the respondent is not proved.

32. Section 53 of the Act also provides for personal service of the notice. It would, therefore, be appropriate to consider at this stage as to whether appellants have proved service of notice on the company petitioner by personal service. For the purpose of establishing personal service, it is the case of the appellants that Shri Rajesh Tadas, an employee of the company had gone to the residence of the company petitioner and he had met some family members, who refused to accept the notice. The affidavit of the said person Shri Rajesh Tadas is available at page 196 of Paper Book No.2. The affidavit consists of five paragraphs. It is very small and for the sake of convenience, the entire affidavit is reproduced hereinbelow:

> "1. That I am an employee of the Marble City Hospital and Research Centre Pvt. Ltd.
>
> 2. That I am in the employment of the Company since Aug. '03.
>
> 3. That I personally went to the house of Mr. Sarabjeet Singh Mokha, the petitioner in this case on 25.8.04, 08.09.04, 23.12.04 and 24.01.05 to serve the notice of Board meetings.
>
> 4. That the notice of cessation dtd.4.2.05 and share offer letter dtd.30.4.05 was also given to me by the Company for personal by hand service on Mr. Sarabjeet Singh Mokha, and I personally went to the serve the same on Sarabjeet Singh Mokha.
>
> 5. That each time when I went to serve, the notices/letters, to the house of Mr. Sarabjeet Singh Mokha, he was not available and his family members refused to receive or acknowledge the same. Therefore, personal service could not be effected."

33. A perusal of the affidavit would indicate that Shri Rajesh Tadas on oath says that he is an employee of the company, he is working since August 2003 and he personally went to the house of the company petitioner on 25.8.2004, 8.9.2004, 23.12.2004 and 24.1.2005 to serve notice of Board meetings. He also went to serve the notice of cessation dated 4.2.2005 and the letter dated 30.4.2005. Thereafter, he states that each time he went to serve the notices/letters, company petitioner Shri Sarabjit Singh Mokha was not available and his family members refused to receive or acknowledge the same. However, alongwith his affidavit, Shri Rajesh Tadas has not produced the so-called notices, which he carried with him on 25.8.2004, 8.9.2004, 23.12.2004 and 24.1.2005. The dates mentioned in paragraph 3 of his affidavit are the dates on which he went to the house of the company petitioner. He does not say as to what was the date of the notice, which he was required to serve and what was the date indicated in the notice for holding of the Board meetings. The affidavit does not indicate as to what action he took after the family members in the house of the company petitioner refused to receive or acknowledge the notice. If the dates indicated by Shri Rajesh Tadas in paragraphs 3 and 4 of his affidavit are taken note of, it would be seen that they are same dates on which the notices are issued and they are dispatched as per the UPC, available at page 186 onwards of the Second Paper Book. However, if the notices were sent by UPC on the dates indicated in the postal certificates, then it is not known as to why Shri Tadas was also sent on the same date for serving notice by hand. The same can be explained by contending that it was a precautionary measure adopted by the company, and, therefore, there is nothing wrong if such a procedure was followed, but if Shri Rajesh Tadas had really gone to serve the notice, then his affidavit should have been more specific and certain other particulars were also required to be mentioned therein, which are lacking and due to which, the facts indicated in the affidavit becomes doubtful. Some of the facts which should have found place in the affidavit and which are not available are as to who instructed Shri Rajesh Tadas to go and serve the notices personally on the company petitioner. Shri Rajesh Tadas does not disclose as to under whose instructions he had gone to serve the notice personally to the company petitioner; he also does not identify or produced the notices, which were carried by him for service on the dates mentioned in paragraphs 3 and 4, of his affidavit. Copies of notices carried by him are not part of his affidavit. He does not say that the notices available at pages 187, 188, 190, 192 and 194 are the notices, which were carried by him for service on the company petitioner. He does not say as to why he did not make any endorsement with regard to the particulars of the family members to whom he tried to effect service and who refused or did not acknowledge the same, no other witness is shown in whose presence the service was tried to be effected. That apart, finally Shri Tadas does not say as to what was the action taken by him after the notices remained unserved, to whom he

returned the notices, to whom he reported the matter about refusal to accept the notice and how the matter was returned back to the competent authority of the company alongwith his report. His affidavit is silent on all these vital aspects, is vague and does not disclose the aforesaid factual aspects of the matter. If all these discrepancies are evaluated cumulatively, it can be construed that the appellants herein have failed to prove service of notice on the company petitioner by post or personally through Shri Rajesh Tadas.

34. Apart from the aforesaid, it is seen from the notices available on record that the notices are addressed to four directors, three of the directors are the appellants herein and the fourth director is the company petitioner, who is removed. All the four are subscribers to the Memorandum of Association and are the founder directors of the Company. Action is taken against the company petitioner, one amongst the four directors, and he is removed from the office on the ground of automatic cessation by operation of law i.e.. Section 283(1)(g). Company petitioner being a director subscribing to the Memorandum of Association i.e... a founder director, has certain legal rights, vested in him to continue as a director in the company and if he is to be removed from the directorship held by him, the same has to be done in a manner authorized and provided by law. Removal of the company petitioner from the post of directorship has certain civil consequences and, therefore, before visiting him with such civil consequences having adverse effect on his right of discharging the duties as a director, it was incumbent upon the appellants herein to establish that inspite of knowledge, proper service of notice, he was absent from five consecutive meetings of the Board and, therefore, he ceased to be a director. It is the considered view of this Court that appellants have failed to discharge this burden, which lay heavily on them under law and, therefore, this Court has no hesitation in holding that the action taken against the company petitioner is without proper notice to him, without informing him as to when the Board meetings are to be held and in the absence of notice, his removal on the ground of cessation by operation of law cannot be sustained and in so holding the Company Law Board has not committed any error.

35. Shri P.R. Bhave, learned Senior Advocate, during the course of hearing had tried to emphasize that the company petitioner was not available to the civil society for a long period, he was absconding, evading arrest in the criminal case and, therefore, it was tried to be emphasized that the notices were deliberately not received by him or that service of notices should be deemed. To this submission Shri Ajay Mishra, learned Senior Advocate, referred to various sale-deeds said to have been executed by the company petitioner during the same period in connection with his other business activities and tried to submit that the company petitioner was very well available and was discharging his routine business activities. Be it as it may, when the provisions of the Act particularly section 286 read with section 53 contemplates service of notice before a Board meeting to a member entitled to

attend such meeting and when the law contemplates a procedure for service of notice, then without service of notice and intimation of the meeting being proved in accordance to law, no presumption can be drawn merely because the company petitioner was involved in some criminal case or was absconding or on the ground that he was not available to the civil society.

36. Having held so, this company appeal could be very well dismissed on this ground alone, but as serious arguments were advanced during the course of hearing by Shri P.R. Bhave, learned Senior Advocate, with regard to the fact that adverse inference is drawn on the ground that minutes of the Board meetings are not produced. Shri Bhave, learned Senior Advocate, had argued that the company petitioner never challenged holding of the meetings nor was it his case that the Board meetings were not held and, therefore, it was argued that the findings recorded by the Company Law Board to the effect that the appellants have not proved holding of the meeting is a perverse finding.

37. In this regard, this Court is of the considered view that when the Board meetings are held under the Act, then certain statutory procedures are required to be followed. As already indicated hereinabove, the procedure for holding the general meeting and the meeting of the Board of directors are contemplated under section 193. Sub-section (1) thereof mandates that minutes of all the proceedings of the Board of directors shall be kept by recording the minutes within 30 days of conclusion of the meeting and entries thereof are to be made in a book kept for the purpose and in the said book, the pages have to be consecutively numbered. Each page of such book is to be initialled or signed and the last page of the record of the proceedings of each meeting shall be dated and signed. Section 193 contemplates a detailed procedure for recording the minutes of the Board meeting and their maintenance and signature in a particular manner. If the Board meetings and its proceedings are recorded in the statutory manner as contemplated under section 193, then the law presumes under section 194 that the meetings of the Board as recorded under section 193 are held. The presumption can be drawn under sections 194 and 195, if the minutes have been maintained in accordance with the requirement of section 193. In the present case, appellants were proposing to remove the company petitioner from the post of Board of director on the ground that he has not attended five consecutive meetings of the Board. If the meetings of the Board were held and if the company petitioner was absent from these meetings, then even in the absence of allegations being made, it was incumbent upon the appellants herein to produce the minutes of the Board meeting maintained in accordance to the statutory requirement and show that the Board meetings were held, minutes are drawn and the company petitioner is shown to be not present. The minutes of the Board meeting, which are to be kept in accordance to the requirement of section 193 are statutory documents maintained by the company in the day-to-day discharge of its functions and the same can very well be produced

to show that the meetings of the Board were held after complying with all legal formalities. The minutes of the Board meeting were not produced before the Company Law Board and in this proceedings (appeal) before this Court also what is produced is only a photocopy of the proceedings, they are not in the form or statutory prescriptions made for its maintenance under section 193. Before this Court also, the proceedings of the Board meetings are not produced in its original. What is produced is a certified true copy, which does not bear the signature of any person, but is certified as true by the Chairman of the company. The documents are typed copies, containing loose sheets and the same does not indicate that they are maintained in accordance to the requirement of section 193. When the appellants contend that they were acting bonafidely and had no malafide intentions, it is not known as to why the original records of the Board meeting were kept away in these proceedings when they would have thrown much light on the bonafides of the appellants. However, having held that the appellants have miserably failed to establish issuance of proper notice and service of notice with regard to holding of the Board meetings, this Court does not deem it necessary now to go into the question of records of the Board meeting not being produced in the proceedings before the Company Law Board and in this appeal, but sees no error in the finding recorded by the Company Law Board in this regard.

38. Finally, during the course of hearing much arguments were advanced by Shri P.R. Bhave, learned Senior Advocate, to the effect that the requirement of section 400 is not complied with, this section contemplates that the Company Law Board shall give notice of every application filed under sections 397 and 398 to the Central Government and on receipt of such notice, if any representation is submitted by the Central Government, the same has to be considered before passing final order.

39. The requirement of Section 400 of the Act is to be complied with by the Company Law Board, the Board is not impleaded as a party and there is nothing to indicate that any such objection was raised during the pendency of the proceedings before the Company Law Board. The question as to whether notice was sent to the Central Government by the Company Law is a question of fact and the same cannot be looked into at this stage in an appeal, where fact finding enquiry is not permitted. That apart, except for contending that the notice is not issued to the Central Government, no legal provision or any principle is brought to the notice of this Court on the basis of which it can be held that non-issuance of notice under section 400 in the present proceedings is fatal to such an extent that the entire proceedings stand vitiated.

40. Even though by placing reliance on the judgment in the case of *Bilasrai Joharmal and others Vs. Akola Electric Supply Company Pvt. Ltd.* AIR 1959 BOMBAY 176, Shri P.R. Bhave, learned Senior Advocate, contended that issuance of notice to the Central Government was necessary, but there is nothing in the said judgment to indicate that non-issuance of notice would render the entire proceedings to be null and void. When the provision is to be complied with by the

Company Law Board, the company petitioner cannot be made to suffer for non-compliance. In the said judgment, there is nothing to indicate that non-compliance of this provision renders the entire proceeding vitiated. On the contrary, the principles which had weighed with the law-makers for incorporating section 400 would indicate that the provision was incorporated for protecting the interest of minority share holders or a class of members in minority, who have interest in a company and to safeguard their rights and interest, the provision for notice to the Central Government is incorporated. Consideration of the representation contemplated is for obtaining the views of the Central Government in order to protect the right of the unrepresented minority share holders, whose interest is to be seen in a proceedings pertaining to winding up of a company or other matters where public interest is involved. There is nothing under law to indicate that non-compliance with the aforesaid provision renders the proceeding vitiated in all cases, even when no public interest or right of any other member of the company, unrepresented, is involved. (Ref: C.R. Datta on The Company Law, Sixth Edition 2008; Pages 5700 to 5702).

41. As the question of allotment of shares is also done without proper notice to the company petitioner, the finding recorded by the learned Company Law Board with regard to allocation of shares also does not warrant any interference. For the purpose of allocation of shares, it is alleged that the offer was made on 30.4.2003 and in this offer it is indicated that the appellants have decided to allocate the share in its meeting held on 28.5.2005. Service of notice with regard to this meeting is also in the same manner as discussed hereinabove and, therefore, it is not established that the notice is served. That apart, it is clear that the decision with regard to allocation of shares took place on 5.7.2005. If the decision was taken on 5.7.2005, then the respondent who was arrested on 1.7.2005 should have been informed about the same. This was not done. The learned Company Law Board has dealt with this matter in detail, in paragraphs 14 and 15 of its order, and this Court does not see any perversity or error in the aforesaid finding of the Company Law Board, warranting interference.

42. Considering the totality of the facts and circumstances, this Court is of the considered view that in passing the impugned order the Company Law Board has not committed any error, which warrants interference now in this appeal.

43. Accordingly, this appeal under section 10-F of the Act is dismissed without any order so as to costs.

Appeal dismissed.

I.L.R. [2009] M. P., 2965
APPELLATE CIVIL
Before Mr. Justice K.K. Lahoti & Mr. Justice K.S. Chauhan
21 July, 2009*

HAR PRASAD SHARMA ... Appellant
Vs.
SMT. NISHA SHARMA & ors. ... Respondents

Civil Procedure Code (5 of 1908), Order 9 Rule 3 & 4, Order 7 Rule 11 & 13 - *Earlier suit was dismissed in default of appearance of the parties - Apart from this, there was non-compliance of the order to make payment of deficit court fee - Subsequent suit dismissed as not maintainable - Held - If the order passed in earlier suit is treated u/O. 9 R. 3 CPC then the plaintiff can file a fresh suit u/O. 9 R. 4 CPC - If the order passed in earlier suit is treated u/O. 7 R. 11(b) CPC then it was rejection of plaint and u/O. 7 R. 13 CPC plaintiff can file a fresh suit in respect of the same cause of action subject to period of limitation - Order of dismissal of subsequent suit set-aside - Matter remanded back to trial Court.* (Para 6)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 3 व 4, आदेश 7 नियम 11 व 13 – पूर्ववर्ती वाद पक्षकारों की उपस्थिति के व्यतिक्रम में खारिज कर दिया गया – इसके अतिरिक्त न्यायालय फीस में कमी का संदाय करने के आदेश का अपालन भी था – पश्चात्वर्ती वाद पोषणीय न मानकर खारिज किया गया – अभिनिर्धारित – यदि पूर्ववर्ती वाद में पारित आदेश सि. प्र.सं. के आदेश 9 नियम 3 के अन्तर्गत माना जाता है तब वादी सि.प्र.सं. के आदेश 9 नियम 4 के अन्तर्गत नया वाद पेश कर सकता है – यदि पूर्ववर्ती वाद में पारित आदेश सि.प्र.सं. के आदेश 7 नियम 11(बी) के अन्तर्गत माना जाता है तब यह वादपत्र की नामंजूरी थी और सि.प्र.सं. के आदेश 7 नियम 13 के अन्तर्गत वादी परिसीमा की कालावधि के अध्यधीन उसी वादकारण पर नया वाद पेश कर सकता है – पश्चात्वर्ती वाद की खारिजी अपास्त – मामला विचारण न्यायालय को प्रतिप्रेषित।

Manoj Jain, for the appellant.
Bramhadatt Singh, for the respondents.

ORDER

This appeal is directed against the dated 9.1.2009 by 4th Additional District Judge, Bhopal in Regular Civil Suit No. 258-A/2008 by which the suit filed by the appellant was dismissed as not maintainable under Order 7 Rule 11(b) of the Code of Civil Procedure, 1908.

2. This order is assailed by the appellant on the ground that the earlier suit was dismissed in default of appearance of the parties. Apart from this, in the earlier suit, there was non-compliance of the order dated 2.5.2008 by which the

*F.A. No.105/2009 (Jabalpur)

trial Court directed the appellant to make payment of the court fee and even if earlier suit is to be treated as dismissed because of the non-compliance of the order dated 2.5.2008 directing payment of deficit court-fee, the present suit was not barred. It was submitted that the impugned order be set aside and the appellant be permitted to make the payment of deficit court fee in the trial Court as per valuation of the suit.

3. Shri Bramhadatt Singh, learned counsel appearing for the respondents opposed the aforesaid contention and submitted that earlier suit was dismissed because of the non-compliance of the order dated 2.5.2008. The dismissal of the suit amounts to a decree and the second suit was barred. It was submitted that the order passed by the trial Court is in accordance with law and needs no interference by this Court.

4. To appreciate the rival contention of the parties, factual position in the case may be stated.

(a) It is not in dispute that the present suit has been filed by the appellant on the basis of same cause of action on which earlier civil suit was filed and was dismissed on 26.7.2008. In earlier suit, defendants were not served and the trial Court on the basis of the objection raised by the Reader, directed the plaintiff on 2.5.2008 to make payment of deficit court-fee. The aforesaid order was passed under Order 7 rule 11(b) of the C.P.C.

(b) It is also not in dispute that the deficit court fee as directed by the Court in earlier suit was not paid. However, the case was adjourned and was fixed for hearing on 1.7.2008. On the aforesaid date, the presiding officer was on leave and the case was fixed by the Reader for orders for 26.7.2008. From the perusal of the order-sheet dated 26.7.2008, it appears that the plaintiff was not present, defendants were unserved and the trial Court considering the order dated 2.5.2008 found that the court-fee was not paid inspite of extension of time, so the suit was dismissed under Order 7 rule 11 (b) of the C.P.C.

(c) Thereafter, the appellant filed the present suit on 7.7.2008 claiming the same reliefs which were prayed in earlier suit. On notice, defendant filed an application under Order 7 rule 11 read with Section 11 and Order 2 rule 2 C.P.C. contending that the present suit was barred as on the same cause of action, earlier suit was filed and dismissed. Reply of aforesaid application was filed by the plaintiff. The trial Court by the impugned order dismissed the suit as barred and also on the ground that on the earlier round of litigation, plaintiff was directed to make deficit

court fee which was not paid and the present suit was filed without making payment of adequate court-fee, which order is under challenge in this appeal.

5. From the perusal of the record, we find that the trial Court without considering the provisions as contained in order 7 rule 13 CPC decided the matter. Even if earlier order was passed under Order 7 rule 11 CPC, second suit on the same cause of action was not barred. For ready reference, we hereby refer Order 7 Rule 11 and Order 7 Rule 13 of CPC;

Order 7

Rule 11. Rejection of plaint

The plaint shall be rejected in the following cases:–

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9;

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

Rule 13. Where rejection of plaint does not preclude presentation of fresh plaint.

The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint n respect of the same cause of action.

6. In this case, earlier suit was dismissed in default of the appearance of the plaintiff when the defendants were not served, though the trial Court earlier had

passed an order for payment of deficit court fee. If the aforesaid order was passed under Order 9 rule 3 CPC, then the plaintiff was well within his right to file a fresh suit as per Order 9 rule 4 CPC which provides that where neither party appears, when the suit was called on for hearing, the suit may be dismissed, but the plaintiff may bring fresh suit subject to law of limitation or he may apply for an order to set the dismissal aside. In this case, plaintiff filed a fresh suit in place of seeking a remedy of setting aside dismissal of the earlier suit.

7. Even if the earlier dismissal of the suit is treated because of non-compliance of the order dated 2.5.2008 by which the Court directed to make payment of deficit fee under Order 7 Rule 11(b) of CPC, then it was rejection of plaint and under Order 7 rule 13 CPC, the plaintiff was not precluded from presenting a fresh plaint in respect of the same cause of action subject to period of limitation. We are of the considered opinion that the trial Court without considering the provisions as contained in Order 7 rule 13 and Order 9 rule 4 of CPC passed the impugned order, which order is not sustainable under the law and is hereby set aside. The matter is remanded beck to the trial Court to extend an opportunity to the plaintiff to make payment of deficit court fee as per valuation in the suit and after extending an apportunity in this regard to proceed with the trial.

8. As present suit was dismissed on an application filed by the respondents/ defendants under Order 7 rule 11 CPC, we direct that cost of this appeal shall be borne by the respondents/defendants. Counsel's fee Rs.2000/-.

Order accordingly.

I.L.R. [2009] M. P., 2968
APPELLATE CIVIL
Before Mr. Justice S.K. Gangele
30 July, 2009*

NATIONAL INSURANCE COMPANY LTD. ... Appellant

Vs.

SMT. MADHURI KUSHWAH & ors. ... Respondents

A. Motor Vehicles Act (59 of 1988), Section 82 - *Transfer of permit* - *Held* - *Where the holder of the permit dies, the person succeeding to the possession of the vehicle covered by the permit may, for a period of three months, use the permit as if it has been granted to him.* (Para 12)

क. मोटर यान अधिनियम (1988 का 59), धारा 82 – परमिट का अंतरण – अभिनिर्धारित – जहाँ परमिट के धारक की मृत्यु हो जाती है तो परमिट के अन्तर्गत वाहन के कब्जे

*M.A. No.1266/2007 (Gwalior)

का उत्तरवर्ती व्यक्ति तीन माह की कालावधि तक परमिट का उपयोग कर सकेगा मानो यह उसे प्रदान किया गया हो।

B. Motor Vehicles Act (59 of 1988), Section 149 - Compensation - Liability of the Insurance Company - *On the date of the accident the vehicle was not having the valid permit to ply the vehicle on a particular route - Claims Tribunal holding the Insurance Co. liable to pay compensation - Held - If there are violation of terms and conditions of the insurance policy, then the Insurance Co. is not liable to indemnify the insured, however the Insurance Co. shall pay the compensation to the claimants and it recover the same from the owner of the vehicle.* (Paras 21 & 22)

ख. मोटर यान अधिनियम (1988 का 59), धारा 149 – प्रतिकर – बीमा कम्पनी का दायित्व – दुर्घटना की तारीख को वाहन का विशिष्ट मार्ग पर वाहन चलाने का विधिमान्य परमिट नही था – दावा अधिकरण ने प्रतिकर अदा करने के लिए बीमा कम्पनी को दायी ठहराया – अभिनिर्धारित – यदि बीमा पॉलिसी के शर्तों और निबंधनों का उल्लंघन हो तब बीमा कम्पनी पॉलिसी धारक की क्षतिपूर्ति करने के लिए दायी नही है, तथापि बीमा कम्पनी दावेदारों को प्रतिकर का संदाय करेगी और वह उसकी वसूली वाहन के स्वामी से करेगी।

Cases referred :

1994 ACJ 1, 1996 ACJ 581, (1998) 3 SCC 145, 2006 ACJ 941, 2006 ACJ 2015, 2006(3) TAC 128 MP, 2006 ACJ 1058, 2007 ACJ 1577 MP, 2009 ACJ 1298.

B.N. Malhotra, for the appellant.
Arun Sharma, for the respondent Nos.1 to 5.
None for the respondent No.6.
Ravi Tomar, for the respondent No.7.

ORDER

S.K. Gangele, J. :–This order shall also govern the disposal of M.A.Nos. 5/08, 8/08, 1232/08, 1233/08, 1237/08, 1241/08, 1242/08, 1243/08, 1244/08, 1246/08, 1249/08, 1253/08, 1254/08, 1255/08, 408/09 and 409/09.

2. The appellant-Insurance Company has filed this appeal under Section 173 of the Motor Vehicles Act, 1988 against the award dated 25.9.2007, passed by the VIth Additional Motor Accidents Claims Tribunal, Gwalior in Claim Case No.20/2007. All the appeals filed by the Insurance Company are against the awards passed by the various Motor Accidents Claims Tribunal out of the same accident. Because the accident occurred in a passenger vehicle and all the awards are with regard to same accident, hence, all the appeals have been taken together and heard finally. In all the appeals the Insurance Company has challenged the award questioning its liability to indemnify the insured.

3. On 6.2.2006, a passenger bus bearing registration No.M.P.06-B-2567 had

been going from Morena to Vijaypur. A number of passengers had been travelling in the aforesaid bus. A passenger boarded at Kolarus with a small potli and during journey in the bus, he smoked a bidi, due to smoking, the potli caught fire and because inflammable material was in the potli, hence, the bus caught fire and ultimately, the bus was stopped at the police station and in the aforesaid accident near about 18 passengers had been died and number of persons received serious injuries. The report of the accident was lodged at the police station Kolarus, District Morena and police registered an offence against the driver of the bus vide crime No.30/2006 under Section 304/34 of IPC. Subsequently, an offence under Section 356 of Explosive Act has also been registered. The police filed charge-sheet before the J.M.F.C., Sabalgarh. The claimants filed claim applications before the Claims Tribunal for compensation. They pleaded that accident occurred due to negligence of the driver of the bus. It was insured by the non-applicant No.3-Insurance Company, hence, the Insurance Company, owner and driver of the bus are jointly and severally liable for payment of compensation.

4. The Insurance Company before the Claims Tribunal had taken plea that there was no permit to ply on the route of the bus, hence, the bus had been driven in contravention of the terms and conditions of the Insurance Policy. Consequently, the Insurance Company is not liable to indemnify the insured.

5. The Claims Tribunal has held that the accident occurred due to rash and negligent driving of the driver of the bus bearing registration No.M.P.06-B-2567. The bus was insured at the relevant time by the Insurance Company. The driver had a valid driving licence and there was no violation of Insurance Policy. The Tribunal has further held that the owner, driver and Insurance Company are jointly and severally liable for payment of compensation.

6. Learned counsel for the appellant-Insurance Company has submitted that there was no permit on the rout of the bus and it had been driven in violation and contravention of terms and conditions of Insurance Policy. It was over-crowded and there was a sudden explosion in the bus, for that purpose, the vehicle was not insured. Hence, the Insurance Company is not liable to indemnify the insured.

7. Contrary to this, learned counsel for all the claimants-respondents have submitted that there was valid permit of the route and the vehicle was covered by permit at the relevant time. Hence, there is no violation of any terms and conditions of Insurance Policy. Learned counsel for all the claimants further submitted that the accident occurred due to rash and negligent driving of the driver and the conductor of the bus. It was the duty of the conductor to check the passenger and the employees of the owner have failed to perform their duties. It has further been submitted that the bus was not over-crowded and the Tribunal has rightly held that the Insurance Company is liable to indemnify the insured. In support of their contentions, learned counsels relied on the following judgments :-

(i) 1994 ACJ 1 *(G.M.K.S.R.T.C. Vs. Susamma Thomas);*
(ii) 1996 ACJ 581 *(Balwant Yadav Vs. Sarla);*
(iii) (1998) 3 SCC 145 *(Tasnimtaj Vs. M.D.K.S.R.T.C.);*
(iv) 2006 ACJ 941 *(Lalita Devi Vs. Mewa Singh);*
(v) 2006 ACJ 2015 *(Sahjahan Vs. National Insurance Co. Ltd.);*
(vi) 2006 (3) TAC 128 M.P. *(Phool Kunwar Vs. Sourab).*
(vii) 2006 ACJ 1058 *(Vijoy Kumar Vs. Bidyadher);*
(viii) 2007 ACJ 1577 M.P. *(Deepa Vs. M.P.S.R.T.C.); and*
ix) 2009 ACJ 1298 *(Sarla Varma Vs. Delhi Transport);*

8. The facts mentioned in M.A.No.1266/07 filed against the award dated 25.9.2007, passed in Claim Case No.20/2007 have been taken into consideration because in the present case, this Court has not decided quantum of compensation and the appeal has been considered only with regard to liability of the Insurance Company to indemnify the insured, hence, the facts which are necessary for decision on the aforesaid point have been taken into consideration.

9. Mr. Kailash Narayan Thapak, who was working as R.T.O. Morena in his evidence stated that initially a permit was sanctioned in favour of Rakesh Singh Tomar, which was valid from 7.2.1996 to 6.2.2001. The permit was renewed vide order dated 31.1.2001 passed by the Regional Transport Authority for the period from 7.2.2001 to 6.2.2006. Earlier, a vehicle bearing registration No.M.P.06-A/9200 had been covered by the aforesaid permit. The sitting capacity of the vehicle was 50+2. Subsequently, vide order dated 20.9.2005, a vehicle owned by Sobaran Singh Sikarwar bearing registration No.M.P.06B/2567 was covered by the aforesaid permit. On 20.9.2005, a letter was issued to Smt. Sunita Tomar, wife of Rakesh Singh Tomar mentioning the fact that Mr. Rakesh Singh Tomar had been died and after his death no application has been submitted to the office for transfer of permit. Thereafter, Smt. Sunita Tomar submitted an application on 30.1.2006 along with affidavit for transfer of permit because her husband Mr. Rakesh Singh Tomar was died on 27.2.2004. The Regional Authority vide order dated 5.10.2006 rejected the application of Smt. Sunita Tomar for renewal of permit. The then Branch Manager of Insurance Company working in Regional Office, Gwalior Mr. Banwarilal Gupta in his evidence stated that vehicle No.M.P.06B/2567 was insured by the Insurance Company vide Policy No.321401/31/04/6300004185 for a period of 2.3.2005 to 1.3.2006. The policy was issued in favour of Sobaran Singh Sikarwar by the Insurance Company of Morena. The policy was for passenger carrying vehicle under commercial vehicle package. As per the aforesaid policy, the company charged a premium of 22 passengers, driver and conductor and risk of 22 passengers was covered. He further stated that on date of accident, the insurance holder Mr. Sobaran Singh Sikarwar had no effective permit to ply the bus, hence, there was violation of terms and conditions of Insurance Policy. He further stated that in the bus, explosive had been carried out and due to the

explosion, the bus caught fire, in such circumstances, as per the policy, the Insurance Company is not liable to indemnify the insured.

10. From aforesaid two evidence, undisputed facts of the case are that initially a permit was granted in favour of Rakesh Singh Tomar which was valid for the period from 7.2.1996 to 6.2.2001. It was further renewed vide order dated 31.1.2001, passed by the Regional Transport Authority for the period from 7.2.2001 to 6.2.2006. Mr. Rakesh Singh Tomar was died on 27.2.2004. Earlier the bus bearing registration No.M.P.06A/9200 of the sitting capacity 50+2 had been plying on the route covered by the permit. Subsequently, another vehicle of the ownership of Sobaran Singh Sikarwar bearing registration No.M.P.06B/2567, sitting capacity of 22+2 has been covered by the permit vide order dated 20.9.2005. It is an admitted fact that before the aforesaid order, the original holder of permit Mr. Rakesh Singh Tomar died on 27.2.2004. As per the note-sheets filed before the Tribunal, Ex.D-8, Smt. Sunita Singh Tomar filed a revision before the State Transport Authority. It was registered as Case No.403/3005 and the appellate authority vide order dated 20.6.2005 permitted Smt. Sunita Singh Tomar to change the timing of the route on the basis of compromise. Thereafter Smt. Sunita Singh Tomar submitted an application on 7.9.2005 to change the vehicle and cover another vehicle of the ownership of Mr. Sobaran Singh Sikarwar bearing registration No.M.P.06B/2567, Model 205 to the permit. It has been mentioned in the notesheet that husband Smt. Sunita Singh Tomar, Mr. Rakesh Singh Tomar was the original permit holder and he was died, thereafter within the period of 90 days, the legal representatives of Rakesh Singh Tomar did not submit any application for transfer of permit, hence, in such circumstances, whether the vehicle No.M.P.06B/2567 could be covered by the permit which was issued in favour of Mr. Rakesh Singh Tomar. In spite of that objection, the authority issued order covering the permit in favour of Mr. Rakesh Singh Tomar for the vehicle bearing registration No.M.P.06B/2567 owned by Sobaran Singh Sikarwar.

11. From the aforesaid evidence, it is clear that initially permit was issued in favour of Rakesh Singh Tomar for the period from 7.2.1996 to 6.2.2001. Thereafter it was renewed vide order dated 31.1.2001 for the period from 7.2.2001 to 6.2.2006. Mr. Rakesh Singh Tomar died on 27.2.2004. Thereafter no application for transfer of permit by the legal representatives of Rakesh Singh Tomar was filed and for the first time Smt. Sunita Singh Tomar filed an application for transfer the permit in her name on 30.1.2006, that was rejected by the Regional Transport Authority, vide order dated 5.10.2006. A letter was also issued to Smt. Sunita Tomar on 20.9.2005 for submitting an application for transfer of permit. However, vide order of Regional Transport Authority, vehicle No.M.P.06B/2567 owned by Mr. Sobaran Singh Sikarwar has been covered by the permit vide order dated 20.9.2005. The application was filed by Smt. Sunita Tomar and ultimately on the aforesaid date, there was no permit in the name of Smt. Sunita Tomar.

12. Section 82 of the Motor Vehicles Act, 1988 prescribes procedure with regard to transfer of permit which is as under :-

> **82. Transfer of permit.**- (1) Save as provided in sub-section (2), a permit shall not be transferable from one person to another except with the permission of the transport authority which granted the permit and shall not, without such permission, operate to confer on any person to whom a vehicle covered by the permit is transferred any right to use that vehicle in the manner authorised by the permit.
>
> (2) Where the holder of a permit dies, the person succeeding to the possession of the vehicle covered by the permit may, for a period of three months, use the permit as if it had been granted to himself:
>
> Provided that such person has, within ;thirty days of the death of the holder, informed the transport authority which granted the permit of the death of the holder and of his own intention to use the permit:
>
> Provided further that no permit shall be so used after the date on which it would have ceased to be effective without renewal in the hands of the deceased holder.
>
> (3) The transport authority may, on application made to it within three months of the death of the holder of a permit, transfer the permit to the person succeeding to the possession of the vehicles covered by the permit:
>
> Provided that the Transport Authority may entertain an application made after the expiry of the said period of three months if it is satisfied that the applicant was prevented by good and sufficient cause from making an application within the time specified.

It is clear from the aforesaid Section 82 (2) of the Motor Vehicles Act, 1988 that where the holder of a permit dies, the person succeeding to the possession of the vehicle covered by the permit may, for a period of three months, use the permit as if it had been granted to him with the condition of the proviso. In the present case, the original permit holder Mr. Rakesh Singh Tomar was died on 27.2.2004, at that time a vehicle bearing registration No.M.P.06A/9200 was covered by the permit, in that circumstances, the owner of the vehicle bearing registration No.M.P.06A/9200 had a right to ply the aforesaid bus for a period of three months under the aforesaid permit and thereafter without transfer, no person was authorised to ply any bus under the permit granted to Mr. Rakesh Singh Tomar, however, in the present case, wife of Rakesh Singh Tomar submitted an application before the

authority for covering another vehicle under the permit and the Regional Authority vide order dated 20.9.2005 covered the vehicle No.M.P.06B/2567, owned by Mr. Sobaran Singh. The application was filed by Smt. Sunita Singh Tomar, at that time there was no permit in the name of Sunita Singh Tomar.

13. Admittedly, Smt. Sunita Singh Tomar submitted an application for transfer of permit on 31.1.2006 and that has been rejected vide dated 5.10.2006. Admittedly, the permit granted in favour of Rakesh Singh Tomar has never been transferred in the name of Sunita Singh Tomar. The accident occurred on 6.2.2006 and Mr. Rakesh Singh Tomar was died on 27.2.2004, admittedly, on the date of accident, there was no permit at all and the bus No.M.P.06A/9200 was covered by permit which was in the name of Rakesh Singh Tomar, who died near about two years before. In such circumstances, it is clear that when the accident occurred the vehicle had been plying without any permit. As per the Insurance Policy, Ex.D/1, the policy covers risk if vehicle used under a permit within the meaning of the Motor Vehicles Act, 1988. the policy has been issued under passenger carrying commercial vehicle policy package. Hence, it is clear that there was violation of terms and conditions of the policy.

14. Hon'ble Supreme Court in the case of *National Insurance Company Limited Vs. Challa Bharathamma and others*, reported in 2004 ACJ 2094, has held as under with regard to liability of the Insurance Company in the case where the vehicle had been plying without permit :-

> "The insurer resisted the claim on the ground that the insured had not obtained permit to ply the vehicle and, therefore, in terms of the policy of insurance the insurer had no liability. Tribunal accepted the plea. High Court held that insurer was liable to indemnify the award. It was of the view that since there was no permit, the question of violation of any condition thereof does not arise. The view is clearly fallacious. A person without permit to ply a vehicle cannot be placed at a better pedestal vis-a-vis one who has a permit, but has violated any condition thereof."

15. The Division Bench of this Court in the case of *Ram Sujan Tiwari Vs. Sita Gupta and others*, reported in 2009 ACJ 437, has held as under with regard to liability of the Insurance Company in a case where the vehicle had been driven on a route in which permit was not granted when accident was occurred :-

> "26. Since the vehicle was being driven on the route for which the permit was not granted, hence contravened the conditions of permit. It such circumstances, the insurance company cannot be held liable to pay compensation. The Tribunal has rightly exonerated the insurance company from its liability of payment."

16. The Hon'ble Supreme Court in the case of *New India Assurance Company*

Ltd. v. Sadanand Mukhi and others, reported in (2009) 2 SCC 417, has held as under with regard to liability of the Insurance Company to indemnify the insured :-

> "11. Provisions relating to grant of compensation occurring in Chapters XI and XII of the Act have been enacted by Parliament in order to achieve the purpose and object stated therein. Section 146 of the Act lays down the requirements for insurance against third-party risk. Where a third-party risk is involved, an insurance policy is required to be mandatorily taken out. The requirements of policies and the limits of liability, however, have been stated in Section 147 of the Act. Section 147 (1)(b) of the Act, reads as under:
>
> "147. Requirements of policies and limits of liability.- (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which -
>
> * * *
>
> (b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-
>
> (i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;
>
> (ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place;
>
> Provided that a policy shall not be required-
>
> (i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation act, 1923(8 of 1923), in respect of the death of, or bodily injury to, any such employee-
>
> (a) engaged in driving the vehicle, or
>
> (b) if it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or
>
> (c) if it is a goods carriage, being carried in the vehicle, or
>
> (ii) to cover any contractual liability.

Explanation.- For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place."

The provisions of the Act, therefore, provide for two types of insurance - one statutory in nature and the other contractual in nature. Whereas the insurance company is bound to compensate the owner or the driver of the motor vehicle in case any person dies or suffers injury as a result of an accident; in case involving owner of the vehicle or others are proposed to be covered, an additional premium is required to be paid for covering their life and property.

12. It is not a case where even Section 163-A of the Act was resorted to. The respondents filed an application under Section 166 of the Act. Only an Act policy was taken in respect of the motor vehicle. Submission of the learned counsel that being a two-wheeler, the vehicle was more prone to accident and, therefore, whosoever becomes victim of an accident arising out of the use thereof would come within the purview of the term "a person"as provided for in Section 147 of the Act, in our opinion, is not correct.

13. Contract of insurance of a motor vehicle is governed by the provisions of the Insurance Act. The terms of the policy as also the quantum of premium payable for insuring the vehicle in question depends not only upon the carrying capacity of the vehicle but also on the purpose for which the same was being used and the extent of the risk covered thereby. By taking an "Act policy", the owner of a vehicle fulfills his statutory obligation as contained in Section 147 of the Act. The liability of the insurer is either statutory or contractual. If it is contractual its liability extends to the risk covered by the policy of insurance. If additional risks are sought to be covered, additional premium has to be paid. If the contention of the learned counsel is to be accepted, then to a large extent, the provisions of the Insurance Act become otiose. By reason of such an interpretation the insurer would be liable to cover risk of not only a third party but also others who would not otherwise come within the purview thereof. It is one thing to say

that life is uncertain and the same is required to be covered, but it is another thing to say that we must read a statute so as to grant relief to a person not contemplated by the Act. It is not for the court, unless a statute is found to be unconstitutional, to consider the rationality thereof. Even otherwise the provisions of the Act read with the provisions of the Insurance Act appear to be wholly rational."

17. The Hon'ble Supreme Court in the case of *Oriental Insurance Company Limited Vs. Jhuma Saha (Smt.) and others*, reported in (2007) 9 263, has held as under:-

"6. The said contention of the appellant, however, did not find favour with the Motor Vehicles Accidents Claims Tribunal which, inter alia, held that the vehicle being insured and an additional premium for the death of the driver or conductor having been paid, the liability was covered by the insurance policy."

18. From the above principle of law laid down by the Hon'ble Supreme Court and the Division Bench of this Court, it is clear that if there is a violation of terms and conditions of the insurance policy, then the insurance company is not liable to indemnify the insured. In the present case, it is clear that the original permit holder Mr. Rakesh Singh Tomar was died on 27.2.2004, thereafter due to some misconception or manipulation, the owner of the bus got the bus No.M.P.06A/9200, which made the accident covered the vehicle and, in my opinion, the owner of the vehicle No.M.P.06B/2567, non-applicant No.2 played a fraud and he got his vehicle covered under the permit which was in the name of a death person, who was died two years before. In such circumstances, the owner is not entitled to cover his risk under the insurance policy. In the present case, the appellant-Insurance Company is not liable to indemnify the insured. The Claims Tribunal has committed an error of law in holding that the Insurance Company is liable to indemnify the insured.

19. With regard to other arguments raised by learned counsel for the appellant that the bus was overloaded, however, there is no clear evidence on this aspect that how many passengers had been travelling at the time of accident in the bus. It is also a fact that accident occurred due to fire, however, there is no complete evidence that there was explosion in the bus, hence, the aforesaid point raised by the learned counsel for the appellants cannot be decided in favour of Insurance Company.

20. After going through the record of the case, this Court has observed that the authority, who has passed the order dated 20.9.2005 by which the bus No.M.P.06B/2567 of the ownership of Mr. Sobaran Singh has been covered under the permit, which was in the name of Mr. Rakesh Singh Tomar is clear inviolation of statutory

provision of Section 82 of the Motor Vehicles Act, 1988. The authority has not applied its mind at all that a vehicle could not be covered by a permit which was in the name of a dead person, who was died on 27.2.2004, near about one and-a-half years before. This Court feels that the act of the authority is a naked violation of statutory provision.

21. As per the judgment of the Hon'ble Supreme Court in the case of *National Insurance Company Limited Vs. Challa Bharathamma and others,* reported in 2004 ACJ 2094, where the Hon'ble Supreme Court has held that the Insurance Company shall pay the compensation awarded by the Tribunal to the claimants and it could recover the same from the owner in the like manner, which is as under :-

> "13. The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. If may initiate a proceeding before the concerned executing court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle has furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessary arises the executing court shall take assistance of the concerned Regional Transport Authority. The executing court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, i.e., the insured. In the instant case considering the quantum involved we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."

In the present case, the owner of the offending vehicle got the insurance policy although original permit holder was died and at the time of accident the insurance policy was in existence. In view of the above facts and principle of law laid down by the Hon'ble Supreme Court, in my opinion, it would be proper that the insurance company should pay the amount of compensation to the claimants and it is permitted to recover the same from owner of the vehicle.

22. Consequently, all the appeals filed by the Insurance Company are hereby allowed. The appellant-Insurance Company is exonerated to indemnify the insured. However, it is directed that the Insurance Company shall pay the compensation to the claimants in view of the facts mentioned above in the order and judgment of the Hon'ble Supreme Court in the case of *National Insurance Company Limited Vs. Challa Bharathamma and others*, reported in 2004 ACJ 2094 and it could recover the same from the owner of the vehicle. It is hereby directed that a copy of the order be also sent to the State Transport Department for information. No order as to cost.

Appeal allowed.

I.L.R. [2009] M. P., 2979
APPELLATE CIVIL
Before Mr. Justice R.S. Garg
*30 July, 2009**

STATE OF M.P. & anr. ... Appellants
Vs.
RAJENDRA KUMAR & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Order 21 Rule 92 - Maintainability of suit after deciding objections by Executing Court - *Property of judgment debtor put to auction as it failed to pay suit amount - Sale ordered - Objections were raised by State Government and person who was in possession of property as lessee of State Government - Objections decided against the objectors - Objectors subsequently filed civil suit for declaring the sale as bad - Held - Once objections are decided by Executing Court, Order 21 Rule 92(3) would come into play and would forbid every person against whom order is made, to bring a suit - Suit not maintainable - Appeal dismissed.* (Para 8)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 92 – निष्पादन न्यायालय द्वारा आपत्तियाँ विनिश्चित करनें के बाद वाद की पोषणीयता – निर्णीत ऋणी की सम्पत्ति नीलाम की गई क्योंकि वह वाद राशि अदा करने में असफल रहा – विक्रय आदेशित – राज्य सरकार एवं उस व्यक्ति द्वारा, जो राज्य सरकार के पट्टेदार के रूप में सम्पत्ति के कब्जे में था, आपत्तियाँ उठाई गईं – आपत्तियाँ आपत्तिकर्ताओं के विरुद्ध विनिश्चित की गईं – आपत्तिकर्ताओं ने तत्पश्चात् विक्रय को दोषपूर्ण घोषित करने के लिए सिविल वाद पेश किया – अभिनिर्धारित – जब एक बार निष्पादन न्यायालय द्वारा आपत्तियाँ विनिश्चित कर दी जाती हैं, आदेश 21 नियम 92(3) प्रचलन में आयेगा और प्रत्येक व्यक्ति, जिसके विरुद्ध आदेश किया गया है, को वाद लाने से निषेधित करेगा – वाद पोषणीय नही – अपील खारिज।

B. Civil Procedure Code (5 of 1908), Order 21 Rule 4 - Necessary

*S.A. No.725/2009 (Indore)

parties - *Decree holder and judgment debtor are necessary party in a suit challenging the title of judgment debtor by third party - Neither decree holder nor judgment debtor were joined as party - Non-joinder would make the suit statutorily bad.* (Para 9)

ख: सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 4 – आवश्यक पक्षकार – तृतीय पक्ष द्वारा निर्णीत ऋणी के हक को चुनौती देने वाले वाद में डिक्रीदार और निर्णीत ऋणी आवश्यक पक्षकार हैं – न तो डिक्रीदार को और न ही निर्णीत ऋणी को पक्षकार के रूप में संयोजित किया गया – असंयोजन वाद को कानूनी रूप से दोषपूर्ण बनायेगा।

Amit Purohit, for the appellants.
Anjali Jamkhedkar, P.L., for the appellant/State in S.A.no.725/2008.
N. Raveendran, for the respondent No.1

ORDER

R.S. GARG, J.:–Though the appeal filed by the State Government is barred by limitation but, before entering into the question of limitation, I thought it fit to look into the merits of the matter so that the question of limitation is decided one way or the other.

2. Undisputedly one Fazal Hussain had filed Civil Suit No.1-B/1976 against M/s. Dewas Tyres, the said suit was decreed in favour of Fazal Hussain. However M/s. Dewas Tyres did not pay the suit amount, therefore, plots no.9, 10 and 16(c) over which certain construction was raised were put to auction. A sale proclamation was issued and sale was ordered in favour of respondent Rajendra Kumar S/o Rambabu Sharma on 9.5.1981.

3. It is contended by learned counsel for each of the appellant that M/s. Bharat Ice and Cold Storage were in possession of the property as lessees of the State Government, therefore, they filed certain objections under Order 21 Rule 92 before the learned executing Court. The objections came to be decided against the interest of M/s. Bharat Ice and Cold Storage so also against the State Government as contended by Smt. Anjali Jamkhedkar, learned Panel Lawyer.

4. It appears that on 19.4.1990 a sale certificate was issued in favour of said Rajendra Kumar S/o Rambabu Sharma. M/s. Bharat Ice and Cold Storage through its partner and one Pitambar filed a civil suit on 8.12.1994 against Rajendra Kumar the auction purchaser, the State Government so also against the Industries department. Undisputedly in the suit for declaration that the sale was bad the judgment debtor and/or decree holder were not joined as parties. After sometime the State Government and the Industries department made an application for their trans-position as plaintiffs. The application was allowed and the said defendants were trans-posed as plaintiff nos.4 and 5. After recording the evidence and hearing the parties the learned trial Court dismissed the suit, therefore, the original plaintiffs filed Regular Appeal No.5-A of 2008 while the other plaintiffs filed Appeal No. 6-A of 2008. After hearing learned counsel for the parties the learned appellate

Court dismissed both the appeals, therefore, each of the plaintiff have filed Second Appeals which have been numbered as S.A. No.517/2008 and S.A. No.725/2008.

5. Learned counsel for the appellants have submitted that the suit of the plaintiffs is maintainable in view of sub rule 4 of Rule 91 of Order 21 because they are the third parties and they are challenging the title of the judgment debtor. It is also submitted that rejection of the objections by the executing Court which were raised by the plaintiffs would enure to the benefit of the respondent no.1. but, would also provide a cause of action in favour of the appellants to file the suit. It is also submitted that if the property is held by the judgment debtor on lease hold right then the said property could not be sold in auction.

6. Learned counsel for the respondents on the other hand submitted that the suit of the plaintiffs was barred in view of sub rule 3 of Rule 92 to Order 21. It is also submitted that assuming that the suit was maintainable then too the same was liable to be dismissed under sub rule 4 of Rule 92 of Order 21 because of non-joinder of the decree holder and the judgment debtor who under the statute are required to be joined as necessary parties. It is also submitted by learned counsel for the respondents that a perusal of proviso appended to sub rule 1 of Rule 92 of order 21 would make it clear that any third party objection are required to be decided first and only thereafter a final order can be passed in the matter.

7. I have heard parties at length.

8. Sub Rule 1 of Order 21 Rule 92 of the Code of Civil Procedure, 1908 provides as under:

> **"O.XXI R.92 :Sale when to become absolute or be set aside:**
>
> (1). Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute:
>
> (Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection).

A fair reading and understanding of the proviso would make it clear that where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection. From the proviso it would clearly appear that whenever objections to the attachment etc. are raised by any party then the sale would not be confirmed until such objections are decided. Once the Court undertakes the task of deciding the objections then an order has to be passed by the Court either granting or rejecting the objections.

Once the final order is passed by the Court then sub rule 3 of Order 21 Rule 92 would immediately come into play and would forbid every person against whom the order is made to bring a suit. In the present matter as admitted by Shri Amit Purohit and Smt. Anjali Jamkhedkar, learned Panel Lawyer, that their objections against attachment and auction sale were rejected, the said parties would not be entitled to challenge the auction sale.

9. There would be no problem in agreeing to the argument raised by Miss Raveendran in relation to Rule 4 of Order 21 Rule 92. I assume for a moment that each set of the appellant is a third party and they have a right to challenge the judgment debtors' title by filing a suit against the auction purchaser then in such a case the decree holder Fazal Hussain and the judgment debtor M/s. Dewas Tyres were statutorily necessary parties. The cause title would clearly show that neither Fazal Hussain nor M/s. Dewas Tyres were joined as parties. When the statute requires particular person to be joined as party then said non-joinder would make the suit statutorily bad.

10. In the present matter it is also to be seen that the sale amount was deposited by Rajendra Sharma on 9.5.1981 and the possession was delivered to him. The Court below in the opinion this Court was not unjustified in holding that each of the appeal was liable to be dismissed. On the merits, I do not find any good reason to interfere in the matter. Each of the appeal is dismissed summarily.

11. At this stage it would be necessary to record that in such an important matter office of the Advocate General thought that a Panel Lawyer would be competent enough to assist this Court. Though I am not against Mrs. Anjali Jamkhedkar but, I will have to record that better assistance could be provided in the matter.

12. Let a copy of this order be sent to the learned Chief Secretary of the State of M.P for Perusal.

Appeal dismissed.

I.L.R. [2009] M. P., 2982
APPELLATE CIVIL
Before Mr. Justice Rajendra Menon
7 August, 2009*

DOMINIQUE LAPIERRE & ors. ... Appellants
Vs.
SWARAJ PURI ... Respondent

Civil Procedure Code (5 of 1908), Order 43 Rule 1(r), Order 39 Rule 1 & 2 - Temporary injunction - When cannot be granted - *Injunction for sale and circulation of a book granted after 9 years of its publication on the ground*

*M.A. No.3017/2009 (Jabalpur)

that certain statements made in the book to be defamatory in nature - Held - Sufficient prima facie material is available to hold that the publishers may have justification to substantiate the so-called defamatory statements made - Temporary injunction granted without evaluating the principles properly and without taking note of the fact that 9 years has been passed after the publication of defamatory statements - Injunction could not be granted - Application for staying the operation of injunction order allowed till disposal of appeal. (Para 21)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 43 नियम 1(आर), आदेश 39 नियम 1 व 2 – अस्थायी व्यादेश – कब अनुदत्त नही किया जा सकता – एक पुस्तक के विक्रय और परिचालन का व्यादेश उसके प्रकाशन के 9 वर्ष बाद इस आधार पर अनुदत्त किया गया कि पुस्तक में किये गये कतिपय कथनों की प्र.ति मानहानिकारक है – अभिनिर्धारित – यह अभिनिर्धारित करने के लिए प्रथम दृष्ट्या पर्याप्त सामग्री उपलब्ध है कि प्रकाशक के पास किये गये तथाकथित मानहानिकारक कथनों को सिद्ध करने के लिए न्यायोचित्य था – अस्थायी व्यादेश सिद्धांतों का समुचित मूल्यांकन किये बिना और इस तथ्य को ध्यान में लिये बिना कि मानहानि कारक कथनों के प्रकाशन को 9 वर्ष बीत चुके हैं, अनुदत्त किया गया – व्यादेश अनुदत्त नही किया जा सकता था – अपील के निपटारे तक व्यादेश के आदेश का प्रवर्तन रोकने का आवेदन मंजूर।

Cases referred :

AIR 1995 SC 264, AIR 2002 Delhi 58, AIR 1985 Bom 229, 1971 MPLJ SN 23, 1981 MPLJ 589.

Pradeep Bakshi with *Sidharth Gulati*, for the appellants.
Rajesh Pancholi, for the respondent.

ORDER

RAJENDRA MENON, J. :–Heard.

2. This is an appeal under Order 43 Rule 1 (r) of the Code of Civil Procedure assailing the grant of temporary injunction made by the 14th Additional District Judge, Jabalpur on 13.7.2009, in Civil Suit No.3-A/2009. The appeal was admitted for hearing on 31.7.2009 and it is listed today for consideration of I.A.No.8213/2009, an application seeking stay of the impugned order of injunction, temporary in nature, granted under Order 39 Rule 1 and 2 CPC.

3. Suit in question was filed by the respondent plaintiff, who at the relevant time was said to be working as Additional Director General of Police (Intelligence), Government of Madhya Pradesh. The suit was filed for declaration and injunction for restraining the defendants, appellants herein, from publishing and circulating a book titled "It Was Five Past Midnight in Bhopal". It is stated that the said book was authored by defendants 1 and 2 (appellants 1 and 2 herein) and was printed and published by defendant No.3 (appellant No.3 herein). The book pertained to an industrial disaster which took place at Bhopal in the night intervening 2nd and 3rd of March 1984, when certain poisonous gas from a Plant owned by M/s Union

Carbide leaked, causing widespread damage to public property, human life and destruction of animals. The tragedy is classified as one of the worst "industrial disasters" ever to have occurred in the world. Be that as it may, at the relevant time when the aforesaid mishap occurred, plaintiff respondent was holding the post of Superintendent of Police, in Bhopal city and in the book in question certain acts of the plaintiff in the discharge of his official duties as Superintendent of Police are criticized and he is shown to have not taken proper steps in the discharge of his duties.

4. Interalia contending that the statement made relating to the plaintiff are false, distorted and presented in a manner which is defamatory in nature, lowers the dignity of the plaintiff and presents him before the society at large in a manner which would result in lowering his reputation and image before the general public, his friends, family and acquaintances. Claiming certain statements made in the book to be defamatory in nature, the suit in question was filed seeking declaration and injunction in the following manner:

> "(i) It is, therefore, most humbly prayed that this Hon'ble Court may kindly be pleased to declare that the afore-quoted portions of the book in question are false, baseless and defamatory.
>
> (ii) That, this Hon'ble Court may kindly be pleased to grant a decree of permanent prohibitory injunction restraining the defendants from printing, publishing, selling or circulating the aforesaid book – 'It Was Five Past Midnight in Bhopal' in any manner either themselves or through their agents in any part of the world."

5. The defamatory statements used, are indicated in paragraphs 235, 316, 329, 336 and 337 of the Book, which reads as under:

> *"At Page 235 - "Don't you worry, I could feed the whole city" he informed the police Chief who had come to make sure that his troops would be adequately fed.*
>
> *<u>At Page 316</u> - Yet calls were coming in one after another without interruption in the command room on the second floor. One of them was from Arjun Singh, Chief Minister of Madhya Pradesh. Rumour had it that he had left his official residence and taken refuge outside the city. Arjun Singh was calling in by Radio to speak to the Police chief, Swaraj Puri.*
>
> *"You must stop people leaving", the head of the Government intimated to him. "Put barricades across all the roads leading out of the city and make people go back to their homes."*
>
> *The Chief Minister, it seemed, had no idea of the chaos prevailing in Bhopal that night. In any case Puri had a good argument to put to him.*

Sir, he answered, - "how can I stop people leaving when my own policemen have disappeared along with the other fugitives?"

At Page 329 - Out side the situation was worsening. Swaraj Puri, the Police Chief who, during the previous night, had deplored the disappearance of his men, feared violent action. With no means of opposing it, he decided to resort to a stratagem, he summoned a driver of the only vehicle left to him with a loud speaker.

"Drive all over town", he ordered him, "announcing that there's been another gas leak at Carbide."

The effect of the ruse was miraculous. The rioters who had been about to overrun the factory made off in disarray. In a matter of minutes the city was empty. Only the dead remained.

At Page 336 - " Ah, the wonders of Indian hospitality! Police Chief Swaraj Puri, who on the night of the tragedy had watched his policemen flee, was at the foot of the plane in the company of the city's Collector to welcome the visitors with warm handshakes. All that was missing was the traditional garland of flowers and a pretty hostess to give them a welcoming tilak. Anderson and his companions took their seats in an official Ambassador brought to the foot of the steps. The car took off like the wind and left the airport via a service gate to avoid the pack of journalists waiting in the arrivals hall. The police chief and the collector followed in a second car."

"Thank you for having gone to the trouble of fetching us," Anderson said to the uniformed inspector sitting beside the driver.

"It's standard procedure, sir. There's considerable tension in the city. It's our duty to look after your safety."

"The car climbed towards the Shyamla Hills, entered the grounds of the research center and stopped in front of the company's splendid guest house. Anderson was astonished to find two squads of policemen assembled on either side of the door to the establishment. An officer was waiting on the steps."

At Page 337 – At that moment the Police Chief and the Collector arrived. They were accompanied by a magistrate in his distinctive black robe. The American felt reassured; certainly, there had been come misunderstanding. They were coming to set them free. In fact, the magistrate had been

summoned to notify the three visitors of the reasons for their arrest. He informed them that by virtue of Article 92, 120B, 278, 304, 426 and 429 of the Indian Penal Code, they were defendant of "culpable homicide causing death by negligence, making the atmosphere noxious to health, negligent conduct with respect to poisonous substances, and mischief in the killing of livestock." The first charge was punishable with life-imprisonment, the others carried sentences of between three and six months.

"Naturally, all those charges carry the right to bail," intervened Keshub Mahindra, the president of Carbide's Indian subsidiary.

"I'm afraid, that is, unfortunately, not the case," replied the magistrate.

"So what about our meeting with Chief Minister Arjun Singh?" asked the American anxiously.

"You will be notified about that as soon as possible," the police Chief informed him."

6. It is stated by the plaintiff that the aforesaid statements made in the book are not true, they are not based on correct facts and they are the imagination of the authors and have been made deliberately to malign the reputation of the plaintiff. Accordingly the suit in question was filed before the learned Court in February 2005. Alongwith the suit an application for temporary injunction under Order 39 Rule 3 was filed. Defendants/appellants appeared, filed their written statement vide Annexure A/6 and stated that the book merely highlighted the negligent manner in which the Union Carbide Limited had discharged their functions, which resulted in one of the worst "industrial disaster" ever witnessed and what has been referred to in the entire book with regard to the respondent is only a fair criticism of the author with regard to the official functions discharged by the plaintiff and a critical analysis. It was stated that a fair criticism of an individual, public officer, in the discharge of his official duties does not amount to defamation. Finally, in the written statement, justification of the statements made in the book were indicated in the following manner, in paragraph 7 of the written statement:

> "(i) The narration at page 235 in no way can be said to be defamatory as the same is based on interviews carried out by the defendants with the persons presents at the time of incident, the manuscript of which are available with the Defendants and the said incidents are true and not imaginary and also the facts that the plaintiff had met up with Shyam Babu, owner of Shyam Poori Bhandar or that the Plaintiff asked Shyam Babu to feed his troops is true to the Defendants' knowledge. In any event, as already submitted that above said

information by no stretch of imagination can be said to be defamatory. The plaintiff be put to strict proof in this regard.

The incident which took place had been narrated to the Defendants by Shyam Babu amongst other, which by no means suggests that the Police Chief / Plaintiff was not performing his duties or was not worried about the well being of the general public. In this regard, it is respectfully submitted that it is the part of the Plaintiff's duties to watch over the interests of his own Policemen also and caring about them in no way conveys the impression that he is an unprincipled police officer, as alleged.

(ii) It is denied that the information at page 316 quoted in the paragraph are by any stretch of imagination, defamatory and disparaging. It is also denied that the incidents are absolutely false, incorrect and illusory. The Defendants reiterate that what has been mentioned at page 316 of the book the defendants in their research had found the role of the Police at the time of tragedy wanting in certain regard which was observed and collected from newspapers, magazine, and other publications on the subject and nowhere has the author contended that he found any proof or evidence of the role played by the Police in general and the Plaintiff in particular during that night. Since the book was with reference to the positive report ant to expose the real culprit which was the management of Union Carbide, the question of making any imputation on the Plaintiff as alleged or the Policemen in this regard does not arise. The Defendants during their research had found and as has been recorded in other communications that the policemen also fearing for their lives had run away. The incidents at page 316 were narrated to the authors by Mr. Ranjit singh, the then commissioner of Bhopal in an interview to the author and according to him, he was present in the control room when the Chief Minister had spoken to the Plaintiff. it is denied that any wrong imputations on the basis of the above have been created about the Police force being irresponsible or that they had tried to engender a feeling of distrust as alleged.

(iii) In reply to sub para (iii) it is submitted that the incident is based on the information that have been derived from the interview with Mr. Jagan Nath Mukund, manuscript of which is available with the Defendants. It is denied that the said incident is false and incorrect or that when the Plaintiff came to know of the rumour of the another gas leak, he in order to dispel the fear among people, walked on foot with policemen towards Carbide to show that there is no leak is denied.

(iv) The Defendants reiterate the incidents narrated at page 336, the same is based on the incidents as reported by Dan Kurztman's book 'A killing wind" (McGraw-Hill) 1987, p 116, Mr. V.J. Gokhale resident of Bhopal, Dr. Nagu, Secretary of Health Department, Mr. Rajkumar Deswani, Journalist, Mr. Iswhar Das the then Health Minister, Mr. Kamlesh Jamani, Official photographer of Union Carbide, Dr. N.P. Mishra, Dean of Hamidia Medical School, Prof. Heeresh Chandra, Head of Forensic Department in Hamidia Hospital, as well as from a newspaper, reporting during that period and have also based their information on the excerpts from some earlier publication being 'the Poison Cloud' by Larry Everest (Banner Press, Chicago, 1985, p. 14). The incident is in fact only a simple narration of events. It is denied that the manner in which it has been narrated is derogatory. it is denied that the incidents about the hospitality extended to Anderson are all completely false as alleged. It is further denied that the same conveyed any impression of the Responsible Officers including the Plaintiff being uncaring and unprincipled or that they displayed unwarranted pride in welcoming Anderson. It is denied that the policemen's action reflects on the lack of control of the plaintiff or his sub-ordinates or that he has been made a subject of hatred in the eyes and opinion of the people especially in Bhopal, as alleged.

(v)The incidents narrated at page 337 are reiterated. It is incorrect to say that it is inconceivable and impossible for a Judicial Magistrate to visit an accused instead of the accused being presented in the Court. Under the Indian Judiciary, Magistrate can and does exercise all or any of the powers with which he is vested within the justified limit of local area/jurisdiction. It is not un-common for the Magistrate to have held the remand proceedings at the place other than their Courts which normally is done in the cases where there is risk of law and order. It is denied that any dis-repute was caused to the judiciary also, which succumbed to the influence of the main accused of the gas tragedy as alleged by Plaintiff in the said paragraph. It is denied that any impressions of judiciary of having helped and comforted the accused have been made. It is denied that the statement is very obnoxious and tantamount to demeaning judiciary or that it is contemptuous as alleged. The Defendants have considerable regard of the judiciary and under no circumstances could have even imagined making and /or insinuating such allegations and imputation on the judiciary. It is denied that the incidents mentioned in the paragraph disclose

malicious pleasure in making mockery of the Indian system of public judicial administration and judiciary of India, as alleged. It is respectfully submitted that Defendants 1 and 2 are reputed authors and world renowned for their published works. The Defendants 1 and 2 have great love and affection for India and have closely contributed to its society by carrying out charitable work in India and any question of their being indifferent to social justice and portraying in a derogatory light Indian Institutions, does not arise."

Accordingly, prayer made was to dismiss the plaint.

7. Apart from the aforesaid written statement, a reply to the application under Order 39 Rule 1 and 2 CPC was also filed and as temporary injunction has been granted by the impugned order, this appeal is filed.

8. The appeal is already admitted for hearing and by this order, the only question being considered and determined is the question of staying the impugned order.

9. Shri Pradeep Bakshi, learned counsel for the appellants, submitted that assessment of prima facie case made, is totally perverse and illegal and temporary injunction has been granted without evaluating the three ingredients necessary for grant of injunction namely; a prima facie case, balance of convenience and irreparable loss, in a proper perspective. It was emphasized by him that the law laid down by the Supreme Court in the case of *R. Rajagopal alias R.R. Gopal and another Vs. State of Tamil Nadu and others,* AIR 1995 SC 264, is totally misread and without considering the principles laid down with regard to granting temporary injunction for restraining publication of a book or written material in case of libel or defamation, the impugned order passed is liable to be stayed. The judgments relied upon in this regard by Shri Bakshi are, judgment's of the Delhi High Court in the case of *Khushwant Singh and another Vs. Maneka Gandhi,* AIR 2002 DELHI 58; *Indian Express Newspapers (Bombay) Pvt. Ltd. and another Vs. Dr. Jagmohan Mundhara and another,* AIR 1985 BOMBAY 229; *Mother Diary Foods and Processing Limited Vs. Zee Telefilms Limited;* and, the principles laid down in the case *Fraser Vs. Evans and others,* [1969] All E.R 8.

10. Shri Pradeep Bakshi, learned counsel for the appellants, further submitted that apart from the fact that truth as justification for the fair and reasonable criticism is put forth by the appellants as defence, without considering the same and the law governing grant of injunction, grant of the same is not proper and the same is liable to be stayed. Learned counsel further pointed out that the book was published in the year 2001, notice from the plaintiff was received by the defendants in December 2002, it was replied on 15.4.2003 and it was only after about four years of the publication of the book that the suit was filed in February 2005 and now injunction is granted after a further period of four years i.e.. after eight years of the publication of the book, which in the light of the principles laid down by the

Bombay High Court in the case of *Dr. Jagmohan Mundhara* (supra) does not warrant grant of interlocutory injunction. Accordingly submitting that injunction has been granted without following the principles of law, in its right perspective, Shri Pradeep Bakshi assisted by Shri Sidharth Gulati prays for stay of the impugned order.

11. Shri Rajesh Pancholi, learned counsel for the respondent, refuted the aforesaid and by taking me through the reply submitted by the plaintiff/respondent, argued that the criticism made in the book are all false, plaintiff is a Senior IPS Officer, who has received a President's Gold Medal for his services rendered in the incident that took place in Bhopal, the statements made are defamatory in nature and by referring to the principles governing the law of defamation and libel and the judgments rendered in the case of *Abdul Gani Vs. Chhaikodi,* 1971 MPLJ SN 23; *Hari Shankar Vs. Kailash Narayan and others,* 1981 MPLJ 589 and so also referring to certain observations made in the case of *R. Rajagopal* (supra), Shri Pancholi emphasized that in granting injunction the court below has not committed any error. Shri Pancholi dealt with the aspects of the meritorious services rendered by the plaintiff, his distinguished career and the fact that the statements made in the book are false and fabricated and is made intentionally to defame the plaintiff. Taking me through the averments made in the pleadings and documents filed on record, Shri Pancholi emphasized that defendants 1 and 2 are in the habit of defaming eminent personalities and in the past also they have indulged in such activities. Referring to certain incidents with regard to deleting of some material by the same authors in the previous book titled 'Freedom at Midnight', Shri Pancholi tried to emphasize that in the facts and circumstances of the case when false and baseless allegations are leveled against a Senior Police Officer, who has discharged his duties to the best of his ability, for which he has been rewarded by the President's Gold Medal, the consideration of prima facie case made, balance of convenience and irreparable loss assessed by the learned court below is just and fair, which does not warrant any interference at this stage.

12. I have heard learned counsel for the parties at length. As the appeal is already admitted, for the present this Court is only required to consider as to whether stay of the impugned order has to be granted pending final adjudication of this appeal. If the pleadings of the parties are scrutinized meticulously, it would be seen that the five statements made in the book, as referred to hereinabove in pages 329, 336, 337, 316 and 235, are the ones which are said to be imaginary, false and made with a view to lower the esteem of the plaintiff in the eyes of the others. Appellants have given justification for each and every assertion made and it is their case that it is done after research and interview from imminent persons and victims of the tragedy and the records of the interview and the data collected are available with them. It is, therefore, a case where the defendants are justifying their comments and assertions by pleading truth as a defence.

13. In the case of *Mother Diary Foods and Processing Limited* (supra), the Delhi High Court has dealt with the matter in paragraph 25 to 27, as under:

> "25. On the question of restraint on telecast or publication, the legal position is fairly well settled. This Court in *Sardar Charanjit Singh v. Aroon Purie*, 1983 (4) DRJ 86, declined to stay the publication of an article in the magazine 'India Today' on the plaintiffs submissions that the questionnaire sent to him was per se defamatory and the article which was proposed to be written based on the per se defamatory questionnaire would also be defamatory. This Court has negatived allegation of malice and animosity. Taking note of defendant's plea that it would justify the article, that would be published, the Court declined interim injunction holding:-
>
> 'But as the defendants state that they would plead justification and fair comment for publishing the article pertaining to the plaintiff, I am of the opinion that injunction should not issue.'
>
> The Supreme Court also dismissed the SLP preferred against the judgment of the learned single Judge of this Court.
>
> 26. Supreme Court in the case of *Odyssey Communications Pvt. Ltd. vs. Lokvidayan Sanghatana*, AIR 1988 SC 1642, vacated the interim order of injunction of the film 'Honi-Anhoni'. The plaintiff had sought and obtained an injunction pleading that the film was likely to spread false or blind belief amongst members of the public which was not in public interest. The Supreme Court vacated injunction holding that the serial was being telecast the principle of law is that in case of an action for defamation, once the defendants raise the plea of justification at the interim stage, the plaintiff will not be entitled to an interlocutory injunction. To put in other words, in England, a mere plea of justification by the defendant would be sufficient to deny the plaintiff any interim relief. As far as India is concerned, as has been clearly held by this Court in the judgments referred to hereinabove, specially the judgment of this Court in the case of *Dr. Yashwant Trivedi v. Indian Express Newspapers (Bombay) Private Limited*, dated 21st March, 1989 and the judgment of the appellate Bench dated 29th June, 1989 with regard to the same matter in appeal, the judgment of this Court Purshottam Odhnvji Solankiv. Sheela Bhatia dated 3rd December, 1990, judgment of this Court in the case of *Mrs. Betty Kapadia v. Magna Publishing Co. Ltd.* dated 22nd July, 1991 and the judgment in the case of *Indian Express Newspapers (Bombay) Ltd. vs. M/s Magna Publishing Co. Ltd.*,

dated 21st July, 1995, it is clear that in India, a mere plea of justification would not be sufficient for denial of interim relief. The defendants, apart from taking a plea of justification will have to show that the statements were made bona fide and were in public interest, and that the defendants had taken reasonable precaution to ascertain the truth, and that the statements were based on sufficient material which could be tested for its veracity. Therefore, in India, the Court is very much entitled to scrutinize the material tendered by the defendants so as to test its veracity and to find out whether the said statements were made bona fide and that whether they were in public interest. Therefore, in India, even at the interlocutory stage, the Court is very much entitled to look into the material produced by the defendants for the plea of justification, so as to test its veracity with regard to the allegations, alleged to be defamatory."

(Emphasis supplied)

What is laid down in the aforesaid case is that the Courts in India should scrutinize the material tendered by the defendants to test its veracity and find out whether it is made bonafide and in public interest. If the case in hand is scrutinized in the backdrop of the principles laid down in the cases as referred to hereinabove, it would be seen that for each and every statement made in the book in question, appellants have given their justification and have also disclosed the source of information, based on which the statement is made and are trying to justify their action by contending that they have only put forth the facts, which has come to their knowledge on the basis of interviews with various persons, datas collected and are willing to share it with the plaintiff and have further stated that they want to justify it before the Court. It is, therefore, a case where sufficient prima facie material is available to hold that the defendants may have justification to substantiate the so-called defamatory statements made and in that view of the matter, injunction could not be granted.

19. The cases relied upon by *Shri Rajesh Pancholi of Hari Shankar* (supra) and *Abdul Gani* (supra) are based on the general principle governing law of Tort in matters of defamation, they do not deal with the question of granting temporary injunction, restraining a publication and the principles governing the grant of injunction in such matters.

20. The Supreme Court having laid down the principle in the case of *R. Rajagopal* (supra) and when truth is put forth as a justification for the publication and when it is the case of the defendants that the averments made by them are

based on datas collected and research done on the basis of interview of affected persons and various other eminent personalities and particulars of such persons are given, this Court is of the considered view that it was not a fit case where temporary injunction should have been granted. If the order granting temporary injunction is perused and if the assessment of prima facie case made is taken note of, it would be seen in paragraphs 6 and 7, the learned Court has taken note of the pleadings and the allegations and has simply stated that defendants 1 and 2, authors of the book, have not filed an affidavit to say that what they have stated is a true fact. However, the publisher and seller of the book has stated so in his affidavit. Assessment of prima facie is made in paragraph 9, by only pointing out that the right available to the plaintiff under Article 21 would be violated and, therefore, a prima facie case is made out. This in the considered view of this Court is not the correct position and even in paragraph 9, while assessing the prima facie case the observations of the Supreme Court in paragraph 28(3), in the case of R. Rajagopal (supra) is not taken note of in its proper perspective.

21. It is a case where injunction, temporary in nature has been granted without evaluating the principles properly and without taking note of the fact that the injunction is being granted after more than 9 years after the defamatory statement has been published. Even though Shri Pancholi tried to emphasize that the delay was occasioned because of the stay granted by the Supreme Court for more than 2 years and the time taken for service of notice on the defendants, who were staying in France, the fact remains that while granting injunction the principles governing grant of same as has been indicated by the Supreme Court, the Bombay High Court and the Delhi High Court are not taken note of and, therefore, it is a fit case where pending final adjudication of this appeal, there should be stay of the operation of the impugned judgment.

22. Accordingly, I.A.No.8213/2009 is allowed and it is directed that pending final disposal of this appeal, there shall be stay of the impugned order-dated 13.7.2009 passed in Civil Suit No.3-A/2009 by the 14th Additional District Judge, Jabalpur.

23. It is the considered view of this Court that in the facts and circumstances of this case, interest of justice requires that the appeal should heard and decided at an early date. Respondent plaintiff herein is granted four weeks time to file his reply or additional documents, if any, in support of his contention and office is directed to list the appeal for final hearing immediately thereafter.

24. I.A.No.8213/2009 stands allowed and disposed of.

Order accordingly.

I.L.R. [2009] M. P., 2994
APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar & Mrs. Justice Manjusha P. Namjoshi

1 April, 2009*

GORU @ GORIYA ... Appellant
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 3 - Murder - Appreciation of evidence - Last seen with the deceased - *Held* - *Prosecution has failed to prove exact time when the deceased was seen in the company of appellant and there was long gap seeing the appellant in the company of deceased and finding his dead body on the public road - In these circumstances, it cannot be said that appellant was the perpetrator of the crime.* (Para 14)

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धारा 3 – हत्या – साक्ष्य का अधिमूल्यन – मृतक के साथ अंतिम बार देखा गया – अभिनिर्धारित – जब मृतक अपीलार्थी के साथ देखा गया उसका निश्चित समय साबित करने में अभियोजन असफल रहा और अपीलार्थी के मृतक के साथ देखे जाने और सार्वजनिक सड़क पर उसके शव के मिलने में लम्बा अंतराल था – इन परिस्थितियों में यह नही कहा जा सकता कि अपीलार्थी अपराध का कर्ता था।

Cases referred :

2007 Vol. 2 SCC (Cri) 162.

Manish Joshi, for the appellant.

Girish Desai, Dy. A.G., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by

S.L. Kochar, J. :–This appeal has been directed by the appellant against his conviction and sentence passed by the learned Seventh Additional Sessions Judge (Fast Track Court), Ujjain in Sessions Trial No.248/04 dated 22.09.2005 whereby convicted the appellant under Section 302 of the IPC and sentenced to R.I. for life with fine of Rs.500/-, in default of payment of fine, additional R.I. for 6 years and under Section 201 of the IPC and sentenced to R.I. for 6 months with fine of Rs.200/-, in default of payment of fine additional R.I. for 2 months.

2. According to the prosecution case, on 10.12.2003 at 7.00 a.m. PW-1 Shahid lodged a report in Alot Police Station recorded by Station House Officer M.S.Parmar that on 09.12.2003, in the morning, at 7.00 a.m., his brother Ajju had gone to work as labour from their house and did not return back upto evening. Shahid inquired from Shabbir and Babloo about deceased Ajju at which Babloo informed him that yesterday at 11.00 a.m. he had sent Ajju from Village Kherapeer

*Cr. A. No.1293 2005 (Indore)

to Alot with his motorcycle to bring Rs.1,500/- from Village but he did not return back. PW-1 Shahid alongwith Shabbir, Arif and Amjad went in search of deceased Ajju and they were informed by PW-8 Arif alias Bhayyu Khan that yesterday on 09.12.2002 at 1.00 p.m. he had seen appellant taking deceased on motorcycle forcibly on a road going to Talod. On this information all reached at Talod and came to know that Ajju in day time at 12.30 p.m. went on motorcycle towards Alot and appellant after purchasing liquor from liquor shop had also gone towards Alot. In search they found motorcycle lying at a road of Iliyakhedi and dead body of Ajju was lying inside the bushes by the side of the road. They noticed injuries on the right side of the eye and face seems to be caused by stone and marks of pressure by rope on the neck were also present. According to Shahid, his brother Ajju was murdered by the appellant on account of previous ill-will. On the basis of this report, merg No.0/2003 was registered and PW-17 Assistant Sub Inspector Shri Parmar started its inquiry. The spot map Ex.P/39 and P/40 were prepared. Police photographer PW-10 Jadhav took photographs Ex.P/13 to P/30 of the dead body and the spot. Blood stain and controlled earth were seized from the spot alongwith one silver ring on which word "MS" was engraved through seizure memo Ex.P/5. From the spot motorcycle No.MP43-K-4050 was also seized. Seized articles were sent for query to Civil Hospital Mahidpur. PW-22 Babulal Rane recorded Dehati Nalishi and same was sent to Head Constable PW-18 Vijay Singh on the basis of which he registered FIR (Ex.P/44). Seized articles were sent to Forensic Science Laboratory. Dead body was sent for postmortem examination and the same was performed by PW-11 Dr. Dineshchand Saxena, who also issued postmortem report (Ex.P/31). Appellant was arrested on 03.06.2004 and on completion of investigation, appellant was charge-sheeted for commission of murder of deceased Ajju.

3. Appellant refuted the charges and claimed for trial. He did not examine any witness in defence. Learned Trial Court found the prosecution case proved on the basis of the evidence adduced, and convicted and sentenced the appellant as described here-in-above.

4. Before the Trial Court as well as before this Court homicidal death of deceased Ajju is not challenged, same is also proved on the basis of the evidence of Dr. Dineshchandra Saxena and postmortem report (Ex.P/31) proved by him. Dr.Saxena found in all 7 injuries on the person of deceased and deceased died because of excessive bleeding. Injuries were ante-mortem in nature and death was homicidal.

5. Learned counsel for the appellant has submitted that conviction is based mainly on the circumstance of last seen together and prosecution has examined PW-8 Arif @ Bhayyu to prove this circumstance. Learned counsel has pointed out material contradiction & omissions and submitted that statement of Arif is not reliable for convicting the appellant.

6. On the other hand, learned counsel for the State has supported the impugned judgment and finding arrived at by the learned Trial Court.

7. Having heard the learned counsel for the parties and after perusing entire record carefully, we are of the opinion that prosecution has failed to establish its case against the appellant beyond reasonable doubt.

8. PW-1 Shahid is the brother of deceased, who lodged the report (Ex.P/1). According to this witness, PW-8 Arif @ Bhayyu took the deceased on motorcycle, on 09.12.2003, at 12.30-1.00 p.m., from some distance of Village Talod towards Village Jhuthawad and committed his murder between Talod and Patan. This information was given to him by PW-8 Arif @ Bhayyu at his house situated in Alot town. After receiving this information PW-1 Shahid @ Sahid alongwith 5-6 persons reached on the spot on motorcycle and found the dead body and police was also present there. From the spot they had gone to the Police Station and he lodged the report Ex.P/1. He has also stated that appellant was having ill-will with his elder brother Sharif because of which appellant committed murder of his younger brother Ajju.

9. PW-8 a solitary eye witness examined by the prosecution to prove the circumstance of last seen together of deceased in the company of the appellant, has deposed that on 09.12.2003 at 10.30 a.m. he had seen the deceased Ajju going on motorcycle in Village Talod and appellant was also going with him after seeing he had gone to Alot and when brother of Ajju asked him as to whether he had seen his brother Ajju, he disclosed him about going of the deceased in the company of the appellants towards Jhuthavad. Arif has no where stated about exact time of last seen of appellant and deceased going on motorcycle and any kind of information given to PW-1 Shahid regarding commission of murder of deceased by the appellant. Arif has been declared hostile by the prosecution and confronted with his case diary statement Ex.P/11. Looking to the statement of PW-1 Shahid and PW-8 Arif @ Bhayyu, we are finding clear contradiction about information given by Arif to Shahid. Shahid has stated that Arif disclosed about commission of murder of deceased by the appellant at a particular place and motorcycle was also lying on or near the scene of occurrence whereas Arif has not stated so. PW-1 has also stated that when they reached on the scene of occurrence, police party was already present there and thereafter they returned back to the police station and he lodged the report (Ex.P/1).

10. Deceased was seen in the company of the appellant by PW-8 Arif @ Bhayyu, on 09.12.2003, at 3.30 a.m., in Village Talod whereas Shahid has given the time disclosed to him by witness Bhayyu 12.30 to 1.00 p.m. PW-17 Sub Inspector Parmar has stated that on 09.12.2003 telephonic message was received in Police Station that one dead body was lying on Iliyakhedi road

and he reached on this information where PW-1 Shahid was present and he recorded report (Ex.P/1). Ex.P/1 is the merg intimation report recorded on the spot whereas according to PW-1 Shahid, they all went to Police Station Alot where report was lodged. Ex.P/1 was recorded on 10.12.2003 at 7.00 a.m. If information of last seen was given to witness Shahid by witness Bhayyu on the same day as well as about commission of murder of deceased by the appellant, the report Ex.P/1 should have not been recorded on the next day and that too as merg intimation. The merg intimation (Ex.P/1) is disclosing altogether a different story than the statement given by PW-1 Shahid. PW-1 Shahid has no where stated that he alongwith his brother and other friends went in search of the deceased. According to merg intimation report (Ex.P/1), deceased was taken away forcibly on motorcycle by the appellant. In Court PW-1 Shahid has deposed that Bhayyu disclosed about commission of murder of deceased by the appellant on a particular place, if this was so, there was no question of going alongwith the friends and relatives to search the deceased as mentioned in merg intimation report Ex.P/1. All the proceedings recorded by the police are of dated 10.12.2003 and not of 09.12.2003. Copy of the intimation about telephonic message received on 09.12.2003 was not filed by the police in Court. Through seizure memo (Ex.P/5) on 10.12.2003 at 10.30 a.m. alongwith blood stain heavy stone, one silver ring on which english capital word "MS" was engraved, but no evidence has been collected by the investigating agency, who was the owner of this ring and what is full form of word "MS"

11. Looking to the contents of merg intimation report Ex.P/1, statement of PW-1 Shahid and statement of PW-8 Arif, there is much difference about time of last seen together and the time of finding the dead body as well as distance between two places. PW-23 Kalu Singh has stated that at 11.00 a.m. deceased came to his shop and got filled air and went away. He has no where stated that appellant was in his company, on the contrary in the cross-examination he has specifically stated that deceased came alone. The prosecution witness Shabbir has turned hostile, who had sent the deceased with motorcycle to bring Rs.1,500/-.

12. It is pertinent to mention here that information was received at Police Station on 09.12.2003 about presence of dead body on the road and PW-17 Shri Parmar also reached there, but inquest was prepared on 10.12.2003. The time of inquest is not mentioned in the inquest report Ex.P/39. Photographs of the deceased were also taken on 10.12.2003. There is no explanation given by the prosecution as to why on 09.12.2003 inquest proceeding could not be recorded.

13. Supreme Court in case of *State of Goa V/s. Sanjay Thakran and*

another (2007 Vol.2 Supreme Court Cases (Cri.) 162) has in detail considered the law of circumstantial evidence in paragraph 29, 30 and 34 to 36. Para 34 is reproduced here-in-below :-

Para 34.

From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident

occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.

14. In view of the aforesaid dicta, on visualization of the circumstantial evidence first of all prosecution has failed to prove exact time when the deceased was seen in the company of the appellant and if it is considered then there was a long gap seeing the appellant in the company of the deceased and finding his dead body as well as dead body was found on a public road, therefore, only on the basis of this circumstance it cannot be said that the appellant was the perpetrator of the crime.

15. In view of the aforesaid discussion, this appeal is allowed. Conviction and sentence of the appellant as passed by the Trial Court is hereby set aside. Learned Trial Court is directed to release the appellant forthwith if not wanted in any other criminal case. Office is directed to send a copy of this judgment alongwith the record to the Trial Court.

Appeal allowed.

I.L.R. [2009] M. P., 2999
APPELLATE CRIMINAL
Before Mrs. Justice Sushma Shrivastava
7 July, 2009*

RAM MILAN & ors. ... Appellants
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Sections 304-B & 498-A; Evidence Act, 1872, Section 32(1) - Cruelty - *Oral complaints made by deceased to her relatives regarding demand of dowry and ill treatment - Statements of relatives although admissible in respect of offence u/s 304-B by virtue of S. 32(1) of Evidence Act as it related to cause of death - But, such evidence not admissible for the offence punishable u/s 498-A and has to be termed as hearsay evidence - Therefore, could not form legal or substantive evidence for offence u/s 498-A - Appeal allowed.*

(Paras 12 & 13)

दण्ड संहिता (1860 का 45), धाराएँ 304–बी व 498–ए, साक्ष्य अधिनियम, 1872, धारा 32(1) – क्रूरता – मृतक द्वारा अपने नातेदारों से दहेज की माँग और दुर्व्यवहार के सम्बन्ध में मौखिक शिकायतें की गईं – नातेदारों के कथन यद्यपि साक्ष्य

*Cr.A. No.2127/1999 (Jabalpur)

अधिनियम की धारा 32(1) के आधार पर धारा 304–बी के अन्तर्गत अपराध के सम्बन्ध में ग्राह्य हैं क्योंकि वह मृत्यु के कारण से सम्बन्धित है – किन्तु ऐसी साक्ष्य धारा 498–ए के अन्तर्गत दण्डनीय अपराध के लिए ग्राह्य नहीं है और अनुश्रुत साक्ष्य की कोटि में आती है – इसलिए, धारा 498–ए के अन्तर्गत अपराध के लिए विधिक और पर्याप्त साक्ष्य नही बन सकती – अपील मंजूर।

Cases referred :

(2002) 2 SCC 619.

Vikash Mahawar, for the appellants.

R.N. Yadav, Panel Lawyer, for the respondent/State

J U D G M E N T

Sushma Shrivastava, J.:–Appellants have preferred this appeal challenging their conviction and order of sentence passed by Sessions Judge, Rewa in S.T. No.228/97, decided on 31.7.99.

2. Appellants have been convicted under Section 498-A of IPC and sentenced to suffer rigorous imprisonment for three years by the impugned judgment.

3. According to prosecution, deceased Buta @ Savita (hereinafter referred to as 'deceased') was married to appellant no.2 Santosh Kumar, son of appellants no.1 and 3, at the early age of twelve years. Her gauna was performed six years after her marriage. Since then she lived in her matrimonial home at village Dihiya. Appellants used to make unlawful demand for watch and motorcycle from the parents of the deceased and subjected her to cruelty in order to fulfil their demand. This fact was communicated by the deceased to her parents, brother and sister-in-law. As a result of ill-treatment and cruelty meted out to her, deceased committed suicide at her matrimonial home by consuming Celphos on 25.8.97. The intimation of her death was given to the Police by her father-in-law, Rammilan (appellant no.1). Merg intimation was recorded at the instance of appellant no.1 and the merg inquest was made. The dead body of deceased was sent for postmortem examination. After merg enquiry, an offence was registered against the appellants and was investigated. After due investigation, appellants were prosecuted under Section 306, 498-A and 304-B/34 of IPC and were put to trial.

4. Appellants denied the charges framed against them under Section 498-A and 306 of IPC pleading innocence and false implication.

5. After trial and upon appreciation of the evidence adduced in the case, learned Sessions Judge acquitted all the appellants of the charge under Section 306 of IPC, but found them guilty for committing the offence under Section 498-A of IPC, and sentenced them as aforesaid by the impugned judgment.

Being aggrieved by the aforesaid conviction and sentence, appellants have preferred this appeal.

6. Learned counsel for the appellants submitted that the trial court gravely erred in relying upon the inconsistent and contradictory evidence of the related witnesses and erroneously convicted them under Section 498-A without there being any cogent and legal evidence against them.

7. Learned counsel for the State, on the other hand, justified the conviction and sentence of the appellants.

8. Record of the lower court is perused. The conviction of the appellants is founded mainly on the testimony of Jagdish Prasad Patel (P.W-1), Phoolmati (P.W-2) and Sunita Devi (P.W-4), who are respectively brother, mother and sister-in-law of the deceased coupled with the evidence of Rajendra Kumar Patel (P.W-3). Their evidence is essentially to the effect that deceased made oral complaints to them as to ill-treatment and unlawful demand of property by the appellants.

9. P.W-1 Jagdish Prasad Patel deposed in his evidence that on her visit to her parental home, deceased had told him, his wife and parents that her husband Santosh (appellant no.2) used to make a demand for money and vehicle and subjected her to harassment and threatened her to perform second marriage. According to P.W-1 Jagdish Prasad Patel, when his sister (deceased) came last on Raksha-Bandhan, she had told that appellants were asking for bringing scooter and money and threatened to kill her in case their demand was not fulfilled; and shortly thereafter her sister had breathed her last.

10. W-2 Phoolmati, mother of the deceased, also deposed that on coming to her place deceased had told her that appellants used to ask for scooter, gave her beating, deprived her of food and also threatened to kill her. P.W-4 Sunita Bai also made similar statement that whenever the deceased came to her parental home, she used to tell that her in-laws were asking for vehicle in dowry and also subjected her to 'mar-peet'. P.W-3 Rajendra Kumar also deposed that deceased used to tell him that her in-laws were giving her trouble and asking for money. This witness, however, declined to state anything against appellant no.2, the husband of the deceased and therefore, he was declared hostile by the prosecution.

11. The aforesaid witnesses were subjected to cross-examination in extenso. Besides there being contradictions in their statements regarding complaints made to them by the deceased with respect to the demand of cash and nature of vehicle, it is apparent from their evidence that their entire testimony is based on the oral complaints allegedly made by deceased to them and none of them in fact witnessed actual physical or mental cruelty allegedly meted out to the deceased by the appellants. There is also no such cogent or dependable evidence that appellants putforth any unlawful demand for cash or vehicle directly from the parents, brother

or sister of the deceased. Although P.W-2 Phoolmati made a vague statement that appellants had said that on failure to give dowry, they will kill the girl and perform second marriage, but she admitted in her cross-examination that her daughter had undergone a 'tigadda' marriage and dowry is not prevalent in such marriage. She also admitted that there were no negotiations for dowry either before or after the marriage of the deceased and even after her 'gauna'. Thus, her statement made in examination-in-chief that appellants used to demand dowry and threatened to perform second marriage cannot be relied upon. Needless to repeat that her remaining evidence and the evidence of all other related witnesses is based on the oral complaints made by the deceased to her parents and relatives regarding ill-treatment and unlawful demand of property by appellants.

12. The Apex Court in the case of *Gananath Pattnaik Vs. State of Orissa* reported in (2002)2 SCC page 619 has held that such evidence, although admissible in respect of the offence under Section 304-B by virtue of the Section 32 of the Evidence Act as it related to the cause of death, is not admissible for the offence punishable under Section 498-A of IPC and has to be termed as being only hearsay evidence. It would be profitable to refer to the following observation made by their Lordships in the case of *Gananath Pattnaik* (supra) with reference to the statement made by the deceased to her relatives :

> "Such a statement appears to have been taken on record with the aid of Section 32 of the Indian Evidence Act at a time when the appellant was being tried for the offence under Section 304-B and such statement was admissible under Clause (1) of the said Section as it related to the cause of death of the deceased and the circumstances of the transaction which resulted in her death. Such a statement is not admissible in evidence for the offence punishable under Section 498-A of the Indian Penal Code and has to be termed as being only a hearsay evidence. Section 32 is an exception to the hearsay rule and deals with the statements or declarations by a person, since dead, relating to the cause of his or her death or the circumstances leading to such death. If a statement which otherwise is covered by the hearsay rule does not fall within the exception of Section 32 of the Evidence Act, the same cannot be relied upon for finding the guilt of the accused."

13. In view of the legal position enunciated above, the evidence of all the four witnesses, namely, Jagdish Prasad Patel (P.W-1), Phoolmati (P.W-2), Rajendra Kumar Patel (P.W-3) and Sunita Devi (P.W-4) relating to the oral complaints made by the deceased to them against the appellants regarding unlawful demand for money and vehicle and ill-treatment to the deceased was not admissible in evidence for the purpose of offence under Section 498-A of IPC and thus could not form legal or substantive

evidence against them for the said offence. It is pertinent to mention that there has been no state appeal against acquittal of the appellants under Section 306 of IPC and no charge under Section 304-B of IPC was framed against them.

14. As already stated above, there is no other legal, cogent or direct evidence on record that appellants ill-treated the deceased, subjected her to physical or mental torture or otherwise harassed her making any lawful demand for property. Thus, there being no legal evidence on record against the appellants for the offence under Section 498-A of IPC, their conviction under Section 498-A of IPC cannot be sustained and deserves to be set aside.

15. Appeal is, therefore, allowed. The conviction of the three appellants and the sentence awarded to them under Section 498-A of IPC are hereby set aside and they are acquitted of the charge.

Appellants are on bail. Their bail bonds shall stand discharged.

Appeal allowed.

I.L.R. [2009] M. P., 3003
APPELLATE CRIMINAL
Before Mr. Justice S.S. Dwivedi
25 August, 2009*

ANAMIKA (SMT.) ... Appellant
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Sections 306, 498-A, Evidence Act, 1872, Section 113-A - Presumption - *No evidence that any of the appellants instigated deceased to commit suicide - No evidence for alleged harassment or cruelty - Evidence shows that the appellants were in good relations with deceased - In such circumstances, presumption u/s 113-A of Evidence Act will not arrive at - Appellants cannot be held guilty for the offence punishable u/ss 306 & 498-A of IPC.* (Paras 18 to 22)

दण्ड संहिता (1860 का 45), धाराएँ 306, 498–ए, साक्ष्य अधिनियम, 1872, धारा 113–ए – उपधारणा – कोई साक्ष्य नही कि किसी अपीलार्थी ने मृतक को आत्महत्या करने के लिए दुष्प्रेरित किया – कथित तंग करने या क्रूरता के संबंध में कोई साक्ष्य नही – साक्ष्य दर्शाता है कि अपीलार्थियों के मृतक के साथ अच्छे सम्बन्ध थे – इन परिस्थितियों में साक्ष्य अधिनियम की धारा 113–ए की उपधारणा नही की जायेगी – अपीलार्थियों को भा.द.सं. की धारा 306, 498–ए के अन्तर्गत दण्डनीय अपराध के लिए दोषी नहीं ठहराया जा सकता।

Cases referred :
2002 SCC (Cri) 971, 2002 SCC (Cri) 1098.

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*Cr.A. No.304/2003 (Gwalior)

Arun Pateriya, for the appellant.
T.C. Bansal, for the respondent/State.
Y.S. Tomar, for the complainant.

J U D G M E N T

S.S. Dwivedi, J.:–The aforesaid three appeals have been preferred by the respective appellants/accused feeling aggrieved by the impugned judgment dated 18.6.2003 passed by First Additional Sessions Judge, Vidisha in Sessions Trial No.125/00, whereby all the appellants/accused have been found guilty for the offence punishable under Sections 306 and 498-A of IPC and each of them have been sentenced to four years RI with a fine of Rs.5000/-, and two years RI with a fine of Rs.2500/- respectively. In default of payment of fine further ordered to suffer imprisonment for six months on each count. Both the sentences are ordered to run concurrently.

2. As all the aforesaid three appeals have been preferred against the common impugned judgment passed by the trial Court, hence all these three appeals are being decided by this judgment.

3. Briefly stated facts of the case are, Sandhya Bai (deceased) was married with the appellant/accused Rajesh on 4.2.1995 and she was found dead on the railway track at Ganj Basoda. The information about the accidental death of Sandhya Bai had been reported by the Assistant Station Master Ganj Basoda Railway Station to the Railway Police Outpost Ganj Basoda, on which basis the Incharge of Police Outpost Babulal Yadav (PW.14) registered an inquest report about accidental death of the concerning lady; reached on spot; prepared the spot map as well as the inquest Panchnama of the deadbody of deceased lady and sent the deadbody for post-mortem examination to the Government Hospital, Ganj Basoda. It came to know that deadbody of the lady belonged to Sandhya Bai W/o Rajesh R/o Ganj Basoda. Meanwhile, it is also alleged that the accused Shambhu Dayal had also lodged the report at Police Station Ganj Basoda about missing of his daughter-in-law Sandhya Bai from the house. When the accused persons, who are the husband, father-in-law and mother-in-law of the deceased Sandhya Bai, came to know about the accidental death of Sandhya Bai the deceased, then they also informed the parents of Sandhya Bai, who belong to Jabalpur. On information Rameshwar Dayal Agarwal, the father of the deceased Sandhya Bai, came to Ganj Basoda and he lodged the FIR Ex.P/1 against the appellants/accused with regard to cruel treatment coupled with demand of dowry by the husband, father in law, mother-in-law and sister-in-law of his daughter Sandhya Bai, on which basis G.R.P. Police registered a case under Section 304-B of IPC against all these four appellants/accused and started investigation; recorded the statements of witnesses, the post-mortem of the deadbody of Sandhya Bai has been performed by Dr.K.K.Shrivastava (PW.10), Asstt. Surgeon, Government

Hospital, Ganj Basoda, and proved the post-mortem report Ex.P/15. After due investigation charge sheet had been filed.

4. All the four accused/appellants abjured the guilt and their defence is of false implication in this case. The appellants/accused had also examined four defence witnesses and also produced certain documentary evidence in their support. The learned trial Court after due appreciation of the entire evidence on record, by the impugned judgment acquitted the appellants/accused from the charge under Section 304-B of IPC, but held them guilty for the offence punishable under Sections 306 and 498-A of IPC and sentenced them as stated herein above. Aggrieved by which the appellants have preferred these three separate appeals.

5. Having heard the learned counsel for the appellants as well as the learned Public Prosecutor appearing for the State and learned counsel appearing for the complainant, and perused the record.

6. It is submitted on behalf of the appellants that admittedly the marriage of deceased Sandhya Bai had taken place on 4.2.1995 with the appellant/accused Rajesh Agarwal and unnatural death of Sandhya Bai occurred on 21.7.1999, meaning thereby she died within seven years of her marriage with the appellant/accused Rajesh. It is further submitted that the trial Court after due appreciation of the entire evidence on record came to the conclusion that demand of dowry by any of the appellants/accused is also not found proved by the prosecution evidence and, hence, the learned trial Court has acquitted all the appellants/accused from the charge under Section 304-B of IPC and against the aforesaid finding of acquittal for the offence under Section 304-B of IPC the prosecution as well as the complainant has not preferred any appeal against that part of the judgment. Thus, it is proved that the prosecution has utterly failed to prove the demand of dowry by any of the accused from the deceased Sandhya Bai.

7. Now only question remains for consideration with regard to the cruelty exercised upon the deceased by any of the appellants or all the appellants/accused. On this point it is submitted by learned counsel for the appellants that there is no specific allegation against any of the accused with regard to the alleged cruelty to the deceased. The only allegation found in the statements of Rameshwar Dayal (PW.2), Veerendra (PW.3), Taradevi (PW.8), Radheshyam (PW.9) and Madhusudan (PW.11), all near relatives of the deceased that all the appellants/accused were harassing the deceased Sandhya Bai but there is no specific allegation against any one of the accused with regard to any particular incident. The only allegation alleged to be introduced by the statements of these witnesses that the accused persons were not permitting Sandhya Bai to talk with her parents on telephone or to write any letter to the parents and only by this type of allegation the prosecution wants to prove the alleged cruelty as defined under Section 498-A of IPC and only on the basis of this such type of omnibus allegation the alleged cruelty by any of the accused cannot be found proved.

8. It is also submitted that it is on record that after the marriage with the cooperation of the accused persons Sandhya Bai also appeared in B.Ed. examination in the year 1997 and also passed the aforesaid examination. There are also documentary evidence that the deceased Sandhya Bai and her husband/ accused Rajesh were in cordial relationship. Various photographs have also been produced by the defence, on which basis this cannot be inferred that both the deceased as well as the appellants/accused were not having good relationship and if on the basis of such type of omnibus allegation the cruelty to the deceased is not proved by the prosecution then certainly the presumption under Section 113-A of the Evidence Act for instigation to commit suicide is not found proved against any of the accused and the learned trial Court has wrongly held the appellants guilty for the offence punishable under Sections 306 and 498-A of IPC. Hence, prayed for setting aside of the impugned judgment of conviction passed by the trial Court.

9. In reply, learned Public Prosecutor for the State assisted by learned counsel for the complainant supported the impugned judgment and submits that on the basis of the statements of parents namely Rameshdayal (PW.2) and Taradevi (PW.8) and on the basis of the statements of other witnesses Veerendra (PW3), Radheshyam (PW9) and Madhusudan (PW.11) the prosecution has fully proved the case that all the accused persons were repeatedly harassing the deceased and also treating her with cruelty, due to which instigation she committed suicide and the trial Court has rightly held all the appellants guilty for the offence punishable under Sections 306 and 498-A of IPC and no grounds are available for any interference in the impugned judgment of conviction and sentence passed by the trial Court. Hence, prayed for dismissal of all the three appeals.

10. To bring home the charge, it is not in dispute that Sandhya Bai died in the suspicious circumstances on the railway track within seven years of her marriage. As stated herein above, the marriage took place on 4.2.1995 and the deadbody of deceased Sandhya Bai was found dead on the railway track near Ganj Basoda Station on 21.7.1999. It is also apparent that demand of dowry by any of the appellants is not found proved by the trial Court on the basis of the statements given by the parents and due to which the trial Court itself has acquitted the appellants from the charge under Section 304-B of IPC. Therefore, the statements of the aforesaid witnesses with regard to demand of dowry given in the trial Court need not to be re-examined by this Court.

11. Now the only point for determination is as to whether any of the appellants/ accused has treated the deceased Sandhya Bai with cruelty and due to which harassed her. For this, the prosecution had examined Rameshwardayal (PW.2) and Taradevi (PW.8), father and mother of the deceased, who omnibusly stated that all the accused persons were harassing Sandhya Bai due to the reason that in the marriage car had not been given by the parents of the deceased but, as stated herein above, the demand of car as dowry is not found proved on the

basis of the statements given by the prosecution witnesses; but in the statements of the aforesaid two witnesses – the parents Rameshwardayal (PW.2) and Taradevi (PW.8) there is no specific allegation with regard to the kind of harassment or cruelty to the deceased by the accused persons. Rameshwardayal (PW.2) in detailed cross-examination only alleged that the accused persons were not permitting Sandhya Bai to talk with her parents on telephone and she cannot also write any letter to the parents but this does not appear to be probable allegation of cruelty against the appellants. Rameshwardayal (PW.2) admitted in his cross-examination that after the marriage the appellants had permitted deceased Sandhya Bai to appear in the B.Ed. examination and she also appeared in the examination and passed the examination in the year 1997, for which he had also sent congratulation letter to Sandhya Bai and to her inlaws. Similarly, Rameshwardayal (PW.2) also admitted the fact that he also joined the marriage of Anamika (appellant/ accused in Criminal Appeal No.304/03) which had taken place in the year 1997 and certain photographs had also been taken, at that time there was no allegation against Anamika or any of the accused with regard to any harassment to the deceased, on which basis the allegation of cruelty can be found proved against any of the appellants.

12. Rameshwardayal (PW.2) also admitted in cross-examination that he has not lodged any report against any of the appellants with regard to the alleged harassment or cruelty to his daughter Sandhya Bai. Similarly he had also not produced and proved any letter written by Sandhya Bai alleging against any of the accused with regard to the alleged cruelty or harassment.

13. Veerendra Agarwal (PW.3), the brother of the deceased, admitted the fact that two letters have been written by Sandhya Bai but those letters have also not been produced by the prosecution in support of the allegation that in those letters also Sandhya Bai narrated about the alleged harassment or cruelty by any of the accused. In such circumstances also, there is no cogent support found on record on which basis the allegation with regard to the harassment to the deceased by any of the accused or all the accused can be found proved on which basis the cruelty is defined under Section 498-A of IPC can be found proved.

14. Taradevi (PW.8) the mother of the deceased stated that the accused persons were also beating Sandhya Bai but no such allegation has been made by the father Rameshdayal (PW.2) against any of the accused that they were also repeatedly beating his daughter Sandhya Bai. Similarly, there is also no such allegation in the statement of Veerendra Agarwal (PW.3) that any of the accused had beaten deceased Sandhya Bai at any point of time.

15. Radheshyam Agarwal (PW.9), who is maternal uncle (Mousa) of the

deceased, has also not stated that Sandhya Bai ever told him with regard to the alleged cruelty or harassment by her husband or in-laws at any point of time and this witness has been declared hostile by the prosecution.

16. Madhusudan (PW.11) is the cousin brother of deceased Sandhya Bai. He has also not stated that any specific allegation or statement was made to him by Sandhya Bai during her life time with regard to the alleged harassment or cruel treatment by any of the accused.

17. Thus, the prosecution rests only on the omnibus statement of Rameshdayal (PW.2) and Taradevi (PW.8) with regard to the harassment by the accused persons. PW.2 Rameshdayal in cross-examination in para 49 also admitted that he had not clarified from Sandhya as to how and under what circumstances the alleged harassment is made by her in-laws or the husband to Sandhya Bai.

18. On the other hand, the defence has filed documentary evidence Ex.D/6 to D/25. These documents are the greeting cards and the photographs taken on various occasions, wherein the deceased Sandhya Bai was found in cordial and happy relationship with Anamika and with her husband Rajesh and looking to these photographs and various greeting cards it is also not found proved that deceased Sandhya Bai was not in good relationship with the accused Rajesh or with her sister-in-law/appellant-accused Anamika. In such circumstances also the allegation of Rameshdayal (PW.2) and Taradevi (PW.8) that all the accused persons are repeatedly harassing the deceased does not appear to be a probable story.

19. Learned counsel for the appellants also drew our attention on the statement of Shambhu (PW.17), who is the alleged eye witness of the incident, who clearly stated that he saw that a lady with a child while going towards the railway line, immediately at that time some train arrived and due to some rashness she fell down on the railway track and this incident occurred. This witness Shambhu is the prosecution witness, who actually saw the incident and has not been declared hostile by the prosecution. The prosecution is bound by the statement of this witness, which clearly indicates that the incident of death of Sandhya Bai appears to be an accident for which this cannot be presumed that Sandhya Bai committed suicide by coming in front of the train. Therefore, by the statement of Shambhu (PW.17) also, the submission made by learned counsel for the appellants appears to be probable that the death of Sandhya Bai may be an accidental death also and if that being so and cruelty and harassment as discussed above is not proved then certainly the presumption under Section 113-A of the Evidence Act will not be available in favour of the prosecution on which basis the appellants/ accused can be held guilty for the offence punishable under Section 306 of IPC.

20. Similarly, the Autopsy Surgeon Dr.K.K.Shrivastava (PW.10), who performed the post-mortem of the deadbody of Sandhya Bai, also opined that looking to the injuries sustained to the deceased the death may be accidental also.

21. Hon'ble Apex Court in case of *Girdhar Shankar Tawade vs. State of Maharashtra,* reported in 2002 Supreme Court Cases (Cri) 971, has held here as under:-

> "16. We have already noted Section 498-A herein before in this judgment and as such we need not delve into the same in greater detail herein excepting recording that the same stands attributed only in the event of proof of cruelty by the husband or the relatives of the husband of the woman. Admittedly, the finding of the trial court as regards the death negated suicide with a positive finding of accidental death. If suicide is ruled out then in that event applicability of Section 498-A can be had only in terms of Explanation (b) thereto which in no uncertain terms records harassment of the woman and the statute itself thereafter clarified it to the effect that it is not every such harassment but only in the event of such a harassment being with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand – there is total absence of any of the requirements of the statute in terms of Section 498-A. The three letters said to have been written and as noticed earlier cannot possibly lend any credence to the requirement of the statute or even a simple demand for dowry."

22. Similarly in another decision of the Hon'ble Apex Court in the case of *Ramesh Kumar vs. State of Chhattisgarh,* reported in 2002 SCC (Cri) 1088, the Hon'ble Apex Court while defining the word "instigation" as defined under Sections 306 and 107 of IPC, has held here as under:-

> "11. There is no direct evidence adduced of the accused-appellant having abetted Seema into committing suicide. The prosecution has relied on Section 113-A of the Evidence Act which reads as under:
>
> "113-A. Presumption as to abetment of suicide by a married woman.-- When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that

she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.-- For the purpose of this section, 'cruelty' shall have the same meaning as in Section 498-A of the Indian Penal Code (45 of 1860)."

12. This provision was introduced by the Criminal Law (Second) Amendment Act, 1983 with effect from 26.12.1983 to meet a social demand to resolve difficulty of proof where helpless married women were eliminated by being forced to commit suicide by the husband or in-laws and incriminating evidence was usually available within the four corners of the matrimonial home and hence was not available to anyone outside the occupants of the house. However, still it cannot be lost sight of that the presumption is intended to operate against the accused in the field of criminal law. Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113-A shows that to attract applicability of Section 113-A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the abovesaid circumstances, the court may presume that such suicide had been abetted by her husband or by such relatives of her husband. Parliament has chosen to sound a note of caution. Firstly, the presumption is not mandatory; it is only permissive as the employment of expression "may presume" suggests. Secondly, the existence and availability of the abovesaid three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the court shall have to have regard to "all the other circumstances of the case". A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the court to abstain from drawing the presumption. The expression -- "the other circumstances of the case" used in Section 113-A suggests the need to reach a cause-and-effect relationship between the cruelty and the

suicide for the purpose of raising a presumption. Last but not the least, the presumption is not an irrebuttable one. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase "may presume" used in Section 113-A is defined in Section 4 of the Evidence Act, which says -- "Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it."

23. In view of the aforesaid case law, on appreciation of the evidence in the present case on record, as discussed herein above, there is no specific allegation against any of the appellants/accused that by any act they had instigated the deceased Sandhya Bai for commission of suicide. There is also no specific allegation with regard to harassment or cruelty. No documentary evidence is also available for the alleged harassment or cruelty. On the other hand, there is documentary evidence on record that the appellants and deceased Sandhya Bai were in good relationship. This has also been proved by the statement of Vivek Shukla (DW.2), Rambabu (DW.3) and Ajay Agarwal (DW.4). This statement cannot be disbelieved only on the basis that they had been produced by the accused persons. In such circumstances, when prosecution has failed to produce and prove any documentary evidence with regard to the alleged cruelty and defence has successfully proved that the appellants were having good relation with the deceased Sandhya Bai then certainly the presumption under Section 113-A of the Evidence Act will not arrive at, on which basis the appellants can be held guilty for the offence punishable under Sections 306 and 498-A of IPC.

24. The other witnesses examined by the prosecution are Deviprasad (PW.1), who went with the memo issued by A.S.M. Ganj Basoda, who delivered it to the Police Outpost G.R.P. Ganj Basoda; Raju (PW.4), who is the Panch witness of Ex.P/8; Dr. Devendra Kumar Jain (PW.5), who proved the injury sustained to the minor child of Sandhya Bai; Rambabu (PW.6), who proved booking of Hitkarini Dharamshala at the time of marriage of Sandhya Bai; Narayan Das Agarwal (PW.7), who proved the seizure memos Ex.P/3 to Ex.P/7; Hariram (PW.12), who is the railway gangman who informed about the accidental death of a lady; D.P.Dudhane (PW.13), who is the Investigating Officer, who recorded the statements of the witnesses; Babulal Yadav, Head Constable (PW.14), who registered the inquest report; J.P.Sahu (PW.15), who is the A.S.M., who informed the police with regard to the accidental death of a lady on the railway track; B.S.Gurjar (PW.16), who proved the document Ex.P/16; Harishchandra (PW.18) who proved the

submission of copy of the FIR at CJM Court; Ramprasad Pandey (PW.19), who proved the missing report lodged by the accused Shambhu Dayal.

25. Thus, on over all re-appreciation of the entire prosecution evidence on record, in my considered opinion, the prosecution has failed to prove beyond reasonable doubt that all the appellants or any of them harassed the deceased and also treated her with cruelty due to which instigation Sandhya Bai committed suicide on the date of incident. Therefore, the alleged charge for the offence punishable under Sections 306 and 498-A of IPC is not found proved against any of the accused persons.

26. Resultantly, all the three appeals (Criminal Appeals No.304/03, 317/03 and 333/03) succeed and are hereby allowed. The impugned judgment of conviction and sentence passed by the trial Court is set aside and the appellants are acquitted from the charge under Sections 306 and 498-A of IPC. The fine amount if any deposited by the appellants be refunded to them. The appellants are on bail, their bail bonds stand discharged forthwith.

Appeal allowed.

I.L.R. [2009] M. P., 3012
APPELLATE CRIMINAL
Before Mr. Justice S.A. Naqvi
7 October, 2009*

AASIF MALIK ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 20(b)(ii)(b) - Conscious possession - *Ganja seized from a room of house - House does not belong to appellant - No evidence that room was in exclusive possession of appellant - No evidence that appellant was found in room near the sack of Ganja - No evidence that appellant was in conscious possession of Ganja - Appeal allowed.* (Para 16)

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 20(b)(ii)(b) – सचेतन कब्जा – गृह के एक कमरे से गांजा अभिग्रहीत किया गया – गृह अपीलार्थी से संबंधित नही – कोई साक्ष्य नही कि कमरा अपीलार्थी के अनन्य कब्जे में था – कोई साक्ष्य नही कि अपीलार्थी कमरे में गांजे के पैक के पास पाया गया – कोई साक्ष्य नही कि अपीलार्थी गांजे के सचेतन कब्जे में था – अपील मंजूर।

B. Words & Phrases - Conscious possession - Awareness of particular act - It is a state of mind, which is deliberated or intended. (Para 16)

*Cr.A. No.2425 2008 (Jabalpur)

AASIF MALIK Vs. STATE OF M.P.

ख. शब्द और वाक्यांश – सचेतन कब्जा – किसी विशिष्ट कार्य का ज्ञान – यह मस्तिष्क की एक अवस्था है, जो जानबूझकर या आशयित है।

Sanjay Patel & M.K. Tripathi, for the appellant.
Umesh Pandey, P.P., for the respondent/State.

J U D G M E N T

S.A. NAQVI, J.:–Assail is to the judgment dated 15.11.2008 passed by Special Judge (N.D.P.S.) Khandwa East Nimad in Spl. Case.No.3/2008 whereby the appellant Aasif Malik has been convicted under Section 8 read with Section 20(b) (ii)((B) of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "NDPS" Act) and sentenced to undergo 8 years rigorous imprisonment and fined Rs.1,00,000/- in default 1 year rigorous imprisonment.

2. The case of prosecution in a nut shell is that on 9.3.2008 a secret information was received that the appellant Aasif Malik and co-accused Ashfaq Malik having illegal Ganja in their possession in the house of Ashfaq Malik situated at Dedhtalie, they are going to sell Ganja to Maharashtra. The information was entered in rojnamcha sanha Ex.P/21. Panch witnesses were called. Entries were made in rojnamcha Ex.P/3. Panch witnesses were apprised of the received information and Panchnama Ex.P/25 was prepared. The provisions of the NDPS Act were complied with. The police party alongwith panch witnesses started from the police station entry was made vide Ex.P/28. They reached at the house of co-accused Ashfaq Malik who was previously known to the police. Police Party saw co-accused Ashfaq Malik running from the spot. The appellant Aasif Malik found on the spot. He was informed about the information received from informer and Panchnama Ex.P/5 was prepared. Notice Ex.P/6 u/s 50 of the NDPS Act was served on the appellant. After his consent personal search of the appellant was carried out. Rs.58,625/- were found on the person of the appellant. Thereafter house of co-accused Ashfaq Malik was searched in presence of the appellant. Panchanama Ex.P/8 was prepared. In corner of the room ganja was found in white coloured plastic bag. Ganja was physically examined and panchnama Ex.P/9 was prepared. Ganga was mixed. On weighing the total weight of ganja was found to be 13 Kgs. 200 gms. Toal Panchanamas Ex.P/11 and Ex.P/12 were prepared. Two samples weighing 50 grams each were taken from the ganja separately and sealed. The remaining part of ganja is also sealed. The impression of seal was taken on Ex.P/14. Ganja samples and currency were seized as per seizure memo Ex.P/15.

3. The police party came back to the police station alongwith the appellant and seized contraband article. Seized ganja samples and currency were handed over to Head constable Moharir Bhagirath Patel (PW 6), who kept the same in Malkhana vide Ex.P/18. FIR Ex.P/31 was lodged. Detailed

information was sent to S.D.O.P. Nepanagar vide Ex.P/32. Samples were sent to FSL Sagar for chemical analysis. As per analyst report Ex.P/34 seized article was found to be ganja. Spot map Ex.P/29 was prepared. Statement of witnesses were recorded u/s 161 Cr.P.C. Co-accused Ashfaq Malik absconded. After completion of investigation the appellant and co-accused Ashfaq Malik were charge sheeted.

4. Learned Trial Court framed charge under Section 8 read with section 20(b), (ii) (B) of the NDPS Act against the appellant. The appellant abjured the guilt and pleaded innocence and false implication. His defence is that he went to Dedhtalie to bid cattle market of Dedhtalie. He had also previously took cattle market of Dedhtalie on contract. He stayed at the house of his uncle Faiz Mohammad. He was going to attend auction of weekly market. He saw that police was misbehaving mother of co-accused and other women residing with co-accused Ashfaq Malik. He intervened and objected to it. Police took him police chowki and seized money from him.

5. Prosecution examined 13 witnesses. Defence has examined two witness.

6. After hearing learned counsel for both the parties, perusing evidence and material on record, learned Trial Court convicted the appellant under Section 8 read with Section 20(b),(ii)(B) of NDPS Act and sentenced him as hereinabove mentioned. Being aggrieved by the impugned judgment the appellant has preferred the appeal.

7. I have heard learned counsel for both the parties, perused impugned judgment, evidence and material on record.

8. Learned counsel for the appellant vehemently argued that the appellant Asif Malik is not resident of village Dedhtalie. He is resident of village Mohgaon district Mandla. On 9.3.2008 the appellant Asif Malik went to bid for weekly market in village Dedhtalie. Previously also he took contract of weekly market of Dedhtalie. He was going to attend auction he saw that police was misbehaving the ladies to which he objected and police arrested the appellant. The appellant was not in conscious possession of seized ganja. He was not found in the house of co-accused Ashfaq Malik. Co-accused Ashfaq Malik is his rival. He is not carrying business alongwith co-accused Ashfaq Malik. He was to carry business of weekly market with Mohd. Akram (DW 2). There are material contradictions in the statement of prosecution witnesses. The house from where Ganja is seized was in possession of co-accused Ashfaq Malik, where his mother, his wife, brothers and children are jointly residing. The appellant never stayed in the house of co-accused Ashfaq Malik. Learned trial Court committed error in relying upon the testimony of prosecution witnesses and in convicting and sentencing the appellant mentioned hereinabove. Contrary to that learned Public Prosecutor supported the impugned judgment and contended that learned trial Court did not err in convicting and sentencing the appellant.

9. Indrajeet Ueekay (PW 1), Vinod (PW 9) and Ganesh (PW 10) turned hostile. They are not supporting the factum of seizure of 13 Kgs 200 grms ganja from the possession of the appellant. Indrajeet Ueekay (PW 1) deposed that Rs.58,625/- was seized from the possession of the appellant. He also deposed that 13 Kg. 200 grms ganja was seized in a sack. Two samples weighing 50 grms each were taken from the seized ganja. He also deposed that the appellant told that his name is Asif and he is resident of village Mohgaon district Mandla. Vinod (PW 9) and Ganesh (PW 10) are not supporting the prosecution story they totally denied the seizure of Ganja from the possession of the appellant.

10. N.S. Rawat (PW 11) deposed that he received secret information that Ashfaq Malik and Aasif Malik having ganja in the house situated at village Dedhtalie and they are going to sell it in Maharashtra. The entry was made vide Ex.P/21. Provisions of NDPS Act were complied with. Panch witnesses were called. Police party alongwith panch witnesses reached in village Dedhtalie at the house of Ashfaq Malik. He further deposed that Ashfaq Malik seeing police party fled away from the spot and the appellant Aasif Malik apprehended there. He was apprised of secret information received from the informer. Notice u/s 50 of the NDPS Act was served on the appellant. He agreed to be searched by N.S. Rawat. On personal search of the appellant Rs.58,625/- were found. Thereafter house of co-accused Ashfaq Malik was searched. In a corner of room one polethine bag full of ganja was found. It was physically examined and after satisfaction that it is ganja, it was mixed . From the seized ganja two sample weighing 50 gram each were taken and sealed separately. Remaining part of ganja is also seized. Prior to taking sample on weighing total weight of ganja was found to be 13 Kg 200 grams. Ganja, sample and Rs.58,625/- were seized vide seizure memo Ex.P/15. He also prepared spot map Ex.P/29.

11. Police party came back to police station. The seized contraband article, samples and currency were kept in Malkhana in sealed condition vide Ex.P/18. In due course of time the samples were sent to FSL, Sagar for chemical analysis. As per analyst report Ex.P/34 on physical examination, microscopic and thin layer chromatography test seized article was found to be ganja. Pankaj Jaghav (PW 4) also corroborated the testimony of N.S.Rawat. Independent witnesses Shankar Das (PW 5), Vinod (PW 9) and Ganesh (PW 10) turned hostile and they are not supporting evidence of N.S.Rawat. There is overwhelming evidence on record that on 9.3.2008 police received secret information that in the house of co-accused Ashfaq Malik ganja is kept and after complying mandatory provisions of the NDPS Act the house of co-accused Ashfaq Malik was raided and in presence of the appellant Asif Malik 13 Kgs. 200Grams ganja was seized. There is also overwhelming evidence that following due procedure two samples weighing 50 grams each were taken from the seized ganja. There is also positive evidence on record that the samples and seized ganja were kept in malkhana in police station.

which is kept by Bhagirath Patel in safe custody. There is also positive evidence on record that the same samples were sent to FSL Sagar for chemical analysis and vide Ex.P/34 analyst report it is proved beyond doubt that seized article is ganja. The oral evidence is corroborated by document Ex.P/1 to Ex.P/34 hence prosecution evidence in this respect is wholly reliable. The fact that who received information through whom is immaterial and does not adversely affect the prosecution case. Learned trial Court rightly held that 13 Kg.200 grams ganja was seized from the house of co-accused Ashfaq Malik. The finding of learned trial Court in this respect is hereby affirmed. Now it has to be considered that whether the prosecution has proved beyond doubt that the appellant Asif Malik was in conscious possession of seized ganja and learned trial court has rightly convicted him or not ?

12. Pankaj (PW 4) and N.S. Rawaat (PW 11) deposed that seeing police party co-accused Ashfaq Malik fled away from the spot and the appellant Asif Malik was apprehended by the police and in his presence ganja was seized. The presence of accused on spot is also established by the evidence of Indrajeet Ueekay (PW 1) and signatures of the appellant on documents Ex.P/5 to Ex.P/18. Learned counsel for the appellant submits that there is no evidence on record that the appellant was found in the house of co-accused Ashfaq Malik near the sack of ganja, hence it can not be held that the appellant was in conscious possession of ganja.

13. Pankaj Yadav (PW 4) deposed that police party reached at the house of co-accused Ashfaq Malik and the appellant were present, but he has no specifically deposed that the appellant Asif Malik was found in the house of co-accused Ashfaq Malik .

14. N.S. Rawat (PW 11) also deposed that the appellant was found at the spot and in his presence house of co-accused Ashfaq Malik was searched and ganja was seized. He further deposed that co-accused Ashfaq Malik fled away from the spot on seeing police party. In para 28 N.S. Rawat (PW 11) deposed that he has not mentioned in spot map Ex.P/29 that at the house of co-accused Ashfaq Malik two boys were standing and one boy fled away from the spot. He deposed that he has mentioned in Ex.P/29 that both boys were in room No.1, but in second breath he mentioned that he has not mentioned the same in Ex.P/29. On going through the spot map Ex.P/29 it is revealed that there is no mentioned in the spot map that at which place the appellant was standing and from where co-accused Ashfaq Malik fled away. House of co-accused Ashfaq Malik is situated road side and in front of his house a platform is situated thereafter a room is situated from where ganja is seized from a corner. There is no specific mention in Ex.P/29 that where the appellant was found in room no.1 or he was on a platform of the door. The prosecution is bound to prove beyond reasonable doubt by reliable

evidence that the appellant was found in the room and he was in conscious possession of Ganja, but there is no specific oral evidence on record that the appellant was found in the room or near sack of ganja. Ex.P/9 is panchanama of physical verification of contraband article. There is no mentioned in Ex.P/9 that the appellant was found near sack of ganja. In Ex.P/8 search panchanama it has not been mentioned that the appellant is found in the room near sack of ganja. On going through the evidence of Pankaj Yadav and N.S. Raswat it is clear that from a considerable distance co-accused Ashfaq Malik saw the police party and ran away from the spot and the appellant was near the house of co-accused. He did not try to fled away from the spot, consequently he was apprehended by the police. On going through the whole evidence on record, I am of the view that there is no positive evidence on record that the appellant was found in the room near sack of ganja from where ganja was seized. Ex.P/38 is a document proved by S.R.Chopra (PW 13). It is clear from the document that the house from where ganja was seized belongs to Husain Khan son of Rahaman Khan and co-accused Ashfaq Malik's mother Ayassha Begum, brother Wasim Malik and Sadan reside in that house. In Ex.P/38 it has not been mentioned that the appellant Asif Malik resides in the house of co-accused Ashfaq Malik. There is positive evidence on record that Farah Mohammad maternal uncle of the appellant Asif Malik resides near the house of co-accused Ashfaq Malik. Indrajeet Ueekay (PW 1) admitted that when the appellant was apprehended he informed that he is residing at village Mahgaon district Mandla, and he came to Dedhtalie to participate in acution of weekly market. Though Pankaj Yadav and N.S. Rawat denied the aforementioned fact but Saleem (PW 7) and Saleem Qureshi (PW 8) specifically admitted that mother, brother, wife and children of co-accused Ashfaq Malik resides in the house, and Ashfaq Malik also comes in that house. It is clear from the evidence of Saleem that Wasim and Sadan brother of co-accused Ashfaq Malik are adult. Saleem Qureshi (PW 8) admitted that in 2006-07 the appellant Asif Malik took contract of weekly market of village Dedhtalie. He also admitted that the appellant is a resident of village Mahgaon district Mandla and he used to come to his maternal uncle's house Faiz Mohammad and he stayed in the house Faiz Mohammad.

15. Ravindra (DW 1) deposed that the appellant Asif Malik and Ashfaq took part in auction of weekly market of village Dedhtalie in the year 2006-07 which is corroborated by document Ex.D-6/C. Co-accused Ashfaq Malik having grudge with the appellant and they were not in talking terms. It is proved by Ravindra (DW 1) that in 2006-07 the appellant Asif Malik also bid in cution of weekly market. Mohd. Akram (DW 2) deposed that the appellant was his partner but he could not reach to the auction place because police apprehended him. Hence there is overwhelming evidence on record that the appellant Asif Malik took contract of weekly market of village Dedhtalie in the year 2006-07 and he also came to bid alongwith Mohd. Akram for weekly market of the year 2008-09 which is also

clear from the evidence of Mohd.Akram that the appellant was not having cordial relations with the co-accused Ashfaq Malik and they were not in talking terms. At any stretch of imagination it can not be held that the appellant was indulged in business of contraband article with the co-accused Ashfaq Malik and at the time of seizure he was found in house of co-accused Ashfaq Malik near sack of ganja. As per above discussion, I am of the view that prosecution has failed to establish that the appellant was found in the room of co-accused Ashfaq Malik near the sack of ganja. It is true that police apprehended him near the house of co-accused Ashfaq Malik and he co-operated police and signed various documents, but it does not mean that the appellant was in conscious possession of ganja. The heavy burden is on the prosecution to prove that ganja was found in conscious possession of the appellant.

16. There is positive evidence that in that house, from where ganja is siezed Ashfaq Malik his two brothers, his mother, his wife and children reside . There is no evidence that on fateful day the appellant stayed in the house of co-accused Ashfaq Malik he was not found in the house of co-accused Ashfaq Malik. The appellant stayed at the house of his maternal uncle Faiz Mohd. He came to take part in auction of weekly market of village Dedhtalie which was to be held on 9.3.2008 as established by document Ex.D/4 and evidence of Ravindra (DW 1). There is no positive evidence on record that the room from where ganja is seized was in exclusive possession of the appellant Asif Malik. There is no circumstance and evidence on record to hold that the appellant was having knowledge that Ganja is kept in the house of co-accused Ashfaq Malik and he was in possession of that ganja and was involved in marketing ganja. It is clear from the spot map Ex.P/29 that there are only two rooms in the house of co-accused Ashfaq Malik. Looking to the number of family members of co-accused it can be safely presumed that both the rooms have been occupied by the family members of co-accused Ashfaq Malik. There is no evidence to hold that any of these rooms was in exclusive possession of the appellant. There is no evidence on record to connect the appellant with the act of co-accused Ashfaq Malik. The house does not belong to the appellant from where ganja is seized. Neither the appellant was owner nor he was in possession of the room fromwhere ganja was seized. The conscious possession has to be determined with the actual back drop. The word 'conscious' means awareness of the particular act, it is a state of mind which is deliberated or intended. There is no positive evidence or any circumstance on record to prove that the appellant Asif Malik was in conscious possession of the seized ganja. Contrary to that there is positive evidence on record that on fateful day he came to Dedhtalie to participate auction of weekly market and he was going to bid the same alongwith Mohd. Akram (DW 2) and he was apprehended by the police near the house of co-accused

Ashfaq Malik. Learned trial Court over sighted these facts and aforementioned evidence and circumstances. As per above discussion, I am of the view that the evidence of Pankaj Yadav (PW 4) and N.S. Rawat (PW 11) cannot be relied upon beyond reasonable doubt and their evidence is not sufficient to prove that ganja was seized from conscious possession of the appellant Asif Malik. Learned trial Court committed error in relying upon the testimony of the prosecution witnesses and holding that ganja has been seized from the possession of the appellant and convicting him u/s under Section 8 read with Section 20(b) (ii)((B) of Narcotic Drugs and Psychotropic Substances Act, 1985 . Since conscious possession of the appellant over the seized ganja has not bee proved by the prosecution, hence the appellant is entitled to acquittal.

17. Consequently, appeal has merit, deserves to be and is hereby allowed. The impugned judgment of conviction and order of sentence passed by learned trial Court is hereby set aside. The appellant Asif Malik is acquitted of the charge under Section 8 read with Section 20(b) (ii)((B) of Narcotic Drugs and Psychotropic Substances Act, 1985 . The seized money be returned back to the appellant because it has no connection with sell of ganja. The appellant is in jail the copy of judgment be sent to him in jail.

Appeal allowed.

I.L.R. [2009] M. P., 3019

CIVIL REVISION

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

28 April, 2009*

KRISHI UPAJ MANDI SAMITI, BANAPUR ... Applicant

Vs.

CHANDRA SHEKHAR RAGHUVANSHI & ors. ... Non-applicants

A. Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 67 - *Notice u/s 67 is mandatory and suit without serving a notice is not maintainable.* (Para 6)

क. कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 67 – धारा 67 के अन्तर्गत सूचनापत्र आज्ञापक है और सूचनापत्र तामील किये बिना वाद पोषणीय नही है।

B. Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 67, Civil Procedure Code, 1908, Section 80(2) - *Benefit of S.80(2) of CPC cannot be extended to suits against Krishi Upaj Mandi Samiti and the suit, without serving statutory notice under the Adhiniyam, is not maintainable.* (Para 6)

*C.R. No.238/2008 (Jabalpur)

ख. कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 67, सिविल प्रक्रिया संहिता, 1908, धारा 80(2) – सि.प्र.सं. की धारा 80(2) का लाभ कृषि उपज मण्डी समिति के विरुद्ध वादों तक विस्तारित नही किया जा सकता और अधिनियम के अन्तर्गत वैधानिक सूचनापत्र तामील किये बिना वाद पोषणीय नही है।

C. Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 67, Municipalities Act, M.P. 1961, Section 319 - *The provision of S. 67 of M.P. Krishi Upaj Mandi Adhiniyam is pari materia to S. 319 of M.P. Municipalities Act.* (Para 7)

ग. कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 67, नगरपालिका अधिनियम, म.प्र. 1961, धारा 319 – म.प्र. कृषि उपज मण्डी अधिनियम की धारा 67 का उपबंध म.प्र. नगरपालिका अधिनियम की धारा 319 के समविषयक (पेरी मटेरिया) है।

Cases referred :

1992 MPLJ 998, 2005(3) MPLJ 530, 2005(4) MPLJ 38, AIR 1984 SC 1043.

Sanjay Sarwate, for the applicant.

Greeshm Jain, for the Non-applicant No.1.

ORDER

The Order of the Court was delivered by ARUN MISHRA,J.:– Writ petition and the civil revision have been preferred by Krishi Upaj Mandi Samiti, Banapura, Tahsil-Seoni Malwa, District-Hoshangabad (hereinafter referred to as "the Samiti"). In civil revision no. 238/08 order passed by Civil Judge, Class-II, Seoni Malwa, District-Hoshangabad in Civil Suit No.43-A/05 on 29.2.08 has been assailed whereas in WP No.17381/07 orders passed by the trial Court and the appellate Court in the matter of interim grant of injunction have been assailed by the Samiti. Both the cases have been listed before the Division Bench as per Order passed by Hon'ble the Chief Justice on 21.1.2009. Consequently, civil revision is also heard by us.

2. The facts in short giving rise to the instant suit indicates that Chandra Shekhar Raghuvanshi has filed a suit for declaration and injunction against the Samiti, Director of Mandi Board, Bhopal and State of M.P. through Collector, Hoshangabad and for setting aside resolution passed by the Samiti dated 29.8.05 being illegal and void. Prayer has also been made to restrain the implementation of notice inviting tenders for installation of weighing machines in terms of NIT dated 29.10.05. Matter has travelled to this Court in a WP No.5277/2005 which was decided by this Court on 7.3.2006, it was an independent writ petition in which prayer was made to quash the order dated 17.6.05 and direct the respondents to execute the agreement and to permit the petitioner to establish the weight equipment in the market yard, Krishi Upaj Mandi Samiti, Banapura, District-Hoshangabad and to

operate it. This Court has allowed the writ petition on conditional order. The Samiti was directed to take a final decision or to issue a fresh letter permitting the petitioner to install weigh machine within a period of 30 days from the date of the order. Other directives were also issued, in case the Samiti takes a decision permitting the plaintiff to install weigh machine. In case of refusal to permit the petitioner to install the weigh machine directives were also issued by this Court. It is not in dispute that pursuant to the decision rendered by this Court in the writ petition the plaintiff has been permitted to install weigh machine. However, he has filed the instant suit praying for the aforesaid relief on 29.11.05. The suit was filed as mentioned in para 16 without serving a notice. It was submitted that it was not practicable to serve the notice of two months which was necessary, consequently the permission was prayed to institute the suit without serving the notice. Application was filed before the trial Court to reject the plaint under Order 7 Rule 11 CPC on the ground that notice under Section 67 of MP Krishi Upaj Mandi Adhiniyam, 1972 (hereinafter referred to as "the Adhiniyam") has not been served. The trial Court has rejected the application vide Order dated 29.2.2008. The trial Court has held that the suit has been filed for specific performance of the contract between the parties, suit was held to be maintainable, permission was granted under Section 80(2) of CPC to institute the suit. The objection has not been taken at the first instance. Aggrieved by the order civil revision has been preferred.

3. In WP No.17381/07 trial Court has granted injunction restraining the Samiti from acting upon the NIT and to install other weigh machines during pendency of the suit, order has been affirmed by the appellate Court. Aggrieved by the orders, aforesaid writ petition has been preferred.

4. Shri Sanjay Sarwate, learned counsel appearing for petitioner Samiti has submitted that in view of the admitted fact that notice under Section 67 of the Adhiniyam has not been served, the suit would not be maintainable. He has placed reliance on decisions of this Court in *Bhagwandas Goyal vs. Krishi Upaj Mandi Samiti, Datia and another* 1992 MPLJ 998. He has also relied upon Division Bench decision of this Court in *Municipality, through Chief Municipal Officer, Raghogarh vs. Gas Authority of India Ltd. and others* 2005(3) MPLJ 530 and a decision in *Harmesh Chandra Dua and another vs. Nagar Palika Nigam, Gwalior* 2005(4) MPLJ 38. He has also submitted that balance of convenience and irreparable injury could not be said to be in favour of plaintiff, consequently grant of injunction by the Courts below could not be said to be proper, virtually the suit has been decreed.

5. Shri Greeshm Jain, learned counsel appearing for respondent no.1 has submitted that though the suit was filed without serving notice under Section 67 of the Adhiniyam, however, the trial Court has granted permission under Section 80(2) of CPC to institute the instant suit. The objection of want of service of notice under Section 67 was required to be taken at the threshhold it was not

taken at the initial stage consequently filing of application later on could not be said to be proper.

6. First we take up the civil revision for decision. Section 67 of the Adhiniyam provides Bar of suit in absence of notice. Section 67 reads thus :-

> **"67. Bar of suit in absence of notice:-** No suit shall be instituted against the Board or any Market Committee, until the expiration of two months next after notice in writing stating the cause of action, name and place of abode of the intending plaintiff, and the relief which he claims has been delivered or left at its office. Every such suit shall be dismissed unless it is instituted within six months from the date of the accrual of the alleged cause of action."

We find that notice is mandatory under Section 67 of the Adhiniyam. The NIT was issued purporting to exercise powers under the Adhiniyam. The action was clearly within the periphery of the Adhiniyam. Notice under Section 67 is mandatory and suit without serving a notice is not maintainable has been laid down by this Court in *Bhagwandas Goyal vs. Krishi Upaj Mandi Samiti, Datia and another* (supra). This Court has laid down that the language used in Section 67 of the Adhiniyam leaves no manner of doubt that provision is mandatory. It takes away the right of any one to institute a suit against "the Board" or "Market Committee" until the expiration of two months from the delivery of the notice. The question with respect to plea being technical has also been considered by this Court in *Bhagwandas Goyal vs. Krishi Upaj Mandi Samiti, Datia and another* (supra). This Court has laid down that provision being mandatory obliges the Court to hold the suit not maintainable, if it is filed before expiry of statutory period of two months, the decision of *Bihari Chowdhary and another vs. State of Bihar and others* AIR 1984 SC 1043 has also been considered in which Section 80 CPC came for consideration as it stood prior to its amendment by Act No.104 of 1976. This Court has laid down thus :-

> "5. In *Bihari Chowdhary vs. State of Bihar,* AIR 1984 SC 1043 their Lordships held :-
>
> " A suit against the Government or a public officer, to which the requirement of a prior notice under S.80 CPC is attracted, cannot be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable."
>
> The language used in S.67 of the Adhiniyam leaves no manner of doubt that the provision is mandatory. It takes away the right of any one to institute a suit against "the Board" or "Market

Committee" until the expiration of two months from the delivery of the notice. *Bihari Chowdhary's case* applies to S.67 of the Adhiniyam, with all force in view of similarity in the language employed in S.80 CPC and S.67 of the Adhiniyam.

6. The learned counsel for the appellant submitted that the defendant should not have been permitted to take shelter behind the plea under S.67 of the Adhiniyam. Firstly, because it is a technical plea and secondly, because the defendant/respondent having refuted the claim of the plaintiff within the period of 2 months and then filing the suit. Reliance was placed on *Mahabir Kishore vs. State of M.P.* 1990 JLJ 1(SC) and *State of M.P. vs. Ramrao Krisharao Paliskar,* 1990 JLJ 315 (D.B.) in both the decisions, the Apex Court and this Court have held that State should not rely on technical plea of limitation to defeat the legitimate claim of the citizens. It is for the defendant/respondent to read and act on the law so laid down while learning moral therefrom. However, two cases relied upon by the learned counsel for the appellant do not help him in the present case for the simple reason that S.67 of the Adhiniyam is mandatory in character and obliges the Court to hold the suit not maintainable, if it is filed before expiry of statutory period of two months as is the law laid down in *Bihari Chowdhary's case* (supra)."

Section 80 has been amended later on. Sub-section (2) has been added. However, Section 67 does not contemplate permission to institute a suit which is provided in Section 80(2) CPC, thus, grant of permission under Section 80 CPC could not have been used by the trial Court to protect the suit instituted without serving a notice under Section 67 of the Adhiniyam. In the instant case, no notice was infact issued under Section 67 of the Adhiniyam . None of the act of the Collector was assailed, thus, permission granted under Section 80(2) CPC was superfluous and could not inure to the benefit of plaintiff so as to hold that suit is maintainable as no such permission is contemplated under Section 67 of the Adhiniyam.

7. Division Bench of this Court has distinguished the provisions of Section 319 of M.P.Municipalities Act and Section 80(2) of CPC in *Municipality, through Chief Municipal Officer, Raghogarh vs. Gas Authority of India Ltd. and others* (supra). It has been held that benefit of Section 80(2) of CPC cannot be extended to suits against Municipal Council and the suit without serving statutory notice under the Municipalities Act is not maintainable. Division Bench of this Court has laid down thus :-

"19. It appears that the trial Court in a haste to decide the suit has

not considered the material objections. When specific plea as to valuation was raised, it was the duty of the trial Court to examine the question of valuation from bare reading of the plaint. Trial Court committed error in holding that the Court fee paid is proper. Plaintiffs themselves have valued their suits and they have sought injunction to avoid their monetary liability of Rs. two crore and above. Loss which was going to cause to the plaintiffs was of two crore and two crore fifty three lac in two suits respectively. Therefore, the trial Court ought to have directed the plaintiffs to pay ad valorem Court fee. In the absence of any such direction, suit as filed itself was not maintainable. There is no notice under Section 80, Civil Procedure Code according to law. Plaintiffs have neither mentioned the date on which cause of action has accrued and the reliefs intended to be claimed by the plaintiffs in the notice. There is nothing in the pleadings that the said notice has been delivered at the office or place of residence of the concerned officer and to whom notice has been served. Therefore, in view of such technical flaws suit as filed itself was not maintainable. Even otherwise, suit against the Municipal Council without serving statutory notice under Section 319 of the M.P. Municipalities Act is not maintainable. The benefit of Section 80(2) Civil Procedure Code cannot be extended to suits against Municipal Council and the suit without serving statutory notice under the Municipalities Act is not maintainable."

The provision of Section 67 is pari materia to Section 319 of MP Municipalities Act is also not in dispute.

8. In *Harmesh Chandra Dua and another vs. Nagar Palika Nigam, Gwalior* (supra), Division Bench of this Court has laid down that notice under Section 401 of MP Municipal Corporation Act is mandatory. Plaint was ordered to be returned to plaintiff with liberty to present after complying with provisions of notice, if it is within limitation and permissible under the law.

9. In view of the aforesaid, we hold that notice under Section 67 of the Adhiniyam to be mandatory, the suit could not be said to be maintainable. As prayed, plaint is ordered to be returned which was also the recourse adopted to in *Harmesh Chandra Dua and another vs. Nagar Palika Nigam, Gwalior* (supra). We direct the plaint to be returned to the plaintiff with liberty to present it after complying with provisions of notice and to present it, if it is within limitation and permissible under the law.

10. It is conceded at Bar that in view of aforesaid, the writ petition has been rendered infructuous Same is dismissed as infructuous. Civil Revision is allowed. Impugned

order with respect to application under Order 7 Rule 11 CPC is hereby quashed, application is allowed. Parties to bear their own costs as incurred of the petitions.

Revision allowed.

I.L.R. [2009] M. P., 3025
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice J.K. Maheshwari
28 July, 2008*

SANJAY ... Applicant
Vs.
STATE OF M.P. & anr. ... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 70(2) - Perpetual warrant of arrest - *Applicant not an accused in Crime No. 26/95 - Inspite of that perpetual warrant of arrest issued against him - Issuance of warrant of arrest and proclamation issued by S.P., are without any authority - Consequently they are quashed.* (Para 6)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 70(2) – गिरतारी का शाश्वत वारण्ट – आवेदक अपराध क्र. 26/95 में अभियुक्त नही – इसके बावजूद उसके विरुद्ध गिरतारी का शाश्वत वारण्ट जारी किया गया – गिरतारी का वारण्ट जारी किया जाना और पुलिस अधीक्षक द्वारा जारी उद्घोषणा बिना किसी प्राधिकार के – परिणामतः वे अभिखंडित की गई।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 70(2) - Perpetual warrant of arrest - Applicant accused in another crime - However, warrant of arrest issued in wrong name - Applicant directed to be taken into custody. (Para 17)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 70(2) – गिरतारी का शाश्वत वारण्ट – आवेदक भिन्न अपराध में अभियुक्त – तथापि, गिरतारी का वारण्ट गलत नाम से जारी किया गया – आवेदक को अभिरक्षा में लेने का निदेश दिया गया।

L.S. Chandiramani, for the applicant.
Manish Joshi, Panel Lawyer, for the Non-applicant.

ORDER

J.K. Maheshwari, J.:–This petition has been filed under Section 482 of Cr.P.C., seeking quashment of the proclamation dated 23.11.2008 (Annexure A-5) issued by Superintendent Police, Mandsaur. It is said in the proclamation that a perpetual warrant of arrest was issued on 20.4.2005, in furtherance to the order of Additional Sessions Judge, Bhanpura dated 12.4.2005 in S.T. No. 91/03, offering a reward of Rs.500/- on petitioner, payable to whom, who shall furnish the intimation of the said accused or produce him in the custody.

* M.Cr.C. No 2799/2009 (Indore)

2. It is the case of the petitioner that the Police Station Bhanpura, District Mandsaur registered an offence under Sections 323, 341 and 326 of IPC vide Crime No. 26/95, wherein two persons were named and 50 others were unknown. After recording statements of 161 of Cr.P.C. by police eight persons were made accused, while filing challan. Out of them seven accused persons were put into trial and one person Sanjay S/o Kanwarlal had shown absconded. The Additional Sessions Judge, Bhanpura passed an order in S. T No. 91/2003 dated 12.4.2005 showing him absconding and directed to issue perpetual warrant of arrest.

3. It is submitted that in the order of committal, the name of accused No. 8 has shown Sanjay S/o Kanwarlal, while the perpetual warrant of arrest was issued against Sanjay S/o Bhanwarlal. Petitioner by attaching the voter I. D. card issued by Election Commission and Permanent Account Number of Income Tax Department, submitted that issuance of a proclamation in the name of the petitioner i.e. Sanjay S/o Bhanwarlal in place of Sanjay S/o Kanwarlal is without any basis and illegal, hence liable to be quashed.

4. Under the orders of this Court, case diary of Crime No. 26/95 of Police Station Bhanpura was called, and the record of S. T. No. 91/2003 has also been called, which is attached in the pending Criminal Appeals No.478/05 and 498/05. On perusal of the case diary it reveals that total 8 accused persons were identified and named, against whom challan was filed as per Parcha No. 16 of the diary, on 30.7.2009 at Sr. No. 104. As per case diary following persons namely Bashir S/o Abdul Gani, Dhirendra S/o Narendra Saxena, Ganesh S/o Hiranand, Nimesh @ Banti S/o Govind Prasad, Prakash S/o Babulal, Hukum S/o Manakchand, Ramesh S/o Ramchandra Soni and Shiv S/o Mangilal Sethia were the accused. On filing the Challan, cognizance had taken by the Judicial Magistrate First Class, Bhanpura, and the case was registered as Criminal Case No. 234/95, while the order of committal was passed on 14.7.2003 by Mr. Manoj Tiwari, JMFC, Bhanpura due to addition of the offence under Sections 333, 332 of IPC. On receiving the committal order, the then Sessions Judge, Mandsaur vide order dated 21.7.2003 made over the case S. T. No.91/03 to the Court of Additional Sessions Judge, Bhanpura. In the transfer order the then Sessions Judge, Mandsaur specified the names of the accused persons including Sanjay S/o Kanwarlal and Radheshyam; whereas Sanjay and Radheshyam were not the accused of the said crime number. In the said crime number as per the case diary, Dheerendra and Bashir were the accused, but they were not shown as accused in the orders of committal, however, their case had not been made over for trial to the Additional Sessions Judge, Bhanpura.

5. It is surprising that the then Additional Sessions Judge, Bhanpur Dr. J. C. Sunhere tried the accused persons, who were mentioned in the committal order and vide judgment dated 12.4.2005 passed in S. T. No. 91/2003, Ramesh, Prakash, Radheshyam (not the accused of Crime No. 26/95) and Hukumchan were

acquitted, and the accused Ganesh and Nimesh were convicted, and directed to undergo sentence of three years R.I. each with fine of Rs.5,000/- for the offence under Section 332/149 and 147 of IPC. By passing a separate order on the same date Sanjay was shown as absconding, and thereafter, perpetual warrant of arrest was directed to be issued against him. In furtherance to the said order, the Superintendent of Police has issued the proclamation (Annexure A-5) which is impugned in this petition.

6. After having heard learned counsel appearing on behalf of the parties and looking to the facts contained in the case diary of Crime No. 26/95 of P. S. Bhanpura, it appears that Sanjay S/o Bhanwarlal (wrongly shown as Kanwarlal in the committal order) is not the accused in the said crime number; however the then Additional Sessions Judge could not have passed the order for issuance of perpetual warrant of arrest against him, therefore, the order passed on 12.4.2005 for issuance of perpetual warrant against petitioner, and proclamation as issued by the Superintendent of Police, Bhanpura (Annexure A-5) dated 23.11.2008 is without any authority under the law. Consequently, the order dated 12.4.2005 passed by the then Additional Sessions Judge, Bhanpura in S. T. No. 91/2003 and the proclamation dated 23.11.2008 Annexure-A/5 passed by Superintendent of Police, Mandsaur is hereby quashed.

7. While hearing this petition, the case diary of Crime No. 26/95 of the offence under Sections 147/34, 341, 323 and 326 of IPC registered at Police Station Bhanpura and the case diary of Crime No. 31/95 for the offences under Sections 147, 323, 341 and 326 of IPC registered in the same Police Station have perused. The records of Criminal Case Nos. 234/95 and 233/95 of Judicial Magistrate, First Class, Bhanpura, and the records of S. T. Nos. 91/03 and 90/03 of Additional Sessions Judge, Bhanpura have also been perused. It is seen that the report of Crime No. 26/95 was lodged by complainant J. S. Pinto, Bank Manager State Bank of Indore, Bhanpura, wherein the name of Nimesh @ Banti and Ganesh Mata were shown in FIR and various other persons were shown unknown. After completion of investigation police had filed charge sheet on 30.7.95 against 8 accused persons in total namely; Nimesh Tiwari @ Banti, Ganesh Mata, Bashir, Dheerendra, Prakash, Hukumchand, Ramesh and Shiv, however, Radheshyam and Sanjay were not the accused in the said offence.

8. It further reveals from the record that the first order sheet of JMFC, Bhanpura in Criminal Case No. 234/95 is of dated 20.9.1995, who had tagged the order sheets of another crime No.31/95 with this case, while the order of committal had passed by Mr. Manoj Tiwari, the then JMFC, Bhanpura vide order dated 14.7.2003 and committed the case to the Court of Sessions Judge, Mandsaur against, 8 accused persons namely Ramesh S/o Ramchandra, Prakash S/o Babulal, Radheshyam S/o Goverdhan (not the accused of Crime No. 26/95), Ganesh S/o

Heerachand, Nimesh @ Banti S/o G.P. Tiwari, Hukumchand S/o Manakchand, Shiv S/o Mangilal and Sanjay S/o Kanwarlal (not accused in Crime No.26/95, but an accused of Crime No.-31/95 of the same Police Station. In view of the aforesaid it is apparent that two persons namely Radheshyam and Sanjay, who were not the accused of the said crime number (26/95), wrongly joined in committal order, while two persons namely Bashir and Dheerendra who were the accused in the said crime, but their case has not yet been committed to the Court of Session for trial.

9. The then Sessions Judge, Mandsaur vide order dated 21.7.2003 made over the Criminal Case No. 234/95 to the then Additional Sessions Judge, Bhanpura registering it as S. T. No. 91/03 (Crime No. 26/95). The Sessions Judge, Mandsaur while making over the case had not verified, how many persons were the accused in Crime No. 26/95, and against how many persons the order of committal had passed. Thus, the S. T. No. 91/03 was made over to the then Additional Sessions Judge, Bhanpura in respect to the accused persons shown in committal order, and not as per charge sheet.

10. It is surprising, the then Additional Sessions Judge, Bhanpura, Dr. J. C. Sunhere without ascertaining the names of the accused from the contents of FIR and charge sheet of Crime No. 26/95, and proceeded to decide the Sessions Trial. He had framed the charge against accused Radheshyam, recorded evidence and finally acquitted him vide judgment dated 12.4.2005. It is very surprising that order of issuance of perpetual warrant of arrest against accused Sanjay has been passed in the same case, whereas he is not the accused of said crime. It is relevant to point out here that the accused persons namely Deerendra and Bashir, were the accused in Crime No. 26/95, but neither any order of committal of their case has yet been passed, nor they have tried yet to the said offence.

11. Similarly, in an another offence, registered vide crime No. 31/95 at Police Station Bhanpura, under Sections 341, 323 and 326 of IPC, on the basis of complaint lodged by Mr. L. S. Katiyar, Dy. Manager, State Bank of Indore, Bhanpura for the incident of about 10:25am in the morning dated 11.2.95. After investigation, charge sheet had filed against 8 accused persons namely Radheshaym, Ramesh, Prakash, Ganesh Mata, Nimesh @ Banti, Hukumchand, Shiv and Sanjay S/o Bhanwarlal on 30.7.95. It reveals that first order sheet of Criminal Case No. 233/95 is of dated 20.9.95 of JMFC, Bhanpura who has tagged the order sheet, relating to another Crime No. 26/95, in this case. In the committal order dated 14.7.2003 passed by the then JMFC, Bhanpura Mr. Manoj Tiwari, made total 10 persons as accused namely Radheshyam, Prakash, Ganesh, Nimesh @ Banti, Hukumchand, Shiv, Rameshchandra, Dheerendra, Bashir (not the accused in the said crime number) and Sanjay S/o Bhanwarlal (wrongly showing his father's name as Kanwarlal). The then Sessions Judge, Mandsaur vide order dated 21.7.03 made over the Criminal Case No. 233/95 to the then Additional Sessions Judge, Bhanpura registering it as S. T. No. 90/03 of Crime No. 31/95. The Sessions Judge, Mandsaur while making over the case had not verified how many

persons were accused in Crime No. 31/95 and against how many persons the order of committal had passed. Thus in the sessions trial, which was made over to the then Additional Sessions Judge, Bhanpura persons were joined accused as per committal order, and not as per the charge sheet.

12. It is surprising, the Additional Sessions Judge, Bhanpura, Dr. J.C. Sunhere without ascertaining the names of the accused persons from the contents of FIR and charge sheet of Crime No. 31/95, and proceeded to decide the sessions trial. He had framed the charges against accused persons Dheerendra and Bashir, recorded evidence and finally acquitted them vide judgment dated 12.4.2005 giving benefit of doubt. It is very interesting that by a separate order, perpetual warrant of arrested was issued against Sanjay S/o Kanwarlal, though Sanjay S/o Bhanwarlal R/o Bhanpura is the accused in the said crime. Thus, in Crime No. 31/95 the accused Sanjay S/o Bhanwarlal has not yet been tried for the said offences.

13. Because both the crime numbers (26/95 and 31/95), wherein all these persons are accused, are of the same police station and the prosecution version having connection with each other, however, reference of the prosecution version is as follows. In Crime No. 26/95, complainant Mr. J. S. Pinto, Bank Manager, State Bank of Indore, Bhanpura lodged the FIR. While in Crime No. 31/95 complainant Mr. L. S. Katiyar, Dy. Manager, State Bank of Indore, Bhanpura lodged the FIR. In both the cases the date of incident is the same i.e. 11.2.95, but the time and place of incident are different. A mob headed by Nimesh and Ramesh, over about 50 persons created hinderence, to Manager and Dy. Manager of the Bank in discharge of their official duty on the pretext of non-sanctioning of the loan. They were abused and assaulted by the such mob, however, the said FIRs were lodged by them to take action against accused persons and to provide them security. On going through various noting (Parchas) of the case diaries of both the cases, it reveals that the accused persons were related to the MLA of the area, who had made the prestige issue in the matter of the arrest of the accused persons. As per notings of the case diaries the said MLA had contended to the police officers with respect of having talk with the Chief Minister, and said that the accused persons should not be arrested without his orders. It has also come on record that one of the police officers trying hard to arrest the accused persons was line attached, thus the accused persons could have been arrested after a long lapse of time, while Sanjay S/o Bhanwarlal has not yet arrested, and produced before the Court.

14. In view of foregoing discussion, it appears that on filing the challan of Crime Nos.26/95 and 31/95 order sheets of Criminal Case Nos. 234/95, and 233/95 were written on 20.9.95, but attached in the different case files by the then Judicial Magistrate First Class, Bhapura (name is not reflected from the order sheet). In crime No.26/95 Radheshya and Sanjay S/o Bhanwarlal wrongly shown his father's name as Kanwarlal were made accused as per committal order dated 14.7.2003 passed by Mr. Manoj Tiwari the then Judicial Magistrate First Class, Bhanpura.

The case of the accused persons Bashir and Dharmendra were not committed for the said crime, though they were accused therein. In crime No.31/95 the case was committed against 10 accused persons including Dharmendra and Bashir, though they were not accused of crime No.31/95. In the order of committal the name of Sanjay S/o Bhanwarlal has wrongly been mentioned as Sanjay S/o Kanwarlal. Thus working of both the Judicial Magistrate, Bhanpura, posted at the relevant time is requires close scrutiny.

15. In both the cases the then Sessions Judge, Mandsaur (name is not reflected from order sheet) had made over the S.T. No.90/03 of crime No.31/95 and S.T. No.91/03 of crime No.26/95 to the Additional Sessions Judge, Bhanpura. On committal of the cases the Sessions Judge, Mandsaur had not verified the names of the accused persons from the committal orders and charge sheet, while making over the said session trial to Additional Sessions Judge, Bhanpura, therefore, the then Sessions Judge, Bhanpura has acted without perusal of record and irresponsibly, which requires scrutiny.

16. The Additional Sessions Judge, Bhanpura Dr. J.C. Sunhere in S.T. No.91/03 had framed the charges against the accused person Radheshyam, and after recording evidence acquitted him vide judgment dated 12.4.2005 by giving benefit of doubt; while perpetual warrant of arrest had issued against Sanjay S/o Kanwarlal, though he is not the accused in the said crime, as per the charge sheet. It is pertinent that two accused persons of the said crime namely Dharmendera and Bashir have not yet been tried. Similarly, in S.T. No.90/03 the ASJ, Bhanpura Dr. J.C. Sunhere has framed the charge against the accused persons Dharmendra and Bashir and recorded evidence. By the judgment dated 12.4.2005 both were acquitted giving benefit of doubt, in fact both were not the accused of crime No.31/95. One of the accused Sanjay S/o Kanwarlal has been shown absconding, in fact as per charge sheet his name is Sanjay S/o Bhanwarlal R/o Bhanpura. Thus the working of the then ASJ, Bhanpura Dr. J. C. Sunhere is without application of mined, negligent, and under clouds, which requires scrutiny.

17. As per cardinal principles of law the persons who are accused to an offence should not be left without trial, while a citizen should not be tried for an offence in which he is not the accused. In the present case on account of non-application of mind, irresponsible and negligent working of two Judicial Magistrates, First Class, one Additional Sessions Judge and one Sessions Judge has led to acted not in accordance to the process of law. Therefore, in the opinion of this Court, the work performance of the said four judicial officers posted at Bhanpura and Mandsaur at the relevant time requires scrutiny by the Vigilance Cell of the High Court in respect to aforementioned cases, and also of other cases of such period, after getting approval from Hon'ble the Chief Justice of High Court of Madhya Pradesh on administrative side. Consequently this petition is disposed of with the following directions :-

"(i) The order of issuance of perpetual warrant against petitioner in S.T. No.91/03 (of crime No.26/95) dated 12.4.2005 passed by Additional Sessions Judge, Bhanpura is without any authority, hence set aside. Consequentially, the proclamation with respect to perpetual warrant of arrest issued by Superintendent of Police, Mandsaur dated 23.11.2008 (Annexure-A/5) is quashed.

(ii) The accused of crime No.26/95 namely Dharmendra and Bashir shall be taken into custody by the Police and be produced in the Court of Judicial Magistrate First Class, Bhanpura for trial in accordance with law. The Court competent is at liberty to release them on bail during trial.

(iii)The accused Sanjay S/o Bhanwarlal R/o Bhanpura be also taken into custody in the crime No.31/95 of Police Station, Bhanpura and be produced before the Judicial Magistrate First Class, Bhanpura for trial in accordance with law.

(iv) In the aforementioned facts and circumstances the Vigilance Cell of the High Court shall go through the case diary of crime Nos.26/95 and 31/95 of Police Station, Bhanpura and Criminal Case Nos. 233/95, 234/95 of Court of Judicial Magistrate First Class, Bhanpura and also S.T. Nos.90/03 and 91/03 of ASJ, Bhanpura, which is available with Bench Registry of this Court in Criminal Appeal No.478, 498, 479, 456 and 499 of 2005, shall inquire about working of aforementioned four Judicial Officers after getting approval from Hon'ble the Chief Justice on administrative side and prepare a report on the issues discussed above or any other points. Thereafter the said report be placed before the respective Committee's to take decision for proposed action against the officers.

(v) The Bench Registry of this Court shall transmit the copy of this order to Principal Seat to do the needful. A copy of this order be also placed on record of pending and disposed of criminal appeals of each accused persons for perusal of the Court. A copy of this order be also sent to District and Sessions Judge, Mandsaur and Additional District and Sessions Judge, Bhanpura and the concerned Judicial Magistrates for their knowledge.

(vi) A copy of this order be also sent to the Superintendent of Police, Mandsaur and the concerned SHO of Bhanpura to take appropriate action and to arrest the accused persons, and submit the compliance report to the Bench Registry.

Potition disposed of.

BANSHILAL Vs. ABDUL MUNNAR

I.L.R. [2009] M. P., 3032

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

15 September, 2009*

BANSHILAL ... Applicant

Vs.

ABDUL MUNNAR ... Non-applicant

A. Negotiable Instruments Act (26 of 1881), Section 138, Criminal Procedure Code, 1973, Section 200 - *Whether at the time of taking cognizance of an offence u/s 138 of Act, examination of complainant u/s 200 Cr.P.C. is mandatory - Held - Yes - Non obstante clause either in S. 142 or in S. 145(1) of Act does not relieve the Magistrate of his duty to examine the complainant on oath as examination u/s 200 Cr.P.C. is altogether different from evidence as contemplated in S. 145(1) of the Act.* (Para 5)

क. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138, दण्ड प्रक्रिया संहिता, 1973, धारा 200 – क्या अधिनियम की धारा 138 के अन्तर्गत अपराध का संज्ञान लेते समय द.प्र.सं. की धारा 200 के अन्तर्गत परिवादी की परीक्षा आज्ञापक है – अभिनिर्धारित – हाँ – अधिनियम की धारा 142 में या धारा 145(1) में सर्वोपरि खण्ड मजिस्ट्रेट को परिवादी की शपथ पर परीक्षा करने के उसके कर्तव्य से मुक्त नही करता है क्योंकि द.प्र.सं. की धारा 200 के अन्तर्गत परीक्षा अधिनियम की धारा 145(1) में अनुध्यात साक्ष्य से पूर्णतया भिन्न है।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 482 & 200, Negotiable Instruments Act, 1881, Section 138 - *Magistrate taking cognizance u/s 138 of Act without examining the complainant u/s 200 Cr.P.C. - Held - Magistrate has not complied with statutory mandatory procedure - The order directing issuance of process deserves to be interfered with under the inherent powers but it would not be possible to quash the complaint in its entirety - Order set-aside - However, the Magistrate shall be at liberty to make an inquiry u/s 200 & 202 of Cr.P.C. to ascertain as to whether there exists sufficient ground for proceeding against the accused in respect of offence u/s 138 of Act.* (Paras 6 & 7)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 482 व 200, परक्राम्य लिखत अधिनियम, 1881, धारा 138 – मजिस्ट्रेट ने द.प्र.सं. की धारा 200 के अन्तर्गत परिवादी की परीक्षा किये बिना अधिनियम की धारा 138 के अन्तर्गत संज्ञान लिया – अभिनिर्धारित – मजिस्ट्रेट ने कानूनी आज्ञापक प्रक्रिया का अनुपालन नही किया – आदेशिका जारी करने के निदेश देने वाला आदेश अन्तर्निहित शक्तियों के अधीन हस्तक्षेप योग्य है किन्तु यह संभव नही होगा कि परिवाद पूर्णतः अभिखंडित किया जाए – आदेश अपास्त – तथापि, यह अभिनिश्चित करने के लिए कि क्या परिवादी के विरुद्ध अधिनियम की धारा 138 के अन्तर्गत अपराध के सम्बन्ध में कार्यवाही के लिए पर्याप्त आधार विद्यमान है, मजिस्ट्रेट द.प्र.सं. की धारा 200 व 202 के अन्तर्गत जाँच करने के लिए स्वतंत्र होगा।

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*M.Cr.C. No.3940/2009 (Jabalpur)

Cases referred :

(2009) 1 SCC 407, (1998) 1 SCC 687, 2007 CrLJ 2207, (2006) 9 SCC 601.

R.K. Samaiya, for the applicant.
Rajesh Dubey, for the non-applicant.

ORDER

R.C. MISHRA, J.:–Arguments heard.

This is a petition, under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'), for quashing the proceedings pending against the petitioner as MJC No.754/2008 in the Court of JMFC, Waidhan. In that case, cognizance of the offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the Act') was taken upon a complaint made by the respondent. However, before directing the issuance of process under S.204 of the Code, the learned Magistrate did not examine the complainant (respondent here).

2. In reply, while inviting attention to the contents of the corresponding order dated 22/8/2008, respondent has submitted that the direction to issue process was given only after taking into consideration the affidavit filed by him in lieu of his oral examination under S.200 of the Code.

3. Placing reliance on a recent decision of the Supreme Court in *National Small Industries Corporation Limited v. State* (NCT Delhi (2009)1 SCC 407, learned counsel for the petitioner has strenuously contended that examination of the complainant under S.200 of the Code is mandatory. In that case, while explaining the rationale behind exemption of a public servant from the mandatory examination under S.200, the Apex Court quoted the following observations made in *Associated Cement Co. Ltd. v. Keshavanand* (1998) 1 SCC 687) with approval –

> "22. Chapter XV of the new Code contains provisions for lodging complaints with Magistrates. Section 200 as the starting provision of that Chapter enjoins on the Magistrate, who takes cognizance of an offence on a complaint, to examine the complainant on oath. Such examination is mandatory as can be discerned from the words 'shall examine on oath the complainant ...' The Magistrate is further required to reduce the substance of such examination to writing and it 'shall be signed by the complainant'. Under Section 203 the Magistrate is to dismiss the complaint if he is of opinion that there is no sufficient ground for proceeding after considering the said statement on oath. Such examination of the complainant on oath can be dispensed with only under two situations, one if

the complaint was filed by a public servant, acting or purporting to act in the discharge of his official duties and the other when a court has made the complaint."

4. Learned counsel for the respondent still urged that by virtue of S.145(1) of the Act, he was entitled to give evidence by way of affidavit. However, this aspect of the matter has elaborately been dealt with by a Division Bench of Bombay High Court in *Maharaja Developers v. Uday Singh Pratapsinghrao Bhonsle* (2007 CrLJ 2207).

5. Accordingly, non obstante clause either in Section 142 or in Section 145(1) does not relieve the Magistrate of his duty to examine the complainant on oath as 'examination' under S.200 of the Code is altogether different from 'evidence' as contemplated in Section 145(1) of the Act.

6. In view of non-compliance with the statutorily mandatory procedure of examining the complainant, the order dated 22/8/08 directing issuance of process deserves to be interfered with under the inherent powers. But, it would not be possible to quash the complaint in its entirety (*Narmada Prasad Sonkar v. Sardar Avtar Singh Chabara* (2006) 9 SCC 601 referred to).

7. In the result, the petition is allowed in part. The order dated 22/8/2008 (above) is hereby set aside. However, the Magistrate shall be at liberty to make an inquiry, under Sections 200 and 202 of the Code, to ascertain as to whether there exists sufficient ground for proceeding against the petitioner in respect of the offence under S. 138 of the Act.

Appeal Partly allowed.
