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THE HIGH COURT OF MADHYA PRADESH

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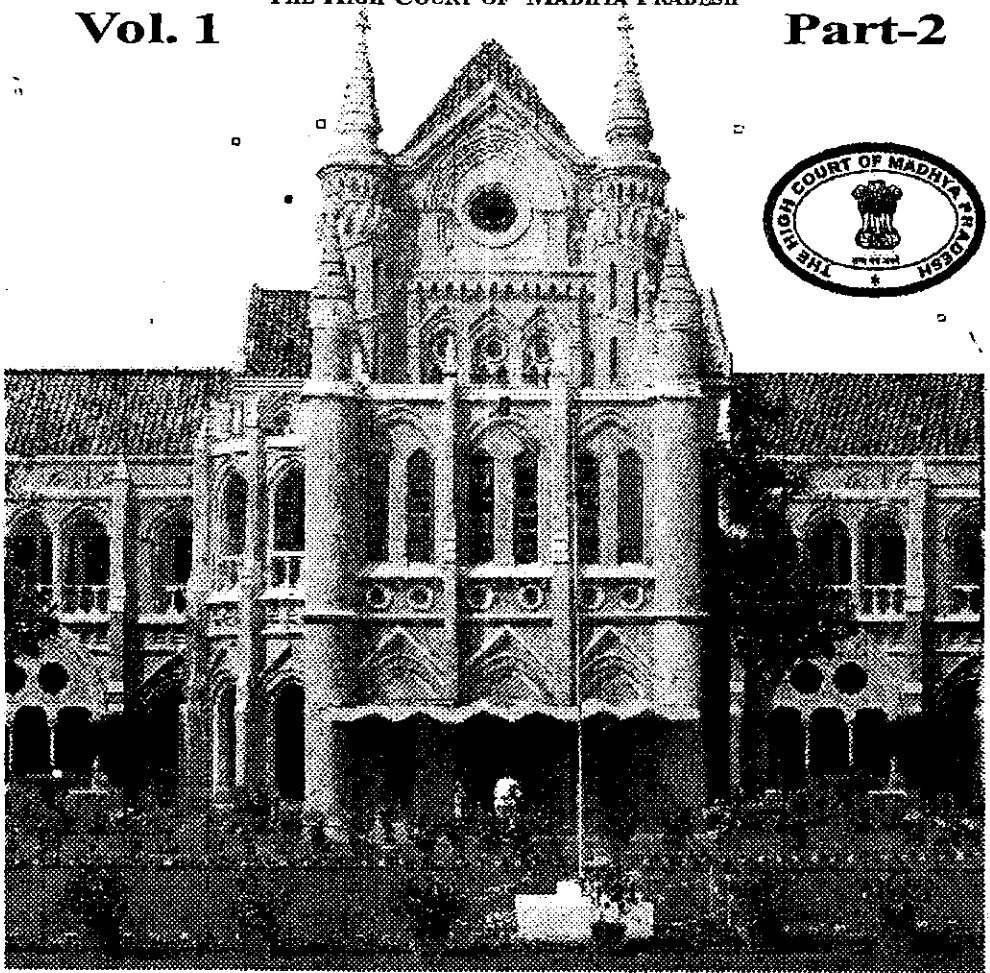

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TABLE OF CASES REPORTED

(Note An asterisk (*) denotes Note number)

INDEX

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INDEX

(Note An asterisk (*) denotes Note number)

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शब्द और वाक्यांश :

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NOTES OF CASES SECTION

Short Note

(6)

Mrs. Sushma Shrivastava, J

DAGDULAL
Vs.
STATE OF M.P.

A. Evidence Act (1 of 1872), Section 3 - *Child witness* - *Evidence of child witness must be evaluated more carefully and with greater circumspection - It is not law that if witness is child, his evidence shall be rejected even if it is found reliable.* (1998) 7 SCC 177 (ref.)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – बालक साक्षी – बालक साक्षी की साक्ष्य का मूल्यांकन अधिक सावधानीपूर्वक और बड़ी सतर्कता से करना चाहिए – यह विधि नही है कि यदि साक्षी बालक है तो उसकी साक्ष्य अस्वीकार कर दी जायेगी यद्यपि वह विश्वसनीय पायी गयी हो। (1998) 7 SCC 177 (संदर्भित).

B. Penal Code (45 of 1860), Section 376 - *Rape* - *Slight penetration* *- Even a slight penetration is sufficient to constitute an offence of rape.* 1992 JLJ 377 (SC), 2006 AIR SCW 4550, AIR 2008 SC 572 (ref.).

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – अल्प प्रवेशन – बलात्संग का अपराध गठित करने के लिए अल्प प्रवेशन भी पर्याप्त है। 1992 JLJ 377 (SC), 2006 AIR SCW 4550, AIR 2008 SC 572 (संदर्भित).

C. Penal Code (45 of 1860), Section 376 - *Rape* - *Old age* *- Nothing on record to suggest that appellant's penis was attenuated and not capable of penetration - Evidence of doctor is that appellant was capable of committing sexual intercourse - Argument that appellant being sixty years old person could not have such erection of penis, is bereft of any substance - Appeal dismissed.* AIR 1950 Nag 9 (ref.)

ग. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – वृद्धावस्था – अभिलेख पर यह सुझाव देने के लिए कुछ नही कि अपीलार्थी का लिंग क्षीण हो गया था और प्रवेशन में समर्थ नही था – चिकित्सक की साक्ष्य है कि अपीलार्थी मैथुन करने में समर्थ था – तर्क कि अपीलार्थी साठ वर्षीय वृद्ध व्यक्ति होने से लिंग का ऐसा स्थापन नही कर सका था, सार विहीन है – अपील खारिज। AIR 1950 Nag 9 (संदर्भित).

Surendra Singh with *Manish Mishra,* for the appellant.
Sheetal Dubey, G.A., for the respondent/State.

***Cr.A. No.1604/1999 (Jabalpur), D/- 12 November, 2009.**

NOTES OF CASES SECTION

Short Note

(7)

Rakesh Saksena &
Smt. Sushma Shrivastava, JJ

INDU BAI
Vs.
STATE OF M.P.

A. Evidence Act (1 of 1872), Section 32 - *Dying Declaration - Authenticity - Nothing on record to indicate that Doctor who gave certificate and Executive Magistrate who recorded dying declaration had any animus or ill will against appellant - No reasons to suspect that Government Officials would manipulate dying declaration.* 2009(4) MPHT 271, 2009 CrLJ 2833; 2009 CrLJ 3470, (2006) 2 SCC (Cri.) 36, (2005) SCC (Cri) 231, (2005) SCC (Cri) 1050, (2003) 1 SCC 112, (2004) 6 SCC 34, 1996(1) MPJR 375 (ref.).

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – प्रमाणिकता – यह उपदर्शित करने के लिए अभिलेख पर कुछ भी नही कि चिकित्सक जिसने प्रमाणपत्र दिया और कार्यपालक मजिस्ट्रेट जिसने मृत्युकालिक कथन अभिलिखित किया, अपीलार्थी के विरुद्ध कोई विद्वेष या वैमनस्य रखते थे – यह संदेह करने का कोई कारण नही कि शासकीय अधिकारियों ने मृत्युकालिक कथन में कोई छलसाधन किया होगा। 2009(4) MPHT 271, 2009 CrLJ 2833, 2009 CrLJ 3470, (2006) 2 SCC (Cri.) 36, (2005) SCC (Cri) 231, (2005) SCC (Cri) 1050, (2003) 1 SCC 112, (2004) 6 SCC 34, 1996(1) MPJR 375 (संदर्भित).

B. Evidence Act (1 of 1872), Section 32 - *Dying Declaration - Fit state of mind - If person recording dying declaration is satisfied that deceased was in fit state of mind, dying declaration can be acted upon without examination of doctor.* AIR 1978 SC 1530, AIR 2002 SC 2973, (1999) 7 SCC 695 (ref.).

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – स्वस्थ मनःस्थिति – यदि मृत्युकालिक कथन अभिलिखित करने वाले व्यक्ति का यह समाधान हो जाता है कि मृतक की मनःस्थिति स्वस्थ थी, तो चिकित्सक की परीक्षा के बिना मृत्युकालिक कथन पर कार्यवाही की जा सकती है। AIR 1978 SC 1530, AIR 2002 SC 2973, (1999) 7 SCC 695 (संदर्भित).

C. Criminal Procedure Code, 1973 (2 of 1974), Section 174 - *Inquest - There is absolutely no requirement of law of mentioning of FIR, name of accused or names of eye witnesses in merg inquest report.* AIR 2006 SC 951 (ref.).

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 174 – मृत्युसमीक्षा – मर्ग मृत्यु समीक्षा रिपोर्ट में एफ.आई.आर., अभियुक्त का नाम या प्रत्यक्षदर्शी साक्षियों के नामों का उल्लेख करने की आत्यंतिक रूप से विधि की कोई अपेक्षा नही है। AIR 2006 SC 951 (संदर्भित).

Vijay Nayak, for the appellant.
Prakash Gupta, Panel Lawyer, for the respondent/State.

***Cr.A. No.1964/2007 (Jabalpur), D/- 24 December, 2009.**

NOTES OF CASES SECTION

Short Note

(8)

Mrs. Indrani Datta, J

RAMPRAKASH SONI

Vs.

STATE OF M.P.

Penal Code (45 of 1860), Sections 304 Part-II & 304-A - ***Culpable homicide not amounting to murder or causing death by negligence*** - *Applicant was cleaning his licencee revolver and at-randomly trigger was pressed and one bullet hit his grand-daughter resulting in her death - Held - Death is caused by negligent act of applicant - Offence u/s 304 Part-II not made out - Case will fall within purview of S. 304-A.*

"9. It is apparent that the act of applicant was neither done with intention of causing death of his Granddaughter nor the act was done with intention of causing such bodily injury as is likely to cause death. So, necessary ingredients of Section 304-I IPC are not satisfied. So far as part-II of Section 304 of IPC is concerned in the present case, whether the applicant was cleaning his licencee revolver with knowledge that it is likely to cause death of his Granddaughter is to be examined.

10. Knowledge of the applicant that his act is likely to cause death of his Granddaughter is to be gathered from First Information Report and statements of witnesses recorded under Section 161 Cr.P.C. and surrounding circumstances. Uma Devi daughter of applicant and mother of deceased who was sitting with her daughter one and half years old (deceased) in courtyard of the house has stated in her statement recorded under Section 161 Cr.P.C. specifically that applicant her father was also sitting with them and was cleaning licencee revolver. All of a sudden, bullet hit her daughter. All other prosecution witnesses whose statements are recorded under Section 161 Cr.P.C. have also narrated the same story. So, it is apparent that on the day of incidence, applicant was sitting with his daughter Uma Devi and Granddaughter on the same bed and was cleaning his licencee revolver. Therefore, now it can be believed that he was having knowledge that by such an act, his one and half years old Granddaughter would be killed. Had that been so, he would have taken care of removing her from his proximity. It is apparent that death of Granddaughter is caused by negligent act of applicant and the death of Granddaughter is result of one of the unfortunate accidents happened in human life. Therefore, offence under section 304-II IPC is not made out."

दण्ड संहिता (1860 का 45), धारा 304 भाग–II व धारा 304–ए – हत्या की कोटि में न आने वाला आपराधिक मानव वध अथवा उपेक्षा से मृत्यु कारित करना –

आवेदक अपनी लायसेंसशुदा रिवॉल्वर साफ कर रहा था और अचानक ट्रिगर दब गया और एक गोली उसकी पोती को लगी जिसके परिणामस्वरूप उसकी मृत्यु हो गयी – अभिनिर्धारित – मृत्यु आवेदक के उपेक्षापूर्ण कार्य से कारित हुई है – धारा 304 भाग–II के अन्तर्गत अपराध नही बनता – मामला धारा 304–ए के अन्तर्गत आयेगा।

Pradeep Katare, for the applicant.

B.D. Mahore, P.P., for the non-applicant/State.

***Cr.R. No.872/2009 (Gwalior), D/- 12 November, 2009.**

BHAIRON SINGH Vs. STATE OF M.P.

I.L.R. [2010] M. P., 301

SUPREME COURT OF INDIA

Before Mr. Justice D.K. Jain & Mr. Justice R.M. Lodha

29 May, 2009*

BHAIRON SINGH ... Appellant

Vs.

STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 498-A, Evidence Act, 1872, Section 32(1) - *Cruelty - Oral evidence - Admissibility - No direct evidence about torture and harassment to deceased wife - Death of wife was accidental - Oral evidence of witnesses about what the deceased told them against the accused about the torture & harassment - Oral evidence of witnesses has no connection with any circumstance of transaction which resulted in death of deceased - Such evidence cannot be looked into for any purpose except S. 32 of Evidence Act - Conviction u/s 498-A of IPC cannot be upheld.* (Paras 10 & 11)

दण्ड संहिता (1860 का 45), धारा 498–ए, साक्ष्य अधिनियम, 1872, धारा 32(1) – क्रूरता – मौखिक साक्ष्य – अनुज्ञेयता – मृत पत्नी को यंत्रणा देने और तंग करने के बारे में कोई प्रत्यक्ष साक्ष्य नही – पत्नी की मृत्यु दुर्घटनावश हुई थी – साक्षियों की मौखिक साक्ष्य कि उन्हें मृतक ने यंत्रणा देने और तंग करने के बारे में अभियुक्त के विरुद्ध बताया था – साक्षियों की मौखिक साक्ष्य ऐसी परिस्थिति के संव्यवहार से कोई सम्बन्ध नही रखती जिसके परिणामस्वरूप मृतक की मृत्यु हुई – साक्ष्य अधिनियम की धारा 32 के सिवाय किसी प्रयोजन के लिए ऐसी साक्ष्य की जाँच पड़ताल नही की जा सकती है – भा.द.सं. की धारा 498–ए के अन्तर्गत दोषसिद्धि की पुष्टि नही की जा सकती।

Cases referred :

(1984) 4 SCC 116, (2001) 10 SCC 736.

J U D G M E N T

The Judgment of the Court was delivered by **R.M. Lodha, J.** :–Leave granted.

2. The question that arises for consideration in this appeal by special leave is : in a case where accused has been acquitted of the offence punishable under Sections 304-B and 306 IPC, and the death of wife is neither homicidal nor suicidal but accidental, whether the oral evidence of witnesses about what the deceased had told them against the accused about the treatment meted out to her is admissible under Section 32 (1) of the Evidence Act to sustain conviction under Section 498A, IPC?

3. Section 32(1) of the Indian Evidence Act, 1872 reads thus:

> **"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.--** Statements,

*Cr.A. No.1124/2009

written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:--

(1) when it relates to cause of death.--When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

4. The legal position relating to the admissibility of evidence under Section 32(1) has come up for consideration before this court time and again. It is not necessary to multiply the authorities in this regard as reference to a three Judge Bench decision of this Court in *Sharad Birdhichand Sarda vs. State of Maharashtra,* (1984) 4 SCC 116, will suffice. Regarding the application of rule under Section 32(1) Evidence Act, Fazal Ali, J. culled out the legal position as follows:

"(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect,as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story,the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death.It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For

instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant."

5. A. Varadarajan, J. on the other hand referred to the legal position stated by Woodroffe and Amir Ali in their Law of Evidence,(fourteenth edition) and Ratanlal Dhirajlal in their Law of Evidence (1982 Reprint). This is how A. Varadarajan, J. dealt with the admissibility of evidence under Section 32(1):

"....The position of law relating to the admissibility of evidence under Section 32(1) is well settled. It is, therefore, not necessary to refer in detail to the decisions of this Court or of the Privy Council or our High Courts. It would suffice to extract what the learned authors Woodroffe and Amir Ali have stated in their Law of Evidence, Fourteenth Edn. and Ratanlal and Dhirajlal in their Law of Evidence (1982 Reprint). Those propositions are based mostly on decisions of courts for which reference has been given at the end. They are these: Woodroffe and Amir Ali's Law of Evidence, Fourteenth Edn.:

"Page 937 : Hearsay is excluded because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the test applied to admissible evidence, namely, the oath and cross-examination. But where there are special circumstances which

give a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source.

Page 941: What is relevant and admissible under clause (1) of this section (Section 32) is the statement actually made by the deceased as to the cause of his death or of the circumstances of the transaction which resulted in his death.

Page 945-946: A statement must be as to the cause of the declarant's death or as to any of the circumstances of the transaction which resulted in his death i.e. the cause and circumstances of the death and not previous or subsequent transaction, such independent transactions being excluded as not falling within the principle of necessity on which such evidence is received. When a person is not proved to have died as a result of injuries received in the incident in question, his statement cannot be said to be a statement as to the cause of his death or as to any of the circumstances which resulted in his death. (AIR 1964 SC 900.) Where there is nothing to show that the injury to which a statement in the dying declaration relates was the cause of the injured person's death or that the circumstances under which it was received resulted in his death, the statement is not admissible under this clause. (ILR 1901 25 Bom 45).

Page 947: Circumstances of the transaction resulting in his death: This clause refers to two kinds of statements: (i) when the statement is made by a person as to the cause of his death, or (ii) when the statement is made by a person as to any of the circumstances of the transaction which resulted in his death. The words `resulted in his death' do not mean `caused his death'. The expression `any of the circumstances of the transaction which resulted in his death' is wider in scope than the expression `the cause of his death'. The declarant need not actually have been apprehending death. (AIR 1964 MP 30.)

Page 947: The expression `circumstances of the transaction' occurring in Section 32, clause (1) has been a source of perplexity to courts faced with the question as to what matters are admissible within the meaning of the expression. The decision of Their Lordships of the Privy Council in *Pakala Narayana Swami v. Emperor* (AIR 1939 PC 47) sets the limits of the matters that could legitimately be brought within the purview of that expression. Lord Atkin, who delivered the judgment of the Board, has, however, made it abundantly clear that, except in special circumstances no circumstance could be a circumstance of the transaction if it is

not confined to either the time actually occupied by the transaction resulting in death or the scene in which the actual transaction resulting in death took place. The special circumstance permitted to transgress the time factor is, for example, a case of prolonged poisoning, while the special circumstance permitted to transgress the distance factor is, for example, a case of decoying with intent to murder.... But the circumstances must be circumstances of the transaction and they must have some proximate relation to the actual occurrence.

Page 948: `Circumstances of the transaction' is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in `circumstantial evidence' which includes the evidence of all relevant factors. It is on the other hand narrower than `res gestae'. Circumstances must have some proximate relation to the actual occurrence, though, as for instance, in the case of prolonged poisoning they may be related to dates at a considerable distance from the date of actual fatal dose.

Page 948: The Supreme Court in the case of *Shiv Kumar v. State of U.P.* {1966 Cri.App.R (SC) 281} has made similar observations that the circumstances must have some proximate relation to the actual occurrence, and that general expressions indicating fear or suspicion, whether of a particular individual or otherwise and not directly to the occasion of death will not be admissible.

Page 949: The clause does not permit the reception in evidence of all such statements of a dead person as may relate to matters having a bearing howsoever remote on the cause or the circumstances of his death. It is confined to only such statements as relate to matters so closely connected with the events which resulted in his death that may be said to relate to circumstances of the transaction which resulted in his death. [(1939) 66 IA 66.] `Circumstances of the transaction which resulted in his death' means only such facts or series of facts which have a direct or organic relation to death. Hence statement made by the deceased long before the incident of murder is not admissible.[1974 Cri LJ 1200 (MP).]

Law of Evidence by Ratanlal and Dhirajlal (1982 Reprint)

"Page 94: Circumstances of the transaction: General expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death are not admissible. [(1939) 66 IA 66] (18 Part 234.)

> Page 95: Circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant. The condition of the admissibility of the evidence is that the cause of the declarant's death comes into question. It is not necessary that the statement must be made after the transaction has taken place or that the person making it must be near death or that the 'circumstance' can only include the acts done when and where the death was caused....Dying declarations are admissible under this clause."

6. On October 9, 1990, the body of Smt. Ranjana Rani @ Raj Kumari was found in a well in village Pyasi. Autopsy of the dead body was done. The cause of death was asphyxia due to drowning. Smt. Ranjana Rani @ Raj Kumari had married the appellant, Bhairon Singh, about 10 years before her death. Gauna ceremony is said to have been held after three years of marriage. The prosecution case is that after one year of Gauna, the accused subjected his wife to torture and harassment. The accused would ask his wife to ask her brother to arrange a job for him or get the registry of the house at Ganj Basoda made in his name or that she should bring Rs. 1 lac to enable him to start business. Ranjana Rani @ Raj Kumari is said to have told the incidence of torture and harassment to her brothers Brindavan (PW-4) and Krishan Murari (PW-5).

7. The accused was charged and tried for the offences punishable under Sections 304B, 306 and 498A, IPC and under Section 3 of Dowry Prohibition Act, 1961. The prosecution in support of its case examined seven witnesses namely, Ghuman (PW-1), Prakash Chand (PW-2), Dr. Sunil Kumar Pandya (PW-3), Brindavan (PW-4), Krishan Murari (PW-5), N.P. Rajoriya (PW-6) and Lalaram (PW-7). The accused also examined three witnesses, namely, Bala Prasad (DW-1), Surat Singh (DW-2) and Hanumat Singh (DW-3).

8. The trial court held: that it was not possible to conclude that accused committed the murder of Ranjana Rani @ Raj Kumari; that there was no evidence to prove that Ranjana Rani @ Raj Kumari had committed suicide and that Ranjana Rani @ Raj Kumari had fallen into the well accidentally and she died. Since the marriage of Ranjana Rani @ Raj Kumari with the accused was held to have taken place more than seven years before the date of her death, the trial court held that the presumption under Section 113A and 113B of the Indian Evidence Act was not attracted. The trial court, accordingly, acquitted the accused of the offence punishable under Sections 304B and 306, IPC. Relying upon the testimony of PW-4 and PW-5, the two brothers of the deceased, the trial court, however, held that the accused was guilty of the offence punishable under Section 498A, IPC and Section 3 of Dowry Prohibition Act, 1961. The trial court sentenced the accused to undergo rigorous imprisonment for three years along with fine of Rs.5,000/- for the offence under Section 498A, IPC and rigorous imprisonment

for five years along with fine of Rs.15,000/- for the offence under Section 3 of Dowry Prohibition Act, 1961.

9. The accused challenged the judgment of the trial court in appeal before the Madhya Pradesh High Court. The High Court set aside the conviction and sentence under Section 3 of Dowry Prohibition Act, 1961 but maintained the conviction and sentence under Section 498A, IPC.

10. The only evidence to bring home charge under Section 498A, IPC, is that of PW-4 and PW-5. In their deposition PW-4 and PW-5 stated that their sister told them that accused was torturing her as he wanted that her brothers arrange a job for him or the house at Ganj Basoda is given to him or a cash of Rs.1 lac is given to enable him to do some business. They deposed that as and when their sister come to their house, she would tell them that accused used to insert cloth in her mouth and give beatings for dowry. The trial court as well as the High Court relied on the evidence of PW-4 and PW-5 and held that charge under Section 498A, IPC, against the accused was proved. Apart from the statement attributed to the deceased, none of the witnesses had spoken anything which they had seen directly insofar as torture and harassment to Ranjana Rani @ Raj Kumari was concerned.

11. The moot question is: whether the statements attributed to the deceased could be used as evidence for entering upon a finding that the accused subjected Ranjana Rani @ Raj Kumari to cruelty as contemplated under Section 498A, IPC. In our considered view, the evidence of PW-4 and PW-5 about what the deceased Ranjana Rani @ Raj Kumari had told them against the accused about the torture and harassment is inadmissible under Section 32(1) of the Evidence Act and such evidence cannot be looked into for any purpose. Except Section 32(1) of the Indian Evidence Act, there is no other provision under which the statement of a dead person can be looked into in evidence. The statement of a dead person is admissible in law if the statement is as to the cause of death or as to any of the circumstance of the transactions which resulted in her death, in a case in which the cause of death comes into question. What has been deposed by PW-4 and PW-5 has no connection with any circumstance of transaction which resulted in her death. The death of Smt. Ranjana Rani @ Raj Kumari was neither homicidal nor suicidal; it was accidental. Since for an offence under Section 498A simpliciter, the question of death is not and cannot be an issue for consideration, we are afraid the evidence of PW-4 and PW-5 is hardly an evidence in law to establish such offence. In that situation Section 32(1) of the Evidence Act does not get attracted.

12. We are fortified in our view by the decision of this Court in *Inder Pal vs. State of M.P.*, (2001) 10 SCC 736 wherein this Court considered the matter thus:

> "4. We will consider at first the contention as to whether there is any evidence against the appellant which can be used against him

for entering upon a finding that he subjected Damyanti to cruelty as contemplated in Section 498-A IPC. PW 1 father of the deceased and PW 8 mother of the deceased have stated that Damyanti had complained to them of her plight in the house of her husband and particularly about the conduct of the appellant. PW 4 sister of the deceased and PW 5 a relative of the deceased have also spoken more or less on the same line. Exhibit P-7 and Exhibit P-8 are letters said to have been written by Damyanti. In those two letters reference has been made to her life in the house of her in-laws and in one of the letters she said that her husband had subjected her to beating.

5. Apart from the statement attributed to the deceased none of the witnesses had spoken of anything which they had seen directly. The question is whether the statements attributed to the deceased could be used as evidence in this case including the contents of Exhibits P-7 and P-8 (letters).

6. Before deciding that question we have to point out that the High Court came to a conclusion that the allegation that she committed suicide was not substantiated. A dying declaration was recorded by the Executive Magistrate in which the deceased had stated that she got burns accidentally from a stove. If that be so, death could not be the result of either any harassment or any cruelty which she was subjected to. In this context we may point out that the State has not challenged the finding of the High Court that death of Damyanti was not due to commission of suicide.

7. Unless the statement of a dead person would fall within the purview of Section 32(1) of the Indian Evidence Act there is no other provision under which (2001) 10 SCC 736 the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstance of the transactions which resulted in her death, in cases in which the cause of death comes into question. By no stretch of imagination can the statements of Damyanti contained in Exhibit P-7 or Exhibit P-8 and those quoted by the witnesses be connected with any circumstance of the transaction which resulted in her death. Even that apart, when we are dealing with an offence under Section 498-A IPC disjuncted from the offence under Section 306 IPC the question of her death is not an issue for consideration and on that premise also Section 32(1) of the Evidence Act will stand at bay so far as these materials are concerned."

13. The learned counsel for the State, however, invited our attention to Section 6 of the Evidence Act and referred to a decision of this Court in *Sukhar vs. State of U.P.*,(1999) 9 SCC 507.

14. Section 6 of the Evidence Act reads thus:

> **"6. Relevancy of facts forming part of same transaction.--** Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places."

15. In the case of, *Sukhar*, this Court noticed position of law with regard to Section 6 of the Evidence Act thus:

> "6. Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter. The aforesaid rule as it is stated in Wigmore's Evidence Act reads thus:
>
> "Under the present exception [to hearsay] and utterance is by hypothesis, offered as an assertion to evidence the fact asserted (for example that a car brake was set or not set), and the only condition is that it shall have been made spontaneously, i.e. as the natural effusion of a state of excitement. Now this state of excitement may well continue to exist after the exciting fact has ended. The declaration, therefore, may be admissible even though subsequent to the occurrence, provided it is near enough in time to allow the assumption that the exciting influence continued."
>
> 7. Sarkar on Evidence (15th Edn.) summarises the law relating to applicability of Section 6 of the Evidence Act thus:
>
> "1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.
>
> 2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.

3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and bystanders. In conspiracy, riot & c the declarations of all concerned in the common object are admissible.

4. Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated."

16. The rule embodied in Section 6 is usually known as the rule of res gestae. What it means is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. To form particular statement as part of the same transaction utterances must be simultaneous with the incident or substantial contemporaneous that is made either during or immediately before or after its occurrence. Section 6 of the Evidence Act, in the facts and circumstances of the case, insofar as admissibility of a statement of PW-4 and PW-5 about what the deceased had told them against the accused of the treatment meted out to her is concerned, is not at all attracted.

17. We hold, as it must be, that there is not an iota of evidence which can be admitted in law to be used against the appellant for the offence punishable under Section 498A, IPC.

18. Consequently, the appeal has to be allowed and is allowed and the conviction and sentence passed on the appellant under Section 498A, IPC is set aside. The accused be released forthwith, if not required in any other case.

Appeal allowed.

I.L.R. [2010] M. P., 310
SUPREME COURT OF INDIA
Before Mr. Justice Harjit Singh Bedi & Mr. Justice J.M. Panchal
18 September, 2009*

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

A. Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Section 302 - *Appellant husband found in his house with a bloodstained knife beside the dead body of his wife and minor children - Medical evidence supported the prosecution case - Held - Circumstances forming a chain even stronger than an eye-witness account - Conviction of appellant on the charge of multiple murders was fully justified - Conviction and death sentence upheld - Appeal dismissed.* (Para 8)

*Cr.A. No.338/2007

क. साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धारा 302 – अपीलार्थी पति अपने घर में रक्तरंजित चाकू के साथ अपनी पत्नी और अवयस्क बच्चों के पास में पाया गया – चिकित्सीय साक्ष्य ने अभियोजन मामले का समर्थन किया – अभिनिर्धारित – परिस्थितियाँ प्रत्यक्षदर्शी साक्षी के बयान से भी प्रबल श्रृंखला बनाती हैं – अनेक हत्याओं के आरोप पर अपीलार्थी की दोषसिद्धि पूर्णतः न्यायोचित – दोषसिद्धि और मृत्यु दण्डादेश की पुष्टि की गयी – अपील खारिज।

B. Penal Code (45 of 1860), Section 84 - *Act of a person of unsound mind - Plea with regard to appellant's mental condition based exclusively on the statements made by his close family members - Plea taken for first time before Apex Court at the SLP stage only - Appellant not entitled for any benefit.* (Para 7)

ख. दण्ड संहिता (1860 का 45), धारा 84 – विकृत चित्त व्यक्ति का कार्य – अपीलार्थी की मानसिक दशा सम्बन्धी अभिवचन उसके नजदीकी पारिवारिक सदस्यों द्वारा किये गये अनन्यतः कथनों पर आधारित – अभिवचन प्रथम बार विशेष अनुमति याचिका के प्रक्रम पर सर्वोच्च न्यायालय के समक्ष किया गया – अपीलार्थी किसी लाभ का हकदार नही।

C. Evidence Act (1 of 1872), Section 3 - *Circumstancial evidence - Motive - It is true that in a case of circumstancial evidence, motive does have extreme significance but to say that in the absence of motive, the conviction based on circumstancial evidence cannot, in principle, be made is not correct.* (Para 8)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 3 – परिस्थितिजन्य साक्ष्य – हेतु – यह सही है कि परिस्थितिजन्य साक्ष्य के मामले में हेतु अत्यंत महत्व रखता है किन्तु सिद्धांततः यह कहना कि हेतु के अभाव में परिस्थितिजन्य साक्ष्य पर दोषसिद्धि आधारित नही की जा सकती, सही नही है।

D. Evidence Act (1 of 1872), Section 106 - *Burden of proving fact especially within knowledge - Appellant and the deceased family members were the only occupants of the room - It was incumbent on the appellant to have tendered some explanation in order to avoid any suspicion as to his guilt.* (Para 8)

घ. साक्ष्य अधिनियम (1872 का 1), धारा 106 – विशेषतः ज्ञात तथ्य को साबित करने का भार – केवल अपीलार्थी और मृत पारिवारिक सदस्य कमरे के अधिभोगी थे – अपीलार्थी बाध्य था कि उसके दोषी होने के किसी संदेह से बचने के लिए कोई स्पष्टीकरण निविदत्त करता।

Cases referred :

AIR 1977 SC 949, AIR 1979 SC 916, AIR 1977 SC 949, AIR 1979 SC 916, AIR 1979 SC 716, AIR 1980 SC 898, AIR 1987 SC 1346, AIR 1988 SC 747, 1994 JT 33 SC, (1996) 2 SCC 175, (1996) 8 SCC 110, AIR 1999 SC 1221, JT 2003 (5) SC 590, JT 2003(7) SC 419, JT 2003(10) SC 340, (2006) 2 SCC 243, (1980) 2

SCC 684, (1983) 3 SCC 470, (2002) 5 SCC 234, (2009) 6 SCC 498, (1971) 1 SCC 468, (1974) 4 SCC 443, (1978) 1 SCC 214, (1978) 4 SCC 428, (1982) 1 SCC 352, (1983) 2 SCC 68, (1983) 2 SCC 344, 408 US 238 (1972), 428 US 153 (1976), 451 US 949 (1981).

JUDGMENT

The Judgment of the Court was delivered by HARJIT SINGH BEDI, J. :–The appellant was convicted under Section 302 of the IPC for having murdered his wife, four minor daughters and a minor son all between 1 and 16 years of age and was sentenced to death by the Additional Sessions Judge, Manasa by judgment dated 24th April, 2006. On an appeal and reference to the High Court, the conviction and sentence has been maintained leading to the present appeal. The prosecution story is as follows:

2. At about mid night of the 19th August, 2005 PW1 Ramprasad, the brother of the appellant, on being informed by PW-4 Balchand that he had heard a huge commotion from the appellant's house, rushed that side and looking through the window saw the appellant sitting in the room with a bloodstained knife in his hand and his clothes soiled in blood and the dead bodies of his wife Amribai, and daughters Karibai, Vidhyabai, Rajubai and Rachna aged 16 years, 12 years, 8 years and 6 years respectively and his son Dilkhush aged 1 year lying besides him. Ramprasad asked the appellant as to what he had done but he threatened him with dire consequences and told him that he would kill him as well. Ramprasad thereupon retreated and raised an alarm which attracted the occupants of the neighbouring houses, and also locked the room from the outside to prevent the appellant's escape. He also rushed to Police Station, Manasa accompanied by Sarpanch Devilal (PW3) and recorded the F.I.R.. He then returned to the village with a police party, headed by PW15 SI Karulal Patel. The appellant was arrested on the spot and on interrogation a bloodstained pajama and knife hidden in a quilt were seized. On the completion of the investigation, he was brought to trial on six counts of murders. He pleaded innocence and claimed trial. The trial court observed that the case rested almost exclusively on circumstantial evidence and then went on to examine the various circumstances. The court found that the evidence of PW1 Ramprasad that the dead bodies were lying in the room was supported by the evidence of PW3 Devilal, PW11 Vinod as also PW15 SI Karulal. The court also observed that the medical evidence of PW-8 Dr. R.K. Joshi and PW-9 Dr. Dinesh Bansal, who, between themselves, had carried out the post-mortem examinations on the dead bodies to the effect that the murders had been committed with a knife and that the knife which had been recovered at the instance of the appellant from inside the room could be the murder weapon, corroborated the ocular account. The court further held that though in a case of circumstantial evidence motive was of great significance, it could not be said as a matter of principle that the absence of motive would render the prosecution story weak and

in the light of the fact that the murders had been committed in the family home which was locked from the inside, with no other person present at that time, it was to some extent obligatory on the appellant to have given some explanation as to the murders. The court then observed that the explanation in the statement under Section 313 of the Cr.P.C. was unacceptable as it had been simply pleaded that he had been sleeping in the room and had woken up on hearing a noise outside and the police had entered the room and caught hold of him and had immediately arrested him.The appellant also undertook to produce evidence in defence, but ultimately did not do so. PW-1 Ram Prasad's statement at the trial that some thief had been present in the room on the date and time in question was rejected, as being an after thought as he was the appellant's brother, and was making a belated attempt to save him. The court finally found that the extra judicial confession made before Ramprasad PW1 and Devilal PW3 and the fact that he had been arrested from the spot, clearly proved his involvement. On a cumulative assessment of the circumstances, the Court concluded that the appellant was involved in the multiple murders. The question as to the sentence to be imposed was then examined in depth and relying on various judgments of this Court and in particular on *Mohan Singh vs. State of Delhi* AIR 1977 SC 949, *Rajendra Prasad vs. State of Uttar Pradesh* AIR 1979 SC 916, *Bachan Singh vs. State of Punjab* AIR 1980 SC 898, *Mahesh & Ors. Vs. State of M.P.* AIR 1987 SC 1346, *Darshan Singh vs. State of Punjab* AIR 1988 SC 747, *Dhananjay Chatterji vs. State of West Bengal* 1994 JT 33 SC, and *Nirmal Singh vs. State of Haryana* AIR 1999 SC 1221 held that the offence which the appellant had committed was reprehensible and truly diabolical and that the only sentence appropriate to the gravity of the crime was a sentence of death. The plea on behalf of the appellant's counsel based on the judgment of this Court in *Nathu Garam vs. State of Uttar Pradesh* AIR 1979 SC 716 that a conviction based on circumstantial evidence should not ordinarily invite a death penalty, was rejected. A Reference was thereafter made by the Sessions Judge to the High Court as postulated by Section 366 of the Cr.P.C. and the accused too challenged the judgment in appeal. The High Court first examined the appeal and concluded that the evidence against the appellant was conclusive as to his involvement and though there was no apparent motive, the other circumstances were sufficient to bring home the charge. The merits of the murder reference were then examined and after days consideration it was held that the matter fell within the category of the rarest of rare cases and relying on the judgments of this Court in *Ravji vs. State of Rajasthan* 1996(2) SCC 175, *Umashankar Panda vs. State of M.P.* 1996 (8) SCC 110, *Dayanidhi Bisoi vs. State of Orissa* JT 2003 (5) SC 590, *State of Rajasthan vs. Kheraj Ram* JT 2003(7) SC 419, *Sushil Mumu vs. State of Jharkhand* JT 2003(10) SC 340, and *Union of India & Ors. Vs. Devendra Nath Rai* 2006 (2) SCC 243 observed that as the murders were particularly foul, vile and senseless, the death penalty was the only appropriate sentence in such a

situation. The High Court, accordingly, dismissed the appeal and confirmed the Reference. The matter is before us by way of special leave in this backdrop.

3. This Special Leave Petition first came up before this Court on the 1st September, 2006 and was adjourned to call for the records. On 25th September, 2006, when the case was again taken up, it appears that an argument was raised that the appellant had been suffering from some mental ailment at the time of the murders and the counsel sought time to go through some documents pertaining to his treatment. On 8th January, 2007, this Court made an order that the counsel should find out, if possible, the date and place where the petitioner may have been treated. On 12th February, 2007, the counsel made a statement that the appellant's family members had been able to collect some documents which would be received by him shortly. On 12th March, 2007 leave was granted, limited however, to the question of sentence only. During the pendency of this appeal, and on the direction of this Court, yet another enquiry was made to find out if the appellant had any mental disorder and had been undergoing any treatment to this effect. Consequent to the enquiry, a report has been tendered to this Court supported by an affidavit of Shri Vineet Kumar, Additional Superintendent of Police, District Neemuch, Madhya Pradesh to the effect that no medical record which could establish that the appellant had undergone treatment for a mental or psychological problem had been found but statements of his family members and others including Mohan Lal, his elder brother and his parents Mohan Lal and Sita Devi and the Secretary of the Gram Panchayat, Achalpur which were to the effect that the appellant had been addicted to drugs, particularly to Ganja, and had become mentally disturbed and had been under treatment, and it was on account of this mental illness that he had killed his family, had been received, were being put on record.

4. Relying on these statements, the learned counsel for the appellant has pointed out that as the appellant appeared to be of unsound mind and incapable of understanding the nature of his actions he was absolved of any liability under Section 84 of the IPC. On merits, it has been urged that in the light of the fact that there was no eye witness to the incident, the mere circumstance that the murders had happened in the family home, was insufficient to prove the case beyond reasonable doubt, and reliance has finally been placed on *Nathu Ram's case* (supra) to contend that a sentence of death based on circumstantial evidence was a risky proposition, and was thus not called for.

5. We have heard the learned counsel for the parties and gone through the record very carefully. The sheer enormity of the crime, the diabolical manner of the murders, and the feeling of abhorrence which would undoubtedly be raised in the mind of the court, are factors which have persuaded us to examine the entire story with even greater care and notwithstanding that a notice limited to the question of sentence only had been issued, we have, in the backdrop of the new issue that has been raised, and the horrific consequences for the appellant, permitted his counsel to argue the entire appeal.

6. We first examine the argument of the appellant's counsel based on Section 84 of the I.P.C.. Section 84 reads as under:

> "Act of a person of unsound mind. - Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

7. The benefit of this provision is available to a person who at the time when the act was done was incapable of knowing the nature of his act or that what he was doing was wrong or contrary to law. The implication of this provision is that the offender must be of this mental condition at the time when the act was committed and the fact that he was of unsound mind earlier or later are relevant only to the extent that they, alongwith other evidence, may be circumstances in determining the mental condition of an accused on the day of incident. We have gone through the status report filed by Shri V.K.Jain, Additional S.P. and find it based exclusively on the statements made by close family members of the appellant. It is significant that before the trial court as well as in appeal in the High Court, no plea with regard to the appellant's mental condition had been taken and it was only in this Court at the SLP stage when, shaken by the sheer brutality of the crime, this Court perhaps felt that only a person of unsound mind could commit such a horrendous crime, and it had thus been thought prudent to have the matter re-examined. We are of the opinion however, that the statements in the status report and the affidavit do not advance the appellant's case whatsoever.

8. We find that the case against the appellant has been proved by the evidence of PW1 Ramprasad, his brother, PW3 Devilal and PW11 Vinod his neighbours, who had all seen the dead bodies with the appellant sitting beside them armed with a knife and he had in fact threatened that anyone else interfering would meet the same fate. It is also significant that Ramprasad had locked the door from the outside and it was in that condition that the appellant had been arrested by SI Karulal and his bloodstained clothes and knife had been recovered. It is true that in a case of circumstantial evidence motive does have extreme significance but to say that in the absence of motive, the conviction based on circumstantial evidence cannot, in principle, be made is not correct. It bears repetition that the appellant and the deceased family members were the only occupants of the room and it was therefore incumbent on the appellant to have tendered some explanation in order to avoid any suspicion as to his guilt. The story that a thief was present in the room introduced by Ramprasad at the stage of the trial was doubtless an attempt to help the appellant who was his brother. The medical evidence also supports the prosecution story in its entirety. The two doctors, R.K.Joshi and Dinesh Bansal who had conducted the post-mortem examination on the dead bodies, concluded that the knife recovered at the instance of the appellant could have been used to commit the murders. There is another extremely relevant

circumstance pointing towards the appellant's involvement. The appellant, after arrest, was found with injuries on his person and was subjected to a medical examination by PW5 Dr. K.C.Kothari. The doctor reported six superficial incised injuries on his person, some on the neck and the others on the fingers, and opined that they could all be self suffered. This statement was further corroborated by the unrebutted testimony of PW3 Devi Lal who testified that the appellant had told him that after killing his family he had attempted to commit suicide. All the factors referred to above are undoubtedly circumstances, but they are so evidently categoric, that they constitute a chain even stronger than an eye-witness account, and do remind us of the clichi that men often lie, circumstances do not. We are, therefore, of the opinion that the conviction of the appellant on the charge of multiple murders is fully justified.

9. The crucial question, and the question on which the learned counsel for the appellant has argued with some emphasis, is the question of sentence.It has been submitted that the death sentence in a case of circumstantial evidence was not called for and as there appeared to be some evidence that the appellant was of unsound mind and the sheer enormity and senselessness of the killings also pointed in that direction, and also indicated that something unusual had happened on that day were all factors which required consideration. He has also submitted that as the murders had been committed in the year 2006 and as the death sentence had been hanging over the appellant's head for more than three years was itself a punishment, the death sentence ought to be commuted to life. He has also referred us to some of the judgments abovementioned. The learned State counsel has submitted with equal emphasis that the enormity of the crime, the brutality with which had been executed, the helpless state of the victims vis-`-vis the assailant who was a husband and father were all factors which brought the matter within the category of the rarest of the rare cases. He too has relied on *Ravji vs. State of Rajasthan* 1996(2) SCC 175, *Umashankar Panda and Devendra Nath Rai cases* (supra). In *Ravji's case* (supra), which pertained to the inexplicable murder of a wife and 5 others (including three minor children) this Court, after examining several earlier cases, observed that the killing of a wife in an advanced stage of pregnancy and three minor children for no reason whatsoever "was one of the most heinous crimes" and that the appellant being the head of the family had a solemn duty to protect them but he had on the contrary "betrayed the trust reposed in him in a very cruel and calculated manner without any provocation whatsoever" and that the court "would be failing in its duty in not imposing an adequate punishment for a crime which had been committed not only against the individual victim but also against the society to which the criminal and victim belonged," and that the "enormity of the crime requires that the society's cry for justice against such a criminal should be heard." *Umashankar Panda's case* again pertained to the murder of a wife and two children and grievous injuries to 3 children during an attempt to kill them and it was observed as under:

"We have already given the injuries inflicted on the deceased persons as well as on the children who escaped death. We find that the accused had caused in all 64 sword injuries to all the six persons including the three deceased persons and those injuries speak for themselves about the gruesome nature of the crime committed by the accused. Be it noted that there was no provocation and there is nothing to suggest that there was any quarrel between the accused and his wife or among any one of the family members. The way in which the crime was executed clearly shows that it was a premeditated one and not on account of sudden provocation or any "mental derangement". The motive suggested in the course of cross-examination of the prosecution witnesses is also not helpful to the accused inasmuch as he has pleaded alibi in his statement (under Section 313 CrPC) and that has also been taken note of by the trial court as well as by the High Court. As pointed out earlier, both the Sessions Judge and the High Court have given special reasons for awarding death sentence and we are also of the opinion that the crime indulged by the accused is undoubtedly gruesome, cold-blooded, heinous, atrocious and cruel. We are also satisfied that on the facts established on the record, there appears to be no mitigating circumstances whatsoever, but only aggravating circumstances which justify the imposition of death sentence. If we look into the manner in which the crime was committed, the weapon used, the brutality of the crime, number of persons murdered, the helplessness of the victims, we cannot come to any other conclusion except the one, the Sessions Judge and the High Court arrived at to award the capital sentence to the appellant."

In *Devendra Nath Rai's case* (supra) this Court after examining *Bachan Singh vs. State of Punjab* (1980) 2 SCC 684, *Machhi Singh v. State of Punjab* (1983) 3 SCC 470 and and *Devender Pal Singh vs. State of NCT of Delhi* (2002) 5 SCC 234 culled out the broad principles with regard to the infliction of the death penalty in the following terms:

"The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person

vis-`-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the mother land.

(3) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of `bride burning' or `dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-`-vis whom the murderer is in dominating position, or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

These aggravating circumstances have been reiterated in *Dhananjay Chatterjee's case* (supra).

10. A bare perusal of the aforesaid judgments would bring this matter within principles 1, 4 and 5. We find the case in hand that the murders were particularly horrifying, as the assailant was in a dominant position and a position to trust as well as he was the head of the family, the crime was enormous in its proportions as the entire family had been done away, the hapless victims being the wife and the minor children of the assailant, the youngest being the only son, just one year old. We have also examined the mitigating circumstances referred to in *Bachan Singh's case* (supra) and in *Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra* (2009) 6 SCC 498. We find that the balance sheet is heavily weighted against the appellant.

11. The appellant's counsel has also referred to the lapse of about three years between the sentence of death awarded by the Sessions Judge and the hearing of this appeal and has submitted that as a delay in the execution of the death sentence was itself a dehumanizing and an unreasonable procedure, the death sentence ought to be converted to one for life. We have examined this matter very carefully. In *T.V. Vatheeswaran vs. State of Tamil Nadu* (1983) 2 SCC 68 and *Ediga*

Anamma vs. State of Andhra Pradesh (1974) 4 SCC 443 it has been held that a delay of two years was permissible beyond which the sentence ought to be converted to life. In *Bhagwan Bux Singh & Anr. vs. The State of U.P.* (1978) 1 SCC 214 similar observations were made with respect to a delay of two and a half years and in *Sadhu Singh vs. State of U.P.* (1978) 4 SCC 428 to a delay of three and a half years. We find, however, that as per the latest position in law, no hard and fast rules can be laid down with respect to the delay which could result as a mitigating circumstance, and each case must depend on its own facts. We have in this connection gone through the judgment in *Vivian Rodrick vs. The State of West Bengal* (1971) 1 SCC 468 and this is what the Court had to say:

> "It seems to us that the extremely excessive delay in the disposal of the case of the appellant would by itself be sufficient for imposing a lesser sentence of imprisonment for life under Section 302. Section 302, IPC prescribes two alternate sentences, namely, death sentence or imprisonment for life, and when there has been inordinate delay in the disposal of the appeal by the High Court it seems to us that it is a relevant factor for the High Court to take into consideration for imposing the lesser sentence. In this particular case, as pointed out above, the appellant was committed to trial by the Presidency Magistrate as early as July 31, 1963, and he was convicted by the Trial Judge on September 4, 1964. It is now January 1971, and the appellant has been for more than six years under the fear of sentence of death. This must have caused him unimaginable mental agony. In our opinion, it would be inhuman to make him suffer till the Government decides the matter on a mercy petition. We consider that this now a fit case for awarding the sentence of imprisonment for life. Accordingly, we accept the appeal, set aside the order of the High Court awarding death sentence and award a sentence of imprisonment for life. The sentences under Section 148,IPC and Section 5 of the Explosive Substances Act and under Section 302, IPC, shall run concurrently."

Likewise in *State of U.P. vs. Sahai & Ors.* (1982) 1 SCC 352 which pertained to a murder of four persons in a particular ghastly manner, it observed as under :

> "The next question that remains is as to the sentences to be imposed on the respondents. Although the Sessions Judge had given all the respondents, excepting Sahai, sentences of life imprisonment under Section 302 read with Section 149 of the Indian Penal Code, he had passed the sentence of death on Sahai because he alone had

shot dead three of the deceased persons. *The occurrence took place sometime in December 1972, and more than eight years have elapsed since. The accused had been convicted by the Sessions Court but acquitted by the High Court. The present appeal has been pending for five years. Having regard to the reasons given above, therefore, we feel that although the murders committed by Sahai were extremely gruesome, brutal and dastardly, yet the extreme penalty of death is not called for in the circumstances of this particular case.*"

It is true that in some of the cases referred to above, a delay beyond two or three years has been said to be excessive but in *Sher Singh vs. State of Punjab* (1983) 2 SCC 344, this Court while agreeing with the broad proposition with regard to the delay in death penalty cases, declined to accept the outer time limit of two years for the execution of a death sentence, failing which it would be incumbent on the court to commute it to life but at the same time had some very pertinent observations to make. We reproduce some of them herein below:

"But we must hasten to add that this Court has not taken the narrow view that the jurisdiction to interfere with a death sentence can be exercised only in an appeal against the judgment of conviction and sentence. The question which arises in such appeals is whether the extreme penalty provided by law is called for in the circumstances of the case. The question which arises in proceedings such as those before us is whether, even if the death sentence was the only appropriate sentence to impose in the case and was therefore imposed. It will be harsh and unjust to execute that sentence by reason of supervening events. In very recent times, the sentence of death has been commuted to life imprisonment by this Court in quite a few cases for the reason, inter alia, that the prisoner was under the spectre of the sentence of death for an unduly long time after the final confirmation of that sentence, consequence upon the dismissal of the prisoner's special leave petition or appeal by this Court."

and further

"The prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman and degrading punishment in the circumstances of a given case."

"Death sentence is constitutionally valid and permissible within

the constraints of the rule in Bachan Singh. This has to be accepted as the law of the land. We do not, all of us, share the views of every one of us. And that is natural because, every one of us has his own philosophy of law and life, moulded and conditioned by his own assessment of the performance and potentials of law and the garnered experiences of life. But the decisions rendered by this Court after a full debate have to be accepted without mental reservations until they are set aside."

The Bench also relied on a sociological study "Condemned to Die, Life Under Sentence of Death" by Robert Johnson which we too have found appropriate to quote to complete the narrative :

"Death row is barren and uninviting. The death row inmate must contend with a segregated environment marked by immobility, reduced stimulation, and the prospect of harassment by staff. There is also the risk that visits from loved ones will become increasingly rate, for the man who is "civilly dead" is often abandoned by the living. The condemned prisoner's ordeal is usually a lonely one and must be met largely through his own resources. The uncertainties of his case - pending appeals, unanswered bids for commutation, possible changes in the law - may aggravate adjustment problems. A continuing and pressing concern is whether one will join the substantial minority who obtain a reprieve or will be counted among the to-be-dead. Uncertainty may make the dilemma of the death row inmate more complicated than simply choosing between maintaining hope or surrendering to despair. The condemned can afford neither alternative, but must nurture both a desire to life and an acceptance of imminent death. As revealed in the suffering of terminally ill patients, this is an extremely difficult task, one in which resources afforded by family or those within the institutional context may prove critical to the persons's adjustment. The death row inmate must achieve equilibrium with few coping supports. In the process, he must somehow maintain his dignity and integrity.

Death row is a prison within a prison, physically and socially isolated from the prison community and the outside world. Condemned prisoners life twenty-three and one-half hours alone in their cells....."

The Court concluded with the following significant observations :

"A prisoner who has experienced living death for years on end is therefore entitled to invoke the jurisdiction of this Court for

examining the question whether, after all the agony and torment he has been subjected to, it is just and fair to allow the sentence of death to be executed. That is the true implication of Article 21 of the Constitution and to that extent, we express our broad and respectful agreement with our learned Brethren in their visualisation of the meaning of that Article. The horizons of Article 21 are ever widening and the final word on its conspectus shall never have been said. So long as life lasts, so long shall it be the duty and endeavour of this Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation. Therefore, Article 21 is as much relevant at the stage of execution of the death sentence as it is in the interregnum between the imposition of that sentence and its execution. The essence of the matter is that all procedure, no matter what the stage, must be fair, just and reasonable."

The judgments rendered aforesaid have thrown model underlying philosophy of the aforesaid judgments has already indicated above stem out not only from Article 21 of the Constitution but from the judgments rendered by the 8th Amendment in the US Constitution ratifying way back in 1791 which provide that no cruel and unusual punishment shall be inflicted. While construing this provision, the Court of the Magistrates while observing that the Eight Amendment does not prohibit capital punishment did indicate that as pending execution had it dehumanizing effect and lengthy imprisonment prior to execution and the judicial and administrative procedures essential to the due process of law are carried out. Penologists and medical experts agreed that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture. Relying on *Coleman vs. Balkcom*, 451 U.S. 949, 952 (1981) observed that "the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself" and when the death penalty "ceases realistically to further these purposes,.....its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." The Courts have, however, drawn a distinction whereby the accused himself has been responsible for the delay by misuse of the judicial process but the time taken by the accused

in pursuing legal and constitutional remedies cannot be taken against him. The Court nevertheless cautious which we have reproduced as under:

> "We must take this opportunity to impress upon the Government of India and the State Governments that petitions filed under Article 72 and 161 of the Constitution or under Sections 432 and 433 of the Criminal Procedure Code must be disposed of expeditiously. A self-imposed rule should be followed by the executive authorities rigorously, that every such petition shall be disposed of within a period of three months from the date on which it is received. Long and interminable delays in the disposal of these petitions are a serious hurdle in the dispensation of justice and indeed, such delays tend to shake the confidence of the people in the very system of justice. Several instances can be cited, to which the record of this Court will bear testimony, in which petitions are pending before the State Governments and the Government of India for an inexplicably long period. The latest instance is to be found in Criminal Writ Petition Nos. 345-348 of 1983, from which it would appear that petitions filed under Article 161 of the Constitution are pending before the Governor of Jammu & Kashmir for anything between five to eight years. A pernicious impression seems to be growing that whatever the courts may decide, one can always turn to the executive for defeating the verdict of the court by resorting to delaying tactics. Undoubtedly, the executive has the power, in appropriate cases, to act under the aforesaid provisions but, if we may remind, all exercise of power is pre-conditioned by the duty to be fair and quick. Delay defeats justice."

12. We have also examined the case law on this aspect with respect to other jurisdictions. We may refer to a few such decisions. It has been repeatedly emphasized that the death sentence has two underlying philosophies ;

(1) that it should be retributive, and

(2) it should act as a deterrent

and as the delay has the effect of obliterating both the above factors, there can be no justification for the execution of a prisoner after much delay. Some extremely relevant observations have been quoted above from *Coleman v. Balkcom,* 451 U.S. 949, 952 (1981). While examining the matter in the background of the Eighth Amendment to the U.S. Constitution which provides that :

> "excessive bail should not be required, nor excessive fine imposed, nor cruel and unusual punishment inflicted"

it has observed that though the death penalty was permissible, its effect was lost in case of delay (*Gregg v. Georgia,* 428 U.S. 153 (1976). The Court also has repeatedly examined the consequences on a prisoner who was under the spectre of death over a period of time and has emphasised "when a prisoner sentenced by a Court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it". The U.S. Supreme Court and other courts have repeatedly held that "the cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution" and that "the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death".(*Furman v. Georgia* 408 U.S. 238, 288-289 (1972)

13. We are of the opinion that the underlying principles of the Eighth Amendment with regard to the infliction of a cruel and unusual punishment has its echo in Article 21 of our Constitution as well and it would, therefore, be open to a condemned prisoner, who has been under a sentence of death over a long period of time, for reasons not attributable to him, to contend that the death sentence should be commuted to one of life. The power of the President and the Governor to grant pardon etc. under Articles 72 and 161 of our Constitution though couched in imperative terms, has nevertheless to be exercised on the advice of the executive authority. In this background, it is the Government which, in effect, exercises that power. The condemned prisoner and his suffering relatives have, therefore, a very pertinent right in insisting that a decision in the matter be taken within a reasonable time, failing which the power should be exercised in favour of the prisoner. We, as Judges, remain largely unaware as to the reasons that ultimately bear with the Government in taking a decision either in favour of the prisoner or against him but whatever the decision it should be on sound legal principles related to the facts of the case. We must, however, say with the greatest emphasis, that human beings are not chattels and should not be used as pawns in furthering some larger political or government policy. We may hark back to our own experiences in life. Even a matter as mundane or trivial as the impending result of an examination or the report of a medical test arising out of suspicion of a serious disease, or the fate of a loved one who has gone missing or a person hanging between life and death on account of a severe injury, makes it impossible for a person to maintain his equanimity or normal way of life. Contrast this with the plight of a prisoner who has been under a sentence of death for 15 years or more living on hope but engulfed in fear as his life hangs in balance and in the hands of those who have no personal interest in his case and for whom he is only a name. Equally, consider the plight of the family of such a prisoner, his parents, wife and children, brothers and sisters, who too remain static and in a state of

limbo and are unable to get on with life on account of the uncertain fate of a loved one. What makes it worse for the prisoner is the indifference and ennui which ultimately develops in the family, brought about by a combination of resignation, exhaustion, and despair. What may be asked is the fault of these hapless individuals and should they be treated in such a shabby manner.

14. The observations reproduced above become extremely relevant as of today on account of the pendency of 26 mercy petitions before the President of India, in some cases, where the Courts had awarded the death sentences more than a decade ago. We, too, take this opportunity to remind the concerned Governments of their obligations under the aforementioned statutory and Constitutional provisions.

15. Those of us who have had the occasion to inspect a Jail where executions are carried out have first hand knowledge of the agony and horror that a condemned prisoner undergoes every day. The very terminology used to identify such prisoners - death row in-mates, or condemned prisoners, with their even more explicit translations in the vernacular - tend to remind them of their plight every moment of the day. In addition to the solitary confinement and lack of privacy with respect to even the daily ablutions, the rattle on the cell door heralding the arrival of the Jailor with the prospect as the harbinger of bad news, a condemned prisoner lives a life of uncertainty and defeat. In one particular prison, the horror was exacerbated as the gallows could be seen over the wall from the condemned cells. The effect on the prisoners on seeing this menacing structure each morning during their daily exercise in the courtyard, can well be imagined. To cap it all, some of these prisoners, sentenced to death by the Sessions Judge in a case of multiple murders, were later acquitted by the High Court in appeal for lack of evidence.

16. The facts of the present case; the incident happened on the 20th August 2005. The Additional Sessions Judge rendered his judgment on 24th April 2006 and the judgment was confirmed by the High Court on 27th June 2006. This matter first came up in this Court on 1st September 2006 and was adjourned repeatedly on the request of the appellant's counsel so as to find out if some material could be collected to substantiate his claim that he was unsound mind and it was on 12th March 2007 that leave was granted limited to the question of sentence only. The matter is being disposed of by us in September 2009. We are, therefore, of the opinion that there is no delay whatsoever in the aforesaid circumstances. The appeal is, accordingly, dismissed.

Appeal dismissed.

ASHOK SHARMA Vs. UNION OF INDIA

I.L.R. [2010] M. P., 326

WRIT APPEAL

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

24 November, 2009*

ASHOK SHARMA ... Appellant

Vs.

UNION OF INDIA & ors. ... Respondents

A. Service Law - *Character and Antecedents Verification Roll - Non-disclosure of fact that appellant was prosecuted under offences of Indian Penal Code - Appellant was juvenile on the date of the commission of the offence - Held - His prosecution by regular Magistrate during his juvenile status was without jurisdiction and by such disclosure, he could not have earned any disqualification - Appellant cannot be said to have suppressed any substantial information.* (Paras 8 to 15)

क. सेवा विधि – चरित्र और पूर्ववर्ती सत्यापन रॉल – इस तथ्य का अप्रकटीकरण कि अपीलार्थी को भारतीय दण्ड संहिता के अपराधों के अन्तर्गत अभियोजित किया गया – अपीलार्थी अपराध किये जाने की तारीख को किशोर था – अभिनिर्धारित – उसकी किशोरावस्था के दौरान नियमित मजिस्ट्रेट द्वारा उसका अभियोजन अधिकारिता विहीन था और ऐसे प्रकटीकरण द्वारा वह कोई निरर्हता अर्जित नही कर सका था – अपीलार्थी द्वारा कोई सारवान जानकारी छिपाया जाना नही कहा जा सकता।

B. Practice & Procedure - *New plea - At the stage of Writ Appeal - Permissibility - Prosecution of juvenile by Court of regular Magistrate even with other accused was without jurisdiction in view of S. 24 of Juvenile Justice Act, 1986 - Such new plea involving no factual dispute may be raised even at the stage of Writ Appeal.* (Para 7)

ख. पद्धति और प्रक्रिया – नया अभिवचन – रिट अपील के प्रक्रम पर – अनुज्ञेयता – किशोर न्याय अधिनियम, 1986 की धारा 24 को दृष्टिगत रखते हुए नियमित मजिस्ट्रेट के न्यायालय द्वारा किशोर का अभियोजन अन्य अभियुक्त के साथ भी अधिकारिता विहीन था – ऐसा नया अभिवचन जिसमें कोई तथ्यात्मक विवाद अन्तर्ग्रस्त नहीं है, रिट अपील के प्रक्रम पर भी उठाया जा सकता है।

Cases referred :

(2003) 3 SCC 437, (2004) 7 SCC 708, (2009) 1 SCC 308, (2009) 3 SCC 141, (2009) 3 SCC 285, AIR 1974 SC 1527, (2008) 1 SCC 660, ILR [2008] MP 2783, 2007(2) MPHT 373 (DB), 2004 CrLJ 3465, 2004(17) AIC 637, (2000) 6 SCC 759, (2005) 3 SCC 551, (2005) 2 SCC 746.

Anil Mishra, for the appellant.

V.K. Sharma & Ankur Mody, A.S.G., for the respondents.

*W.A. No.705/2007 (Gwalior)

ASHOK SHARMA Vs. UNION OF INDIA

J U D G M E N T

The Judgment of the Court was delivered by ABHAY M. NAIK, J. :–This appeal has been preferred against the order dated 8.10.2007 passed by the learned Single Judge of this Court in W.P.S.No.653/03.

2. Short facts relevant for the purpose of this appeal are that the petitioner was bonafide resident of dacoity affected area of District Bhind with 5.3.1979 as his date of birth. A report was lodged with the police against various family members of the petitioner including him in respect of an offence alleged to have been committed on 18.6.1994. Case No.56/94 was registered under Section 452, 323, and 325/34 of IPC and a challan was filed before the court of regular magistrate (not Special Magistrate under the Juvenile Justice Act 1986). Petitioner was acquitted on 15.12.1999 as revealed in Annexure P/3. Prior to acquittal, petitioner was appointed as Constable in Central Reserve Police force in the year 1999 itself. The petitioner was required to furnish certain information for verification roll in the format prescribed under Rule 14 (B) of the Central Reserve Police Force Rules, 1955. Petitioner was merely a 10th standard passed boy from rural background. He put a mark of 'x' before Hindi version of Column 12 (a) and put "no" before English version, which is reproduced below :-

> "Have you ever been arrested, prosecuted, kept under detention or bound down/fined, convicted, by a court of law for any offence or debarred/disqualified by any Public Service Commission from appearing at its examination/ selections, or debarred from taking any examination/rusticated by any University or any other education authority/Institution ?"

A memorandum dated 18th January 2002 was issued directing thereby an enquiry against the petitioner for the charge of suppression. Statement of article of charge and imputation of article of charge are contained in Annexure P/4 as Annexures I and II, which are reproduced below:-

"ANNEXURE -I

STATEMENT OF ARTICLE OF CHARGE FRAMED AGAINST NO.991370942 CONSTABLE (GD) ASHOK SHARMA OF B/ 125 BATTALION, C.R.P.F.

ARTICLE-I

That the said No.991370942 Const (GD) Ashok Sharma of B/125 BN, CRPF committed an act of grave misconduct in his capacity as a member of the Force under Section 11 (1) of CRPF Act, 1949 read with GOI decision No.02 below Rule 11 of CCS (CCA) Rules, 1965 in that he managed to get himself enlisted in CRPF fraudulently by suppressing facts that a Criminal case was

registered against individual but he suppressed this fact while filing his Character and Antecedents Verification Roll (CRPF Form-12)

ANNEXURE -II

IMPUTATION OF ARTICLE OF CHARGE FRAMED AGAINST NO.991370942 CONSTABLE (GD) ASHOK SHARMA OF B/125 BATTALION, C.R.P.F.

ARTICLE-I

That the said No.991370942 CT/GD Ashok Sharma of B/125 BN, CRPF committed an act of misconduct in his capacity as a member of the Force under Section 11 (1) of CRPF Act, 1949 read with GOI decision No.02 below Rule 11 of CCS (CCA) Rules, 1965 in that he managed to get himself enlisted in CRPF fraudulently by suppressing/concealing the facts that criminal case was registered against him the Court of First Class Magistrate, Bhind (M.P.) vide Criminal Case No.446/97 under Section 56/94 of Cr.P.C. 452, 323, 325/34 of IPC. The case was dropped by the First Class Magistrate, Bhind on 15.12.1999 as it was compounded by the both parties and giving benefit of doubt. His act of fraud came to notice when GC CRPF Shivpuri verified his character and Antecedents from his District Magistrate Bhind. In turn, District Magistrate, Bhind vide his letter No.0/15/AC/V- 117319913324 dated 19.9.00 has confirmed GC CRPF Shivpuri that he has suppressed/concealed the facts in Col No.12 of Verification Roll. Thus, he committed an act of serious misconduct in misleading the Government by suppressing/ concealing the facts at the time of his enlistment while fulfilling the Verification Roll (CRPF Form No.25)."

3. Petitioner in his reply submitted that he was not able to understand the language and gravity of Column 12 of verification roll. It was clearly mentioned in the reply that the petitioner was aged 15 years only at the time of alleged criminal incidence. Moreover, the petitioner having already been acquitted can not be said to have committed any substantial suppression or concealment. An enquiry was conducted by Assistant Commandant. He vide his report dated 22nd March 2002 (Annexure P/5) opined that the petitioner was merely 15 years old at the time of the alleged criminal incidence and the contents of the Verification Roll might not have been properly understood by him. He being merely a 10th class passed person from rural background and further on account of already having been acquitted, deserves sympathetic treatment. Disciplinary authority on receipt of enquiry report found the charge proved and dismissed the petitioner from service vide order dated 5th May 2003 (Annexure P/2). Appeal preferred against it having been rejected vide order dated 13th Sept. 2003 (Annexure P/1), Writ Petition under

Article 226/227 of the Constitution of India was submitted for quashment of Annexures P/1 and P/2 and for further directions for reinstatement of the petitioner with consequential benefits including back wages.

Petition was opposed by the respondents on the ground that the petitioner had suppressed the factum of his prosecution. He was found guilty of the charge in the enquiry duly conducted under the rules. Thus, the prayer for dismissal of Writ Petition was made.

4. Learned Single Judge placing reliance on the decision of the Supreme Court of India in the case of *Kendriya Vidyalaya Sangathan and others v. Ram Ratan Yadav* [(2003) 3 SCC 437], dismissed the Writ Petition. Being aggrieved, present Writ Appeal is preferred, wherein extensive submissions have been made by the learned counsel for the parties.

5. From the aforesaid, it is quite clear that the petitioner/appellant was charged with an offence under Section 452, 323, 325/34 of IPC with certain other persons. It is equally established that he was prosecuted, whose non- disclosure in routine course could have been treated as suppression or concealment attracting disciplinary proceeding for misconduct. However, an important factor of this case is that the date of birth of the petitioner is 5.3.1979, as revealed in the record of Union of India itself (i.e. employer) and the petitioner/appellant was aged less than 16 years at the time of occurrence of the alleged criminal incidence. Appellant according to the record of the Union of India itself, was a juvenile and he could not have been prosecuted except by a Juvenile court. Thus, prosecution of the petitioner by court of regular magistrate was without jurisdiction. Impact of Juvenile Justice Act, 1986 was not taken into consideration by the disciplinary authority while imposing punishment of dismissal. Since this point was not raised before the learned Single Judge, it could not come up for consideration. In order to impart justice, we invited both the counsel to address on the effect of the provisions of The Juvenile Justice Act 1986 (for brevity 'Act of 1986') and The Juvenile Justice (Care and Protection of Children) Act, 2000 (for brevity 'Act of 2000').

6. Learned Assistant Solicitor General of India for respondents vehemently opposed on the ground that the plea that the petitioner was juvenile and could not have been prosecuted by a regular magistrate is not taken at all neither in the writ petition nor in the writ appeal. Therefore, such a new plea can not be permitted to be raised for the first time in the writ appeal. Reliance has been placed on (2004) 7 SCC 708 *(Sayed Muhammed Mashur Kunhi Koya Thangal v. Badagara Jumayath Palli Dharas Committee and others)*, (2009) 1 SCC 308 *(Assistant Commercial Taxes Officer v. Bajaj Electricals Limited)*, 2009 (3)SCC 141 *(G.Jayashree and others v. Bhagwandas S.Patel and others)*, (2009) 3 SCC 285 *(Bangalore Metropolitan Transport Corporation v. Padma and others)*.

7. We are not impressed with this contention. It is true that while drafting and

preparing the writ petition as well as Writ Appeal no such ground has been taken in specific. However, it can not be ignored that according to the record of Union of India itself as revealed in Annexure R/1, the date of birth of the petitioner/ appellant is 5.3.1979. According to the record of enquiry, the alleged criminal incidence occurred on 18.5.1994. Thus, the petitioner at the relevant time was unquestionably a juvenile. No factual dispute is involved in entertaining the said plea. On the contrary, the provisions of the Act of 1986 and the Act of 2000 are to be necessarily taken into consideration while imparting justice in the case of a juvenile against victimization in contravention of the provisions of the said Acts. Section 2 (h) of the Act of 1986 defines a 'juvenile' as a boy, who has not attained the age of 16 years, or a girl, who has not attained the age of 18 years. Section 23 of the Act of 1986 lays down that notwithstanding anything to the contrary contained in Code of Criminal Procedure 1973, no proceeding shall be instituted and no order shall be passed against a juvenile under Chapter VIII of the said Code. Section 25 further lays down that notwithstanding contained in any other law, a juvenile who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attaching to the conviction of offence under such a law. Petitioner was obviously a juvenile as per the aforesaid definition on the date of alleged criminal occurrence i.e. 18.6.1994 and his prosecution by court of regular magistrate even with other accused was without jurisdiction in view of Section 24, which prohibits joint trial of a juvenile with a person who is not a juvenile. Although the Juvenile Justice Act, 1986 is further repealed by the Act of 2000, sections 23, 24 and 25 of the earlier Act are virtually retained in spirit in the form of Sections 17, 18, and 19. Object of both the aforesaid acts can not be ignored by not taking into consideration a new plea, which has no involvement of new facts. In our considered opinion, the various citations submitted by the learned Assistant Solicitor General of India do not come in our way to impart justice in the light of the provisions, which are meant for protecting the rights of juveniles.

We may successfully refer here the decision of the Apex Court in the case of *Chief Commr. v. Indian Chambers, Commerce* (AIR 1974 SC 1527), wherein while allowing a new plea, it was observed :-

> "This point will not require any additional material for its decision. The question is only of drawing a correct inference about the point in issue from the material already on record."

8. Learned Single Judge has placed reliance on the decision of the Hon'ble Supreme Court of India in the case of *Kendriya Vidyalaya Sangathan* (supra), wherein a criminal case was pending against the employee, who has against Column No.12 (i) 13 of the attestation form mentioned "no" despite the fact that criminal case was pending against him in the court of law. He was holder of B.A., B.Ed. and M.Ed. Degrees. Therefore, it was not accepted that he could not correctly

understand the contents of Column 12 and 13. It has been further observed by the Hon'ble Supreme Court in para 12 :

> "The object of requiring information in columns 12 and 13 of the attestation form and certification thereafter by the candidate was to ascertain and verify the character and antecedents to judge his suitability to continue in service. A candidate having suppressed material information and/or giving false information cannot claim right to continue in service. The employer having regard to the nature of the employment and all other aspects had the discretion to terminate his services, which is made expressly clear in para 9 of the offer of appointment. The purpose of seeking information as per columns 12 and 13 was not to find out either the nature or gravity of the offence or the result of a criminal case ultimately. The information in the said columns was sought with a view to judge the character and antecedents of the respondent to continue in service or not."

In the case of *R.Radhakrishnan v. Director General of Police and others* [(2008) 1 SCC 660], the employee had suppressed disclosure about pendency of criminal case against him under Section 294 (b) of IPC. It was held that in the event such disclosure had been made, the authority could have verified the character of the employee as also his suitability for appointment.

In a decision of this court in the case of *Narayan Singh Yadav v. State of Government of M.P.* [I.L.R.(2008) M.P.2783, an employee holding the post of teacher was found involved in seven criminal cases, which were suppressed in the verification roll. Therefore, the suppression was held fatal.

In the case in hand, the Enquiry Officer has concluded that the petitioner being a 10th class passed person from rural background might not have understood the contents of relevant column of verification roll. His this conclusion has not been reversed by the Disciplinary Authority.

9. Division Bench of this Court headed by the then Hon'ble Mr.Chief Justice A.K.Patnaik (presently Judge of Hon. Supreme Court of India) in the case of *Union of India v. Hariom* [2007 (2) M.P.H.T.373 (DB)] has observed :-

> "The respondent who was an illiterate scheduled caste person obviously is not expected to know as to which circumstance might impair fitness under Government. It is for the authorities proposing to appoint a candidate as Safai Karmachari to indicate clearly in the different questions in the verification roll the circumstances which might impair fitness for employment under Government by putting a question in that regard in the verification roll."

10. In none of the cases cited by the respondents, the provisions of the Act of 1986 or of Act of 2000 did come up for consideration. We may successfully refer to the decision of the High Court of Rajasthan in the case of *Munshi Khan v. State of Rajasthan* (2004 Cri.L.J. 3465) to conclude that the plea of benefit of the provisions of Act of 86 and Act of 2000 may be raised at any stage, even at the stage of appeal.

Division Bench of Delhi High Court in the case of *Ex.Gnr. Ajit Singh v. Union of India* [2004 (17) AIC 637] has held that the provisions of Act of 2000 are equally applicable to a juvenile in the army. Thus, there is no reason for not invoking the provisions in the case of employees of CRPF.

Hon'ble Supreme Court in the case of *Raj Singh v. State of Haryana* [(2000) 6 SCC 759], has observed as under :-

> "It is on record that the appellant's date of birth is 9-12-1974 as per the certificate issued by the Board of School Education, Haryana. This certificate stands reaffirmed by another certificate produced today before the Court verifying the said fact. In the circumstances, there cannot be any serious dispute about the date of birth of the appellant i.e. 9-12-1974. If that is so, the trial should have been held only as provided under Section 22 of the Act so a different procedure followed leading to conviction of the appellant is vitiated."

In the case of *Pratap Singh v. State of Jharkhand and another* [(2005) 3 SCC 551], Five Judges Bench of the Supreme Court has finally held that the reckoning date for the determination of age of juvenile is the date of the commission of the offence and not the date when he is produced before the competent authority or court.

It is observed :

> "The whole object of the 1986 Act and the 2000 Act is to provide for the care, protection, treatment, development and rehabilitation of juveniles. The Acts being benevolent legislations, an interpretation must be given which would advance the cause of the legislation i.e. to give benefit to the juveniles."

It is further observed :

> "The definition of delinquent juvenile in the 1986 Act is referable to an offence said to have been committed by him. It is the date of offence that he was in conflict with law. When a juvenile is produced before the competent authority and/or court he has not committed an offence on that date, but he was brought before the authority for the alleged offence which he has been found to have committed."

Further it is observed :

> "The purpose of the juvenile justice legislation is to provide succour to the children who were being incarcerated along with adults and were subjected to various abuses. It is not only a beneficent legislation, but also a remedial one."

11. It is suppression in the Verification Roll of substantial material, which if taken into consideration, may dislodge an employee from seeking appointment. It is true that the act of the appellant in the present case may be technically termed as suppression, but the same in our opinion is not substantial because at the time of filling up the Verification Roll, there was no pending criminal case against the appellant. Appellant was acquitted by the regular magistrate on 15.12.1999, whereas Verification Roll was attested later on. Secondly, rather more importantly, the appellant was juvenile on the date of occurrence of the alleged criminal incidence according to the record of the respondents themselves and he could not have been prosecuted by a regular magistrate by virtue of Section 23 of Act of 1986. His prosecution by a regular magistrate was nullity and may be treated as non est for the purpose of Verification Roll.

12. Viewed from the angle of the aforesaid settled position of law, we will now take up the case in hand. As per Annexures I and II reproduced in para 2, it is clear that the charge levelled against the appellant was that he managed to get himself enlisted in CRPF fraudulently by suppressing facts that a Criminal case was registered against him. In the imputation of article of charge (Annexure II) it is mentioned that the petitioner managed to get himself enlisted in CRPF fraudulently by suppressing/concealing the facts that criminal case was registered against him in the Court of First Class Magistrate, Bhind (M.P.) vide Criminal Case No.446/97 under Section 56/94 of Cr.P.C. 452, 323, 325/34 of IPC. Thus the petitioner was not charged with allegation about suppression of factum of arrest. He was merely charged with an allegation of suppression of his prosecution in Criminal Case No.446/97 by the court of First Class Magistrate Bhind. This being so, the question of arrest of the petitioner or the factum of its suppression is not liable to be considered for the purpose of this Writ Appeal. It is only the factum of suppression of registration of Criminal Case No.446/97 against the petitioner and his prosecution by the court of First Class Magistrate Bhind, which are to be considered in the light of the provisions of Act of 1986 and Act of 2000.

13. Apex court in the case of *Secy.Deptt. of Home Secy. A.P. and others v. B.Chinnam Naidu* [(2005) 2 SCC 746] has reiterated that the object of requiring information in various columns like column 12 of the attestation form and declaration thereafter by the candidate is to ascertain and verify the character and antecedents to judge his suitability to enter into or continue in service.

14. In the present case, the appellant with 5.3.1979 as his date of birth according

to the record of the respondents themselves was a juvenile on the date of occurrence of the alleged criminal incidence on 18.6.1994. Criminal case No.446/97 was registered against him in the court of First Class Magistrate Bhind under Section 56/94 of Cr.P.F.C., Sections 452, 323, 325/34 of IPC. He was acquitted by the said magistrate on 15th December 1999 as revealed in Annexure P/3. Court of Judicial Magistrate First Class Bhind was not a special court having powers under the Act of 1986. Prosecution and trial of the appellant by the court of JMFC Bhind were vitiated being nullity for want of jurisdiction. Therefore, the prosecution of the appellant was not valid in the eye of law and ought to have been treated as non est for the purpose of verification roll. The appellant even if had been convicted by the JMFC Bhind, the conviction could not have been given effect to on account of the appellant being juvenile at the time of occurrence of the alleged criminal incidence. Section 25 of the Act of 1986 clearly lays down that a juvenile who has committed an offence and has been dealt with under the provisions of the said Act, shall not suffer disqualification, if any, attaching to a conviction of an offence under such law. Thus, even if the disclosure of prosecution had been made, the appellant would not have earned any disqualification on acount of such jurisdictionless prosecution. According to the Apex Court, disclosure in verification roll is in order to provide information to the employer to judge the suitability. Particulars about prosecution of the appellant by the Court of JMFC would not have provided any material to the respondents to deny the appointment because the prosecution itself was nullity on account of the appellant being juvenile on the date of occurrence of the alleged criminal incidence. This aspect was not considered at all by the respondents while passing the impugned order contained in the Annexures P/1 and P/2. The same could not be pointed to the learned Single Judge who passed the impugned order of dismissal of the writ petition. Status of prosecution of the appellant by the court of JMFC Bhind was not considered at all, which was without jurisdiction and stood vitiated by virtue of the provisions of Act 1986 and Act of 2000. This being so, the appellant can not be said to have suppressed any substantial information, which on being considered would have debarred the appellant from service because of juvenile status of the appellant at the time occurrence of the alleged criminal incidence.

15. Thus, in view of the aforesaid facts and discussion, we hold that the petitioner/appellant did not make suppression of any substantial fact to get himself enlisted in CRPF. In the charge levelled against him, it is alleged that the petitioner/appellant managed to get himself enlisted in CRPF fraudulently by suppressing/concealing the fact that Criminal Case No.446/97 was registered against him by the court of First Class Magistrate Bhind. Omission to mention fact is not always an out come of fraud. There is no specific finding of Disciplinary Authority that any kind of fraud was committed by the petitioner in the alleged suppression or concealment. Moreover, the factum of prosecution of the petitioner in Criminal Case No.446/97

could not have been taken into consideration by the respondents in denying the appointment/selection in the service of CRPF on account of juvenile status of the petitioner at the time of occurrence of the alleged criminal incidence. This being so, the impugned orders contained in Annexures P/1 and P/2 are not sustainable in law.

16. Consequently, the appeal deserves to be and is hereby allowed. Impugned oder of the learned Single Judge as well as Annexures P/1 and P/2 are hereby set aside. Respondents are directed to reinstate the petitioner/appellant on the post of Constable by issuing necessary appointment letter subject to his fitness.

17. As regards back wages, it can not be gainsaid that the petitioner/appellant did not provide the information about his prosecution by the court of JMFC Bhind. Though, he is found entitled to the benefit of Act of 1986 and Act of 2000, it can not be ignored that the information about his prosecution was not disclosed. In this view of the matter, the petitioner/appellant is not held entitled to the back wages. He would be entitled to salary from the date of his rejoining on work.

No order as to costs.

Appeal allowed.

I.L.R. [2010] M. P., 335
WRIT APPEAL

Before Mr. R.S. Garg, Acting Chief Justice & Mrs. Justice Indrani Datta

15 December 2009*

JAI BABA DEVPURI WAREHOUSE, MORENA (M/S) ... Appellant

Vs.

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

Agricultural Warehouse Act, M.P. 1947 (1 of 1948), Section 3, Krishi Upaj Mandi Adhiniyam, M.P. 1972, Sections 31 & 32 - *Licence for carrying on business or for operating in market area - The two Acts are totally different and operate in different areas - One Act provides for storing and proper supervision & control and other Act provides for better regulation of buying and selling of agricultural produce - Licence holder under Act of 1947 would not be protected from the clutches of Ss. 31 & 32 of Act of 1972 - Notice of Mandi Samiti to petitioner for getting licence u/s 32 of the Act of 1972 held valid - Appeal dismissed.* (Paras 10, 11, 19 to 21)

कृषि गोदाम अधिनियम, म.प्र. 1947 (1948 का 1), धारा 3, कृषि उपज मण्डी अधिनियम, म.प्र. 1972, धाराएँ 31 व 32 – मण्डी क्षेत्र में कारोबार करने या संचालित करने के लिए लायसेंस – दोनों अधिनियम पूर्णतः भिन्न हैं और भिन्न–भिन्न क्षेत्रों में प्रवर्तित होते हैं – एक अधिनियम संग्रहण और समुचित पर्यवेक्षण एवं नियंत्रण का उपबंध करता है तथा दूसरा अधिनियम

*W.A. No.513/2009 (Gwalior)

कृषि उत्पाद के क्रय और विक्रय के बेहतर विनयमन का उपबंध करता है – 1947 के अधिनियम के अन्तर्गत लायसेंस धारक, 1972 के अधिनियम की धारा 31 व 32 के नियंत्रण से संरक्षित नही होगा – 1972 के अधिनियम की धारा 32 के अन्तर्गत लायसेंस प्राप्त करने के लिए मण्डी समिति का याची को सूचनापत्र विधिमान्य ठहराया गया – अपील खारिज।

Cases referred :

1998(1) JLJ 203.

Vinod Bhardwaj with *Anand Bhardwaj,* for the appellants.
Vivek Khedkar, for the respondent No.1.
S.P. Jain, for the respondent Nos.2 & 3.

JUDGMENT

The Judgment of the Court was delivered by **R.S. GARG, ACTING CHIEF JUSTICE.** :–The appellants of different appeals being aggrieved by order dated 6.10.2009 passed by the learned Single Judge in Writ Petition No.2407/2009 {M/s.Jai Baba Devpuri Warehouse, Morena Versus State of M.P.& Others}, Writ Petition No.715/2009 {Balaji Warehouse, Sheopur Versus State of M.P.& Others}, Writ Petition No.716/2009 . {Jeevan Warehouse, Sheopur Versus State of M.P.& Others}, Writ Petition No.948/2009 {M/s. Sadana Warehouse & Another Versus State of M.P.& Others}, Writ Petition No.5057/ 2007 {M/s.O.P.Warehouse, Nagda Versus State of M.P.& Others}, Writ Petition No.5058/2007 {M/s.Agrawal Warehouse Nagda Sheopur Versus State of M.P.& Others}. Writ Petition No.5035/2007 {M/s.S.K. Warehouse, Nagda Sheopur Versus State of M.P.& Others} and Writ Petition No.5059/2007 {M/s.Madhuvan Warehouse, Nagda Sheopur Versus State of M.P.& Others} have filed these appeals under Section 2 {1} of Madhya Pradesh Uchcha Nyayalaya {Khand Nyaypeeth Ko Appeal} Adhmiyam,2005 with a submission that the learned Single Judge was absolutely unjustified in not appreciating the fact that the petitioner/petitioners had obtained license under the provisions of Madhya Pradesh Agricultural Warehouse Act, 1947 {hereinafter referred to as 'Act of 1947'}, they were not required to obtain another license under the provisions of Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 {hereinafter referred to as 'Adhiniyam 1972'} and has also not appreciated that the two Acts operate in different fields and as the objects &. reasons of the said Acts are different, the petitioner/petitioners could not be compelled by the authorities of respondent No. 3 to obtain a license.

2. Short facts taken from Writ Petition No.2407/2009 {M/s.Jai Baba Devpuri Warehouse, Morena Versus State .of M.P.& Others} are that the petitioner is a partnership firm registered under the provisions of Partnership Act, being aggrieved by the notice dated 18th/19th May 2009 whereunder the petitioner was required to obtain a license under the Adhiniyam 1972 came to the Court with a submission that having obtained a license under the Act of 1947, the petitioner was not required to obtain yet another license.

3. The petitioner submitted that in response to the notice dated 18th/19th May 2009, he had sent a reply but he was required to come to this Court because the respondents No. 2&3 were extending discriminatory treatment; on one side, they had exempted the Madhya Pradesh State Warehouse & Logistic Corporation from the necessity of obtaining a license under the Adhiniyam 1972 though the said Madhya Pradesh State Warehouse & Logistic Corporation is also in the same business. It is. submitted that the respondents under the law had no authority to ask the petitioner/petitioners to obtain the license.

4. The respondent/State, Mandi Board & Krishi Upaj Mandi Samiti, Morena contending contrary to the submissions made in the writ petition submitted their reply pleading *inter alia* that Section 31 provides that a warehouseman is required to obtain a license in accordance with the provisions of the Act; Rules and the bye-laws made under the Act and, therefore, the warehouseman would be obliged to obtain a license under Section 32{1} of the Adhiniyam 1972. It was also submitted by them that the Madhya Pradesh Warehouse & Logistic Corporation had been exempted by the Director of Mandi Board, therefore, case of the petitioner/ petitioners could not be compared with the especially protected authority/ corporation.

5. After hearing learned counsel for the parties, the learned Single Judge came to the conclusion that as Section 31 & Section 32 of Adhiniyam 1972 were mandatory in their operation, the petitioners were obliged to obtain license for carrying on business or for operating in the market area. The learned Single Judge also observed that any exemption later issued by the Director of Mandi Board would not provide any protection or solace to the Madhya Pradesh State Warehouse & Logistic Corporation from applicability of provisions of the Adhiniyam 1972.

6. After recording the concession made by learned counsel for respondent No. 3 that the periodical returns were not required to be furnished but the petitioner was required to furnish necessary information as contained in Form 12-D. The petition was disposed of with directions as contained in Paragraph 14, which reads as under:-

> "{a} The petitioners shall obtain a license from the Krishi Upaj Mandi Samiti, concerned by submitting an appropriate application as per. the provisions of the Adhiniyam 1972 and also keeping in view the. bye-laws of the Mandi Samiti within a period of fifteen days from the date of receipt of a certified copy of this order and the competent authority of the Mandi Samiti shall process the application for grant of license so preferred by the petitioners' individually and appropriate orders shall be passed within a period of thirty days from the date of receipt of such an application.

{b} The petitioners as already accepted before this Court shall submit the specific information in Form 12-D enclosed alongwith Annexure R/1, i.e. 20-8{a}-of the bye-laws of the Mandi Samiti, Morena.

{c} The respondents shall not take any coercive action against the petitioners for the period which is already over for not obtaining the license as per the provisions of the Adhiniyam 1972 and keeping in view the provisions of the Adhiniyam 1972 and bye-laws of the Mandi Samiti."

7. Shri Vinod Bhardwaj, learned senior counsel for the appellants referring to the preamble of the Act of 1947 submitted that as the objects & reasons and the preamble of the two Acts are different, the same are required to be considered in their true perspective.

8. Learned counsel for the respondents, however, submitted that the two Acts are not mutually exclusive but are to be read in conjunction with each other.

9. For proper appreciation of the arguments, we will have to refer to the preamble and the statement of objects & reasons of the two Acts. For the Act of 1947, it is said that it is an Act to encourage the establishment of warehouses for storing agricultural produce and to make provision for their proper supervision and control. Adhiniyam 1972 provides that it is an Act to provide for the better regulation of buying and selling of agricultural produce and the establishment and proper administration of markets of agricultural produce in the State of Madhya Pradesh.

10. The two Acts are totally different and they operate in different areas. The Act of 1947 clearly provides that it is an Act to encourage the establishment of warehouses for storing agricultural produce and to make provision for their proper supervision and control. The objects & reasons for enactment of the Act of 1947 were to encourage the establishment of warehouses and the warehouses were to be established for storing agricultural produce and to make provision for their proper supervision and control. The warehouses if were to be established for storing agricultural produce and to make provision for their proper supervision and control then one cannot read in the said objects & reasons that the Madhya Pradesh Agricultural Warehouse Act, 1947 was also to deal with the establishment and proper administration of markets of agricultural produce and for better regulation of buying and selling of agricultural produce.

11. True it is that in both the Acts the concern of the Government is in relation to the agricultural produce but if the two Acts operate in separate fields then one cannot lose sight of the fact that under the Act of 1947, the intention of the Government is to store agricultural produce and to make provision for their proper supervision and control. The Act of 1947 nowhere provides that it is an Act for

better regulation of buying and selling of agricultural produce and the establishment and proper administration of markets of agricultural produce in the State of Madhya Pradesh. One Act controls the establishment of warehouses and it does not deal with the buying and selling of the agricultural produce while the other Act is for better regulation of buying and selling of agricultural produce. If the two different Acts provide different facilities; one for storing and proper supervision and control and the other Act provides for better regulation of buying and selling of the agricultural produce then it cannot be argued that the Act of 1947 would protect the petitioner/petitioners from the clutches of Section 31 and Section 32 of the Act.

12. Assuming that instead of a warehouse somebody keeps the large amount of the agricultural produce anywhere else then he would not be entitled to claim any protection from the clutches of Adhiniyam 1972. The Act of 1947 simply provides that how the warehouses would be established and what would be the purpose of establishment of warehouses. The warehouses simply provide storing facility and, therefore, if storing facility is the main object in the Act of 1947 then one cannot say that buying and selling of the very same agricultural produce would not change the situation and would not colour the scenario differently.

13. A warehouse under the Act of 1947 means a building or protected enclosure which is used or may be used for the purpose of storing agricultural produce and a warehouseman means a person licensed as such under this Act to conduct a warehouse. A warehouse if is only a building or protected enclosure then that cannot control application of Adhiniyam 1972 which even, for the sake of repetition, we would say is for better regulation of buying and selling of agricultural produce.

14. Section 31 of Adhiniyam 1972 clearly provides that no person shall, in respect of any notified agricultural produce, operate in the market area as ..... warehouseman ..... except in accordance with the provisions of this Act and Rules and bye-laws made thereunder.

15. On one side, the Act of 1947 provides for establishment of a warehouse but Section 31 provides that such a person would not be entitled to operate in the market area as a warehouseman except in accordance with the provisions of this Act and Rules and the bye-laws made thereunder.

16. If the schemes of both the Acts are seen then one is for storing and protection while the other is for better regulation of buying and selling of agricultural produce. Section 31 cannot be said to be in derogation of the Act of 1947 infact it puts a bar against the activities of a warehouseman in the market area. The validity of Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 has already been upheld by a judgment of this Court, therefore, it cannot now be argued that the provisions of Section 31 would not apply.

17. Learned senior counsel for the appellants also placed reliance upon a Full

Bench Judgment of. our own Court in the matter of *Surajdin & Others Versus Shriniwas & Others* 1998 {1} JLJ 203 to submit that if the particular Acts operate in different fields then due respect should be given to the intention of such Acts. Paragraph 10 of the said judgment reads as under:-

> "10. We have carefully examined the two conflicting views expressed by the two Division Benches and have also considered the submissions made on the interpretation of Article 182 {2} of the Limitation Act. The question requires interpretation of the relevant entry in Clauses {2} and {5} of Article 182 of the Limitation Act, 1908. Looking at the. relevant entry contained in Clause {2} of Article 182, in our opinion, we find that the various clauses in Article 182 cannot be read and construed in isolation from each other. All the entries in Clauses {1} to {7} and the Explanation therein have to be read in continuation and have to be construed in conjunction with each other. The normal rule of interpretation is that general words in a statute must receive general construction unless there is something in the Act itself such as the subject matter with which the Act is dealing or the context in which the said words are used to show the intention of the Legislature that they must be given a restrictive or wider meaning. It is quite often that the object or the subject matter or the collocation or speaking briefly the context has the effect of restricting the normal wide meaning of general words, "for words and particularly general words cannot be read in isolation, their colour and content are derived from their context". It is recognized principle of construction, observed Kapur, J in *Express Mills Versus Municipal Committee, Wardha* {AIR 1958 SC 341}, that general words and phrases, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act. It may in the same context be said that it is a sound rule of construction to confine the general provisions of a statute to the statute itself. "One of the safest guides to the construction of sweeping general words which it is difficult to apply in their full literal sense" stated the Privy Council, "is to examine other words of like import in the same instrument and to see what limitations can be placed on them". {See : Principles of Statutory Interpretation by Justice G.P.Singh, Sixth Edition 1996, Pages 294 to 296}."

18. In the said matter, the question before the Court was that what shall be the legal interpretation of the Clauses {1} and {2} of Article 182 of the Limitation Act. The Court after dedicating its anxious consideration came to the conclusion

that the two Clauses i.e. 182{1} and 182{2} operate indifferent fields. The Full Bench was of the opinion that a decree would become executable either from the date of the decree or in case where there has been an appeal, from the date of disposal of the appeal. We would derive some support from the said judgment when the said judgment says that if the provisions are to operate in different fields then the said fields should be considered separately.

19. In the present matter, both the Acts are operating in different fields as observed; one is in relation to establishment of the warehouses while the other Act is to provide for better regulation of buying and selling of agricultural produce. It would not be proper to say that storing would not be different from buying and selling. One may store the things after buying the same or for the purposes of selling the same. Storing something in case of a warehouse would be for the benefit of the others but if the law requires that a warehouse is to be operated by a warehouseman only under a license then no wrong can be found in the scheme of Adhiniyam 1972.

20. In view of the aforesaid, we are of the considered opinion that the Mandi Samiti was entitled to issue a notice to the petitioner/petitioners to apply for a license under Section 32 {1} of Adhiniyam 1972 so that they could legally operate and avoid the bar contained under Section 31 of Adhiniyam 1972. Each of the petitioner shall be obliged to make an application for license within thirty days from today. If within thirty days, such an application is filed then the application would be processed by the Mandi Samiti and appropriate license in accordance with law shall be issued and no coercive action shall be taken against the petitioner/ petitioners. In case required applications are not filed within the afore-referred period then the State Government/Mandi Samiti would be entitled to take appropriate action against the defaulting petitioner/petitioners.

21. On merits, each of the appeal with the liberty aforesaid is dismissed. There shall be no order as to costs.

Appeal dismissed.

I.L.R. [2010] M. P., 341
WRIT PETITION
Before Mr. Justice R.S. Jha
17 September, 2009*

GYANENDRA @ CHOTU ... Petitioner
Vs.
ANOOP CHAND & ors. ... Respondents

A. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122, Panchayats (Election Petitions, Corrupt Practices and

*W.P. No.16716/2007 (Jabalpur)

Disqualification for Membership) Rules, M.P. 1995, Rule 80 - *Recount - Permissibility - Held - An order of recount can be made only on the basis of clear and specific pleading supported by clear evidence to the effect that the ballot papers of a particular booth had been wrongly accepted or rejected which would have immediately affected the result of the election.* (Para 9)

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122, पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995, नियम 80 – पुनर्गणना – अनुज्ञेयता – अभिनिर्धारित – पुनर्गणना का कोई आदेश केवल स्पष्ट और विनिर्दिष्ट अभिवचन तथा स्पष्ट साक्ष्य से समर्थित होने के आधार पर किया जा सकता है कि किसी विशिष्ट बूथ के मतपत्र गलत रूप से स्वीकृत या अस्वीकृत किये गये थे, जो अव्यवहित रूप से चुनाव के परिणाम को प्रभावित करते।

B. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122, Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rule 80 - *Recount - Not permissible - Election Tribunal ordering for recount on the basis of scarcity of light and overwriting on the declaration form issued which cannot be a ground for recount but are grounds for generally challenging the election of the returned candidate under the provision of the Rules.* (Para 10)

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122, पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995, नियम 80 – पुनर्गणना – अनुज्ञेय नही – निर्वाचन अधिकरण ने पुनर्गणना का आदेश प्रकाश के अभाव और जारी किये गये घोषणापत्र पर अधिलेखन (overwriting) के आधार पर दिया था, जो पुनर्गणना के लिए आधार नही हो सकता है बल्कि निर्वाचित उम्मीदवार के निर्वाचन को नियमों के उपबंध के अन्तर्गत सामान्यतः चुनौती देने के लिए आधार हैं।

Cases referred :

(2001) 3 SCC 81, (2004) 6 SCC 341, (2007) 1 SCC 341.

A.P. Singh, for the petitioner.

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

D.S. Thakur, for the respondent No.1.

O R D E R

R.S. JHA, J. :–The petitioner has filed the present petition being aggrieved by order dated 22-11-2007 passed by the Election Tribunal / Sub-Divisional Officer, Kherlanji in an election petition filed by the respondent No.1 against the election of the petition as Sarpanch of Gram Panchayat, Amai, Tahsil Kherlanji, District Balaghat.

2. The brief facts leading to filing of the petition are that the petition, the respondent No.1 and other candidates participated in the elections held for the post of Sarpanch, Gram Panchayat, Amai, Tahsil Kherlanji, District Balaghat held

on 23-1-2005 and the petitioner was declared elected having secured 433 votes as against the respondent No.1 who secured 430 votes. Being aggrieved by the election of the petitioner, the respondent No.1 filed an election petition before the Election Tribunal / Sub-Divisional Officer, Kherlanji under Section 122 of the M.P. Gram Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 read with the provisions of the M.P. Panchayat (Election Petition Corrupt Practices and Disqualification for Membership) Rules, 1995. The Sub-Divisional Officer by the impugned order dated 22-11-2007 has ordered recount by allowing the petition being aggrieved by which the petitioner has filed the present petition.

3. It is submitted by the learned counsel for the petitioner that the impugned order has been passed by the Election Tribunal without taking into consideration the requirements of the provisions of law and in the absence of proper pleadings in the election petition. It is submitted by the learned counsel for the petitioner that the finding recorded by the SDO is also not based on proper appreciation of facts and application of mind to the evidence on record inasmuch as the Election Tribunal has recorded a finding contrary to the evidence on record.

4. Per contra, it is submitted by the learned counsel for the respondent No.1 that the Election Tribunal after recording a finding to the effect that the counting was effected in candle light, held that there was insufficient light and ordered recounting rightly. It is submitted that the impugned order is based on proper appreciation and due application of mind by the SDO and does not warrant any interference.

5. I have heard the learned counsel for parties at length. From a perusal of the documents on record, it is clear that the election for the post of Sarpanch of Gram Panchayat Amai, Tahsil Kherlanji, District Balaghat was held on 23-1-2005, voting was continued till 3.00 o'clock in the afternoon and thereafter the counting started. In the initial count, the respondent No.1 was declared elected by one vote. The petitioner immediately filed an application under rule 80 of the M.P. Panchayat (Nirvachan) Niyam, 1995 and the recount was ordered. In the recount, the petitioner having obtained 433 votes, i. e., 3 votes more than the respondent No.1 was declared elected. From the record it is also clear that the respondent No.1 on the next day, i. e., 24-1-2005, filed an application for recount, which was not considered by the authorities and, in my opinion, rightly so in view of the provisions of rule 80 of the Rules 1995 and judgment of the Supreme Court reported in the case of *V.S.Achuthanandan v. P. J. Francis* (2001) 3 SCC 81.

6. From a perusal of the impugned order, it is also manifestly clear that the Election Tribunal in para 5 has extensively analysed and summarised the evidence of all the witnesses from a perusal of which it is clear that except respondent No.1, all the other witnesses including the official witnesses, have clearly stated that there was adequate and sufficient lighting arrangement, that the electricity

was not available for a short period of time but during that period, there was no deficiency of light on account of the fact that patromaxes and other lighting arrangement had been made by the authorities and that the light was sufficient to enable all the persons present to clearly scrutinise the ballot papers including the seal affixed by the voters thereon. But inspite of the aforesaid summary of evidence recorded by the Election Tribunal, the Tribunal / Sub-Divisional Officer has gone on to hold that the counting was held in insufficient light and, therefore, there was violation of rules 77 and 80 of the Rules and has ordered recount.

7. From a perusal of the impugned order, it is also clear that the Election Tribunal has also taken into consideration the fact that there was some over-writing in the declaration of result in Form 17 by the Returning Officer violating the provisions of rule 76 and 80. However, it is also apparent that the finding has been recorded totally overlooking the fact that said authorities have given cogent and reasonable explanation for the same and by also overlooking the fact that the respondent himself being present at the time of declaration of the result did not object to the same but did so much later subsequently.

8. The Supreme Court in the case of *V.S.Achuthanandan v. P. J. Francis* (2001) 3 SCC 81, in para-13, after taking into consideration the various judgments has summarised the law relating to recount in the following terms:

> "13. The power vesting in the Court seized of a election dispute to order for inspection and re-count of the ballot papers has been subject matter of several decisions of this Court which have by authorities exposition settled the law thereon. Without burdening this judgment with the series of available decisions, it would suffice to mention a few only, namely, Constitution Bench decision in *Ram Sewak Yadav v. Hussain Kamil Kidwai,* AIR 1964 SC 1249, three Judges Bench decision in *Suresh Prasad Yadav v. Jai Prakash Mishra,* AIR 1975 SC 376; Bhabhi v. Sheo Govind, AIR 1975 SC 2117 which refers to all the decisions available till then and a recent decision in *M. R. Gopalkrishnan v. Thachady Prabhakaran,* 1995 Suppl (2) SCC 101 : (1995 AIR SCW 156) to which one of us (Dr. A. S. Anand, J., as his Lordship then was) is a party. We may briefly restate the principle as under :-
>
> > 1. The secrecy of the ballot is sacrosanct and shall not be permitted to be violated and merely for asking or on vague and indefinite allegations or adverments of general nature. At the same time purity of election process has to be preserved and therefore inspection and re-count shall be permitted but only on a case being properly made out in that regard.

2. A petition seeking inspection and re-count of ballot-papers must contain averments adequate, clear and specific making out a case of improper acceptance of rejection of votes or non-compliance with statutory provisions in counting. Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted would not serve the purpose.

3. The scheme of the rules prescribed in Part V of the Conduct of Election Rules, 1961 emphasises the point that the election petitioner who is a defeated candidate, has ample opportunity to examine the voting papers before they are counted, and in case the objections raised by him or his election agent have been improperly over-ruled, he knows precisely the nature of the objections raised by him and the voting papers to which those objections related. It is in the light of this background that S. 83(1) of the Act has to be applied to the petitions made for inspection of ballot boxes. Such an application must contain a concise statement of the material facts.

4. The election-petitioner must produce trustworthy material in support of the allegations made for a re-count enabling the Court to record a satisfaction of a prima-facie case having been made out for grant of the prayer. The Court must come to the conclusion that it was necessary and imperative to grant the prayer for inspection to do full justice between the parties so as to completely and effectually adjudicate upon the dispute.

5. The power to direct inspection and re-count shall not be exercised by the Court to show indulgence to a petitioner who was indulging in a roving enquiry with a view to fish out material for declaring the election to be void.

6. By mere production of the sealed boxes of ballot-papers or the documents forming part of record of election proceedings before the Court the ballot papers do not become a part of the Court record and they are not liable to be inspected unless the Court is satisfied in accordance with the principles stated hereinabove to direct the inspection and re-count.

7. In the peculiar facts of a given case the Court

> may exercise its power to permit a sample inspection to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made in support of a prayer for re-count and not for the purpose of fishing out materials."

The same view has again been in the case of *M. Chinnasamy v. K.C. Palanisamy* (2004) 6 SCC 341 and *Baldev Singh v. Shinder Pal Singh* (2007) 1 SCC 341.

9. From a perusal of the aforesaid judgments, it is clear that an order of re-count cannot be made on the mere asking or for the purpose of making a roving enquiry but can be made only on the basis of clear and specific pleading supported by clear evidence to the effect that the ballot papers of a particular booth had been wrongly accepted or rejected which, had they been counted in favour of the returned candidate or deducted from the votes polled by the returned candidate would have immediately affected the result of the election.

10. From a perusal of the election petition in the present case, it is clear that such a specific averment regarding particular booth, particular number of votes and defect in acceptance or rejection therein is totally missing. It is also clear that the Election Tribunal / SDO had ordered re-count not on the basis of such specific averment but on account of scarcity of light and over writing in the declaration form issued which cannot form a ground for ordering re-count but are grounds for generally challenging the election of the returned candidate under the provisions of the Rules.

11. In the aforesaid facts and circumstances, I am of the considered opinion that the impugned order of re-count passed by the Election Tribunal / SDO dated 22-11-2007 being perverse and beyond the authority of the election Tribunal in view of the fact that the essential requirements for ordering re-count were missing, deserves to be and is hereby set aside.

12. It is submitted by the learned counsel for the petitioner that in view of the interim order passed by this Court re-count has been conducted and though the result has not been declared the respondent No.1 has knowledge of the fact that he has secured more votes than the petitioner and in such circumstances the respondent No.1 be declared elected.

13. I am of the considered opinion that upon the finding recorded by me holding the impugned order to be perverse, all steps undertaken thereafter stand quashed. I find support from the judgments in the case of *P.K.K. Shamsudeen v. K.A.M. Mappillai Mohindeen* (1989) 1 SCC 526 and the judgment in the case of *Baldev Singh v. Shinder Pal Singh* (2007) 1 SCC 341.

14. The learned counsel for the respondent No.1 has relied upon an unreported judgment of this Court passed in W.P. No.10717 / 2007 *(Chandrashekhar*

Nagpure v. Sub-Divisional Officer and others) dated 25-4-2008 wherein the order of re-count was upheld in view of scarcity of light. From a perusal of the order, it is clear that that was a case where frequent electricity failure occurred at the time of counting itself and thereby affecting and disturbing the counting and, therefore, a finding was recorded that because of frequent failure of the electricity the counting of votes was affected, which is not the case in the present petition. In the present petition, from the evidence of witnesses it is clear that inspite of power failure because of adequate lighting arrangement, there was sufficient light and counting of votes went on smoothly. In the circumstances, the reliance placed on the aforesaid judgment by the learned counsel for respondent No.1 is misconceived.

15. In the light of the aforesaid, the petition filed by the petitioner is allowed and the impugned order is quashed and set aside and consequently election of the petitioner as Sarpanch of Gram Panchayat Amai, Tahsil Kherlanji, District Balaghat is hereby affirmed. In the facts and circumstances of the case, there shall be no order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 347
WRIT PETITION
Before Mr. Justice K.K. Lahoti & Mr. Justice P.K. Jaiswal
9 October, 2009*

SHIVENDRA SINGH ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Constitution, Article 226 - *Contract - Award of contract to partners - Dispute between partners - In compliance of settlement before authority first partner returned amount invested by second partner and new agreement was executed between first partner and the federation - At the instance of Minister, federation awarded contract to second partner for remaining term of contract - Held - Order of federation is arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached to such conclusion - Order quashed - Petition allowed.* (Paras 33, 34 & 36)

संविधान, अनुच्छेद 226 – संविदा – भागीदारों को संविदा का दिया जाना – भागीदारों के मध्य विवाद – प्राधिकारी के समक्ष समझौते के अनुपालन में प्रथम भागीदार ने द्वितीय पक्षकार द्वारा निवेश की गयी धनराशि लौटा दी और प्रथम भागीदार और संघ के मध्य नया अनुबन्ध निष्पादित किया गया – मंत्री की प्रेरणा पर संघ ने संविदा की शेष अवधि के लिए द्वितीय भागीदार को संविदा प्रदान की – अभिनिर्धारित – संघ का आदेश मनमाना और तर्कहीन कि युक्तियुक्त रूप से और सुसंगत विधि के अन्तर्गत कार्य करने वाला कोई उत्तरदायी प्राधिकारी ऐसे निष्कर्ष पर नही पहुँच सकता था – आदेश अभिखंडित – याचिका मंजूर।

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*W.P. No.8989/2009 (Jabalpur)

SHIVENDRA SINGH Vs. STATE OF M.P.

Cases referred :

(2004) 3 SCC 553, (2007) 10 SCC 33, (2005) 1 SCC 679, AIR 1990 SC 1031.

R.K. Verma, for the petitioner.

Vivek Agrawal, G.A., for the respondent No.1.

Mrigendra Singh, for the respondent Nos.2 & 3.

Sanjay K. Agrawal, for the respondent No.4.

ORDER

The Order of the Court was delivered by P.K. JAISWAL, J. :–Challenge in this writ petition is the order dated 27.8.2009 (Annexure P/19) passed by respondent No.2, whereby right to sell the fishes for the remaining period of contract is given to the respondent No.4. In the writ petition, the petitioner is seeking following reliefs :

> (i) A writ in the appropriate nature may kindly be issued to quash order dated 27.8.2009,contained in ANN-P/19, issued by respondent no.2;
>
> (ii) That a writ in the nature of mandamus may also be issued directing the respondents No.2 & 3 to permit the petitioner to execute the contract in terms of ANN-P/1 as he is doing since the date of execution of the said agreement uptill now.
>
> (iii) Any other relief flowing from the facts and circumstances of the case may please be awarded along with the costs of the proceedings to meet the larger interest of justice.

2. The factual position in a nutshell is as follows.

3. The respondent No.2 had invited tenders for fisheries rights from Ban Sagar Dam for the period of 5 years commencing from 2006-07 to 2010-11. The petitioner being the highest bidder, his bid was accepted and agreement to this effect was entered between the petitioner and respondent No.2 vide Annexure P/1 on 24.1.2007.

4. By the said agreement, the petitioner was entrusted with the rights to sell the fishes of the Ban Sagar Dam for a period of five years with effect from 24.1.2007 to 15.6.2011. As per clause (1) of the agreement, at the time of submission of tender, the petitioner had submitted a bank draft of Rs.6.00 lacs and thereafter when the contract was awarded to him, on 24.1.2007 he submitted a demand draft of Rs.6.60 lacs. As per terms and conditions of the agreement, the petitioner was to deposit Rs.25.20 lacs for the year 2006-07, Rs.56.28 lacs for the year 2007-08, Rs.61.32 lacs for the year 2008-09, Rs.68.04 lacs for the year 2009-10 and Rs.74.76 lacs for the year 2010-11. As per clause (3) of the agreement, the petitioner was required to deposit the security deposit, 25% of the annual value of the contract.

5. On 21.2.2007 the petitioner entered into an agreement with respondent No.4 and formed a joint venture-cum-partnership with him that they would do the business in the name and style of M/s Ma Kali Enterprises. They also executed a partnership deed on 21.2.2007 (Annexure P/2). As per clause (2) the partnership shall commence on the 27th day of January 2007 and shall continue for a period of the terms and conditions of the contract dated 24.1.2007. As per clause (3) the capital of the firm shall be contributed by both the partners in an equal proportion and if during the continuation of contract any further capital is needed by the firm, both the partners shall contribute on such terms and conditions and in such shares as they may mutually agree upon. As per clause (7) every partner and his authorized representative shall have the right of access to the books of account maintained by the firm as also the right of either inspecting them or copying the whole or any portion of such books of account. As per clause (10) every partner shall have a right to take part in the conduct of the business. As per clause (11) every partner shall be entitled to 50% of the profits of the firm and shall also bear the loss, if any, in the same proportion. Clause 16 deals with the dispute and differences, if arises, between the partners. This clause provides a mode for settlement of disputes between the partners of firm, through arbitration which reads as under:-

> "16. Any dispute or difference of opinion that may arise between the partners or their legal representatives or heirs with regard to this partnership agreement of to any other matter relating to the firm shall be referred to two arbitrators by common agreement of the partners. Where the arbitrators are themselves divided in opinion, the matter may further be referred to any umpire chosen by the said arbitrator. The decision of the arbitrator or umpire shall be final and binding on all the partners."

6. After executing a partnership deed, the petitioner submitted an application before the respondent No.2 on 12.3.2007 (Annexure R/1) seeking permission to permit him to execute the contract along with respondent No.4 -Abhay Kumar Shaw with whom the petitioner executed a joint venture/partnership deed on 21.2.2007, in the name and style of M/s Ma Kali Enterprises and said change be incorporated in the contract agreement. The respondent No.2 had accorded permission for the said change in the contract with the condition that all terms & conditions as stipulated in the contract agreement (Annexure P/1) shall be applicable to them. The respondent No.2 had further clarified that no further change in the structure of the firm shall, however, be permitted and passed an order on 5.4.2007 (Annexure R/2).

7. Thereafter on 5.4.2007 a supplementary agreement was executed by the respondent No.2 with the petitioner and his partner i.e. respondent No.4 vide Annexure R/3.

8. As per terms of the contract (Annexure P/1), an amount of Rs.56,07,000/- was required to be deposited as Bank Guarantee towards security. A joint Bank Guarantee was furnished by the petitioner along with respondent No.4 to the extent of Rs.35 lacs to the Federation. The rest of the Bank Guarantee of Rs.21 lacs was to be submitted by the end of December, 2008. The petitioner was also called upon by the respondent No.2 Federation that if the Bank Guarantee of Rs.56,07,000/- is not furnished afresh, the agreement would be cancelled. He was also called upon to furnish the Bank Guarantee of remaining amount within the stipulated period. It is also submitted that the respondent No.4, partner of the petitioner, stopped taking any interest in the matter. The petitioner on 20.6.2008 and 22.8.2008 wrote a letter asking him to submit the Bank Guarantee of Rs.56,07,000/- failing which the partnership would be terminated. Thereafter the petitioner sent a fax message on (Annexure P/6) reiterating the same grievances and requested the respondent No.4 to furnish the bank guarantee of Rs.21.07 lacs. It is also pointed out that if the bank guarantee is not furnished within the stipulated period, the contract would be cancelled and the petitioner will have to incur huge loss. The petitioner also wrote a letter to the respondent No.2 Federation pointing out the above facts and also requested the said authority to issue necessary instructions so that he may submit the said Bank Guarantee and continue with the contract. On 5.1.2009, he received a letter (Annexure P/7) from the respondent No.2-Federation wherein it has been pointed out that the petitioner and his partner had furnished a Bank Guarantee of Rs.45.00 lacs in their individual name whereas they have to furnish the bank guarantee of Rs.56.07 lacs in the name of firm and directed them to furnish a fresh Bank Guarantee of Rs.56.07 lacs in the name of M/s Ma Kali Enterprises and if the same is not furnished within a period of 15 days, the action will be taken against the petitioner and respondent No.4. On receiving this letter, a legal notice was issued by the petitioner to the respondent No.4 and pointed out that if the Bank Guarantee is not furnished, the agreement dated 24.1.2007 would be cancelled and the Bank Guarantee of Rs.45,00,000/- already furnished would be forfeited. It is also pointed out by the petitioner that in spite of notice dated 5.1.2009 necessary Bank Guarantee towards security deposit amounting to Rs.56,07,000/- has not been furnished due to inaction on your part and in that event the agreement may be cancelled by the Federation and, therefore, the petitioner has no option but to cancel the partnership deed with immediate effect as period of six months has expired from notice dated 20.6.2008 and 22.8.2008.

9. On 28.1.2009 respondent No.2 Federation wrote a letter to M/s Kali Enterprises stating therein that despite the repeated demands the bank guarantee is not being furnished. It is also stated that the respondent No.2 Federation is not concerned with the inter se dispute between the petitioner and respondent No.4 i.e. partners of petitioner firm M/s Ma Kali Enterprises and contended that the Fedration is concerned with the fisheries right which was awarded to them and

wants that the work be done strictly as per terms & conditions of the contract. The security deposit in the shape of bank guarantee has not been furnished within a period of 30 days and thus they have violated the terms and conditions of the contract and granted a last opportunity to furnish the bank guarantee so that the contract may not be terminated, else the security deposit held by the respondent No.2 Federation would be forfeited and agreement would be terminated.

10. The respondent No.4 served a legal notice to the petitioner vide Annexure P/10 dated 17.3.2009 and stated that there is a gross violation of the partnership agreement as the petitioner is not allowing the constituted attorney of respondent No.4 to participate in the business nor he is permitting him to inspect the accounts book as per terms and conditions of the partnership deed and further stated that in such circumstances there is a dispute and difference between the petitioner and the respondent No.4 in running the partnership business and invoked clause 16 of the partnership deed (Annexure P/2) and suggested the name of two arbitrators and requested the petitioner to accord his consent for the appointment of proposed arbitrators. The petitioner immediately submitted his reply through registered A.D. on 18.4.2009 and intimated that both the proposed arbitrators are close friends of respondent No.4 and had a discussion with regard to the dispute with the petitioner and, therefore, he refused to accept the name of the above two proposed arbitrators and requested to suggest two new names failing which he will appoint two arbitrators to get the dispute decided in terms of clause (16) of the partnership deed.

11. The respondent No.2 Federation who had earlier entered into an agreement with the petitioner for production of fishing in the reservoir of Ban Sagar Dam district Shahdol and later on at the request of petitioner permitted the change and constitution of partnership firm in the name and style of M/s Ma Kali Enterprises, vide order dated 5.4.2007 and on the basis of the affidavit furnished by the petitioner and respondent No.4 jointly, passed an order and executed an agreement to the effect that the contract or fishing rights shall be deemed to be executed between M/s Ma Kali Enterprises and respondent No.2 and modified the earlier contract and amended the agreement by holding that the agreement was deemed to have been executed by the petitioner and respondent No.4. It vide letter dated 13.7.2009 directed both the partners to appear before the Managing Director of the Federation on 21.7.2009 for settlement of their inter se dispute. On 21.7.2009 in absence of respondent No.4 the matter was adjourned to 3.8.2009 and thereafter for 17.8.2009. The respondent No.4 was not willing to remain present on 17.8.2009 and permitted his attorney to attend the meeting and on that day no meeting was held because the petitioner was not willing to sit with the attorney of respondent No.4.

12. Prior to 17.8.2009 the petitioner was called upon by the Federation vide letter No.235 dated 1.8.2009 to deposit the lease amount for the period 2009-

2010, difference of security amount, the amount of arrears of seed and the rent of boats, etc. etc amounting to Rs.27,77,010/-. On 11.8.2009 the petitioner alone deposited the said amount and sought permission to start the work so that the fishing operations may be done through the societies and wrote a letter to this effect which is evident from Annexure P/15 and P/16.

13. As per the agreement the fishing is to be done through fishermen of the registered Co-operative Societies and for that tripartite agreement was executed by the petitioner with the registered fishing society i..e Mrignayani Fishermen Co-operative Society through its President and also by the Regional Manager of the Federation on 13.8.2009 (Annexure P-17) for a period commencing from 16.8.2009 to 15.6.2010. As per terms and conditions of the said agreement the petitioner has to pay the necessary charges to the Fishermen Co-operative Society @ Rs.17/- per kg. After completion of necessary formalities as required under the terms of agreement dated 24.1.2007 (Annexure P/1) , the work order was issued to the petitioner on 16.8.2009 vide Annexure P/18. After the receipt of work order, the petitioner started the work as per terms and conditions of the contract.

14. The petitioner after depositing the amount of Rs.27,77,010/- had entered into an agreement with the registered Fishing Society. The said agreement was tripartite signed by the petitioner, President of Mrignayani Fishermen Co-operative Society and Regional Manager of the respondent No.2 Federation. The aforesaid action has not been challenged by the respondent No.4 by taking appropriate proceedings and the same has attained a finality. Thereafter all of a sudden, without any notice to the petitioner, the respondent No.2 issued an order dated 27.8.2009 by which he took a decision that the right to sell the fishes of the remaining period is given to respondent No.4. It is this action which is impugned in the writ petition.

15. In view of the fact that once the petitioner was permitted to carry out the contract w.e.f. 16.8.2009 vide Annexure P/18 which was never challenged by the respondent No.4, there was no question of awarding the contract for remaining period to respondent No.4. The said order has been challenged on the ground that the Federation is not concerned with the inter se dispute between the petitioner and respondent No.4 and was not having any right to take a decision to award contract for the remaining period in favour of respondent No.4 when there was no breach of any terms and conditions of the contract. It is also contended that the petitioner furnished the bank guarantee of Rs.21 lacs after cancelling the partnership deed with respondent No.4 and thereafter deposited a huge amount of Rs.27,77,010/- and the learned authority accepted these changes and permitted the petitioner to carry out the contract for the remaining period and issued an order to this effect on 16.8.2009 and thereafter all of a sudden at the instance of Minister, respondent No.2 Federation had taken a decision to award the contract for the remaining period in favour of respondent No.4 which is arbitrary. The said action of respondent No.4 which is at the behest of the Minister is arbitrary,

unjust and per se illegal because the petitioner is neither a defaulter nor has committed any breach of the terms and conditions of the contract and the powers exercised by respondent No.2 is apparently in violation of Article 14 of the Constitution of India.

16. The respondents No.2 and 3 filed their return and made the following admissions in para 3, 6, 9 and 11 of the return which reads thus :

> "3. It is admitted fact that the petitioner was successful bidder in respect of NIT issued by the answering respondents for the purpose of sale of fish from Bansagar Dam for the period from 2006-07 to 2010-2011. At that stage the petitioner himself volunteered to execute the contract as sole contractor, hence the answering respondent had duly executed the contract agreement (Annexure P-1) with the petitioner alone. It was only after having successfully obtained the contract that the petitioner found himself to be unable to deposit the requisite of security, Bank Guarantee, regular instalments against the cost of fish and also amounts to be deposited by the Contractor under different heads like fish seed stocking etc. Hence the petitioner himself had submitted an application before the Managing Director of the answering respondent on 12.3.2007 seeking permission to execute the contract with one Abhay Kumar Shaw, another partner having share capital of 50%. The name of the partnership firm was disclosed by the petitioner himself as M/s Ma Kali Enterprises having its registered office at 34, Lake Road, Kolkata and Branch Office at Village Kuan, Tahsil Beohari, District Shahdol. Copy of the letter of request dated 12.3.2007 sent by the petitioner to the answering respondents is being annexed herewith as Annexure R-1.
>
> 6. That, at the time of agreement the petitioner has deposited Rs.6.30 lacs as annual Security Deposit and also an amount of Rs.6.30 lacs as against the first instalment of first year of the contract. Thereafter, before 15.3.2007, the second instalment of Rs.6.30 lacs was again deposited by the petitioner. After coming into existence of the partnership firm, the amount has invariably been deposited in the name of the firm which had stepped into the shoes of the contractor after the permission/Annexure P-2. Thus, it does not lie in the mount of the petitioner that he continued to deposit the amount in is personal capacity even after the partnership firm came into existence at the petitioner's instance itself. Thus, every amount deposited after the constitution of the partnership firm, has been adjusted against the same account i.e. contract in respect of Ban Sagar Dam for the period from 2007 to 2011. Even

otherwise, the writ jurisdiction of this Hon'ble Court cannot be invoked for holding a roving inquiry as regards disputed facts relatable to the present dispute between the partners inter-se.

9. That, the petitioner in his entire petition has not disclosed the fact that during the subsistence of the contract and also the partnership deed, supplementary agreement so entered into between the petitioner and the respondent No.4 which has been received by the answering respondent on 29.6.2009. The said supplementary agreement invariably stipulates that the petitioner and the respondent No.4 since are partners to the extent of 50%, the execution of the contract in hand shall be shared by the two in equal proportion, meaning thereby the contract awarded for a term of period of five years, has to be invariably split into two parts, first half to be executed by the petitioner herein, Ist partner, and the later part of two and half years to be executed by the second partner i.e. respondent No.4. It is on the basis of the said supplementary agreement signed by both the partners that the respondent No.4 had approached the Managing Director of the M.P. Matsya Mahasangh (who had referred the matter to the Minister of Fisheries who is ex-officio Chairman of M.P. Matsya Mahasangh) along with opinion received from the Legal Advisor as also the Chartered Accountant. The Chairman of the Federation after due scrutiny of the supplementary agreement detailed supra, has referred the matter back to the Managing Director for decision as per the supplementary agreement. Hence the Managing Director, after holding the meetings on 21.7.2009, 3.8.2009 and 17.8.2009 had proposed three options so as to resolve the issue:

(i) As per the demand of Shri Shaw, Partner of Ma Kali Enterprises and according to the agreement, the work for the rest of the period may be given to him.

(ii) the aforesaid agreement may be terminated.

(iii) To continue the work as prevalent at present.

11. That, the decision aforesaid has been taken by the answering respondent in the larger interest of the fishermen whose only source of livelihood is the work of fishing which shall come to standstill in case of any dispute between the partners of the firm executing the contract of sale of fish. Thus, the petitioner who himself has initiated to constitute the partnership firm even after entering into a contract agreement with Mahasangh, cannot now blame Mahasangh for having decided the matter in the interest of

partnership firm which has in fact stepped into the shoes of the contractor for sale of fish from Bansagar Dam."

17. As per the averments made in the aforesaid paras, it is not in dispute that the amount of bank guarantee submitted by the respondent No.4 was duly returned to him and thereafter the petitioner deposited the lease amount and furnished the bank guarantee as security deposit and deposited the other necessary charges and also executed the tripartite agreement with the Mrignayani Fishermen Co-operative Society. In the return respondents No.2 and 3 very specifically admitted that the petitioner has not committed any breach of the terms & conditions of the contract nor they issued any notice to the petitioner and under the terms & conditions there is no provision to award the contract for the remaining period in favour of respondent No.4 It is also not in dispute that at the behest of the Minister, the respondent No.2 awarded the contract for the remaining period in favour of respondent No.4. Minutes of the meeting held on 17.8.2009 at Bhopal for settling the dispute between the partners of M/s Ma Kali Enterprises is relevant which reads thus:

विषय : बाणसागर जलाशय के मत्स्य विकय अनुबंधकर्ता के भागीदार का विवाद ।

बाणसागर जलाशय के मत्स्य विकय कार्य के अनुबंधकर्ता मॉ काली इन्टरप्राइजेज, कोलकाता के भागीदारो में उत्पन्न परस्पर विवाद के संबंध में मान. अध्यक्ष महोदय की नोट शीट जावक कमांक 657 दिनांक 23.5.2009 से स्थिति अवगत कराई गई थी । मान. अध्यक्ष द्वारा भागीदार श्री अभय शाव द्वारा भागीदारो के आपसी समझौतो की प्रति के साथ प्रकरण का परीक्षण करने तथा आपसी हल करने के निर्देश दिए गए थे ।

उपरोक्त परिप्रेक्ष्य में दोनो भागीदार श्री शिवेन्द्र सिंह तथा श्री अभय शाव को दिनांक 03.08.2009 को बुलाया गया था, परन्तु श्री शिवेन्द्र सिंह द्वारा दूसरे भागीदार श्री शाव के बजाय उसके प्रतिनिधि श्री गुप्ता के साथ चर्चा करने को सहमत नहीं होने के कारण पुनः दिनांक 17.8.2009 की बैठक तिथि रखी गई । उक्त तिथि को श्री शिवेन्द्र सिंह, प्रथम भागीदार तथा शाव दूसरे भागीदार के मुख्यातारखास श्री गुप्ता उपस्थित हुए । इस बैठक में महाप्रबंधक तथा क्षेत्रीय प्रबंधक, लेखा भी उपस्थित रहे । श्री शिवेन्द्र सिंह को पुनः मुख्यातारनामा का अवलोकन कराकर संतुष्ट किया गया कि श्री गुप्ता इस बैठक में श्री शाव की ओर से चर्चा करने हेतु सक्षम हैं ।

उपरोक्त समझौता दस्तावेज के बिन्दु तथा उक्त सम्बन्ध में पाई गई स्थिति निम्नानुसार है ;

बिन्दु 1 अभय शाव के तरफ से कम्पनी में लगी राशि रू0 21.00 लाख उन्हे वापस की जाऐगी । इस संबंध में श्री शिवेन्द्र सिंह ने बताया कि दुसरे भागीदार को उक्त राशि रेखांकित चेक से भुगतान की गई । श्री गुप्ता (प्रतिनिधि श्री शाव) ने इस पर सहमति दी ।

बिन्दु 2 15.12.2007 को महासंघ से जमा होने वाली किश्त राशि रू0. 11,25600 दोनो भागीदार द्वारा जमा की जाएगी ।

श्री शिवेन्द्र सिहं ने बताया कि दिनांक 15.12.2007 की राशि उनके द्वारा जमा की गई । श्री गुप्ता ने बताया कि उनके द्वारा किश्त राशि का हिस्सा भुगतान किया, परन्तु उसका अभिलेख उनके कर्मचारी (जो बैंक का कार्य देखता है) के पास है। महासंघ के अभिलेख के अनुसार श्री शिवेन्द्र सिंह, मॉ काली इन्टरप्राइजेज (पत्र कमांक 1184, दिनांक 17.12.2007) द्वारा किश्त राशि। रू0. 11,25600 का भुगतान किया गया ।

बिन्दु 3 महासंघ के मत्स्य बीज की राशि रू0 6.00 लाख दोनो भागीदारो द्वारा जमा किए जावेंगें ।

महासंघ की बीज की बकाया राशि रू0 6.00 लाख के विपक्ष में रू0 1.00 लाख दिनांक 15.2.2008 को तथा शेष राशि दिनांक 05.11.2008 को भुगतान किया गया । यह राशि निर्धारित की गई तिथि के लगभग एक वर्ष बाद जमा हुई। प्रश्नधीन राशि महासंघ अभिलेख अनुसार श्री शिवेन्द्र सिंह, बाणसागर द्वारा जमा की गई ।

बिन्दु 4 इस विषय पर कोई चर्चा होने पर दोनो पक्ष के आपसी निर्णय से ही कोई विषय मान्य होगा ।

श्री शिवेन्द्र सिंह ने बताया कि भागीदार द्वारा सहमति पत्र के बिन्दु क्रमांक 2 एवं 3 का पालन नहीं किया । इस कारण आगे की कार्यवाही नहीं की गई । श्री गुप्ता ने बताया कि उनके द्वारा सभी बिन्दुओं का पालन किया गया, परन्तु उनके पास वर्तमान में जानकारी उपलब्ध नहीं है ।

उपरोक्त स्थितियों के परिप्रेक्ष्य में जमा की गई बैंक गारंटी की स्थिति का भी परीक्षण किया गया, जिसमें पाया कि रू056.07 लाख की बैंक गारंटी निम्नानुसार प्रदाय की गई :

इस हेतु बैंक गारंटी राशि रू056.07 लाख निर्धारित थी । जो महासंघ को निम्नानुसार प्राप्त हुई :

रू0 35.00 लाख	श्री शिवेन्द्र सिंह तथा अभय कुमार शाव, संयुक्त रूप से दोनो भागीदार द्वारा ।
रू0 10.00 लाख	श्री शिवेन्द्र सिंह द्वारा ।
रू0 10.07 लाख	श्री शिवेन्द्र सिंह द्वारा ।
योग रू0 56.07 लाख	

उक्त स्थिति को देखते हुए यह स्पष्ट है कि दोनो भागीदारों के मध्य मतभेद है तथा उनका विवाद उनके मध्य समझौता होने की दशा में ही हल हो सकता है । उल्लेखनीय है कि इस विवाद से अगर मॉ काली इन्टरप्राइजेज की भागीदारी टूटती है तो उससे महासंघ के साथ निष्पादित अनुबंध भी प्रभावित होगा जो महासंघ के हित में नहीं होगा ।

उपरोक्त स्थिति में निम्न विकल्प हो सकते हैं ;

1. मॉ काली इन्टरप्राइजेज के भागीदार श्री शाव की मांग अनुसार व समझौते में उल्लेखानुसार शेष अवधि का कार्य उन्हें दे दिया जाये ।
2. उक्त अनुबंध को समाप्त कर दिया जाये ।
3. वर्तमान में जैसा कार्य चल रहा है उसे यथावत चलने दिया जाये ।

प्रबंध संचालक,
मत्स्य महासंघ

मान. अध्यक्ष महोदय,
म.प्र. मत्स्य महासंघ,
भोपाल

बिन्दु कमांक 1 के अनुसार कार्यवाही करें ।

M.D.

सही
मंत्री
किसान कल्याण तथा कृषि विकास विभाग,
पशुपालन, मछली पालन, पिछडा वर्ग, एवं
अल्प संख्यक कल्याण, मध्यप्रदेश शासन

Issue orders,
Sd/-
26/8/2009"

18. The respondent No.4 filed a separate return inter alia denying the averments made in the petition and made the following submissions in para 5, 12, 20 and 21 which read thus:

> "5. The answering respondent submits that the petitioner was initially awarded contract for collection and sale of fish from Ban Sagar Water Reservoir for a period of 5 years commencing from 24.1.2007 to 15.6.2007. An agreement to the said effect was executed between the petitioner and respondent No.2 on 24.1.2007, copy whereof is already on record as Ann.P/1.
>
> 12. The answering respondent thus respectfully submits that he has already made considerable investment in

execution of the contract. In spite of fact that the answering respondent had provided all the financial assistance required for due implementation of the contract, the petitioner declined to share the profit with the answering respondent. In fact,the petitioner started carrying out the contract individually in his own name. The petitioner has executed contract single handedly for last 2½ years. During this period, the petitioner has not paid single penny to the answering respondent, though the answering respondent had invested considerable amount in the same.

20. The answering respondent submits that impugned order has been passed by the respondent no.2 as the petitioner has already reaped benefit of the contract individually for a period of almost 2½ years i.e. since 24.1.2007. The petitioner has not paid single penny out of his own pocket in connection with the said contract. On the contrary the answering respondent invested considerable amount but has not been paid single paisa out of sale proceeds. It is in the aforesaid scenario and in order to do complete justice between the parties that answering respondent has been permitted to carry out the contract for the remaining period.

21. The order passed by the respondent No.2 is fair, reasonable and equitable. Such an order calls for no interference of this Hon'ble Court in exercise of extraordinary writ jurisdiction. "

19. As per the averments made in the return, the contention of respondent No.4 was that he had provided all the financial assistance required for due implementation of the contract but the petitioner declined to share the profit with the answering respondent and, therefore, the dispute arose between the parties. It is also contended that the petitioner has executed the contract single handedly for a period of last 21/2 years and he had not paid a single penny to the answering respondent and it is he who was controlling the entire business and was acting contrary to the terms & contract of the partnership deed and the respondent No.2 in order to resolve the dispute in a fair and amicable manner asked both the partners of M/s Ma Kali Enterprises to appear before him and thereafter considering the fact that it is respondent No.4 who had made huge investment in executing the contract and, therefore, with a view to settle the matter equitably passed an order on 27.8.2009 permitting him to execute the contract for the remaining period. The said order is fair, reasonable and executable and that the contract in question is a private contract and it is not a statutory contract and no interference is warranted. By the said action if the petitioner has suffered any loss that can be compensated by filing a suit for damages.

20. It is also submitted that clause (16) of the partnership deed dated 21.2.2007 (Annexure P/2), itself provided inter alia for settlement of a inter se dispute between the petitioner and respondent No.4 by reference to arbitrators, there is no reason as to why the petitioner has not followed and adopted that remedy and invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution.

21. We have heard the arguments of learned counsel for the parties, at length and perused the record.

22. In the present case, the petitioner is only challenging the impugned action dated 27.8.2009 (Annexure P/19) of respondent No.2 by which respondent No.2 who is instrumentality of the State in an arbitrary manner at the behest of the Minister terminated the contract and diverted it in favour of respondent No.4 for the remaining period of 2½ years.

23. The scope of interference in judicial review of award of contract is limited only to cases where the decision is vitiated either by arbitrariness/irrationality or either by malafide/favouritism.

24. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound".

25. The Apex Court in the case of ***ABL INTERNATIONAL LTD. AND ANOTHER Vs EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LTD. AND OTHERS*** (2004) 3 SCC 553, laid down the law relating to enforcement of contractual obligations of a State or its instrumentality and the power of the High Court to intervene under Article 226, if the State acts in an arbitrary manner even in a matter of contract. The Federation has to discharge its functions or different duties reasonably, fairly and impartially. The Apex Court has held in the following paras as under : -

> "10.....if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief."
>
> "23..... once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly, and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14, then we have no hesitation in holding

that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. "

"53. From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution."

26. In the case of *Puravankara Projects Ltd. vs Hotel Venus International and others* (2007) 10 SCC 33 it was observed by the Apex Court in para 32 and 33 as follows:-

"32. In *Asstt. Excise Commr. v. Issac Peter* this Court highlighted that the concept of administrative law and fairness should not be mixed up with fair or unfair terms of the contract. It was stated in no uncertain terms that duty to act fairly which is sought to be imported into a contract to modify and/or alter its terms and/or to create an obligation upon the State Government which is not there in the contract is not covered by any doctrine of fairness or reasonableness. The duty to act fairly and reasonably is a doctrine developed in administrative law field to ensure the rule of law and to prevent failure of justice when the action is administrative in nature.

33. Just as the principles of natural justice ensure fair decision where function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action when the function is administrative. But the said principle cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties."

27. According to the petitioner and as per the extract of the meeting it is clear that the petitioner has not committed any breach of the terms and conditions of the contract. The respondent No.2 at the behest of the Minister modified the terms of the contract and awarded the contract for the remaining period to respondent No.4 which is not there in the contract, the said action is not covered by any doctrine of fairness or reasonableness.

28. The respondent No.4 was aware that there is no such terms & conditions of the contract by which the remaining period of the contract can be awarded to him. On the basis of the meeting dated 17.8.2009 three proposals were made by the respondent No.2 Managing Director of the Federation which reads as under:-

"(i) As per the demand of respondent No.4 partner of M/s Ma Kali Enterprises, the work for the rest of the period may be given to him.

(ii) The aforesaid contract may be terminated.

(iii) To continue the work as prevalent at present.

29. With the above three options the matter was referred to the Minister who is Chairman of the M.P. Matsya Mahasangh (Sahkari) Maryadit who on 26.8.2009 directed that as per demand of respondent No.4 the work for rest of the period be given to him.

30. In *Association of Registration Plates Vs. Union of India and others*, (2005) 1 SCC 679 the Apex Court held :

> "43. .... Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest.

31. In the present case, as per Minutes of the meeting which is reproduced herein before in para 17, the respondent No.2 authority directed the petitioner to return the amount of Rs.21.00 lacs which was invested by the respondent No.4. This direction has been made with the consent of representative of respondent No.4. It is also found that a sum of Rs.11,25,600/- towards instalment of the contract amount was deposited by the petitioner on 17.12.2007. As per record of the Federation, it is also found that the petitioner deposited a sum of 6.00 lacs towards the amount of seed, on 15.2.2008 and 5.11.2008. The Federation also found that the respondent No.4 jointly furnished the bank guarantee of Rs.35.00 lacs out of which respondent No.4 received his share and thereafter the bank guarantee of Rs.20.07 lacs was furnished by the petitioner alone. This amount has not been shared by the respondent No.4. Thereafter the petitioner deposited a sum of Rs.27,77,010.00 by demand draft No.306191-95 dated 11.8.2009 as stated in Annexure P/16. This fact has not been disputed by any of the respondents. Thus, as per the settlement. the petitioner returned all the amount to the respondent No.4 and on 26.8.2009 when the contract for the remaining period was awarded to respondent No.4, no amount was deposited by the respondent No.4. In view of above, the respondents No.2 and 3 committed an error in awarding the contract in favour of respondent No.4 whereas in terms of the settlement he received all his money which was invested by him, the process of issuing the order dated 26.8.2009 for diverting the contract for the remaining period in favour of respondent No.4 by the authorities is mala fide and intended to favour the respondent No.4. The decision of respondent No.2 and 3 to award the contract for the remaining period to respondent No.4 is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached to

such decision. The tender conditions gave no such option to the authority to award the contract for remaining 2½ years in favour of respondent No.4. In such circumstances, the limited question is whether the process adopted by respondents No.2 and 3 in awarding the contract in favour of respondent No.4 is malafide or intended to favour respondent No.4. In this case, even before the respondents No.2 and 3 when they called for reconciliation to the petitioner and respondent No.4 there was no issue regarding terminating the contract or granting the contract for the remaining period in favour of respondent No.4. The issue was how to settle the inter se dispute between the petitioner and respondent No.4 who have framed a joint venture in the name and style of M/s Ma Kali Enterprises to carry out the fishing contract for a period of five years. During the meeting the authorities directed the petitioner to return all the amount which has been invested by the respondent No.4 to him. The petitioner in compliance to the same, returned all the amount which has been invested by respondent No.4 and when this fact was not in dispute, there was no occasion to pass the impugned order dated 27.8.2009. Thus the respondent No.2 Federation acted unreasonably and arbitrarily in arriving at the decision, the said authority did not send show cause notice to the petitioner before the order dated 27.8.2009 nor there was any dispute before the authority that the petitioner who was having full control of the contract, has committed any breach of the terms and conditions of the contract or failed to pay the contract amount.

32. Learned counsel for the respondent No.4 submitted that the authorities in exercise of equitable jurisdiction and also on the facts that all the money was invested by respondent No.4 took a decision to award the contract for the remaining period to the respondent No.4 because if the contract was terminated then it is the respondents No.2 who would suffer loss, therefore, in the interest of justice out of the three proposals the respondent No.2 had taken a decision to award the contract in favour of respondent No.4 which is just and proper and no interference in the said decision is warranted. It is also submitted that the respondent No.2 has not acted arbitrarily or with a malafide intention in awarding the contract in favour of respondent No.4. He lastly submitted that the validity of the decision of respondents No.2 and 3 cannot be tested in the writ proceedings nor it can be held that the authority acted arbitrarily in passing the impugned order dated 27.8.2009 and this Court was not sitting in appeal over the decision of respondent No.2.

33. The respondents No.2 and 3 who have admitted the facts that it is the petitioner who was carrying out the fishing contract and he had returned all the amount invested by respondent No.4 and after due permission granted by the authorities on 13.8.2009 executed a tripartite agreement with President of Mrignayani Fishermen Co-operative Society and Regional Manager of the Federation and thereafter he was duly permitted to carry out the contract by

order dated 16.8.2009 and the respondent No.4 had proceeded on incorrect basis of facts, in violation to the principles of natural justice and when there was no breach of any terms and conditions of the contract, then decision dated 26.8.2009 was open to judicial review. In the case at hand the Minister had acted in excess of his power, unfairly and on basis of incorrect facts and without any reason erred in diverting the contract in favour of respondent No.4 when admittedly at the time of passing of the said order he was not carrying out any fisheries rights and he had received all the amounts invested by him and respondent No.2 had granted permission to carry out the contract in favour of petitioner vide order dated 16.8.2009 (Annexure P/18), the said action dated 26.8.2009 is patently illegal and was made by the authorities with a malafide intention to favour the respondent No.4.

34. In the case of *Mahabir Auto Stores and others v. Indian Oil Corporation and others*, AIR 1990 SC 1031 it has been held by the Apex Court that the decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. In the instant case, having considered the facts and circumstances of the case and the nature of the contentions and the dealings between the parties and in view of the present state of law we are of the opinion that the impugned decision of the respondent No.2 dated 27.8.2009 to award contract for the remaining period in favour of respondent No.4 is not a fair action and had been taken with a malafide intention to award the contract to the respondent No.4. The said decision is not based on fair play and equity. The respondent No.2 has an obligation in law to act fairly, justly and reasonably which is a requirement of Article 14 of the Constitution. We may state here, so far as the inter se dispute between the petitioner and respondent No.4 is concerned, the observations made by us herein before in various paras, the same were made in order to narrate the facts. We are not expressing any opinion on the merits of the dispute and the parties shall be free to agitate the same in appropriate forum. As stated herein before, we are only concerned in this case with the order dated 26/27.8.2009 passed by the Minister, awarding the contract to respondent No.4, which action was arbitrary, unreasonable and unfair in the facts and circumstances of the case and as such we quash the same.

35. Thus, on appraisal of the relevant material in the light of the submission before us, we are not satisfied with the argument of learned counsel for the respondents No.2, 3 and 4 that in exercise of equitable jurisdiction the contract was awarded to the respondent No.4 by impugned order dated 27.8.2009.

36. For the above mentioned reasons, the impugned order dated 27.8.2009 (Annexure P/19) is hereby quashed.

37. We direct accordingly to respondents No.2 and 3 to permit the petitioner to

execute the contract in terms of Annexure P/1 and in case if it is found that the petitioner has committed breach of any terms and conditions of the contract, the authority is at liberty to take action in accordance with the terms & conditions of the contract.

38. In the result, the writ petition is allowed and disposed of with the aforesaid directions. In the facts and circumstances of the case, there will be no order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 364
WRIT PETITION
Before Mr. Justice R.S. Garg & Mr. Justice P.K. Jaiswal
12 November, 2009*

TRUCK OWNERS ASSOCIATION & anr. ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

National Highways Act (48 of 1956), Section 9, National Highways (Fees for the use of National Highway Section and Permanent Bridge - Public Funded Project) Rules, 1997, Rule 11 - *Vires of Rule 11 challenged - Held - Rule 11 which provides that the fee shall be collected in perpetuity by the executing agency is bad - However, the agency would be entitled to recover cost of the road/bridge or for its maintenance or its upkeep provided the original cost is not recovered and the executing agency comes out with a clear case that for maintenance etc of a road/bridge, certain tolls are required to be imposed - In Rule 11 'in perpetuity' held ultra vires.* (Para 14)

राष्ट्रीय राजमार्ग अधिनियम (1956 का 48), धारा 9, राष्ट्रीय राजमार्ग (राष्ट्रीय राजमार्ग खण्ड और स्थायी पुल के उपयोग के लिए फीस – लोक निधि परियोजना) नियम, 1997, नियम 11 – नियम 11 की शक्तिमत्ता को चुनौती दी गई – अभिनिर्धारित – नियम 11, जो यह उपबंधित करता है कि निष्पादन एजेंसी द्वारा फीस शाश्वत रूप से संग्रहीत की जायेगी, दोषपूर्ण है – तथापि, एजेंसी सड़क/पुल की लागत या उसके अनुरक्षण के लिए या उसकी मरम्मत के लिए वसूल करने की हकदार होगी बशर्ते मूल लागत वसूल नही हो जाती और निष्पादन एजेंसी इस स्पष्ट मामले के साथ आती है कि सड़क/पुल के अनुरक्षण आदि के लिए कतिपय पथकर अधिरोपित किया जाना आवश्यक है – नियम 11 में 'शाश्वत रूप से' को अधिकारातीत अभिनिर्धारित किया गया।

Cases referred :

1988 MPLJ 773, (2001) 9 SCC 328.

J.P. Sanghi with *Rakesh Chourasiya*, for the petitioner.

Rahul Jain, Dy.A.G., for the respondent Nos.1 to 4.

None, for the respondent No.5.

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*W.P. No.4050/2004 (PIL) (Jabalpur)

ORDER

The Order of the Court was delivered by R.S. GARG, J. :– The petitioner Truck Owners Association and one Sardool Singh, a Truck Owner has filed this petition challenging the constitutional validity of Rule 11 of National Highways {Fees For The Use Of National Highway Section & Permanent Bridge Public Funded Project} Rules, 1997.

2. The submission of learned counsel for the petitioners is that once the cost of construction & cost of maintenance are recovered by the authority which has constructed the bridge then the toll cannot be collected in perpetuity because such an action would be illegal, contrary to the provisions of law and contrary to the fair play and would also demolish the principles of a welfare state. The submission infact is that once the State Government or the Central Government constructs a bridge then it would be entitled to recover cost of the same so that the burden is distributed upon the bridge users but once the cost is recovered then the respondents or the authorities constructing the bridge would not be entitled to recover money any further.

3. Referring to Notification dated 29.6.1998 {Annexure P/1}, it is submitted that the State Government had clearly provided that on such bridges on which collection of toll has been authorized to the Contractors by public auction, the collection of toll shall be suspended only after expiry of the period of contract executed with the Contractors. It is submitted that the State Government's Notification dated 29.6.1998 {Annexure P/1} was subjected to a challenge before the High Court so also before the Supreme Court; a Full Bench of the High Court overruling the earlier Division Bench Judgment in the matter of *Mandsaur Transport Association Versus State of M.P.& Another* reported in 1988 MPLJ 773 held that the Notification would still be bad and cannot be continued if cost of the bridge has already been recovered.

4. Placing reliance upon the judgment of the Supreme Court in the matter of *Mandsaur Transport Association Versus State of M.P.& Others* {2001} 9 SCC 328, it is submitted that there would be no justification for continuing the toll till the contract period with the Contractors is over in respect of a particular bridge. The observations made by the Supreme Court "there is no reason at all why collection of toll should continue henceforth where the cost of construction and even cost of maintenance have already been recovered by the State Government several times over by way of toll on that bridge"are also relied upon.

5. The submission is that in the present matter the cost of construction has already been realized and, therefore, the Notification dated 29.6.1998 {Annexure P/1} should be given full effect so that every bridge is exempted from collection of the toll where the entire cost of construction has been realized by way of toll.

6. It is also submitted that Rule 11 of the afore-referred Rules, which refers to

the tenure of fee collection when provides that the fee shall be collected in perpetuity by the executing agency would be contrary to the judgment of the Supreme Court and as such would be contrary to the provisions of the Constitution. The further submission is that the State Government cannot be allowed to earn money from all such work which under the Constitution it has to carry out.

7. The respondents in their return have submitted that the collection of toll fee at Tilwaraghat Bridge is in accordance with the Rules framed by the Central Government in exercise of the powers under Section 9 of the National Highways Act, 1956.

8. It is asserted that to the facts of the case Rules of 1997 are applicable and under the said Rules, the Central Government is empowered to recover the toll fee in perpetuity, therefore, contention of the petitioner that the toll fee can be collected only to the extent of cost of the bridge being contrary to the provisions of National Highways Act is bad.

9. Rule 2{b} of 1997 Rules provides the definition of executing agency. The definition reads as under:-

> "2{b} "executing agency" means –
>
> {i} In the case of those National Highways administratively placed under the charge of Border Roads Organization, the Border Roads Development Board {hereinafter referred to as 'BRDB'};
>
> {ii} In the case of those National Highways or part thereof entrusted to National Highways Authority of India {hereinafter referred to as NHAI}, the National Highways Authority of India;
>
> {iii} In other cases the State Government or Union Territory, the administration to which such functions are delegated under Section 5 of the Act."

10. From a perusal of Sub-clause {iii} of Clause {b} of Rule 2, it would clearly appear that the State Government would be the executing agency when functions under Section 5 of the Act {Tolls Act} are delegated to it. Rule 5 provides for procedure of collection. It says that the fees levied under these Rules shall be collected by the executing agency concerned departmentally or through private Contractors on the basis of competitive bidding on behalf of the Central Government.

11. A perusal of these Rules would make it clear that the bridges which are constructed on the highways falling within the territory of the State Government would be maintained by the State Government and the State Government would be the executing agency for purposes of collection of toll.

12. Once the judgment of the Supreme Court is taken help of and it is held that recovery of toll would be bad in cases where cost of construction and cost of

maintenance have already been recovered by the State Government several times over by way of toll on that bridge then Rule 11 which provides that the fee shall be collected in perpetuity by the executing agency shall be patently bad.

13. From the matter of *Mandsaur Transport Association Versus State of M.P.& Others* {2001} 9 SCC 328, it would clearly appear that the Division Bench Judgment reported in 1988 MPLJ 773 *{Mandsaur Transport Association Versus State of M.P.& Another}* was held to be bad law by judgment of the Full Bench of this Court in its judgment dated 5.2.1996 and the High Court had held that levy of toll under the Indian Tolls Act, 1851 is in the nature of compensatory tax and, therefore, from its very nature once the amount which has been spent for construction of a road and/or a bridge is recovered, the toll cannot be continued perpetually like a general tax. While quashing part of Notification dated 29.6.1998 {Annexure P/1}, the Supreme Court had gone to the extent of saying that the contract which was in force on the date of the petition or on the date of the judgment also could not be continued nor collection of toll could be continued where the cost of construction & even cost of maintenance had already been recovered by the State Government.

14. In view of the Full Bench Judgment of this Court and the Judgment of Their Lordships of the Supreme Court in the matter of *Mandsaur Transport Association* {supra}, we find no difficulty in holding that Rule 11 of 1997 Rules, which provides that the fee shall be collected in perpetuity by the executing agency is bad. However, we make it clear that the agency would be entitled to recover cost of the road/ bridge or for its maintenance or its upkeep provided the original cost is not recovered and the executing agency comes out with a clear case that for maintenance etc of a road/bridge, certain tolls are required to be imposed. We hold that Rule 11 of 1997 Rules in its term cannot be held to be valid, however, we would clarify and make it clear that the Full Bench Judgment of this Court has clearly observed that the toll tax may be levied for repair of the road and/or the bridge concerned or its necessary upkeep.

15. The writ petition is allowed with the clarification aforesaid. There shall be no order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 368
WRIT PETITION
Before Mr. Justice S.C. Sharma
24 November, 2009*

KIRTI SAXENA [DR(SMT.)] ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. **Service Law - Shaskiya Sevak (Adhivarshiki-Ayu) Dwitiya Sanshodhan Adhiniyam, M.P. (28 of 1998), Section 2, Vishwavidyalaya Adhiniyam, M.P. 1973, Statute 28(1)(d), College Code (Statute 28)** - *Two advance increments awarded for Ph.D. withdrawn on the ground that petitioner is a Principal and not a teacher - Held - Principal is also involved in teaching activities - The post of Principal cannot be excluded from the definition of a teacher - Respondents have extended the benefit of continuance in service by treating the petitioner as a teacher upto the age of 62 years - Withdrawal of benefit of two advance increments is bad in law - Petition allowed.* (Paras 6 to 9)

क. सेवा विधि – शासकीय सेवक (अधिवार्षिकी आयु) द्वितीय संशोधन अधिनियम, म.प्र. (1998 का 28), धारा 2, विश्वविद्यालय अधिनियम, म.प्र. 1973, स्टेचूट 28(1)(डी), कॉलेज कोड (स्टेचूट 28) – पीएच.डी. के लिए दी गई दो अग्रिम वेतन वृद्धियाँ इस आधार पर वापस ले ली गयीं कि याची प्राचार्य है न कि अध्यापक – अभिनिर्धारित – प्राचार्य अध्यापन क्रियाकलापों में भी अन्तर्ग्रस्त होता है – प्राचार्य का पद अध्यापक की परिभाषा से अपवर्जित नही किया जा सकता – प्रत्यर्थियों ने याची को अध्यापक मानकर 62 वर्ष की आयु तक सेवा में बने रहने का लाभ दिया है – दो अग्रिम वेतन वृद्धियों का वापस लिया जाना विधि में दोषपूर्ण है – याचिका मंजूर।

B. **Service Law** - *Interest on retiral benefits - Petitioner attained the age of superannuation on 30.04.2007, but terminal dues have not been finalized after lapse of more than 2 years - Petitioner is entitled for interest on delayed payment of retiral dues.* (Para 9)

ख. सेवा विधि – सेवानिवृत्ति लाभों पर ब्याज – याची ने अधिवार्षिकी आयु तारीख 30.04.2007 को प्राप्त की, किन्तु सेवान्त बकाया का 2 वर्ष से अधिक बीत जाने के बाद भी अंतिम रूप से निपटारा नही किया – याची सेवान्त बकाया के विलम्ब से किये गये भुगतान के लिए ब्याज का हकदार है।

Cases referred :

AIR 1997 SC 3433, (2008) 3 SCC 44.

D.P. Singh, for the petitioner.
Vishal Mishra, G.A., for the respondent/State.

*W.P. No.1528/2009(S) (Gwalior)

ORDER

S.C. SHARMA, J. :–The petitioner before this Court a retired Government servant has filed this present petition for issuance of appropriate writ, order or direction directing the respondents to finalize her terminal dues. The petitioner is also aggrieved by the recovery initiated by the respondents against her.

2. The contention of the petitioner is that she was appointed as a Lecturer on 27/10/1965 and the post of Lecturer was later on redesignated as Assistant Professor. It has been further stated that she was promoted as Professor in the year 1985 and later on in the year 2003 she was promoted as Principal of Degree College. The petitioner has further stated that prior to her retirement she has also worked as Assistant Director, Education. The petitioner on completion of 62 years of age has attained the age of superannuation on 30th April, 2007. The petitioner's further contention is that she was awarded a Ph.D. degree on 31/07/1998 and two advance increments were sanctioned vide order dated 24/06/2000. The respondents have withdrawn the benefit of two advance increments sanctioned to the petitioner after her retirement and an entry has been made in the PPO issued on 04/06/2008 for recovering the amount of two advance increments received by the petitioner with effect from 31/07/1998. The petitioner's contention is that she was rightly extended the benefit of two advance increments and, therefore, action of the respondents is bad in law. The petitioner has also stated before this Court that she is in fact a teacher and the respondents have permitted her to continue in service upto 62 years in the light of the statutory provisions as contained under the Madhya Pradesh Shaskiya Sevak (Adhivarshiki-Ayu Dwitiya Sanshodhan) Adhiniyam, 1998. The learned counsel appearing for the petitioner has further argued before this Court that a teacher has been defined under the College Code (Statute 28) framed under the Madhya Pradesh Vishwavidhyalaya Adhiniyam, 1973 and definition of a teacher as contained in Statute 28 (1) (d) includes the Principal. The petitioner's contention is that for all purpose she has been treated as a Teacher and, therefore, action of the respondents in withdrawing the benefit of two advance increments is bad in law and, therefore, the she is entitled for terminal dues and recovery initiated by the respondents deserves to be quashed by this Court.

3. A reply has been filed by the respondents and the respondents have relied upon a circular of the State Government dated 11th October, 1999. The contention of the respondents is that benefit of two advance increments has been extended to the teachers alone. They have relied upon clause 9 (c) of the circular dated 11th October, 1999 and the contention of the respondents is that the petitioner at the relevant point of time was serving as a Principal and was certainly not entitled to the benefit of two advance increments and, therefore, the amount received by virtue of the aforesaid circular is being recovered. The 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 before this Court was initially appointed as a Lecturer on 27/10/1965 and later on the post of Lecturer was redesignated as Assistant Professor. The petitioner was promoted to the post of Professor in the year 1985 and in the year 2003 she was promoted to the post of Principal. The petitioner has attained the age of superannuation on 30th April, 2007 while serving the Education Department of the State of M.P. as a Principal.

6. This Court has carefully gone through the circular enclosed as Annexure R/1 and the aforesaid circular deals with grant of two advance increments to the teachers who have obtained the Ph.D. degree. The petitioner has obtained the Ph.D. degree on 31st July, 1998 and the respondents have sanctioned two advance increments to the petitioner by an order dated 24/06/2000 with effect from 31/07/1998, Annexure P/4. The petitioner has attained the age of superannuation on 30th April, 2007. The basis question involved in the present case is whether the petitioner who was serving the Higher Education Department of the State of Madhya Pradesh at the time of retirement as a Principal, is a teacher or not. The Statute 28 framed under the provisions of Madhya Pradesh Vishwavidhyalaya Adhiniyam, 1973 defines teachers under Statute 28 (1) (d) which reads as under:

> "**Teachers:** means members of the teaching staff of a college and includes the Principal."

Not only this, the Statute governing the field relating to retirement of State Government employees provides for retirement of teachers at the age of 62 years. The Madhya Pradesh Shaskiya Sevak (Adhivarshiki-Ayu Dwitiya Sanshodhan) Adhiniyam of 1998 provides for retirement of teachers at the age of 62 years and the same reads as under:-

> "2. Amendment of Fundamental Rule 56 as substituted by Section 2 of the Madhya Pradesh Act No. 29 of 1967: In Section 2 of the Madhya Pradesh Shaskiya Sevak (Adhivarshiki- Ayu) Adhiniyam, 1967 (No. 29 of 1967), after sub-rule (1) of Rule 56, of the Fundamental Rules, the following sub-rule shall be inserted namely:-
>
> (1-a) Subject to the provisions of sub-rule (2), every Government Teacher shall retire from service on the afternoon of the last date of the month in which he attains the age of sixty two years:
>
> Provided that a Government teacher whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty two years.

Explanation: For the purpose of this sub-rule "Teacher" means a Government servant by whatever designation called, appointed for the purpose of teacher in Government educational Institution including technical or medical educational educational institutions, in accordance with the recruitment rules applicable to such appointment and shall also include the teacher who is appointed to an administrative post by promotion or otherwise and who has been engaged in teacher for not less than twenty years provided he holds a lien on a post in the concerned School/Collegiate/ Technical/Medical education service."

The petitioner was permitted to continue upto the age of 62 years by the respondents keeping in view the provisions of the Adhiniyam of 1998 and the respondents have treated the petitioner as a teacher for the purpose of retirement. Not only this, the definition under the College Code also makes it clear that the petitioner is a teacher and is entitled for all benefits to which a teacher is entitled.

7. The apex Court in the case of *P.S. Ramamohana Rao vs. A.P. Agricultural University and another,* AIR 1997 SC 3433 in paragraphs 10 and 20 has held as under:

"From the aforesaid affidavit, it is clear that a Physical Director has multifarious duties. He not only arranges games and sports for the students every evening and looks after the procurement of sports material and the maintenance of the grounds but also arranges inter-class and inter-college tournaments and accompanies the students' team when they go for the inter-university tournaments. For that purpose it is one of his important duties to guide them about the rules of the various games and sports. It is well known that different games and sports have different rules and practices and unless the students are guided about the said rules and practices they will not be able to play the games and participate in the sports in a proper manner. Further, in our view, it is inherent in the duties of a Physical Director that he imparts to the students various skills and techniques of these games and sports. There are a large number of indoor and outdoor games in which the students have to be trained. Therefore, he has to teach them several skills and techniques of these games apart from the rules applicable to these games.

We are unable to agree. It may be that the Physical Director gives his guidance or teaching to the students only in the evenings after the regular classes are over. It may also be that the University has not prescribed in writing any theoretical and practical classes

for the students so far as physical education is concerned. But as pointed by us earlier, among various duties of the Physical Director, expressly or otherwise, are included the duty to teach the skills of various games as well as their rules and practices. The said duties bring him clearly within the main part of the definition as a "teacher". We, therefore, do not accept the contention raised in the additional counter-affidavit of the University."

The apex Court in the aforesaid case has treated a Director of Physical Education in University as a teacher and the benefit of continuance in service upto the age of 62 years was extended to the Director of Physical Education in the University. In the present case, the case of the petitioner stands on better footing. The petitioner was appointed as a Lecturer, promoted to the post of Professor and was subsequently promoted to the post of Principal. The Principal is also involved in teaching activities and by no stretch of imagination, the post of Principal can be excluded from the definition of a 'teacher' as has been done in the present case by the respondents/State. Once the respondents have extended the benefit of continuance in service by treating the petitioner as a teacher upto the age of 62 years, there appears to be no justification in withdrawing the benefit of two advance increments granted to him on account of acquiring the Ph.D. degree. Resultantly, the action of the respondents in withdrawing the benefit of two advance increments is bad in law and deserves to be quashed.

8. The petitioner is certainly entitled for two advance increments granted to her vide order dated 24/06/2000. It is really very strange that the terminal dues of the petitioner who has attained the age of superannuation on 30th April, 2007 have not been finalized till date as stated by the learned counsel for the petitioner before this Court.

9. The respondents in the present case have not finalized the pensionary dues of the petitioner till date, though the petitioner has attained the age of superannuation on 30.04.2007. The apex Court in the case of *S.K. Dua vs. State of Haryana and another* (2008) 3 SCC 44 in paragraph 14 has held as under:-

"In the circumstances, prima facie, we are of the view that the grievance voiced by the appellant appears to be well founded that he would be entitled to interest on such benefits. If there are statutory rules occupying the field, the appellant could claim payment of interest relying on such rules. If there are administrative instructions, guidelines or norms prescribed for the purpose, the appellant may claim benefit of interest on that basis. But even in absence of statutory rules, administrative instructions or guidelines, an employee can claim interest under Part III of the Constitution relying on Articles 14, 19 and 21 of the Constitution.

The submission of the learned counsel for the appellant, that retiral benefits are not in the nature of "bounty" is, in our opinion, well founded and needs no authority in support thereof. In that view of the matter, in our considered opinion, the High Court was not right in dismissing the petition in limine even without issuing notice to the respondents."

In the light of the judgment delivered by the Apex Court the petitioner is certainly entitled for interest also on delayed payment of retiral dues.

10. The writ petition is allowed with the following directions:

(a) The petitioner being a teacher shall be entitled for two advance increments on acquiring the Ph.D. Degree with effect from 31/07/1998.

(b) The recovery initiated against the petitioner is hereby quashed.

(c) The respondents are directed to finalize and to release all terminal dues of the petitioner within a period of 90 days from the date of receipt of a certified copy of this order including pension, arrears of pension, etc.

(d) The respondents shall pay interest at the rate of 8% per annum on the amount of terminal dues withheld by them from the date of entitlement of the petitioner till the amount is actually paid to the petitioner.

(e) In case, the terminal dues of the petitioner are not paid within a period of 90 days as directed by this Court, the respondents shall pay interest at the rate of 14% per annum from the date of entitlement of the petitioner till the amount is actually paid to the petitioner.

11. With the aforesaid, the writ petition stands allowed. No order as to costs.

Certified copy as per rules.

Petition allowed.

I.L.R. [2010] M. P., 374
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
26 November, 2009*

RAJENDRA KUMAR CHATURVEDI ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - Police Regulations, M.P., Regulation 270 - *Suo motu revision - Natural Justice - Petitioner was inflicted with punishment of censure which suo motu revised by the Higher Authority and D.E. was initiated against him - Held - Before cancelling the order of penalty and ordering for issuance of the charge-sheet and for holding D.E., it was necessary for the revising authority to have issued a notice to the petitioner to show cause and to have given an opprtunity of hearing to him - Action not only contrary to the provisions contained in the Regulation 270 but is also violative of principles of natural justice.* (Para 7)

सेवा विधि – पुलिस विनियम, म.प्र., विनियम 270 – स्वप्रेरणा से पुनरीक्षण – प्राकृतिक न्याय – याची को परिनिन्दा का दण्ड दिया गया जिसका उच्च प्राधिकारी द्वारा स्वप्रेरणा से पुनरीक्षण किया गया और उसके विरुद्ध विभागीय जाँच प्रारम्भ की गयी – अभिनिर्धारित – शास्ति का आदेश रद्द करने और आरोप पत्र जारी करने तथा विभागीय जाँच करने का आदेश देने के पूर्व पुनरीक्षण प्राधिकारी के लिए यह आवश्यक था कि कारण बताने के लिए याची को सूचनापत्र जारी करते और उसे सुनवाई का अवसर प्रदान करते – कृत्य न केवल विनियम 270 में अन्तर्विष्ट उपबंधों के प्रतिकूल है बल्कि नैसर्गिक न्याय के सिद्धांतों का उल्लंघनकारी भी है।

D.M. Kulkarni, for the petitioner.
Rashmi Pandit, Dy.G.A., for the respondents.

ORDER

SHANTANU KEMKAR, J. :–Petitioner is working on the post of Sub-Inspector in the Home (Police) Department of the State Government. On the basis of the allegation that while registering Crime No.314/04 he did not register the crime for serious offence under Sections 325, 326 and 307 of the Indian Penal Code and registered the same under minor offence of Section 324/34 of the Indian Penal Code, that X-Ray report of injury was obtained belatedly and other irregularities in the investigation of the said crime the fourth respondent Superintendent of Police Mandsaur District inflicted upon the petitioner penalty of Censure vide order dated 08.12.2005 (Annexure P-2). This order of Censure was reviewed by the third respondent Deputy Inspector General of Police, Ratlam Range vide order dated 15.07.2006 and after a preliminary enquiry a charge sheet dated 16.05.2008 (Annexure P-l) has been issued to the petitioner. Aggrieved the petitioner has filed this petition under Article 226/227 of the Constitution of India.

*W.P. No.3856/2008(S) (Indore)

2. Briefly stated on account of the allegations as aforesaid the petitioner was punished by way of Censure vide order dated 08.12.2005 (Annexure P-2) issued by the Superintendent of Police, Mandsaur. The aforesaid order dated 08.12.2005 passed by the Superintendent of Police was cancelled in suo-moto revision vide order dated 15.07.2006 passed by the Deputy Inspector General of Police, Ratlam Range under Regulation 270 of the M.P. Police Regulations (for short Police Regulations) being the authority superior to the authority which has passed the order of Censure. Thereafter a preliminary enquiry as ordered by the Deputy Inspector General of Police, Ratlam was conducted through S.D.O. Police Sub Division Garoth. After perusal of the enquiry report submitted by the S.D.O. Police Sub-Division Garoth the Superintendent of Police Mandsaur submitted his report dated 08.03.2008 before the Deputy inspector General of Police, Ratlam stating therein that petitioner is not guilty of the allegations except to the extent of late receiving of the X-Ray report. After perusal of the said report the Deputy Inspector General of Police vide order dated 15.04.2008 directed the Superintendent of Police to issue charge-sheet to the petitioner. In terms of the said. order the impugned charge-sheet dated 16.05.2008 has been issued to the petitioner.

3. It has been contended by Shri D.M.Kulkarni, learned counsel for the petitioner that before cancelling the order (Annexure P-2), of penalty of censure imposed by the Superintendent of Police the Deputy Inspector General of Police (Revising Authority) has not served upon the petitioner a notice giving opportunity of being heard. In the circumstances according to him the order of the Deputy Inspector General and the issuance of the charge-sheet on the basis of such order is contrary to the Regulation 270 of the Police Regulations and is also violative of the principles of natural justice.

4. Smt. Rashmi Pandit, learned Dy. Govt. Advocate on the other hand, supported the action of the respondents and argued that no case for interference is made out.

5. Having considered the contentions raised by the learned counsel for the parties and after perusal of the record which was made available by the respondents at the time of hearing, I am of the view that the petition deserves to be allowed.

6. Admittedly, for the alleged incident/misconduct the petitioner was punished with penalty of Censure vide order dated 08.12.2005 passed by the Superintendent of Police. The said order was cancelled on 15.07.2006 by the Deputy Inspector General of Police by taking the matter in suo-moto revision under Regulation 270 of the Regulations. However, before cancelling the order of penalty of Censure imposed upon the petitioner and ordering for holding departmental enquiry by issuance of charge-sheet the petitioner was not served with a notice giving him opportunity of being heard. Regulation 270 of the Regulations empowers the revising authority to exonerate, remit, vary or enhance the punishment imposed or

order fresh enquiry or order for taking further evidence after recording reasons in writing provided it shall not vary or reverse any order unless notice has been served on the parties interested and opportunity is giving to them for being heard.

7. Thus. before cancelling the order of penalty in exercise of suo-moto powers under Police Regulation 270 and ordering for issuance of the charge-sheet and for holding regular departmental enquiry it was necessary for the revising authority to have issued a notice to the petitioner to show cause and to have given an opportunity of hearing to him, which has not been done. As a result the action of the reviewing authority is not only contrary to the provision contained in proviso of Regulation 270 of Police Regulations but is also violative of the principles of natural justice.

8. In view of the aforesaid, the order of the Deputy Inspector General of Police canceling the order of penalty of Censure passed by Superintendent of Police and order for directing issuance of charge-sheet and for holding departmental .enquiry against the petitioner cannot be sustained. As a consequence the said orders and the impugned charge-sheet (Annexure P-l) deserves to be and is hereby quashed. The order dated 08.12.2005 (Annexure P-2) by which punishment of Censure was imposed upon the petitioner is restored.

9. The petition is allowed, with no orders as to costs.

Petition allowed.

I.L.R. [2010] M. P., 376
WRIT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta
30 November, 2009*

VIJAY CHOUDHARY ... Petitioner
Vs.
UNION OF INDIA & ors. ... Respondents

Stamp Act (2 of 1899); Section 35, Evidence Act, 1872, Section 65, Constitution, Article 14 - *Whether S. 35 of Stamp Act nullifies S. 65 of Evidence Act - There is distinction between instrument and document - Ss. 35 & 36 of Stamp Act are not concerned with any copy or document - S. 65 of Evidence Act deals with secondary evidence relating to documents only - Two provisions are not to be compared - When both the statutes operate in different fields, they cannot be given equal platform - The legislature has made a distinction and said distinction is rational & relevant and does not invite frown of Article 14 of Constitution.* (Para 15)

स्टाम्प अधिनियम (1899 का 2), धारा 35, साक्ष्य अधिनियम, 1872, धारा 65, संविधान, अनुच्छेद 14 – क्या स्टाम्प अधिनियम की धारा 35 साक्ष्य अधिनियम की

*W.P. No.741/2004 (Jabalpur)

धारा 65 को अकृत करती है – लिखत और दस्तावेज के मध्य विभेद है – स्टाम्प अधिनियम की धाराएँ 35 व 36 किसी प्रतिलि प या दस्तावेज से सम्बन्धित नही हैं – साक्ष्य अधिनियम की धारा 65 केवल दस्तावेजों से सम्बन्धित द्वितीयक साक्ष्य से सम्बद्ध है – दोनों उपबंध तुलना किये जाने योग्य नही हैं – जब दोनों कानून भिन्न–भिन्न क्षेत्रों में प्रवर्तित किये जाते हैं, उन्हें एक समान मंच नही दिया जा सकता – विधायिका ने विभेद किया है और कथित विभेद विवेकी और सुसंगत है और संविधान के अनुच्छेद 14 के अननुमोदन को आमंत्रित नही करता।

Cases referred :

AIR 1971 SC 1070, AIR 1954 SC 526, 2004(2) MPLJ 492, AIR 2005 SC 592, AIR 2008 SC 166, AIR 1969 SC 1094, AIR 1990 SC 1637, AIR 1961 SC 1047, AIR 1998 SC 120, AIR 1963 SC 1667, (2007) 2 SCC 759, (2006) 4 SCC 98, (2009) 2 SCC 352, AIR 1946 PC 51, AIR 1962 AP 132, AIR 1972 AP 373, AIR 1981 AP 175, AIR 1966 Orissa 18.

S.C. Bagadia with *Kapil Jain,* for the petitioner.

Shekhar Sharma, for the respondent Nos. 1 & 4.

A.M. Mathur with *Ashok Lalwani, Abhinav Dhanodkar & B.L. Mehta,* for the respondent No.2.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** :–The petitioner filed a Civil Suit No.46-A/2003 (Old No. 12A/99) for specific performance of contract to sell the suit property and with the passage of time, it came to be dealt with by the XIXth Additional District Judge, Indore. It is pleaded in the plaint that the parties had entered into a written agreement for sale of the suit property and the total consideration had been paid to the respondent no.2, the defendant in the suit. After the execution of the agreement, the original had been retained by the said respondent and a plain copy was given to the petitioner. It was set forth that the transaction has been mentioned by the respondent no.2 in the relevant income tax return. The copy of the plaint has been brought on record as Annexure P/1.

2. In the written statement filed by the defendant, he did not dispute the receipt of the amount but denied the fact of any agreement between the parties having been executed. After commencement of recording of the evidence of the plaintiff, as the original of the document was retained by the defendant, the plaintiff-petitioner submitted an application under Section 65 of the Evidence Act for adducing secondary evidence in respect of the documents mentioned in the application. Copy of the said application has been brought on record as Annexure P/5. An objection was filed by the respondent no.2 opposing the said application. The learned trial Judge upon hearing the parties allowed the application under Section 65 of the Evidence Act by order dated 17.7.01 contained in Annexure P/7.

3. Being aggrieved by the aforesaid order, the second respondent herein preferred a revision before the High Court at Indore Bench on 23.7.01 forming the subject matter of Civil Revision no.748 of 2001. After the Code of Civil Procedure was amended with effect from 1.7.02, the defendant-respondent withdrew the civil revision with liberty to file a review application. The order passed in civil revision has been brought on record as Annexure P/9.

4. As put forth, the respondent no.2 filed an application for review of the earlier order dated 17.7.01 along with an application for condonation of delay in filing the application for review. The said applications were registered by filing objection by the plaintiff.

5. The learned trial Judge allowed the application for condonation of delay and after adverting to the application for review, allowed the same by the impugned order dated 17.7.01. The reason ascribed in the order allowing the review is that the order passed on the earlier occasion was contrary to the decision rendered by the Apex Court in the case of *Jupadi Kesava Rao Vs. Pulavarthi Venkata Subba Rao and Others,* AIR 1971 SC 1070.

6. In the present writ petition, the plaintiff-petitioner while challenging the order passed in the application for review has also called in question the constitutional validity of Section 35 of the Indian Stamp Act, 1899. It is urged in the petition that the Indian Stamp Act, 1899 (for brevity, the Act) is a fiscal statute and the object or purpose of the Act is to collect revenue by imposing stamp duty on every document which is liable to such duty and if the document is not so stamped, then the penalty is to be levied under Section 35 of the Act. It is contended that for the purpose of the act and to serve the legislative intent, it can make no difference between the duty and penalty which is payable on the original document and the copy. It is averred that if the Indian Stamp Act permits for admission of copies of the original instrument on payment of duty and penalty, for the purpose of harmonious construction of Section 65 of the Evidence Act, it should have been made applicable to the secondary evidence. It is his stand in the writ petition that in the present form, Section 35 of the Act nullifies to a large extent, section 65 of the Evidence Act and thereby invites the frown of Article 14 of the Constitution of India.

7. It is urged that the learned trial Judge on merits could not have dealt with the application for review and in any case, the right stage would have been to file the document and thereafter considered the objections on the same but the learned trial Judge has erroneously expressed an opinion that the said document is not admissible in law.

8. A return has been filed by the Union of India, the respondent no.1 herein, contending, inter-alia that the provision is constitutional as the legislative intention is very clear and it does not play foul of Article 14 of the Constitution of India.

9. We have heard Mr. S.C. Bagadia, learned senior counsel with Mr. Kapil Jain for the petitioner, Mr. Shekhar Sharma, learned standing counsel for Union of India, the respondents no.1 & 4 and Mr. A.M. Mathur, learned senior counsel with Mr. Ashok Lalwani; Mr. Abhinav Dhandodkar and Mr. B.L. Mehta for the respondent no.2.

10. Mr. Bagadia, learned senior counsel, has raised the following contentions :-

(i) The provision contained in Section 35 of the Act to the effect that if instrument is not duly stamped, it is inadmissible in evidence fundamentally nullifies the provision as contained in Section 65 and thereby ushers in a state of discrimination which is not permissible as it offends Article 14 of the Constitution of India.

(ii) The provision by restricting it to the instrument and not including the document differentiates between two categories of documents, namely, original and its copy which is per se irrational and unreasonable.

(iii) Section 35 has not visualized many a situation like when a document in its original is retained by force by someone or procured by fraud or destroyed by natural calamity and, thus, the provision is totally arbitrary and unreasonable and deserves to be declared ultra vires.

(iv) The stamp duty being a fiscal statute should have restricted itself to the fiscal field and not dwelled upon the field of admissibility of a document in such a strict manner.

(v) The learned trial Judge has not acted within his jurisdiction to review the order as the same does not come within the purview of review.

(vi) The learned trial Court has fallen into grave error by declaring the document as inadmissible when the plaintiff's evidence was in progress whereas he should have waited for the plaintiff to tender the document and then taken a decision thereon.

11. Mr. Mathur, learned senior counsel, per contra, propounded number of contentions to highlight that Section 35 of the Act does not suffers from the vice of constitutionality. In this regard, Mr. Shekhar Sharma, learned standing counsel for the Union of India, adopted the arguments canvassed by Mr. Mathur. Mr. Mathur, who represents the respondent no.2, in addition to the aforesaid submissions, supported the order passed by the learned trial Judge. It would be appropriate to enumerate the submissions of the learned senior counsel in seriatim as follows:-

(a) Section 35 of the Act and Section 65 of the Evidence Act operate in two different fields and, hence, it would be inappropriate to compare the provisions.

(b) The submission that it is a fiscal statute and, therefore, the field should have been restricted to the fiscal interest of the State alone and there should have been no entrenchment pertaining to the field of evidence, is totally sans substance as the legislature in its wisdom has laid down the parameters and such parameters cannot be stated to be unreasonable as the same subserves the purpose of the enactment.

(c) Section 35 uses the term 'instrument' whereas Section 65 uses the term 'document' and, therefore, the area of operation is different and the classification being permissible, the question of discrimination is not attracted.

(d) The trial Court has correctly allowed the application for review as a plain copy of the document was sought to be introduced which is totally impermissible in view of Section 35 of the Act and when the earlier order was contrary to the decision rendered in 1971 SC, 1070 (supra), no fault can be found with it.

12. The learned senior counsel to bolster the submission has placed reliance on the following decisions:-

Moran Mar Basselios Catholicos and another Vs. Most Rev. Mar Poulose Athanasius and others. AIR 1954 SC 526, *Commissioner of Sales Tax Vs. Hukumchand Mills.* 2004(2) MPLJ 492, *Board of Control for Cricket. India and another Vs. Netaji Cricket Club and Others.* AIR 2005 SC 592, *Jupadi & Kesava Rao Vs. Pulavarthi Venkata Subba Rao and Others.* AIR 1971 SC 1070, *Hariom Agrawal Vs. Prakash Chand Malviya.* AIR 2008 SC 166, *V. Venugopala ravi Verma Rajah v. Union of India and another.* AIR 1969 SC 1094, *Federation of Hotel & Restaurant vs. Union of India and others.* AIR 1990 SC 1637, *Commissioner of Sales Tax. U.P. vs. Modi Sugar Mills Ltd.,* AIR 1961 SC 1047, *Commissioner of Wealth Tax Gujarat -III, Ahmedabad vs. Ellis Bridge Gymkhana etc.,* AIR 1998 SC 120, *Rai Ramkrishna and others etc. vs. State of Bihar,* AIR 1963 SC 1667, *Dr. T.A. Qureshi vs. Commissioner of Income Tax, Bhopal,* 2007(2) SCC 759, *Commissioner of Sales Tax, Delhi and others vs. Shri Krishna Engg. Co. and others,* 2005(2) SCC 692, *State of Maharashtra and others vs. Mana Adim Jamat Mandal,* 2006(4) SCC 98.

13. To appreciate the submissions raised at the bar, it is appropriate to reproduce Section 35 and 36 of the Act which reads as under:-

> *"35. Instruments not duly stamped inadmissible in evidence, etc. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or*

shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided, that:-

(a) any such instrument not being an instrument chargeable 1 [with a duty not exceeding ten naye paise] only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) Where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) Where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;-

(d) Nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

(e) Nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by Section 32 or any other provision of this Act."

"36. Admission of an instrument where not to be questioned.

Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

14. In this context, we may also reproduce Section 65 of the Evidence Act which reads as under:-

"Section 65. Cases in which secondary evidence relating to documents may be given - Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it;

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) When the original is of such a nature as not to be easily movable;

(e) When the original is a public document within the meaning of Section 74;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India, to be given in evidence;

(g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collections.

In cases (a), (c) and (d), any secondary evidence of the contents of the documents is admissible.

In case (b), the written admission is admissible..

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

15. In *Jupadi Kesava Rao* (supra), the Apex Court in paragraphs 13, 14 and 15 held as follows:-

> *13. The first limb of Section 35 clearly shuts out from evidence any instrument chargeable with duty unless it is duly stamped. The second limb of it which relates to acting upon the instrument will obviously shut out any secondary evidence of such instrument, for allowing such evidence to be let in when the original admittedly chargeable with duty was not stamped or insufficiently stamped, would be tantamount to the document being acted upon by the person having by law or authority to receive evidence. Proviso (a) is only applicable when the original instrument is actually before the Court of law and the deficiency in stamp with penalty is paid by the party seeking to rely upon the document. Clearly secondary evidence either by way of oral evidence of the contents of the unstamped document or the copy of it covered by Section 63 of the Indian Evidence Act would not fulfil the requirements of the proviso which enjoins upon the authority to receive nothing in evidence except the instrument itself. Section 35 is not concerned with any copy of an instrument and a party can only be allowed to rely on a document which is an instrument for the purpose of Section 35. Instrument' is defined in Section 2 (14) as including every document by which any right or liability is. or purports to be created transferred, limited, extended, extinguished or recorded. There is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act.*
>
> *14. If Section 35 only deals with original instruments and not copies Section 36 cannot be so interpreted as to allow secondary evidence of an instrument to have its benefit. The words "an instrument" in Section 36 must have the same meaning as that in Section 35. The legislature only relented from the strict provisions of Section 35 in cases where original instrument was admitted in evidence without objection at the initial stage of a suit or proceeding. In other words, although the objection is based on the insufficiency of the stamp affixed to the document, a party who has a right to object to the reception of it must do so when the document is first tendered. Once the time for raising objection to the admission of the documentary evidence is passed, no objection based on the same ground can be raised at a later' stage. But this in no*

way extends the applicability of Sec. 36 to secondary evidence adduced or sought to be adduced in proof of the contents of a document which is unstamped or insufficiently stamped.

15. The above is our view on the question of admissibility of secondary evidence of a document which is unstamped or insufficiently stamped, as if the matter were res integra. It may be noted however that the course of decisions in India in the Indian High Courts, barring one or two exceptions, have consistently taken the same view. "

After so stating, their Lordships proceeded to state as follows:-

"As we have expressed our view already Section 35 imposed a bar on the reception of any but the original instrument and forbade the reception of secondary evidence. Section 36 only lifted that bar in the case of an original unstamped or insufficiently stamped document to which no exception as to admissibility was taken at the first stage. It did not create any exemption in the case of secondary evidence which a copy would undoubtedly be. In the case before the Judicial Committee the copy was one other than the final draft of the original document which had been lost through no fault on the part of the person intending to prove it and yet it was held that the Stamp Act ruled out its admissibility in evidence."

16. From the aforesaid proponement of law, it is quite luminescent that there had been distinction between the instrument and the document. Sections 35 and 36 are not concerned with any copy or document. Section 2(14) defines the term instrument not to cover a copy or document for the purposes of the Stamp Act. The submission of Mr. Bagadia is that the provision of the Stamp Act nullifies Section 65 of the Evidence Act and hence, it is discriminatory. Section 65 of the Evidence Act deals with secondary evidence relating to documents only. As we have already stated, there is a difference between an instrument and a document. The two provisions are not to be compared. What is urged by Mr. Bagadia is that there can be hardship on occasions. Neither the hardship nor the inconvenience can make a provision unconstitutional. When both the statutes operate in different fields, they cannot be given equal platform. The spheres of operation is different. The legislature in its wisdom has made a distinction and the said distinction, we are disposed to think, is rational and relevant and does not invite the frown of Article 14 of the Constitution of India. At this juncture, it would not be out of place to refer to the recent decision rendered in case of *Avinash Kumar Chauhan Vs. Vijay Krishna Mishra* 2009 (2) SCC 352 wherein their Lordships in paragraph 25 have held as follows:-

"Section 35 of the Act, however, rules out applicability of such provision as it is categorically provided therein that a document of this nature shall not be admitted for any purpose whatsoever. If all purposes for which the document is sought to be brought in evidence are excluded, we fail to see any reason as to how the document would be admissible for collateral purposes."

To arrive at such a conclusion, their Lordships placed reliance on the decisions rendered in cases of *Ram Ratan Vs. Parma Nand,* AIR 1946 PC 51, *Bhaskarabhotla Padmanabhaiah Vs. B. Lakshminarayana,* AIR 1962 AP 132, *Sanjeeva Reddi Vs. Johanputra Reddi,* AIR 1972 AP 373, *T. Bhaskar Rao Vs. T. Gabriel,* AIR 1981 AP 175 and *Chandra Sekhar Misra Vs. Gobinda Chandra Das,* AIR 1966 Orissa 18.

We have referred to the said decision only to show there is a distinction between two enactments and they have been accepted by the courts of law.

17. The next argument on behalf of Mr. Bagadia is that the Court should not have allowed the review at that stage. The learned trial Judge has allowed the review and held that:-

"I.L. no. 26. dated 09/09/2002 filed by the defendant (under Order 47 Rule 1 C.P.C.)- decided in affirmative under the following grounds:-

That, earlier on filing of application, I.L.no. 21 u/s 65 Indian Evidence Act, 1972 by the plaintiff, the court allowed the same for adducing secondary evidence with regard to the photocopy of document dated 4.2.88 which is an agreement and on which the suit of the plaintiff is based. This application was opposed by the defendant on the ground that the document is not admissible in evidence, the document is not sufficiently stamped and copy of the same is not admissible.

The defendant placed reliance on AIR 1971 SC 1071 in which it is held that if any document is not stamped or not sufficiently stamped, the contents of the documents cannot be proved by secondary evidence in the light of Section 36 & 36 of Indian Stamps Act, 1899.

Section 35 & 36 of the Indian Stamps Act, 1899 relates to the original document and not the copy of the document. In this case, photocopy of the document agreement dated 04/02/88, on which the plaintiff's suit is based has been filed and not the original document therefore, the defendant opposed the application for secondary evidence.

The Court did not follow the principles laid down in AIR 1971 SC 1070 (relied by the defendant) but, followed AIR 1971 Punjab & Haryana 488 which is also regarding the admissibility of the document. Needless to say on the similar point when the Supreme Court has laid down the principle on the same point, it is not necessary to analyze AIR 1971 Punjab & Haryana 488.

As regarding raising objection by the defendant the objection was raised at the time of recording evidence of PW-1 Vijay Choudhary at para 13 of his statement when the document dated 04/02/88 was tendered.

The Court held that it is a fit case for allowing the application under Order 47 Rule 1 C.P.C. for there is mistake apparent on the face of the record. Consequently, the application, I.L. no. 26 dated 09/09/02 under Order 47 Rule 1 C.P.C. was allowed and earlier order dated 17/7/01 (which was pronounced allowing I.L. No. 21 U/s 65 Indian Evidence Act) is amended to the extent that the plaintiff's document agreement dated 04/02/88 is not admissible in evidence, therefore, the plaintiff cannot adduce secondary evidence U/s 65 Indian Evidence Act, 1872 to this document."

18. In our considered opinion, the permission was granted to adduce secondary evidence with regard to factum of the document which was an agreement and on which the suit of the plaintiff was based. The application was opposed by the defendant on the ground that the document was not admissible in evidence as it was not sufficiently stamped. A photocopy of the alleged instrument cannot be tendered in evidence. Section 35 clearly prohibits so but the learned trial Judge was not aware of the principles laid down in *Jupadi Kesava Rao* (supra).

19. In view of the aforesaid, we do not find any error in the order allowing the review. Consequently, the writ petition, being devoid of merits, stands dismissed. However, as the suit is pending since long, the trial Judge shall positively decide the same within a period of three months from the date of receipt of the order passed today. Liberty is granted to the petitioner to produce a copy of the order before the learned trial Judge. There shall be no order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 387
WRIT PETITION
Before Mr. Justice S.K. Gangele
2 December, 2009*

RATNA PRABHA (KU.) ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Constitution, Article 226, Madhyamik Shiksha Mandal (Manyata) Viniyam, 2005 - *Entitlement for compensation - Student admitted by the institution for the course for which it had no permission or recognition by the Board of Secondary Education under the Regulations of 2005 - Held - Student lost valuable academic year - Institution directed to pay compensation Rs.50,000 to student - Institution committed a fraud - District Administration directed to initiate appropriate criminal proceedings against institution - Petition allowed.* (Paras 6 & 9 to 11)

संविधान, अनुच्छेद 226, माध्यमिक शिक्षा मण्डल (मान्यता) विनियम, 2005 – प्रतिकर की हकदारी – संस्था द्वारा छात्र को ऐसे पाठ्यक्रम के लिए प्रवेश दिया गया जिसके लिए उसके पास विनियम, 2005 के अन्तर्गत माध्यमिक शिक्षा मण्डल से कोई अनुमति या मान्यता नही थी – अभिनिर्धारित – छात्र का मूल्यवान शैक्षणिक सत्र नष्ट हो गया – संस्था को निदेश दिया गया कि छात्र को 50,000 रुपये प्रतिकर अदा करे – संस्था ने कपट किया – जिला प्रशासन को निदेशित किया गया कि संस्था के विरुद्ध समुचित दाण्डिक कार्यवाहियाँ प्रारम्भ करे – याचिका मंजूर।

Cases referred :

(1992) 4 SCC 440, (2009) 4 SCC 473.

Sarvesh Sharma, for the petitioner.
Raghavendra Dixit, for the respondent No.2.
Dharmendra Nayak, for the respondent Nos.4 & 5.

ORDER

S.K. GANGELE, J. :–Heard.

Petitioner has filed this petition for the following reliefs that recognition to run school of respondents No. 4 and 5 be canceled and criminal action be taken against respondents No. 4 and 5 for playing fraud with students. The petitioner also prayed any other suitable relief as Court may deem fit in favour of the petitioner.

2. Petitioner, after passing 11th class examination, got admission in 12th class at Laxmi Bai Convent Higer Secondary School, Bhind, Madhya Pradesh. However, she was not permitted to appear in the examination of 12th class by the Board of Secondary Education, Madhya Pradesh, Bhopal, on the ground that the subjects in which petitioner got admission in the school were not recognized by the Board.

*W.P. No.1235/2009 (Gwalior)

3. As per petitioner, she could not appear in Class 12th examination of the Board due to fraudulent action of the school, respondent No.5. The school had given admission to the petitioner in spite of the fact that the school had no recognition for the subject from the Board of Secondary Education, Madhya Pradesh, Bhopal.

4. Respondent No. 2, Board of Secondary Education, Madhya Pradesh, Bhopal, in its return, stated that respondents No. 4 and 5, admitted the petitioner in Higher Secondary School in Class 12th in the subject of Home Science, however, the school had no recognition to conduct classes with regard to subject of Home Science of Higher Secondary School (10 + 2). In consequence thereof the examination form sent by the school to the respondent No. 2, Board, has been rejected. Copy of the order of rejection of form has been filed as Annexure R-2/1. It has further been stated that the Board has framed regulations with regard to recognition in exercise of powers under Section 28 of the Madhya Pradesh Board of Secondary Education Act, 1965, named as Madhyamik Shiksha Mandal, Manyata Viniyam, 2005, hereinafter referred to as the 'Regulation of 2005', copy of which has been filed as Annexure R2/3. As per the aforesaid Regulations only those educational institutions would be permitted to conduct classes of High School or Higher Secondary School, which have been recognized by the Board under the Regulations of 2005. The institution, and its Governing Body, respondents No. 4 and 5, were not issued recognition for Class 12th for the subject Home Science, hence the examination form of the petitioner has been rejected. It has further been stated that school filed a Writ Petition before this Court for recognition, which was registered as Writ Petition No. 1208/09, *Laxmi Bai Convent Higher Secondary School, Bhind v. The M.P. Board of Secondary Education, Bhopal and another,* and this Court dismissed the aforesaid writ petition vide order dated 10.08.2009, with the following observations :-

> "Keeping in view the totality of the facts and circumstances of the case, no case for interference is made out in the matter. As the institution in question is responsible for the loss of one academic year in the matter in respect of 20 students, it is directed that the institution in question shall not charge any fee from the students in respect of Board Examination of the year 2009 - 2010 and fee of the 20 students who have lost their one valuable year, shall be paid by the institution itself. Not only this, the students shall also be free to take appropriate legal proceedings against the institution for the loss of one year.
>
> With the aforesaid, the writ petition stands dismissed. No order as to costs.
>
> Certified copy as per rules."

5. Respondents No. 4 and 5, in the return, stated that respondent - institution

has been recognised by the Board since 1994. Number of students have completed their studies of Class 12th from the institute and their results have also been declared. It has further been submitted that the respondent - Institute, was informed by the Board with regard to cancellation of examination forms of its students of Class 12th, then, it filed a writ petition before this Court, which was dismissed.

6. From the facts of the case, it is clear that the petitioner was admitted in Class 12th as regular student with Home Science subject by respondents No. 4 and 5. Respondent - institute also charged fee from the petitioner, however, there was no recognition granted by the Board to the respondent - institute to conduct class of 12th with Home Science subject. That is why the Board rejected the examination form of the petitioner submitted by respondents No. 4 and 5 for permission to appear in the examination and due to the afore said act of the respondents No. 4 and 5, valuable time of the petitioner of one year has been lost. Respondents No. 4 and 5 have not filed any order or letter showing that they had recognition from the Board for the purpose of conducting classes of 12th with Home Science subject. It is also clear from the order passed by this Court in Writ Petition No. 1208/09, *Laxmi Bai Convent Higher Secondary School, Bhind v. The M.P. Board of Secondary Education, Bhopal and another.*

7. The Hon'ble Supreme Court in *Students of Dattatraya Adhyapak Vidyalaya v. State of Maharashtra and others,* (1992) 4 SCC 440, has held, as under, with regard to action of the State Government if the school is not recognized :-

> "Heard counsel for the petitioner. The special leave petition is dismissed. We are coming across cases of this type very often where allegations are made that innocent students are admitted into unrecognised schools and are made to suffer. Some courts out of compassion occasionally interfere to relieve the hardship. We find that the result of this situation is total indiscipline in the field of regulation. We suggest to the States to take steps that adequate publicity be given that unrecognised institutions have no right to run and admit students and their claim to sit in the examination would not be permitted. Government should also come forward to prosecute unrecognised institutions and their organisations which admits students by suppressing the proof of non-recognition. Dismissal of this special leave petition does not preclude the petitioner to move the State Government for such relief as is admissible in accordance with rules."

8. Hon'ble the Supreme Court in *Buddhist Mission Dental College and Hospital v. Bhkopesh Khurana and others,* (2009) 4 SCC 473, has further held, as under, with regard to entitlement of the student for compensation if he/she has been admitted by the Institute for the course for which it has no permission or recognition :-

"Although the respondent students stated that they had paid capitation fee / donation of rupees one lakh each and despite repeated requests, receipts were not given to them, the said fact has been denied by the appellant. In view of the disputed question of fact, it is difficult to give any specific finding allowing the said contention of the respondents and to give direction to refund this amount with interest to them. However, it is observed that the appellant institute has played with the career of the students and virtually ruined their career and the respondent students have lost two valuable academic years. Hence, on consideration of the totality of the facts and circumstances of the case and in the interest of justice, it is directed that : (I) the respondent students would be entitled to the compensation as directed by the National Commission, (ii) further, the appellant institute must additionally pay a compensation of rupees one lakh to each of the respondents, and (iii) the appellant institute would also pay the costs of the litigation, which is quantified at rupees one lakh, to each of the respondents."

9. In the present case, it is clear that the respondents No. 4 and 5 did not has recognition to admit students in Class 12th with Home Science subject. In spite of that petitioner was admitted in Class 12th with Home Science subject and fee was also charged from the petitioner by respondents No. 4 and 5. In my opinion, thereby the respondents No. 4 and 5 have committed a fraud.

10. Looking to the aforesaid facts of the case, it would be just and proper to award a proper compensation in favour of the petitioner under Article 226 of the Constitution of India and it would also be just and proper to direct the District Administration to initiate appropriate criminal proceedings against respondents No. 4 and 5.

11. Consequently, petition of the petitioner is disposed of with the following directions :-

(i) The respondents No. 4 and 5 are directed to pay a compensation of Rs.50,000/- (Rupees Fifty Thousand only) to the petitioner within a period of one month from the date of receipt of a certified copy of this order;

(ii) The Collector, district Bhind and Superintendent of Police, Bhind, are directed to take appropriate criminal action against the office bearers of respondents No. 4 and 5 and Principal of the Institute.

Petition allowed.

I.L.R. [2010] M. P., 391
WRIT PETITION
Before Mr. Justice Rajendra Menon
10 December, 2009*

S.C. MUKHERJEE ... Petitioner
Vs.
CHAIRMAN, STATE BANK OF INDIA & ors. ... Respondents

A. **Service Law** - *Disciplinary Proceedings - Supply of documents - Documents sought by petitioner were not mandatory requirement under any statutory provision - Most of the documents sought by the petitioner were either produced and made available and those which were not produced were either not available or were not relevant - It was not shown that non-supply caused prejudice to petitioner - Merely on the basis of vague and unspecified allegation regarding non-supply of documents, interference into matter not warranted - Petition dismissed.* (Paras 18 & 24)

क. सेवा विधि – अनुशासनिक कार्यवाहियाँ – दस्तावेजों का प्रदाय – याची द्वारा चाहे गये दस्तावेज किसी कानूनी उपबंध के अन्तर्गत आज्ञापक अपेक्षा नही थी – याची द्वारा चाहे गये अधिकांश दस्तावेज या तो पेश और उपलब्ध कराये गये और वे दस्तावेज जो पेश नही किये गये या तो उपलब्ध नही थे या सुसंगत नही थे – यह नही दर्शाया गया कि अप्रदाय के कारण याची को पूर्वाग्रह कारित हुआ – दस्तावेजों के अप्रदाय से सम्बन्धित अस्पष्ट और अविनिर्दिष्ट अभिकथनों के आधार पर, मामले में हस्तक्षेप आवश्यक नही – याचिका खारिज।

B. **Constitution, Article 226** - *Judicial Review - High Court does not sit over decision of disciplinary authority as if it is exercising appellate jurisdiction - Enquiry officer, disciplinary authority and appellate authority concurrently recorded finding against petitioner - Findings are based on documents on record and can not be held to be perverse - Petition dismissed.* (Paras 30 to 33)

ख. संविधान, अनुच्छेद 226 – न्यायिक पुनर्विलोकन – उच्च न्यायालय अनुशासनिक प्राधिकारी के विनिश्चय पर अपीलीय अधिकारिता के समान प्रयोग नही कर सकता – जाँच अधिकारी, अनुशासनिक प्राधिकारी और अपीलीय प्राधिकारी ने समवर्ती रूप से याची के विरुद्ध निष्कर्ष अभिलिखित किये – निष्कर्ष अभिलेख पर मौजूद दस्तावेजों पर आधारित हैं और विपर्यस्त नही ठहराये जा सकते – याचिका खारिज।

Cases referred :

(2007) 1 SCC 338, (1993) 4 SCC 727, (2005) 8 SCC 211, (1997) 3 SCC 72, (1996) 3 SCC 364, AIR 1995 SC 561, (1995) 6 SCC 749, (1996) 5 SCC 474, (2000) 1 SCC 416.

Vijay Nayak & Anand Nayak, for the petitioner.

Akash Choudhary, for the respondents.

*W.P. No.653/1999 (Jabalpur)

S.C. MUKHERJEE Vs. CHAIRMAN, STATE BANK OF INDIA

ORDER

RAJENDRA MENON, J. :–Challenging the order of punishment – Annexure P/4 dated 15.6.1998, imposing penalty of compulsory retirement, and the order – Annexure P/6 dated 21.9.98, passed by the appellate authority rejecting the appeal of the petitioner, this petition is filed.

2. From the facts that have come on record, it is seen that in the year 1995, petitioner was working as a Field Officer in State Bank of India, Sarkanda Branch, Bilaspur. As a Field Officer it was his duty to take action for processing and evaluating the claims and cases of various persons and establishments for grant of loan and also take steps for recovery of the same.

3. On the ground of serious irregularities committed by the petitioner in the matter of discharging his duties as a Field Officer and not taking proper steps in the matter of processing and granting loan facilities to various persons and establishment, a charge-sheet – Annexure P/1 was issued to the petitioner. Petitioner's reply to the same being found unsatisfactory, enquiry was ordered. On the basis of evidence and material that came on record, the enquiry officer conducted enquiry and submitted his finding, which was forwarded to the petitioner vide Annexure P/2 dated 2.1.98, asking him to give his say on the finding. Petitioner submitted his reply to the findings of the enquiry officer vide Annexure P/3 and after considering the same, the disciplinary authority by the impugned order – Annexure P/4 dated 15.6.98 imposed penalty of compulsory retirement on the petitioner in terms of the relevant rules applicable i.e.. The State Bank of India Officers Service Rules. Being aggrieved by the aforesaid penalty, petitioner preferred an appeal vide Annexure P/5 dated 30.7.98, which is rejected vide Annexure P/6 dated 21.9.98 and, therefore, petitioner is before this Court challenging the enquiry conducted, the finding recorded and the punishment imposed.

4. Before adverting to consider the contentions advanced, it would be appropriate at this stage to take note of the allegations levelled against the petitioner and the nature of imputations as contained in the charge-sheet Annexure P/1 dated 13.11.95. In all seven charges, imputation of misconduct, were alleged against the petitioner. The statement of allegations and the articles forming the charges are as under:

"STATEMENT OF ALLEGATIONS

1. Zonal Office sanctioned loans aggregating Rs.10.90 lacs to M/s. Shri Ram Metal corporation, Prop. Shri Jai Kumar Saraf under nursing programme vide their letters Nos. R/RM/II/ADV/1712 dated 8.5.87 and R/RM/II/ADV/2306 dated 13.4.88. You have committed following irregularities while the loans were made available to the unit :-

a) You have not obtained the documents in accordance with the sanction letter.

b) The guarantee of Shri Babulal Soni and equitable mortgage of his house property as collateral security have been obtained. Shri Babulal Soni have been reportedly expired in 1966. You failed to notice this fact. This indicates that some fictitious person had executed the mortgage and guarantee agreements.

c) Other guarantors are close relatives of the proprietor Shri Jai Kumar Saraf as such the very purpose of obtaining third party guarantee is defeated.

d) You allowed overdrawings in the unit's cash credit account. You also did not carry out periodical inspections of the unit. The outstandings of Rs. 18,05,200=70 being doubtful of recovery were transferred to protested Bills Account. The DI&CGC have rejected the Bank's claim. You have exposed the Bank to grave risk of loss.

ARTICLES OF CHARGES

By not obtaining documents in accordance with the sanction letter, by getting the guarantee/mortgage agreements executed by fictitious person you have been grossly negligent and acted in a manner detrimental to the Bank's interests and exposed the Bank to grave risk of loss. Your acts are unbecoming of a Bank official. You have contravened Rules Nos. 50(1) and 50(4) of State Bank of India Officers Service Rules governing your services in the Bank.

STATEMENT OF ALLEGATION

2. Zonal Office sanctioned credit facilities aggregating Rs.14.00 lacs to M/s. Nilesh Rolling Mills, partners Smt. Hemlata Saraf W/o. Shri Jai Kumar Saraf and Smt. Anita Devi W/o. Shri Santosh Kumar under nursing programme. You have committed following irregularities while the loans were released to the unit:

a) The equitable mortgage on the property of Shri Jai Ram Soni (guarantor) was initially created by Bilaspur Branch on 6.7.85 which was extended by you on 23.5.88 to cover the enhanced limit sanctioned under nursing programme. Shri Jai Ram Soni have been reportedly expired on 26.4.88. You failed to notice this fact. Thus, on 23.5.88 someone else had impersonated as Shri Jai Ram Soni and executed the documents.

b) You allowed Shri Jai Kumar Saraf to operate the loan Accounts of the above unit without any authority vested in him by the firm.

c) You have not obtained the loan documents in accordance with the sanction letter.

d) You have not created charge on the Jeep financed by Bilaspur Branch as collateral security as per the Terms and Conditions stipulated by Zonal Office in their letter No.R/RM/II/ADV/ 2355 dated 12.4.88.

e) The amount disbursed in Term Loan A/c was credited to cash credit account, thus you did not ensure end use of funds and allowed diversion of funds. The outstandings of Rs.20,82,654=91, are doubtful of recovery and have been transferred to protested Bills A/c. The Bank is likely to be saddled with loss of substantial amount.

ARTICLES OF CHARGES

By not obtaining documents in accordance with the sanction letter and allowing a third person to operate the loan accounts of the unit unauthorizedly and by not adhering to the terms and conditions regarding the collateral security stipulated by Zonal Office, you have disregarded Bank's instructions and acted negligently. By getting charge on the house property of the guarantor extended for the enhanced limit by some fictitious person you were grossly negligent and acted in a manner detrimental to the interests of the Bank. Your acts are unbecoming of Bank Official. In the above, you have contravened Rule Nos.50(1) and 50(4) of the State Bank of India Officers Service Rules governing your services in the Bank.

STATEMENT OF ALLEGATIONS

3. You processed/recommended a loan proposal for sanction of credit facilities aggregating Rs.1.77 lacs (Cash Credit Rs.1.00 lac and Term Loan Rs.0.77 lac) to M/s. Durgesh Metal Industries (partners Sarvashri Ajay Kumar Kathelia and Santosh Kumar) you have committed following irregularities in the process :-

a) You did not make discrete enquiry about the partners of the firm before processing/recommending the credit facilities to the unit. Shri Ajay Kumar Kathelia one of the partners of the firm was financed a credit facility of Rs.15,000/- under SEEUY Scheme on 9.2.87 and this loan account was irregular. A Loan of Rs.35,000/- under SEEUY Scheme was sanctioned on 20.10.87 to Ku. Manjulata Kathelia, sister of Shri Ajay Kumar Kathelia. This unit was not in existence. A Loan of Rs.32,000/- under SEEUY Scheme was also sanctioned to Shri

Krishna Kumar Kathelia Uncle of Shri Ajay Kumar. The above unit was not set up and it was not in existence. It is also revealed that a sick unit of Shri Krishna Kumar Kathelia was earlier taken over by Shri Jai Kumar Saraf. The funds were reportedly utilised by Shri Jai Kumar Saraf. Both the partners of the firm M/s. Durgesh Metal Industries, S/Shri Ajay Kumar Kathelia and Santosh Kumar are the relative of Shri Jai Kumar Saraf. Further wife of Shri Jai Kumar Saraf and wife of Santosh Kumar are partners in the firm M/s. Nilesh Metal Industries. All these aspects were ignored while processing/ recommending the proposal for sanction. Thus you have extended undue favours to Jai Kumar Saraf and Kathelia family despite the fact that their earlier loan accounts were running irregular.

b) You did not obtain partnership deed/letter from the firm (M/ s. Durgesh Metal Industries). While loan application (form Ex-1) has not been signed by all the partners of the firm' Form Ex-2 is signed by only one partner in his personal capacity. Shri Santosh Kumar one of the partners is resident of Saugor. The loan account was allowed to be operated by one partner only. Cash Disbursement of Rs.55,000/- and Rs.45,000/- between September, 1987 and January, 1988 were allowed from unit's Cash Credit Account. There is no other transaction in the account during that period. You did not ensure end use of fund disbursed in cash. The outstandings of Rs.3,10,565=60 are in protested Bills Account. The claim lodged by the Bank with the DI&CGC has been rejected by the corporation. The Bank is likely to saddle with loss of substantial amount.

ARTICLES OF CHARGES

By extending various credit facilities to different persons of one family without considering that the earlier loan accounts were irregular you passed on undue benefits to a particular family and acted in a manner unmindful of Bank's interests. By not obtaining partnership deed/letter from the borrowing firm you have disregarded Bank's instructions. By allowing cash disbursement and not ensuring end use of funds you have exposed the Bank to grave risk of loss. Your acts are unbecoming of Bank Official. You have in the above contravened Rule Nos. 50(1) and 50(4) of the State Bank of India Officers Service Rules governing your services in the Bank.

STATEMENT OF ALLEGATIONS

4. Your processed/recommended for sanction of credit facilities aggregating Rs.2.60 lacs (Cash Credit Rs.2.00 lacs and Term Loan Rs.0.60 lacs) to M/s. Shobha Rolling Mills, Prop. Smt. Shobha Kathelia W/o. Shri Premchand Kathelia. Smt. Shobha Kathelia being house wife does not possess skill to manage the affairs of the project; this aspect was ignored by you. You also ignored that the unit was housed in the premises of M/s Prem Metal Industries a unit of her husband which was also sanctioned a Cash Credit Limit of Rs.2.00 lacs by Zonal Office in March 1986. You accepted the guarantee of Shri Premchan Kathelia husband of the lady proprietor, whose loan account was irregular and his brother instead of insisting for third party guarantee other than the family members. The drawings in the Cash Credit Account were not regulated by DP/Stock statements. The outstandings Rs.3,64,412=05 are in protested Bills Account DI&CGC claim has been rejected by the corporation. The bank is likely to be saddled with loss of substantial amount.

ARTICLES OF CHARGES

You are charged for being negligent in processing the loan proposal. By accepting guarantee of near relatives of the borrower and the defaulter borrower of the Branch. You have acted in a manner detrimental to the Bank's interests. By allowing drawings without arriving at the DP based on stock statements you have disregarded lending norms. In the above you have contravened Rules Nos. 50(1) and 50(4) of State Bank of India Officers Service Rules governing your services in the Bank.

STATEMENT OF ALLEGATIONS

5. You processed/recommended for sanction of a Cash Credit Limit of Rs.1.00 lac to M/s. Soni Metal Industries Proprietor Shri Mohanlal who is close relative of Shri Premchand Kathelia. You accepted guarantee of Smt. Shobha Kathelia W/o. Shri Prem Chand Kathelia. Shri Prem Chand Kathelia and Smt. Shobha Kathelia both are defaulter borrowers of the Branch. You ignored the above facts while considering the loan proposal of M/s Soni Metal Industries. You did not assess the working capital requirement. You also did not obtain stock statement and drawings were not regulated with DP. The unit was not in existence and the loan amounts were misutilised by the borrower. The outstandings of Rs.1,41,045=70 are in Protested Bills Account. DI&CGC claim has been rejected by the corporation. The Bank is likely to suffer a loss of substantial amount.

ARTICLES OF CHARGES

By accepting guarantee of defaulter borrowers and close relatives of the borrower, you have been negligent and acted in a manner unmindful of

the Bank's interests and exposed the Bank to grave risk of loss. By not regulating the drawings with Drawing Powers you have disregarded the Bank's instructions. You have acted in a manner unbecoming of a Bank Official. In the above you have contravened Rules Nos. 50(1) and 50(4) of the State Bank of India Officers Service Rules governing your services in the Bank.

STATEMENT OF ALLEGATIONS

6. A Cash Credit Limit of Rs.20,000/- was sanctioned to M/s. Mahavir Plastic Industries Prop. Shri Narendra Chaturvedi on 2.12.87. You recommended to enhance the existing cash credit limit of Rs.20,000/- to Rs.50,000/- on 1.4.88 despite knowing well that the account of the unit was running highly irregular. You allowed overdrawings upto Rs.37,723=50 unauthorizedly against the sanctioned limit of Rs.20,000/-. Thus, the limit was enhanced to cover the overdrawings. You further allowed overdrawings and outstandings reached upto Rs.95,777=90 against the enhanced limit of Rs.50,000/-. The irregularities were not reported to Controlling Authority. The drawings in account were not regulated with DP/Stock Statement. You also accepted the guarantee of Shri Umashankar Chaturvedi who is the father of Shri Narendra Chaturvedi Prop. Of M/s. Mahavir Plastic Industries. The credit facility sanctioned to Shri Uma Shankar Chaturvedi in the name of M/s. K.L. Chaturvedi and sons was running highly irregular at the time, his guarantee was accepted. Outstandings of Rs.1,05,054=20 in Cash Credit Account of M/s. Mahabir Plastic Industries and Rs.3,77,735=87 in Cash Credit Account of M/s. K.L. Chaturvedi & Sons are doubtful of recovery. Thus, you exposed the Bank to grave risk of loss.

ARTICLES OF CHARGES

By allowing overdrawings and not obtaining controlling Authority's approval, you have exceeded to your authority. By no regulating the drawings by DP/Stock Statements you have violated the Bank's instructions. By accepting guarantee of defaulter borrower and enhancing the limit to regularize the overdrawings permitted, you have been grossly negligent and acted in a manner unmindful of Bank's interests. Your acts are unbecoming of Bank official. In the above you have contravened Rules Nos. 50(1) and 50(4) of the State Bank of India Officers Service Rules governing your services in the Bank.

STATEMENT OF ALLEGATIONS

7. You have processed/recommended for sanction of credit facilities to M/s. Poonam Metal Industries (Cash Credit limit of Rs.50,000/- sanctioned on 4.2.88) and M/s. Pankaj Metal Industries (Cash Credit limit of Rs.1.60 lacs and Term Loan of Rs.0.60 lac sanctioned on 14.5.88). The proprietors

are father and son in relation. Both the units existed in one premises. No distinction was made in the assets belonging to each unit. You accepted guarantee of Smt. Tara Agrawal w/o Shri Rameshwar Agrawal proprietor of M/s Poonam Metal Industries in both the accounts instead of insisting for independent third party guarantee. You did not obtain any collateral security to cover the advances granted to M/s Pankaj Metal Industries. Opinion reports compiled on one of the guarantor Smt. Tara Agrawal on 4.2.88 and 14.5.88 reveals that her worth has been worked out to Rs.1.5 Lacs and Rs. 3.00 Lacs respectively i.e.. 100% increase in the worth within a short period of three months, which indicates a casual approach exhibited by you in compiling the opinion report.

ARTICLES OF CHARGES

By recommending credit facilities to the two units owned by the father and son housed in same premises without any distinction of assets you have facilitated the units for diversion/misutilization of loan amounts. By accepting guarantee of wife/mother of the proprietors of the two firms you have acted detrimental to the Bank's interests. By increasing worth of the same guarantor within a short period of three months by 100% you have exhibited gross negligence in performing your duties as Field Officer. In the above you have contravened Rules Nos.50(1) and 50(4) of the State Bank of India Officers Service Rules governing your services in the Bank."

From the aforesaid allegations levelled against the petitioner in the charge-sheet, it would be seen that the main allegations against the petitioner pertain to irregularities committed by him in the matter of processing the cases for grant of loan without following the conditions stipulated in the letter sanctioning loan, as ordered by the competent authority.

5. Shri Vijay Nayak, learned counsel for the petitioner, during the course of hearing made submissions mainly with regard to two grounds. The first ground of challenge made by him was to the effect that petitioner had submitted an application seeking grant of 51 documents for his defence. By inviting my attention to the list of documents submitted by the petitioner, as is indicated in Annexure P/9 marked as Exhibit DE/1 in the enquiry proceedings, Shri Vijay Naik submitted that the documents requested for by the petitioner were not supplied and the petitioner was compelled to defend himself without supply of the relevant documents, sought for by him. It was the case of the petitioner that most of the documents sought for by the petitioner, as indicated in the list submitted by him, were not supplied, this caused serious prejudice to the petitioner in the matter of defending himself and, therefore, it is argued that the entire action stands vitiated on the ground of denial of proper opportunity of defence, due to non-supply of the documents. Shri Vijay

Naik, learned counsel, emphasized that the enquiry officer while recording the finding at many places, particularly in pages 22, 26 and 27 of his finding – Annexure P/2, has referred to instructions laid down, but the bank's instructions referred to by the enquiry officer were never supplied to the petitioner. Emphasizing that action of the authorities concerned in not supplying the relevant documents and holding the petitioner guilty, without supply of these documents, is unsustainable, interference in the matter is sought for.

6. The **second** ground urged was that the finding of the enquiry officer is perverse, defence and objection of the petitioner justifying his action is not properly considered by the enquiry officer and, therefore, the entire inquiry stands vitiated. By taking me through some of the findings recorded by the enquiry officer with regard to allegations contained in Charge Nos. 1, 2 and 3, Shri Vijay Nayak, learned counsel, tried to emphasize that the findings recorded with regard to these charges are perverse and cannot be accepted.

7. Accordingly, even though various grounds are stated in the writ petition, but during the course of hearing the only two grounds urged were as indicated hereinabove i.e. **first**, non supply of important documents, as prayed for by the petitioner vide list – Annexure P/9; and, **second**, perversity in the finding of enquiry. Apart from the aforesaid two grounds, Shri Vijay Nayak during the course of arguments tried to emphasize that the enquiry is not properly conducted, but no specific instance with regard to procedural irregularity in the conduct of enquiry is pointed out. Placing reliance on the judgment in the case of *Government of AP and others Vs. A. Venkata Raidu,* (2007) 1 SCC 338, Shri Vijay Nayak argued that the enquiry stands vitiated because the material used in the enquiry particularly copies of the circular and instructions are not supplied to the petitioner. Referring to paragraph 9 of the aforesaid judgment, Shri Nayak submits that as documents sought for by the petitioner are not supplied, the inquiry stands vitiated.

8. That apart, placing reliance on another judgment in the case of *Managing Director, ECIL, Hyderabad and others Vs. B. Karunakar and others,* (1993) 4 SCC 727, learned counsel argued that findings of the enquiry officer and acceptance of the same by the disciplinary authority is unsustainable and, therefore, the entire action stands vitiated.

9. Shri Akash Choudhary, learned counsel for the respondents, refute the aforesaid and by placing on record the entire enquiry proceedings and by taking me through the enquiry report and the findings, so also the procedure followed by the enquiry officer, emphasized that in the two lists submitted by the petitioner, various documents were summoned. In the first list submitted, petitioner had sought for 51 documents. Referring to the proceedings of the enquiry and the details in the regard available in the proceedings from 23.7.96 onwards upto the conclusion and the final action taken by the enquiry officer in this regard on 7.10.97, vide

Annexure R/1, Shri Akash Choudhary submitted that all the relevant documents were supplied to the petitioner. As far as the additional documents sought for by the petitioner vide second list is concerned, Shri Choudhary submitted that all the documents have been supplied to the petitioner. It was emphasized by Shri Choudhary that the second list submitted by the petitioner consisted of about 22 documents, which is available in the proceedings dated 2.9.96. In the proceedings held subsequently, each and every document is taken note of and appropriate orders passed with regard to supply of these documents. Shri Choudhary submitted that all the relevant and material documents available were supplied to the petitioner. Except for contending that certain circulars, instructions and documents were not supplied, Shri Choudhary emphasized that the petitioner has not given any particular instance or details of the documents, which were not supplied and as he has not demonstrated the prejudice caused to him due to non-supply of the documents, it is argued by Shri Choudhary that mere vague allegation that the documents were not supplied is not enough to hold the entire action to be vitiated. However, taking me through the evidence of PW-1 recorded in the enquiry i.e.. of one Shri Vinod Rawat, the then Branch Manager of Sarkanda Branch, and the documents available on record, which were produced in the enquiry, Shri Choudhary argued that this is a case were the allegations and the findings recorded are based on documentary evidence, and as all the relevant documents are available on record, no case is made out for interference in the matter.

10. Emphasizing upon the limited power of interference available to this Court in such matters, Shri Choudhary, learned counsel, submitted that no case is made out for interference on the grounds raised in this petition. In support of his contention he invites my attention to a judgment of the Supreme Court, in the case of *U.P. State Textile Corporation Limited Vs. P.C. Chaturvedi and others*, (2005) 8 SCC 211, to emphasize that relevancy of the documents, prejudice caused to the employee and the difference it would make to the ultimate finding, having not been demonstrated, therefore, on the grounds raised in this petition no case is made out for interference.

11. Further, placing reliance on another judgment of the Supreme Court, in the case of *Indian Oil Corporation and another Vs. Ashok Kumar Arora*, (1997) 3 SCC 72, Shri Choudhary emphasized that the scope of judicial review laid down by the Supreme Court as indicated in this judgment does not permit this Court to interfere in the matter. Accordingly, contending that on the grounds raised in this petition, no case is made out for interference, Shri Choudhary seeks for dismissal of this petition.

12. Having heard learned counsel for the parties at length and on consideration of the rival contentions, this Court is of the considered view that the following questions arise for consideration in this matter:

(i) The first question would be as to whether documents sought for by the petitioner were supplied and if not, what is the effect of the same on the final outcome of the departmental proceedings.

(ii) The second question that arises for consideration is with regard to perversity, if any, in the findings recorded by the enquiry officer.

That apart, as the matter pertains to disciplinary action taken against the petitioner on the basis of a finding of guilt recorded in the departmental enquiry, it may be appropriate to consider whether the procedure undertaken in the departmental enquiry meets the requirement of being in accordance to the principles of natural justice, as no statutory rule or regulation in the matter of conducting the enquiry or its breach or violation is brought to the notice of this Court, during the course of hearing of this writ petition.

13. Before adverting to consider the two grounds i.e.. Grounds No.(i) and (ii), as indicated hereinabove, it would be appropriate to consider the procedure followed in the departmental enquiry.

14. From the records, it is seen that after petitioner had denied the charges levelled against him, the competent authority i.e... the Dy. General Manager, who is the disciplinary authority, appointed an officer of the rank of Chief Manager as enquiry officer. Initially the enquiry was conducted by one Shri S.K. Chopra, but due to his transfer one Shri G.L. Nafde, Chief Manager (Enquiry), local Head Office, Bhopal proceeded with the enquiry and submitted his finding, which was forwarded to the petitioner vide Annexure P/2. The first date of enquiry was fixed on 23.3.96, at Sarkanda Branch. On the said date, the enquiry officer Shri S.K. Chopra; the presenting officer Shri S.V.B.S. Sharma; and, the petitioner Shri S.B. Mukherjee, were present. The enquiry officer read out the charge sheet to the petitioner, petitioner accepted receipt of the said charge sheet and denied the charges levelled against him. Thereafter, the enquiry officer asked the petitioner whether he wants the services of a defence counsel to assist him in the enquiry. To this the petitioner replied by stating that he will defend his own case. The presenting officer was thereafter asked to proceed with the case. The presenting officer produced 105 documents in two sets. One set of these 105 documents were supplied to the petitioner, who accepted the same as per the list. After submission of the list, the presenting officer stated that he has brought a file containing the original documents and, therefore, petitioner can verify the documents given to him from the original file. The original file was thereafter handed over to the petitioner, the petitioner verified the documents and thereafter all these documents were taken on record as Prosecution Exhibits – PEX 1 to PEX 105. Thereafter, the presenting officer stated that he would like to examine two witnesses

namely; Shri V.K. Ravat, Branch Manager; and one Shri Cherian, Field Officer in support of the case of the Bank. The matter was thereafter adjourned. The next enquiry was held on 18.6.96 and on the said date the petitioner submitted a list of 51 documents, which he wanted to be produced by the presenting officer, for his defence. The presenting officer submitted that as the list consisted of various documents, which are to be collected from the branch office, he would require some time to produce the documents. Accordingly, at the instance of the presenting officer, seeking time to produce the 51 documents demanded, the enquiry was adjourned. Thereafter, on various dates proceedings took place with regard to production of these documents and after all the documents available and relevant were produced and petitioner raised certain objections, the enquiry continued. PW-1 Shri Vinod Ravat was examined, he was cross-examined by the petitioner and thereafter in the proceedings held on 2.9.96, petitioner again sought for production of 22 documents. Most of these documents were made available and the proceedings dated 2.9.96 indicate that the documents sought for, 22 in number, were either produced or their non-availability or relevancy explained and thereafter the enquiry continued on various dates upto 2.9.96, during which period proceedings for submitting the documents demanded and cross-examination of PW-1 Shri Vinod Ravat by the petitioner were undertaken. The cross-examination of PW-1 was closed by the petitioner on 2.9.96. Thereafter, on 11.10.96, objections raised by the petitioner were considered, the enquiry officer gave his ruling on the objections, the enquiry was thereafter held on 28.12.96, 9.1.97, 30.1.97 and 18.2.97, but was adjourned because of absence of the petitioner and on one date i.e.. 9.1.97, due to absence of both the parties i.e.. the petitioner and the presenting officer. In the meanwhile, after the enquiring authority Shri S.K. Chopra was transferred vide order dated 8.3.97, Shri G.L. Naphade was appointed as enquiry officer. The enquiry was held on 14.5.97, 16.6.97 and from 9.7.97 petitioner started raising objections initially with regard to admissibility of a death certificate of one Babulal Soni, i.e... with regard to how this death certificate is to be proved. The enquiry was held on various dates upto 7.10.97, but on the question of admissibility of a death certificate, it seems that the petitioner was not satisfied with the ruling of the enquiry officer and, therefore, he protested to the same and did not lead any evidence and the enquiry officer, therefore, concluded the enquiry and submitted his finding.

15. During the course of hearing, learned counsel for the petitioner did not raise any objection nor demonstrated before this Court as to how the procedure followed in the departmental enquiry is vitiated or illegal. Infact, no objection to the manner in which the enquiry was conducted was raised at the time of hearing. The procedure followed by the enquiry officer was only objected to with reference to the action of the enquiry officer in not supplying or making available the documents as per the two lists i.e.. list of 51 documents and 22 documents respectively and

non-production of the bank's instruction and circular referred to by the enquiry officer in his finding at various places. Apart from this limited objection, no other procedural irregularity or impropriety in the matter of conducting the departmental enquiry was pointed out, nor any statutory rule or regulation shown to be violated. Even though the records indicate that petitioner was not examined and he had not produced any defence witness, but during the course of hearing by this count, no objections were raised nor any arguments advanced. That being so, it is the considered view of this Court that the procedure followed in the enquiry is proper and the only objection requiring consideration now is the two objections of the petitioner with regard to non-supply of documents and perversity of finding.

16. As far as supply of documents to the petitioner and holding the enquiry to be vitiated on that count is concerned, before examining the said question on merits in accordance to the objections raised at the time of hearing, it would be appropriate to consider the legal principle governing consideration of such an objection.

17. In the case of *State Bank of Patiala and others Vs. S.K. Sharma*, (1996) 3 SCC 364, Hon'ble Supreme Court has considered the aspect of breach of procedural provisions in the matter of conducting a domestic enquiry and after taking note of various judgments on the question, including the judgment in the case of *B. Karunakar* (supra) relied upon by Shri Vijay Nayak, the ultimate legal principle is laid down in paragraph 33 and the relevant provisions of the same reads as under:

> "33. We may summarize the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):
>
> (1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.
>
> (2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.
>
> (3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally

speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4) (a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

xxx xxx xxx xxx

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/

Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

xxx xxx xxx xxx"

(Emphasis supplied)

18. From the aforesaid principle, it would be seen that procedural provisions are bifurcated into two. One is the mandatory provision and the other is directory in nature. The mandatory provisions are to be complied with whereas the directory provisions, if said to be violated, has to be evaluated on the basis of prejudice caused to the delinquent employee. In the present case, no statutory or mandatory provision is brought to the notice of this Court on the basis of which it can be held that the documents sought for by the petitioner was to be supplied as a mandatory requirement under any statutory provision, but on the contrary it is a requirement, directory in nature and, therefore, it is a case where mere non-production of documents as claimed by the petitioner may not be enough to hold that the departmental enquiry stands vitiated. On the contrary it was incumbent on the petitioner to show as to what prejudice was caused to him for non-supply of the document concerned and in what manner the same would have affected the final outcome in the departmental proceeding.

19. This principle laid down in the case of *S.K. Sharma* (supra) is reiterated by the Supreme Court in the case of *U.P. State Textile Corporation Limited* (supra) relied upon by Shri Choudhary. It is, therefore, clear from the principles laid down by the Supreme Court that mere non-supply of the documents and its establishment ipso facto will not vitiate the entire enquiry. The enquiry would be held to be vitiated and the principles of natural justice held to be violated only if it is shown that the documents called for were relevant and their non-supply caused serious prejudice to the petitioner. It would, therefore, be appropriate to consider and apply the aforesaid principle in the facts of the present case.

20. During the course of hearing even though Shri Vijay Nayak, learned counsel for the petitioner, vehemently argued that the documents sought for by the petitioner were not supplied, particularly the circulars and instructions relied upon by the enquiry officer in his finding were not given to the petitioner, but he was unable to demonstrate before this Court by referring to any particular document as to how and in what manner non production of the document caused prejudice to him or caused impediment in defence. He was unable to show to this Court as to what was the relevancy of a particular document, how it had affected his defence and in what manner it had affected the final outcome in the departmental proceedings. It may be emphasized that except for contending that the documents were not

produced or supplied, the petitioner has failed to demonstrate and prove before this Court the prejudice caused to him by non-supply of any documents. In that view of the matter, applying the principles laid down in the case of *S.K. Sharma* (supra), the first objection of the petitioner has to be rejected on this ground alone.

21. However, having found so, this Court deems it appropriate to proceed and analyse as to how infact this aspect of the matter has been dealt with by the enquiry officer in the present case.

22. From the records, it is seen that initially a list of 51 documents were sought for by the petitioner. The presenting officer has dealt with each and every aspect of the documents requested to be produced and the proceedings of the enquiry indicate that reply to the request made by the petitioner with regard to each of the 51 documents is available in the enquiry file. If the proceedings of the enquiry from 23.7.96 are scrutinized and if a gist of the same available on record as Annexure R/1 is taken note of, it would be seen that most of the documents sought for by the petitioner have been supplied and made available to the petitioner. If the list of documents submitted by the petitioner and the proceedings of the enquiry are taken note of, it would be seen that most of the documents sought for by the petitioner were either available in the 105 documents produced by the presenting officer or these documents were made available to the petitioner. For example – the first document sought for by the petitioner related to orders placed by M/s Shri Ram Metal Corporation, the list Annexure R/1 indicates that it was supplied and it was enclosed with Annexure R/1 dated 7.10.97. Annexure R/1 dated 7.10.97 is a document showing supply of documents to the petitioner from the list submitted by him and the reasons given, in case the document is not supplied. A scanning of the aforesaid i.e... Annexure R/1 indicates that most of the documents were supplied and in some cases it is indicated that no such document is available in the branch concerned. As already indicated hereinabove except for contending that the documents were not supplied to the petitioner, reference to a specific document was not made and the fact of its non-supply was not specifically pointed out during the course of hearing, the only specific instance of document not supplied was with regard to bank's instructions in the matter of granting loan to family members and acceptance of guarantee. In the list submitted by the petitioner on 18.6.96, these documents are indicated at Serial Nos. 48, 49, 50 and 51. During the course of hearing Shri Vijay Nayak, learned counsel, had only made specific reference to these four documents and it was said that the instructions and circulars were not supplied. As far as these four documents are concerned, proceedings of the enquiry held on 31.6.98 indicate that while dealing with question of supplying documents and while making available the documents to the petitioner and also while indicating that some of the documents are not available, specific reference is made to the four documents and circulars indicated at Serial Nos. 48 to 51, and if the petitioner's argument to the enquiring authority while deliberating

on certain statements made by the Presenting officer and the witnesses are evaluated i.e... statement of PW-1 V.K. Ravat, the petitioner has given the following statement, which on reproduction reads as under:

> "CSO to IA - My submission – contention of the prosecution is not in consonance with the Bank's instructions as the Defence demanded vide item No.48 to 51, hence the submission of the prosecution in filing the Bank's laid down instructions is not acceptable."

If the aforesaid statement of the petitioner made to the enquiry officer is taken note of, it would be seen that his argument was that the contention of the Presenting Officer is not in line to that of the Bank's instruction, as defence has demanded vide item Nos.48 to 51. If the petitioner is able to make a specific statement that the contentions of the prosecution is not as per Bank's instructions, then a presumption has to be drawn that the documents were made available to the petitioner or that he was aware of these documents. Unless these documents were known to the petitioner or available, petitioner would not be able to make a contention that prosecution's assertion that petitioner has failed to follow bank's laid down procedure, is not acceptable. It is, therefore, clear that the arguments advanced by Shri Vijay Nayak with regard to non-production of the bank's circular is not correct. That apart, if the reference made by the petitioner to the so-called circulars and documents by referring to pages 22, 26, 27, 30, 31 and 33 of findings of Enquiry Officer are taken note of, it would be seen that reference made to the mandatory important instructions, in page 22 is to the instructions contained in the sanction letter No.2355 dated 12.4.88 with reference to allegation No.1. This instruction does not refer to any other Bank's instructions or circular, but the instructions contained in the sanction letter issued by the Zonal Office. Similarly, the bank's instructions referred to in page 26 pertains to the bank's instructions as was produced by the presenting officer vide PEX No.2, which is the drawing power so also to Exhibits 106 and 107. The enquiry officer has referred to these bank instructions as recorded above, meaning thereby the bank's instructions referred to by PW-1 and recorded in the preceeding paragraph. Thereafter, the documents referred to in page 27 is the instructions issued to the petitioner, which is said to be violated with regard to charge No.1. Again in page 29, what is referred to is the instructions conveyed in the sanction letter by the Zonal Office. Similar is the breach pointed out in page 30, with regard to not obtaining documents in accordance to the instructions contained in the sanction letter. In page 31, reference is made to certain instructions in the SEEUY Scheme and the instructions are reproduced by referring to them as under:

> "That apart, the entire SEEUY Scheme is brought on record as PEX-52."

Again, the instructions referred to at page 33 of the enquiry officer's finding is with regard to breach of the instructions contained in the sanction letter and in page 34 after taking note of the procedure followed and after taking note of the procedure and the instructions contained in PEX 31, it is observed by the enquiry officer that the petitioner has not adhered to Bank's financial discipline. Again in page 35, reference is made to Bank's instruction, which is not followed by the petitioner in the matter of granting benefit to defaulter borrowers.

23. On the basis of the material available on record, if the objections raised by the petitioner with regard to non-supply of Bank's instructions are evaluated, two important features can be noticed. The first is with the so-called Bank's instructions referred to most of the time by Shri Vijay Nayak pertains to instructions contained in the sanction letter forwarded by the competent authority to the petitioner. If the statement of allegations as reproduced in paragraph 4, hereinabove, are taken note of, it would be seen that in each of the statement of allegations and charges, petitioner is alleged to have violated zonal office's sanction or instruction with regard to grant of loan. That being so, the enquiry officer in most of the place refers to breach of instructions as per the sanction granted and not to any instructions available in any particular circular. It is only at two places pertaining to breach of Bank's financial discipline and instructions to defaulting borrowers that general instructions are referred to, but petitioner is unable to demonstrate as to how non-production of these documents causes prejudice to the petitioner. If the contention of the petitioner to the enquiry officer with regard to his action being in consonance with the Bank's instructions are taken note of, then it is a case where petitioner has merely tried to allege non-production of certain documents, but has failed to prove how these documents were relevant and how their non-production makes or causes any prejudice to him and how they materially affect the final outcome of the enquiry.

24. In that view of the matter as far as the first ground raised by the petitioner with regard to breach of the principles of natural justice in the matter of non-supply of documents are concerned, this Court is of the considered view that most of the documents sought for by the petitioner were either produced and made available to the petitioner and those which were not produced were either not available or were not at all relevant. However, for the sake of repetition, it may be taken note of that petitioner has not pointed out breach in the matter of supplying documents with reference to any particular document and the prejudice caused to him. That being so, merely on the basis of vague and unspecified allegations made regarding non-supply of documents, interference into the matter is not warranted.

25. Judgments in the case of *A. Venkata Raidu* (supra) and *B. Karunakar* (supra), relied upon by Shri Vijay Nayak, will not help the petitioner. In the case of

A. Venkata Raidu (supra), the principle laid down is the general principle with regard to supply of documents and the resultant violation of the principles of natural justice. However, the said judgment has to be considered in the present case keeping in view the principles laid down in the case of *S.K. Sharma* (supra) and the other cases where mere breach is held not to be fatal, but the principle laid down is that in case of directory provisions the breach complained of should result in prejudice caused, which has to be established. Similarly, the case of *B. Karunakar* (supra) will also not apply in the facts and circumstances of the present case, as the petitioner has not demonstrated the prejudice caused to him due to breach alleged in the matter of conducting departmental enquiry. It is the considered view of this Court that the judgments relied upon by Shri Vijay Nayak in this regard will not apply in the facts and circumstances of the present case.

26. As far as the second ground urged by Shri Vijay Nayak with regard to perversity in the finding of enquiry officer is concerned, the said question has to be considered in the backdrop of the powers of judicial review available to this Court under Article 226 of the Constitution of India. In this regard, it would be appropriate to consider the scope of judicial review in the matter.

27. In the case of *Government of Tamil Nadu and another Vs. Rajapandian*, AIR 1995 SC 561, it has been held that an administrative Tribunal exercising jurisdiction under section 14 of the Administrative Tribunal's Act does not sit over the decision of the disciplinary authority as if it is exercising appellate jurisdiction. Again in the case of *B.C. Chaturvedi Vs. Union of India and others*, (1995) 6 SCC 749, in paragraphs 12 and 13, the scope of judicial review is crystallized in the following manner:

> "12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in eye of the Court. When an inquiry is conducted on charges of a misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice be complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent office is guilty of the charge. The Court/Tribunal in its

power of judicial review does not act as appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry of where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has co-extensive power to reappreciate the evidence or the nature of punishment. In a disciplinary inquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In *Union of India v. H. C. Goel* (1964), (AIR 1964 SC 364), this Court held at page 728 (of SCR), that if the conclusion, upon consideration of the evidence, reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued."

(Emphasis supplied)

28. Thereafter, in the case of *State of TN Vs. Thiru K.V. Perumal and others,* (1996) 5 SCC 474, the principles laid down in the case of *S.K. Sharma* (supra) is followed and the following is laid down:

> "4. ..... The test to be applied in this behalf has been set out by this Court in *State Bank of Patiala Vs. S.K. Sharma,* 1996 (3) SCC 364. It was the duty of the respondent to point out how each and every document was relevant to the charges or to the enquiry being held against him and whether and how their non supply has prejudiced his case. Equally, it is the duty of the Tribunal to record a finding whether any relevant documents were not supplied and whether such non-supply has prejudiced the defendant's case. Since this has not been done by the Tribunal in this matter, it has to go back for a rehearing."

29. Finally, in the case of High Court of *Judicature at Bombay Vs. Shashikant S. Patil and Another*, (2000) 1 SCC 416, it has been held by the Supreme Court that the scope of judicial review available to the High Court under Article 226 of

the Constitution is limited to the purpose of considering as to whether the procedure followed is proper, fair and reasonable. The decision itself is not subject to judicial scrutiny, as if the High Court exercises appellate jurisdiction.

30. On a consideration of the principles laid down by the Supreme Court in the various judgments with regard to scope of judicial review, it would be seen that the High Court does not sit over the decision of the disciplinary authority as if it is exercising appellate jurisdiction, the scope of judicial review is very limited, it is only a judicial review of the decision making process and not the decision itself on merit. If the decision making process is found to be just, fair and reasonable, commensurate with the principles of natural justice, judicial review into the finding, re-appreciation of evidence and substitution of the same by an independent finding is not permissible.

31. If that be so, the second question with regard to perversity in the finding has to be evaluated keeping in view the aforesaid limited scope of interference available to this Court. Except for contending that defence of the petitioner is not taken note of, petitioner was unable to demonstrate before this Court as to how and in what manner the findings of the enquiry officer is perverse. The allegations against the petitioner pertain to not following the instructions of the Zonal office in the matter of granting loan, evaluating documents for grant of loan and taking equitable mortgage or guarantee for the loan sanctioned. Even though oral statement of PW-1 Vinod Ravat is recorded, a perusal of his statement indicates that he has only produced various documents to demonstrate that the instructions given in the sanction granted were not followed by the petitioner and has explained procedure followed by the petitioner to point out the breach committed. The procedural irregularity committed by the petitioner is demonstrated by the Presenting Officer and the Enquiry Officer after evaluating the same has recorded the finding to hold that the petitioner has not followed the instructions given to him, for grant of loan. For example – with regard to the allegations as contained in charge No.1, it was alleged against the petitioner that he permitted equitable mortgage of a house as collateral security with regard to loan granted to M/s Shri Ram Metal Corporation and for the said purpose one Shri Babulal Soni was presented as guarantor. It is found that Shri Babulal Soni had already expired in the year 1966 and, therefore, without verifying the actual identity of the guarantor, petitioner has accepted the equitable mortgage presented in the name of a dead person by an impostor. Similar irregularity has been committed by the petitioner in granting loan to some members of the family when they were not entitled to overdraft facility or certain other benefits. He was also found to have permitted certain account holders like J.K. Saraf to operate the loan account without authority of the firm, in whose name the loan was sanctioned. Infact the finding of the enquiry officer in the present case is based on documentation of the procedure followed for grant of loan and the irregularities committed by the petitioner in the same. The enquiry officer, the

disciplinary authority and the appellate authority have concurrently recorded the finding that the petitioner has failed to follow various instructions and laid down procedure.

32. This Court exercising limited jurisdiction in the absence of specific grounds or facts being demonstrated cannot hold that the findings are perverse. It is a case where on the basis of documents made available, a reasonable finding is recorded by the authorities concerned and the petitioner is compulsorily retired. This Court cannot reappreciate the entire material and hold that the findings are not correct and, therefore, substitute the finding of the authorities with the finding of this Court. This is not the scope and power conferred on the High Court under Article 226 of the Constitution. This Court can only interfere in the matter if from the face of the record it is established that the findings recorded by the enquiry officer, the disciplinary authority and the appellate authority are perverse to such an extent that they are not based on any material available on record, are based on extraneous consideration or recorded without any evidence available on record i.e... the finding has to be such that no evidence is available to record such a finding and that no prudent person would record such a finding. It is only under these circumstances that a writ court can interfere in the matter. In the present case, the finding of the enquiry officer are based on the documents pertaining to sanction and payment of loan and nothing is brought to the notice of this Court on the basis of which it can be held that the findings are perverse.

33. It may be emphasized that during the course of hearing of this writ petition, at no point of time any perversity in the finding was demonstrated with reference to a particular fact or allegation or imputation. Only by reading certain portions of the enquiry officer's finding, it was argued that the findings are perverse, but the perversity, actual in nature with reference to a particular fact or documents and material available on record was not brought to the notice of this Court. That being so, this Court has to hold that the perversity alleged with regard to the findings of the enquiry officer is not established from the material available on record and, therefore, on the second ground urged also, interference into the matter is not called for considering the limited jurisdiction of interference available to this Court in such matters.

34. Finally it can be concluded that in this case petitioner has been compulsorily retired by way of punishment after conducting a departmental enquiry against him in which the charges are proved in a properly conducted departmental enquiry and, therefore, this Court does not find any ground to interfere in the matter.

35. Accordingly, finding no merit, this petition is dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 413
WRIT PETITION
Before Mr. Justice Arun Mishra & Mr. Justice S.C. Sinho
14 December, 2009 *

GULAB CHANDRA VISHWAKARMA ... Petitioner
Vs.
SOUTH EASTERN COALFIELDS LTD. & ors. ... Respondents

Service Law - *Stay of departmental enquiry during pendency of criminal case - There is no rule of automatic stay of D.E. during pendency of criminal proceeding - Only where complicated questions of law and facts are involved, discretion may be exercised - Since employee has disclosed his defence and charge has been framed in criminal case and evidence has been started in D.E. - No prejudice is going to be caused to employee in D.E. - Application for stay rightly rejected - Petition dismissed.* (Paras 6 to 8)

सेवा विधि – दाण्डिक मामले के लम्बित रहने के दौरान विभागीय जाँच की रोक – दाण्डिक कार्यवाही के लम्बित रहने के दौरान विभागीय जाँच की स्वतः रोक का कोई नियम नही है – केवल वहाँ, जहाँ विधि और तथ्य के जटिल प्रश्न अन्तर्वलित हैं, विवेकाधिकार का प्रयोग किया जा सकता है – चूंकि कर्मचारी अपनी प्रतिरक्षा प्रकट कर चुका है और दाण्डिक मामले में आरोप विरचित किया जा चुका है और विभागीय जाँच में साक्ष्य प्रारम्भ हो चुकी है – विभागीय जाँच में कर्मचारी को कोई पूर्वाग्रह कारित नही होने वाला है – रोक का आदेश उचित रूप से नामंजूर किया गया – याचिका खारिज।

Cases referred :
(1999) 3 SCC 679, (2006) 5 SCC 446, (2008) 1 SCC 650.

K.C. Ghildiyal, for the petitioner.
Anoop Nair, for the respondents.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–Writ petition has been filed as against an order passed by the trial Court which has been affirmed by the appellate Court refusing to grant injunction restraining the departmental enquiry during pendency of the criminal case.

2. Plaintiff/petitioner has filed the suit. It is averred that he was employed as Senior Clerk, his duty was to clear the medical bills. On enquiry, it was found that payment was cleared of medical bills of 600 persons without following the due process. Fraud was played intentionally and financial loss was caused to the employer. The act amounted to gross indiscipline and misconduct. Earlier petitioner had travelled to this Court seeking decision on the question whether departmental enquiry could have been proceeded during pendency of criminal case under Sections

*W.P. No.10439/2007 (Jabalpur)

420,467,468 IPC registered at Crime No.105/05. The prayer was rejected by the department hence in civil suit which has been filed interim injunction was prayed on the ground that the charges relate to the same matter in both the cases. Application was resisted by the employer on the ground that High Court has also not passed any order staying the departmental enquiry, direction was given only to consider the prayer. Scope of criminal proceeding as well as that of departmental enquiry was different. The trial Court vide Order dated 6.3.07 held that no prima facie case was made out so as to stay the departmental enquiry. Order has been affirmed by the appellate Court vide Order dated 16.7.07, hence this writ petition has been preferred.

3. Shri K.C.Ghildiyal, learned counsel appearing for petitioner has submitted that considering the facts and circumstances of the case during pendency of the criminal case, the departmental enquiry ought to have been stayed. However, he has conceded that except framing of the charges, nothing has happened in the criminal case so far, evidence has not yet commenced, whereas in departmental enquiry three witnesses have been examined. Learned counsel has prayed for staying of the departmental enquiry during pendency of the criminal case as petitioner's case may be prejudiced in case he discloses the defence.

4. Shri A. Nair, learned counsel appearing for respondents has supported the orders.

5. After hearing learned counsel for the parties, for various reasons, we are not inclined to stay departmental enquiry due to pendency of the criminal case, firstly the scope of departmental enquiry is different than the criminal case, purpose of the departmental enquiry is also different. Criminal case is not going to come to an end for more than a decade, nothing has happened so far, evidence has not yet been recorded.

6. The Apex Court in *Capt. M.Paul Anthony vs. Bharat Gold Mines Ltd. And another* (1999) 3 SCC 679 has culled out the principles by which the Courts are to be governed in the matter of grant of stay of departmental proceeding. It has been observed that proceedings in a criminal case and departmental proceedings can go on simultaneously as there is no bar in their being conducted simultaneously, though separately. Only if there are complicated questions of law and facts, it may be desirable to stay the departmental proceedings. However, said factor cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that that departmental proceedings cannot be unduly delayed, the departmental proceedings, even if they were stayed on account of pendency of criminal case,can be resumed and proceeded with, so as to conclude them at an early date so that if the employee is found not guilty, his honour may be vindicated and in case he is found guilty, administration may get rid of him at the earliest. In the instant case, the petitioner has reached to the verge of

superannuation and the criminal case may not come to an end for about a decade. Departmental enquiry cannot be kept pending in such circumstances till eternity. Both the Courts below have exercised the discretion in not granting the injunction. There is no jurisdictional error in the orders. Both the Courts below have rightly found no prima facie case in favour of petitioner. It is not invariable rule to stay the departmental enquiry. Scope of interference in the discretionary orders passed under Order 39 Rule 1-2 CPC in writ jurisdiction is narrow.

7. In *G.M.Tank vs. State of Gujrat and others* (2006) 5 SCC 446 there was acquittal in criminal trial, departmental enquiry and criminal proceedings were based on same set of facts, charges, evidence and witnesses. No evidence against the employee to hold him guilty was adduced, employee was honourably acquitted in the criminal trial during pendency of proceedings challenging dismissal, finding to the contrary recorded in departmental enquiry was set aside. This stage has not reached in the instant case so far. Case cannot be taken to be an authority that during pendency of criminal case departmental enquiry should be stayed.

8. The Apex Court in *Indian Overseas Bank, Annasalai and another vs. P.Ganesan and others* (2008) 1 SCC 650 observed that there is no rule of automatic stay of departmental enquiry during pendency of criminal proceedings. Only where complicated question of law and facts were was involved, discretion may be exercised. In the instant case, it is not shown by the petitioner's counsel that complicated question of law and facts are involved in the instant case. Charge has already been framed. The employee has disclosed his defence by refuting the charge in toto. Thus, in our opinion no prejudice is going to be caused while conducting the departmental enquiry.

9. Resultantly, we find no merits in the petition, same is hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2010] M. P., 415
WRIT PETITION
Before Mr. Justice K.K. Lahoti & Mr. Justice Alok Aradhe
4 January, 2010*

YOGENDRA KUMAR & ors. ... Petitioners
Vs.
PAVAN KUMAR JAIN & anr. ... Respondents

Civil Procedure Code (5 of 1908), Order 18 Rule 12 - *Scope* - *Scope of Order 18 Rule 12 is that the demeanour can be recorded when the witness is under examination and not at a subsequent stage.* (Para 6)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 18 नियम 12 – विस्तार –, आदेश

*W.P. No.13812/2009 (Jabalpur)

18 नियम 12 का विस्तार यह है कि भावभंगी अभिलिखित की जा सकती है जब साक्षी परीक्षा के अधीन हो न कि किसी पश्चात्वर्ती प्रक्रम पर।

Cases referred :

AIR 1957 AP 441.

S.K. Dwivedi, for the petitioners.

ORDER

This petition is directed against an order dated 5.11.2009 by which the trial Court rejected an application filed by the petitioners under Order 18 rule 12 C.P.C.

2. It is submitted by Shri Dwivedi that the trial Court ought to have allowed the application filed by the petitioners under Order 18 rule 12, C.P.C to record the demeanour of the witness during the course of his examination.

3. From the perusal of the record, we find that the witness, Pawan Kumar Jain, plaintiff was examined on 15.9.2009 and in respect of his demeanour during the course of cross-examination, the petitioner moved an application on 24.9.2009 to record his demeanour which has been rejected by the trial Court by the impugned order.

4. The learned counsel for the petitioner submitted that the demeanour of the witness ought to have been recorded by the trial Court by allowing the application. In support of his contention, he referred Single Bench judgment of Andhra Pradesh High Court In *re. Venkatarama Iyer appellant* (AIR 1957 AP 441) and submitted that the trial Court erred in rejecting the application filed by the petitioners.

5. From the perusal of the impugned order, we find that the witness was examined on 15.9.2009 and the application was moved on 24.9.2009 i.e. nine days after his examination. The trial Court while rejecting the application observed in the order that the demeanour of the witness was already recorded by the trial Court. Though the learned Counsel for the petitioners disputed this position and submitted that no such demeanour was recorded by the trial Court, but from the perusal of the statement of witness Pawan Kumar Jain in para 23 of his statement, we find that the trial Court recorded the event occurred in the Court . The petitioners,who were insisting to record demeanour of witness, ought to have insisted then and there during the course of examination of the witness and not subsequently. If some derogatory remark was made by the witness to the counsel of the petitioners, even then such an application ought to have been filed on the very same day, but such recourse was not taken.

6. Order 18 rule 12, C.P.C provides that the Court may record such remarks as it thinks material respecting the demeanour of any witness while the witness is under examination. The scope of Order 18 rule 12,C.P.C is that the demeanour can be recorded when the witness is under examination and not at a subsequent stage. At this stage, after a period of 4 months, if such prayer is allowed, naturally

the evidence is to be recorded in respect of event of 15.9.2009 which is not permissible under Order 18 rule 12 C.P.C.

7. In *Venkatarama Iyer* (supra), a learned Single Judge of Andhra Pradesh High Court considering the question of remarks on demeanour of witness held in para 11 of the judgment that "The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination. It is a salutary rule that the facts observed by a trial Judge regarding the demeanour of a witness while in the witness box should be immediately placed on record by the judge,especially in cases involving the liberty of the citizen.

8. The learned Judge further held that the omission may be immaterial where as observed by Lord Atkin during the arguments in *Seethalakshmi Ammal vs. Venkatasubramanian* AIR 1930 PC 170, the judge writes his judgment a very few days after the close of the evidence and before his recollection of the witnesses' demeanour in the box has become dim.It was held that the demeanour of the witness is to be recorded while the witness is under examination. But at any subsequent stage by filing of an application such demeanour can not be recorded. Apart from this, the Order 18, rule 12 C.P.C. does not provide for holding of an inquiry in respect of the demeanour of witness transpired during the course of examination.

9. In view of the aforesaid, the trial Court has not committed any error of jurisdiction in rejecting the application filed by the petitioners on 24.9.2009 for recording the demeanour of the witness who was examined on 15.9.2009. This petition is without merit and is dismissed with no order as to cost.

Petition dismissed.

I.L.R. [2010] M. P., 417
WRIT PETITION
Before Mr. Justice R.S. Jha
20 January, 2010*

DWARKA PRASAD KASHYAP ... Petitioner
Vs.
STATE OF M.P. & ors. .... Respondents

Service Law - *Petitioner was terminated on account of pendency of criminal case - Thereafter, he was acquitted and order of acquittal was affirmed - Application for reinstatement filed on 11.10.1980 - Re-appointed on 22.07.1996 with the direction that intervening period has been treated as break in service - Held - Delay in passing order of reinstatement was on the part of authorities & State - Petitioner shall be deemed to have been reinstated in service on his acquittal and the entire period shall be counted for the*

*W.P. No.13843/2003 (Jabalpur)

purpose of pension and entitled for 25% back wages for the period 11.10.1980 to 22.07.1996. (Paras 6 to 9)

सेवा विधि – याची को दाण्डिक मामला लम्बित होने के कारण बर्खास्त किया गया – बाद में उसे दोषमुक्त किया गया और दोषमुक्ति के आदेश की पुष्टि की गयी – पुनर्नियुक्ति का आवेदन 11.10.1980 को पेश किया – 22.07.1996 को इस निदेश के साथ पुनर्नियुक्त किया गया कि मध्यवर्ती कालावधि को सेवा में व्यवधान माना जाए – अभिनिर्धारित – पुनर्नियुक्ति का आदेश पारित करने में विलम्ब प्राधिकारियों और राज्य ने किया था – याची को उसकी दोषमुक्ति पर सेवा में पुनर्नियुक्त होना समझा जायेगा और पेंशन के प्रयोजन के लिए सम्पूर्ण कालावधि की गणना की जायेगी और 11.10.1980 से 22.07.1996 की कालावधि के लिए 25 प्रतिशत पिछले वेतन का हकदार है।

Cases referred :

(1991) 2 SCC 335, (1994) Supp 3 SCC 674.

None, for the petitioner.

Rahul Jain, Dy.G.A., for the respondents.

ORDER

R.S. JHA, J. :–The petitioner has filed this petition being aggrieved by the stipulations made by the respondents in the order dated 22.7.1996 wherein although the petitioner has been reinstated on his being acquitted in the criminal case but backwages have been denied to him and the intervening period has been directed to be treated as break in service.

2. The brief facts leading to the filing of the present petition are that the petitioner at the relevant time was working as an Assistant Teacher in the Tribal School under the Tribal Welfare Department at Balaghat having joined services on 17.3.1966. On a criminal case being registered against him under section 302 of the I.P.C. he was taken in police custody on 14.2.1972 and a criminal trial was instituted against him. On the basis of above the respondents/Department terminated the petitioner's services by order dated 26.4.1972 with effect from 17.3.72. The petitioner was ultimately acquitted in the criminal trial by the District and Sessions Judge, Balaghat by judgment dated 28.11.1972 and the appeal filed by the State against the petitioner's acquittal also suffered dismissal on 31.8.1979.

3. It is stated by the petitioner that he submitted an application for rejoining his post on 2.9.79 and thereafter repeated the same request on 1.6.80 but the respondents/ authorities did not permit him to rejoin the services. On 10.5.95 he again filed an application before the Collector. Ultimately, the State on considering his application dated 11.10.80 directed reappointment of the petitioner by order dated 22.7.96 but denied the benefit of backwages and further directed that the intervening period i.e. from the date of dismissal till the date of reappointment be treated as break in service. Being aggrieved by the aforesaid the petitioner initially approached the authorities and thereafter the M.P. State Administrative Tribunal for redressal of his grievance. The petition having been transferred to this court is being heard and decided.

4. It is submitted by the petitioner in the petition that the stipulations in the impugned order dated 22.7.96 denying backwages and treating the intervening period as break in service is contrary to law and deserves to be quashed.

5. Per contra, it is submitted by the learned Dy. Government Advocate appearing for the State that the petitioner cannot claim backwages as of right nor can he claim that he be given full benefits, moreso, in view of the fact that he was terminated on account of his conviction in a criminal case and thereafter on a sympathetic consideration has been directed to be reappointed, in such circumstances, reliefs sought by the petitioner are misconceived.

6. As is apparent from the perusal of the record, the petitioner was terminated on account of pendency of the criminal case in which he was acquitted and the order of acquittal was also affirmed in the appeal in the year 1979. It is also clear from the perusal of the impugned order that the respondents/authorities have directed reappointment of the petitioner on the basis of an application filed by the petitioner on 11.10.80 after a long lapse of 16 years. In my considered opinion as the termination of the petitioner was based on the pendency of the criminal case and his conviction therein, the petitioner is entitled to reinstatement and reappointment on his being acquitted in the criminal case as has been held by the Supreme Court in the case of *Babu Lal Vs. State of Haryana and others* 1991 (2) SCC 335 and *Sulekh Chand and Salek Chand Vs. Commissioner of Police and others* 1994 (suppl.) (3) SCC 674.

7. Though it is a settled law that such reinstatement is not automatic and on being reinstated the employer has the right to initiate departmental proceedings against the employee. In the instant case the respondents chose not to do so and on considering the application filed by the petitioner on 11.10.80 ordered his reappointment instead of reinstatement.

8. It is also evident that till the date petitioner was not acquitted and the appeal filed against acquittal was not dismissed, the termination of the petitioner was justified but the respondents/authorities on his being acquitted were required to expeditiously consider his case pursuant to the application filed by him on 11.10.80 which was not done by the authorities. In fact orders on the application filed by the petitioner on 11.10.80 were passed on 22.7.96 and therefore the delay in passing the appropriate orders of reinstatement from 11.10.80 to 22.7.96 was on the part of the authorities and State and not on the petitioner.

9. In such circumstances, the petition filed by the petitioner deserves to be and is hereby allowed. The impugned stipulations in the order dated 22.7.96 are hereby quashed and it is directed that the petitioner shall be deemed to have been reinstated in services on his acquittal and the entire period shall be counted for the purpose of pension. It is further directed that the petitioner would also be entitled to 25% backwages for the period 11.10.80 to 22.7.96.

10. The petition is accordingly allowed. There shall be no order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 420
ELECTION PETITION
Before Mr. Justice R.C. Mishra
24 December, 2009*

MUKESH NAYAK ... Petitioner
Vs.
BRIJENDRA PRATAP SINGH ... Respondent

Representation of the People Act (43 of 1951), Section 86, Civil Procedure Code, 1908, Order 7 Rule 11 - *Election Petition - Non-disclosure of cause of action - Election challenged on the ground of correctness and authenticity of counting carried out by means of EVMs - Petitioner is under obligation to demonstrate as to how EVMs could be tempered with to get desired result - No expert opinion placed on record regarding chances of misalignment of EVMs - Even if the averments made in Election Petition are taken at their face value and are accepted in entirety, no triable issue between the parties would arise in absence of complete, precise and specific pleading in respect of alleged irregularities in counting of votes through EVMs - Petition rejected.* (Para 16 to 19)

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 86, सिविल प्रक्रिया संहिता, 1908, आदेश 7 नियम 11 – निर्वाचन याचिका – वादकारण का अप्रकटीकरण – ईवीएम द्वारा की गई गणना की शुद्धता और प्रमाणिकता के आधार पर निर्वाचन को चुनौती – याची यह प्रदर्शित करने के लिए बाध्य है कि इच्छित परिणाम प्राप्त करने के लिए ईवीएम में कैसे हेरफेर किया गया – ईवीएम के मिसएलाइनमेंट की आशंका के सम्बन्ध में अभिलेख पर कोई विशेषज्ञ राय नही रखी गयी – यद्यपि निर्वाचन याचिका में किये गये प्रकथन वैसे ही सम्पूर्णता के साथ स्वीकार कर लिये जाएँ तो भी ईवीएम द्वारा की गई मतों की गिनती में कथित अनियमितताओं के सम्बन्ध में पूर्ण, यथावत् और विनिर्दिष्ट अभिवचन के अभाव में पक्षकारों के मध्य कोई विचारण योग्य विवाद्यक उत्पन्न नही होता – याचिका नामंजूर।

Cases referred :

AIR 1964 SC 1545, AIR 2006 SC 713, (1977) 4 SCC 467, (2003) 5 SCC 650, AIR 2004 SC 38.

Shashank Shekhar, for the petitioner.
Mrigendra Singh, for the respondent.

O R D E R

R.C. Mishra, J. :–This order shall govern disposal of I.A. No.43/2009, which is an application, under Order VII Rule 11 of the Code of Civil Procedure

*E.P. No.32/2009 (Jabalpur)

(for brevity "the Code") read with Section 86 of the Representation of People Act, 1951 (for short "the Act"), seeking rejection of this election petition at the threshold on the following grounds –

(i) The petition is lacking in material facts and particulars.

(ii) The petition does not disclose any cause of action.

(iii) The petition is not supported by any affidavit in Form 25.

(iv) The annexures filed along with the petition are not attested or verified as true copies by the Petitioner.

(v) Material contradictions exist between the contents of verification clause and those of the affidavit filed in support of the pleadings.

2. In this petition, election of returned candidate viz. the respondent to M.P. Legislative Assembly Constituency No.58 Pawai (hereinafter referred to as the 'Constituency') has been called in question on the ground of irregularities in the counting of votes with a prayer for a direction for recounting of the votes polled as well as the postal ballot-papers received in the Constituency. The petitioner has also sought a declaration that irregularities committed by the Returning Officer in counting the votes have vitiated the entire process of election and has further entreated to punish the persons found involved therein.

3. Election to the Constituency was held on 27.11.2008 in which as many as 18 candidates were in the fray. The petitioner and the respondent contested the election respectively as the official candidates of Bhartiya Janshakti Party and Bhartiya Janta Party. Counting of votes through Electronic Voting Machines (EVMs) was scheduled to take place on 08.12.2008. The petitioner had appointed Devendra Kumar Tiwari, Rajaram Singraul, Rajkumar, Ramsewak, Chhotelal Pathak and Shri C.L. Singraul as counting agents whereas one Kedar Prasad, acted as agent of another candidate namely Kamlesh Dwivedi for the purpose. As per tne result notified after conclusion of the counting, the respondent was declared duly elected, as he had secured 39921 votes whereas his nearest rival viz. the petitioner could get 39011 votes.

4. According to the petitioner, -

(i) till 16th round of counting, that was concluded at about 16:00 hours, he was leading as against the respondent by a margin of 3779 votes. However, the administrative officers involved in the process of counting were able to gather from the outcomes of the process of counting in other Constituencies that the ruling Bhartiya Janta Party, represented by the respondent, was again going to form Government in the State. As an obvious reaction, they suddenly left the counting room and even on being asked the reason

for doing so, did not give any logical reply. Their explanation that they were leaving for lunch was also not satisfactory as breaks for the purpose had already been availed of at 13:00 and 14:30 hours.

(ii) At about 16:50 hours, brother of the respondent namely Lokendra Singh and his companion Mahendra Yadav started hurling abuses and throwing chairs on the partition providing separate spaces to the agents and the officers of Election Commission in the counting room. Finding that the situation was a complete chaos, the officers appointed by the Election Commission not only shifted 8 EVMs which were yet to be used for counting of votes but also dragged his counting agents out of the room. Thus, counting in the 17th, 18th and 19th rounds could not be done in presence of his counting agents.

(iii) Further, the moment the counting agents came out of the room, the entry passes issued in their favour were torn into pieces by the police authorities present there. Although, they preferred an oral complaint to the Superintendent of Police, Panna and also submitted an affidavit to the effect that on 8/12/08 after 4.30 p.m. they were expelled from the counting room by the police officials yet, no action was taken presumably in view of the fact that by that time 80% of the election results in the State were formally announced.

(iv) Immediately thereafter, to his utter dismay and surprise, the respondent was declared elected by exhibiting that in the 17th, 18th and 19th rounds, he had received 237, 634 and 355 votes whereas the respondent had secured 1242, 2702 and 1971 votes. This apart, his counting agents were compelled to append signatures on the tabulation sheets showing result of those rounds based on the readings of 8 EVMs despite the fact that procedure prescribed under the Election Law for counting of votes in their presence was not followed. One of the counting agents namely Sitaram Patel made an application for recounting of votes recorded by 8 EVMs in 17th, 18th and 19th rounds on the ground that votes were not counted before him. Another counting agent viz. K.K. Pandey also made a complaint to the effect that the EVM in respect of polling booth No.128 of Bada Gaon Sarsela was not at all included in the process of counting. However, the Returning Officer refused to acknowledge receipt of these complaints.

(v) Thus, the figures reflected in the tabulation chart, prepared as

per Proforma 20 prescribed under Rule 56C(2)(c), were erroneous, incorrect and bogus. In such a situation, he himself faxed applications to the Returning Officer at 18:46 and 19:10 hours for recounting of 17th, 18th and 19th rounds but no action was taken.

5. In the light of these averments, the petitioner has claimed that in case a recounting is done he would emerge as victorious by a considerable margin of votes.

6. As pointed out already, the prayer for rejection of the Election Petition has been made not only on the ground of non-compliance with the statutory procedural requirements but also for the reason that the petition does not disclose any cause of action.

7. In reply, the petitioner has submitted that even if it is assumed that the pleadings or the contents of affidavit suffer from any deficiency, the election petition can not be dismissed in limine. To buttress the contention, reference has been made to leading decision of the Apex Court in *Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore* AIR 1964 SC 1545.

8. At the outset, it may be observed that the objection as contained in ground no.(iii) [above] regarding non-submission of affidavit in Form No.25 prescribed by Rule 94A of the Conduct of Elections Rules, 1961 and the reply that the corresponding particulars may be amended and amplified are apparently misconceived in view of the fact that election in question has not been challenged on the ground of any corrupt practice enumerated in Section 123 of the Act. Further, the ground nos.(iv) and (v) [supra] can be dealt with under the doctrine of curability. As such, the petition can not be rejected on any one of the abovementioned three grounds.

9. The question that arises for consideration is as to whether the petition deserves rejection on the ground nos.(i) and (ii) [*ibid*] relating to the objection as to non-pleading of material facts and materials and non-disclosure of cause of action respectively.

10. The expression 'material facts' has neither been defined in the Act nor in the Code. According to the dictionary meaning, 'material' means 'fundamental', 'vital', 'basic', 'cardinal', 'central', 'crucial', 'decisive', 'essential', 'pivotal', indispensable', 'elementary' or 'primary' (*Harkirat Singh v. Amarinder Singh* AIR 2006 SC 713 referred to). Hence, material facts are facts which if established would give the petitioner the relief asked for even if the respondent had not appeared. Further, for deciding the application under Order VII Rule 11 of the Code, the averments in the petition are germane and the pleas taken by the respondent would be wholly irrelevant at that stage. This apart, rejection of plaint in exercise of the power under Order VII Rule 11 would be necessitated only if on a meaningful, not formal reading of the petition it is manifestly vexations, and

meritless, in the sense of not disclosing a clear right to challenge the election (See. *T. Arivandandam v. T.V. Satyapal* (1977) 4 SCC 467).

11. Examining the pleadings of the petitioner in the light of these guiding principles, one may easily conclude that the petitioner has only suspected a foul play in the process of counting resulting into his defeat inspite of the fact that he was leading upto last but 3 rounds.

12. Law on the subject has been elaborately explained by the Apex Court in *T.A. Ahammed Kabeer v. A.A. Azez* (2003) 5 SCC 650 in the following terms -

> (1) In an election petition wherein the limited relief sought for is the declaration that the election of the returned candidate is void on the ground under Section 100(1)(d)(iii) of the Act, the scope of enquiry shall remain confined to two questions: (a) finding out any votes having been improperly cast in favour of the returned candidate, and (b) any votes having been improperly refused or rejected in regard to any other candidate. In such a case an enquiry cannot be held into and the election petition decided on the finding (a) that any votes have been improperly cast in favour of a candidate other than the returned candidate, or (b) any votes were improperly refused or rejected in regard to the returned candidate.
>
> (2) A recrimination by the returned candidate or any other party can be filed under Section 97(1) in a case where in an election petition an additional declaration is claimed that any candidate other than the returned candidate has been duly elected.
>
> (3) For the purpose of enabling an enquiry that any votes have been improperly cast in favour of any candidate other than the returned candidate or any votes have been improperly refused or rejected in regard to the returned candidate the Election Court shall acquire jurisdiction to do so only on two conditions being satisfied: (i) the election petition seeks a declaration that any candidate other than the returned candidate has been duly elected over and above the declaration that the election of the returned candidate is void; and (ii) a recrimination petition under Section 97(1) is filed.
>
> (4) A recrimination petition must satisfy the same requirements as that of an election petition in the matter of pleadings, signing and verification as an election petition is required to fulfil within the meaning of Section 83 of the Act and must be accompanied by the security or the further security referred to in Sections 117 and 118 of the Act.
>
> (5) The bar on enquiry enacted by Section 97 read with Section

100(1)(d)(iii) of the Act is attracted when the *validity of the votes* is to be gone into and adjudged or in other words the question of *improper* reception, refusal or rejection of any vote or reception of any vote which is *void* is to be gone into. The bar is not attracted to a case where it is merely a question of *correct counting* of the votes without entering into *adjudication* as to propriety, impropriety or validity of acceptance, rejection or reception of any vote. In other words, where on a re-count the Election Judge finds the result of re-count to be different from the one arrived at by the Returning Officer or when the Election Judge finds that there was an error of counting the bar is not attracted because the court in a pure and simple counting carried out by it or under its directions is not adjudicating upon any issue as to improper reception, refusal or rejection of any vote or the reception of any vote which is void but is performing mechanical process of counting or re-counting by placing the vote at the place where it ought to have been placed. A case of error in counting would fall within the purview of sub-clause (iv), and not sub-clause (iii) of clause (d) of sub-section (1) of Section 100 of the Act" [Emphasis supplied]

13. Accordingly, when a petition is for relief of scrutiny and recount on the allegation of miscount, the petitioner has to offer proof of errors in counting and if errors in counting are prima facie established a recount can be ordered. However, fact of the matter is that in the case on hand, scope of inquiry is limited to the correctness and authenticity of counting that was carried out by means of EVMs whereas all doubts and queries regarding the functioning of EVMs have already been answered in FAQs of electronic voting machines published by the Commission on the website. The relevant questions and answers may be reproduced as under:

"Q18. Is it possible to vote more than once by pressing the button again and again?

Ans. No

... ...

Q21. Is it possible to program the EVMs in such a way that initially, say upto 100 votes, votes will be recorded exactly in the same way as the 'blue buttons' are pressed, but thereafter, votes will be recorded only in favor of one particular candidate irrespective of whether the 'blue button' against that candidate or any other candidate is pressed?

Ans. The microchip used in EVMs is sealed at the time of import. It cannot be opened and any rewriting of program can be done by anyone without damaging the chip. There is,

therefore, absolutely no chance of programming the EVMs in a particular way to select any particular candidate or political party.

... ...

Q28. In the conventional system, before the commencement of poll, the Presiding Officer shows to the polling agents present that the ballot box to be used in the polling station is empty. Is there any such provision to satisfy the polling agents that there are no hidden votes already recorded in the EVMs?

Ans. Yes

Before the commencement of poll, the Presiding Officer demonstrates to the polling agents present that there are no hidden votes already recorded in the machine by pressing the result button. Thereafter, he will conduct a mock poll by asking the polling agents to record their votes and will take the result to satisfy them that the result shown is strictly according to the choice recorded by them. Thereafter, the Presiding Officer will press the clear button to clear the result of the mock poll before commencing the actual poll.

Q29. How can one rule out the possibility of recording further votes at any time after close of the poll and before the commencement of counting by interested parties?

Ans. As soon as the last voter has voted, the Polling Officer in-charge of the Control Unit will press the 'Close' Button. Thereafter, the EVM will not accept any vote. Further, after the close of poll, the Balloting Unit is disconnected from the Control Unit and kept separately. Votes can be recorded only through the Balloting Unit. Again the Presiding officer, at the close of the poll, will hand over to each polling agent present an account of votes recorded. At the time of counting of votes, the total will be tallied with this account and if there is any discrepancy, this will be pointed out by the Counting Agents.

[Underlined by me]

14. From the corresponding 'Press Note', copy of which has also been placed by the respondent on record, one may gather the following information about EVMs used by Election Commission of India -

Facts about EVMs used by ECI

(i) ECI-EVMs are manufactured only by Electronics Corporation of India Limited (Department of Atomic Energy)

and Bharat Electronics Limited (Ministry of Defence), both Central Public Sector Undertakings, which are entrusted with development of very high security product/equipment development.

(ii) The ECI-EVMs cannot be reprogrammed.

(iii)The software for this chip is developed in-house by a select group of engineers in the two PSUs independently from each other. A select software development group of 2-3 engineers designs the source code and this work is not sub-contracted.

(iv)The source code is so designed that it allows a voter to cast the vote only once. The next vote can be recorded only after the Presiding Officer enables the ballot on the Control Unit. In between the machine becomes dead to any signal from outside (except from the Control Unit).

(v) After completion of software design, testing and evaluation of the software is carried out by an independent testing group as per the software requirements specifications (SRS). This ensures that the software has really been written as per the requirements laid down for its intended use only.

(vi) After successful completion of such evaluation, machine code of the source programme code known as hex-code (not the source code itself) is given to the micro controller manufacturer for fusing in the micro controllers. From this machine code, the source code cannot be read. Source code is never handed over to anyone outside the software group.

(vii)Micro controller manufacturer initially provides engineering samples for evaluation. These samples are assembled into the EVM, evaluated and verified for functionality at great length. Bulk production clearance is given to micro controller manufacturer only after successful completion of this verification.

(viii) The source code for the EVM is stored under controlled conditions at all times. Checks and balances are in place to ensure that it is accessible to authorized personnel only.

(ix) During production, functional testing is done by production group as per the laid down quality plan and performance test procedures.

(x) Samples of EVMs from production batches are regularly checked for functionality by Quality Assurance Group, which is an independent group within the organizations.

(xi) Certain additional features were introduced in 2006 in ECI-EVMs such as dynamic coding between Ballot Unit and Control Unit, installation of real time clock, installation of full display system and date and time stamping of every key pressing in EVM. It is important to note that there was no modification of any type done at this stage in the basic functions of the machine.

Not comparable with EVMs Abroad

The Commission has come across some comparisons between ECI-EVM and EVMs used by foreign countries. Such comparisons are both misplaced and misguided. Most of the systems used in other countries are PC based and running on operating Systems. Hence, these could be vulnerable to hacking. The EVM in India on the other hand is a fully standalone machine without being part of any network and with no provision for any input. As already stated, the software in the EVM chip is one time programmable and is burnt into the chip at the time of manufacture. Nothing can be written on the chip after manufacture. Thus the ECI-EVMs are fundamentally different from the voting machines and processes adopted in various foreign countries. Any surmise based on foreign studies or operating system based EVMs used elsewhere would be completely erroneous. The ECI-EVMs cannot be compared with those EVMs.

Complete Procedural Security

The Commission has in place elaborate administrative measures and procedural checks-and-balances aimed at prevention of any possible misuse or procedural lapses. These measures include rigorous pre-election test and inspection of each EVM by the technicians, two level randomization with the involvement of candidates and their agents, for the random allotment of the EVMs to various constituencies and their subsequent dispatch to various polling stations. Preparation of the EVMs for elections is done in the presence of the candidates/their agents and sealing of the prepared EVMs is also done in candidate's or their agent's presence. Thread seal are fixed on the EVM where again, the candidates or their

representatives put their own signature and seals. Paper seals guards against any unauthorized access to the EVMs after preparation. EVMs are then kept in sealed strong rooms with provision for the candidates to put their individual seals on the strong rooms. The EVMs are randomized twice over. The list of EVMs going to individual polling stations is given to the candidates for them to check, on the poll day the actual machine, that is used in that polling station. Furthermore a mock poll is conducted in the presence of polling agents, when the polling agents can verify, inter-alia, the EVM numbers. A mock poll certificate is taken before the commencement of poll. After the mock poll the machine is set back to zero and green paper seal printed at Govt. Security Press is put in, where once again every polling agent is allowed to put his/her signature. After the polls, the EVM are also sealed in such a manner that there is no physical access to any of the buttons on the EVMs. Indeed there is no access to the EVMs itself since the carrying case is sealed completely. The machines are put in the strong room again in presence of the candidates, observer of the commission under video camera surveillance. The strong room is allowed to be guarded by the supporters of the candidates besides the police protection provided to strong rooms. At every step, the EVM is very well protected and elaborate arrangements are in place for the same.

15. In *Michael B. Fernandes v. C. K. Jaffer Sharief* AIR 2004 KARNATAKA 289, the Karnataka High Court had the occasion to analyze these claims regarding functional efficacy of EVM by examining one of the scientists of the Bharat Electronic Limited (in short B. E. L.) as the Court witness who was also cross-examined at length. The findings recorded by the learned Election Judge may usefully be quoted as under -

Voting machine has two major units : one is control unit and other is balloting unit. Control unit is handled by the Presiding Officer, who is in-charge of the Polling Booth. The control unit has all the intelligence in- built. The ballot unit is a dummy unit or otherwise called non-intelligence unit. The ballot unit has buttons and a lamp for each candidate arranged in a line. The ballot unit is kept in the polling compartment, 5 meters away from the control unit. The ballot Unit has a cable permanently attached. At the time of polling, the cable is connected to the control unit, when the voter press the button casting the vote to a candidate, the lamp by the side of the button will glow to indicate

that the voting done is proper and simultaneously in the control unit a beep sound is heard to a range of 30 ft. The control unit functions in a non-reversible cycle of voting process.

After the publication of the list of the candidates, the Returning Officer sets the number of contesting candidates in the control unit, which functions on a battery specially manufactured and supplied by B.E.L. The effective life of the battery is 48 hours of continuous functioning. In the balloting unit the printed ballot sheet is put behind the transparent screen. The balloting unit is capable of handling the ballot sheet containing 16 contestants and on the whole EVM is designed to handle a maximum of 64 contestants at an election. The balloting unit has got 16 buttons operatable through a panel cut out. After inserting the balloting paper in the ballot unit, the Returning Officer closes the lid and put a seal provided by the election commission in presence of the candidates /their agents. The lid and the flaps once closed and sealed cannot be opened without tampering the seal. The Returning Officer simultaneously will set the control unit to receive the information about the number of candidates contesting in the election. By pressing the last "Can set" button in the control unit, the number of contesting candidates is recorded. The candidate set compartment of the control unit is closed and sealed in the presence of the candidates/their agents. Thereafter the control unit and the balloting unit are put separately in a carrying cases and are sealed by the Returning Officer in presence of the candidates/agents. The carrying cases containing control unit and balloting Unit are delivered to the Presiding Officers on the previous day to the election and would be carried to the polling booth.

The Polling Officer will verify the seals of the carrying cases, take out the control unit and balloting unit, verify the correctness of the seals. An hour before the polling time, mock poll is conducted to verify the functional capacity. The agents/ candidates are asked to press the button in the balloting unit to cast their votes. Later on the "result button" in the micro controller is pressed which display the number of votes polled. After demonstration of the correctness of the function, the 'clear button' is pressed which will erase all the data of the mock poll. After the mock poll, the Presiding Officer will close the result compartment by putting the seal provided by the election commission by which the voting machine is ready for polling.

The voter presents before the Presiding Officer, after verifying

the identity, the Presiding Officer will press the 'balloting button' in the control unit and send the voter to the polling cabin. When the voter press the 'balloting button' casting vote to the candidate of his choice, the lamp by the side of the button will glow indicating the correctness of voting. The control unit will give a beep sound to indicate that the vote casted is registered in the control unit. For the next vote to be cast, again it is necessary that the 'balloting button' in the control unit is to be pressed by the Presiding Officer, otherwise, mere pressing of button in the balloting unit by the voter will be of no consequence. For every next vote to be cast, it is necessary that the 'balloting button' in the control unit is to be pressed by the Presiding Officer. After polling time is over 'close button' in the control unit is pressed by the Presiding Officer by which the machine gets locked. Thereafter, the balloting unit is disconnected from the control unit, they are separately packed in the carrying cases and sealed in presence of the agents by the Presiding Officer. Later on they are transported to the counting centers and ballot unit and control unit are kept in a strong room before they are taken to the counting centers. At the time of counting, seals put by the Presiding Officer to the control unit is verified to ensure that no tampering has taken place. When the 'result button' is pressed, machine will display the number of votes polled against each candidates sequentially.

Control unit has two main devices: one is micro controller and another is memory. Micro controller is one time programmable component. Micro controller once fused with program code and data is unchangeable and irreversible. The memory device is functionally efficient and retain the voting data without the aid of a battery. The micro controller will record and register the voting data by cross checking with the memory for every vote. The programme code is encrypted and stored in the memory. It is not possible to replace the memory device in order to play mischief. If the Memory device is removed, micro controller will detect and declare that the machine is in error state. The memory device and one time programmable micro controller are the pivotal devices of the EVM and they act as tamper proof device for the programme code and poll data.

If a voter damages the button of the balloting unit or for accidental reason the button of the balloting unit gets struckn,

such errors are indicated in the control unit. In such cases, a spare balloting unit is used. The sound of error message is heard in the control unit like a alert sound, simultaneously the display panel will show letters "PE" indicating that balloting unit has gone out of order. If the connecting cable is damaged or cut, letter 'LE' is displayed in the display panel of the control unit with an alert sound and these are the possible errors that can happen during use of machine during polling. If there is any error in the memory device, the machine is declared dead. The weak battery can also lead to error and the panel display will indicate by six dash marks. The Presiding Officer will change the battery and continue polling. The defect in the battery is a rare phenomenon. If the machine is not functioning, there will be no battery consumption.

The Micro controller manufactured with a given programme code is only useful for EVMS made for the elections by the B. E. L. company and cannot be used for any other purpose. The programme code is encrypted by out-source agency in the presence of the responsible official of the BEL and the programme code is a business secret. Out- source agency would keep the encrypted data as utmost secrecy. It is further stated that the encrypted code and data is unchangeable and indelible by anybody, even by the manufacturer. Any attempt to tamper with the encrypted code would only result in damage to the machine. But the micro controller and memory cannot be manipulated by anybody. It is also stated that the EVM is tested to the temperature condition of 20 degree C to + 55 degree C. and electromagnetic radiation also would not affect the functioning of the machine. The witness categorically states that either by manipulation or by accident there is no possibility of transfer of votes from one candidate to another and the machine designed is fully tamper proof.

16. Since the petitioner has raised doubt as to fairness or impartiality of the officials engaged in the counting process, he is under an obligation to demonstrate as to how the EVMs could be tampered with to get the desired result. However, no expert opinion has been placed on record regarding the chances of misalignment of EVMs. On the other hand, correctness of all the technical aspects of the matter, as reflected as FAQs and the Press Note issued and uploaded on its website by Election Commission of India, has already been verified on the judicial side in *Michael B. Fernandes's case* (supra). Accordingly, the EVM is a foolproof device for counting of votes. In this view of the matter, any further probe into the

allegations made by the petitioner regarding possibility of malfunctioning and tampering of the EVMs used in the counting of votes in 17th, 18th and 19th rounds or non-inclusion of the EVM pertaining to polling booth No.128 of Bada Gaon Sarsela would be a futile exercise. The averments regarding error in counting of postal ballot papers also do not assume any significance in view of the fact that it precedes the counting of votes through EVMs.

17. For these reasons, I am of the view that the petition does not disclose any material fact necessitating a full-dressed trial.

18. In a democracy the mandate has sacrosanctity. It is to be respected and not lightly interfered with. When it is contended that the purity of electoral process has been polluted, weighty reasons must be shown and established. The onus on the election petitioner is heavy as he has to substantiate his case by making out a clear case for interference both in the pleadings and in the trial. Any casual, negligent or cavalier approach in such serious and sensitive matter involving great public importance cannot be countenanced or glossed over too liberally as for fun (*Regu Mahesh Rao v. Rajendra Pratap Bhanj Dev* AIR 2004 SC 38 referred to).

19. To sum up, even if the averments made in the election petition are taken at their face value and are accepted in their entirety, no triable issue between the parties would arise in absence of complete, precise and specific pleadings in respect of the alleged irregularities in counting of votes through EVMs. As an obvious consequence, the petition deserves to be rejected on the ground nos.(i) and (ii) [above].

20. In the result, the petition stands rejected, under Order VII Rule 11(a) of the Code, for want of any cause of action. The parties shall bear their own costs.

21. A copy of this order be forwarded to the Election Commission as well as to the Speaker of the State Legislative Assembly.

Petition rejected.

I.L.R. [2010] M. P., 433
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
23 July, 2009*

KANAKLATA & ors. ... Appellants
Vs.
SUBHADRA & ors. ... Respondents

Civil Procedure Code (5 of 1908), Order 6 Rule 2 & Section 151, Specific Relief Act, 1963, Section 34 - ***Without any prayer or pleading - Decree of possession passed - Permissibility*** - *Suit for declaration & perpetual injunction decreed - Lower appellate Court in exercise of power conferred*

*S.A. No.726/2007 (Jabalpur)

u/s 151 CPC passed additional decree of possession - Held - In absence of pleading or prayer, decree for possession could not be granted by invoking the provision u/s 151 CPC. (Para 12)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 2 व धारा 151, विनिर्दिष्ट अनुतोष अधिनियम, 1963, धारा 34 – किसी प्रार्थना या अभिवचन के बिना – कब्जे की डिक्री पारित की गयी – अनुज्ञेयता – घोषणा और शाश्वत व्यादेश का वाद डिक्री किया गया – निम्न अपीलीय न्यायालय ने सि.प्र.सं. की धारा 151 के अन्तर्गत प्रदत्त शक्ति के प्रयोग में कब्जे की अतिरिक्त डिक्री पारित की – अभिनिर्धारित – अभिवचन या प्रार्थना के अभाव में, सि.प्र.सं. की धारा 151 के अन्तर्गत उपबंध का अवलंब लेकर कब्जे के लिए डिक्री प्रदान नही की जा सकती।

Cases referred :

(2000) 2 SCC 223, 2003(3) MPLJ 379, AIR 2005 VSC 242.

P.S. Das with *Sonal Das*, for the appellants.

None, for the respondents.

JUDGMENT

U.C. MAHESHWARI, J. :–The appellants/defendants, being aggrieved by the judgment and decree dated 21.4.07 passed by the District Judge Betul in Civil Appeal No.l-A/07 whereby affirming the judgment and decree dated 31.3.06 passed by Civil Judge Class-I Betul in Civil Original Suit No.48-A/05, decreeing the suit of the respondents No. 1 to 5 for declaration and perpetual injunction with respect of the agricultural land described in the plaint, granted an additional relief of possession of the disputed land beyond the pleadings in favour of the respondents under Section 151 of the CPC, have filed this appeal.

2. The facts giving rise to this appeal in short are that respondents No.l to 5 herein filed the suit for declaration and perpetual injunction against the appellants with respect of the land bearing Survey No.2 area 2.023 hectare, situated in village Durgapur Chopna, Tehsil Shahpur District Betul. As per averments of the plaint the respondents/plaintiffs being natives of such village are residing there while the appellants/defendants are residing illegally in such village. Long back before forty years the Rehabilitation Department had allotted the disputed land to one Manoranjan Sarkar, the father-in-law of respondent No.1 Subhadra, whose name was also recorded as Bhoomi Swami in the records of rights and since then he was cultivating the same upto his death on 4.3.92. Thereafter it was mutated in the name of the respondents. As per further averments, the appellants and their predecessors were working as labourers of the respondents on such land, but in the year 2003, they started claiming themselves to be the owner of such land, on which, some dispute took place between them. Subsequent to it, in the year 2004, the appellants, contrary to the rights of respondent No. 1, forcefully tried to cultivate the same. It is also alleged that the appellant being residents of West Bengal, are not citizens of India that is why no land has been allotted to them either for rehabilitation or for agricultural purpose. But by taking advantage

of the simplicity of the respondents, the appellants want to keep their possession forcefully over such land. In such premises, the aforesaid suit was filed by the respondents.

3. In the written statement of the appellants, by denying the averments of the plaint, it is stated that treating them to be the displaced persons, they have been rehabilitated by the Union of India vide order dated 6.2.81 on the disputed land of such village. In such premises, the averments of the plaint challenging their citizenship, are denied. In addition, it was stated that the proceeding initiated at the instance of the respondents for their removal has been rejected by the Rehabilitation Department. It is also stated that the disputed land was allotted to the appellants by the aforesaid Rehabilitation Department of the Central Government. With these averment, the praver for dismissal of the suit is made.

4. Respondent No.6 State of Madhya Pradesh was proceeded ex-parte in the trial court while the Rehabilitation Department (defendant No.5) did not file any written statement, on which, its right to file the written statement was closed on dated 22.12.05.

5. After casting the issues and recording the evidence, on appreciation on the same, the suit of the respondents has been decreed by the trial court declaring them to be the Bhumi Swami and title holder of the disputed land and in pursuance of it by issuing the perpetual injunction, appellants were restrained to interfere in their possession with respect of the disputed land. It is noted that no relief with respect of possession was granted in favour of the respondents by the trial court. Such judgment and decree was challenged by the appellants under Section 96 of the CPC before the first appellate court. On consideration, by affirming the decree of the trial court, the appeal was dismissed but simultaneously by invoking the provision of section 151 of the CPC, an additional relief for possession, is also granted in favour of the respondents, on which, the appellants have come forward to this court with this appeal.

6. This court admitted the present appeal vide order dated 16.7.2008 only on the following substantial question of law :-

> "Whether the appellate Court- erred in granting decree for possession in favour of plaintiffs/respondents while such prayer was not made by the plaintiffs and the plaintiffs had not amended the plaint seeking relief of possession from the appellants ?"

7. Shri P.S.Das, learned counsel of the appellant, after taking me through the pleadings of the plaint and the other records of the case said that it is apparent from para-21 of the plaint that the suit of the respondent No.1 was filed only for declaration and perpetual injunction and not for the relief of possession with respect of the disputed land and in such premises, the suit with respect of possession was neither considered nor decided by the trial court. Even in the first appeal, the prayer clause of the plaint for the relief of possession is neither amended nor any

application in this regard was filed by the respondents. In the lack of such prayer in the plaint, the appellate court did not have any jurisdiction to grant such relief in favour of the respondents beyond the pleadings. In any case, in the absence of any cross-objection in the appeal of the appellants, no such prayer could be considered by the appellate court. He also argued that decree for possession could not be passed contrary to the pleadings of the plaint by invoking the provision under Section 151 of the CPC. According to his submission, such section could not be invoked for granting any relief if the substantive provision for granting relief is available under the statute. He also placed his reliance on some reported decisions in this regard. In such premises, he prayed to answer the aforesaid question in favour of the appellants.

8. Having heard the counsel, I have carefully gone through the record of the trial court and also perused the impugned judgment. Before proceeding further, as ready reference, I would like to mention here para-21 of the plaint the prayer clause. The same reads as under:-

अ– यह घोषित किया जावे कि ग्राम दुर्गापुर चौपना के खसरा नं. 2 रकबा 2.023 हेक्टर कृषि भूमि वादीगण के स्वामित्व व हक की कृषि भूमि है जिस पर दखल देने का प्रतिवादीगण को अधिकार नही है।

ब– यह भी घोषित किया जावे कि ग्राम दुर्गापुर चौपना के खसरा नं. 2 रकबा 2.023 हेक्टर कृषि भूमि के एक मात्र स्वामी वादीगण है इसलिए प्रतिवादीगण को उनकी जमीन पर अवैधानिक कब्जा बनाये रखने का कोई कानूनी अधिकार प्राप्त नहीं है।

स– वादीगण के पक्ष में तथा प्रतिवादीगण के विरुद्ध इस आशय की स्थायी निषेधाज्ञा दी जावे कि प्रतिवादीगण स्वयं या अन्य किसी के माध्यम से ग्राम दुर्गापुर चौपना के खसरा नं. 2 रकबा 2.023 हेक्टर की वादीगण की कृषि भूमि पर से वादीगण को बेदखल न करें।

द–यह कि अन्य जो भी अनुतोष माननीय न्यायालय वादीगण को प्रदान करना आवश्यक समझे प्रदान किया जावे।

ई– यह कि वाद का संपूर्ण खर्चा वादीगण को प्रतिवादीगण से प्रदान कराया जावे।

अतः उपरोक्त अनुसार वादीगण को दावा स्वीकार करने की कृपा करें।

9. On perusing the aforesaid prayer, it is apparent that the impugned suit was filed only for declaration and perpetual injunction and not for the relief of possession with respect of the disputed land. I have not found any application of amendment in the record of the trial court showing that at any point of time, the respondents made effort to amend and insert the relief of possession. As such, the relief of possession was never claimed by the respondents either before the trial court or in the subordinate appellate court. Even in pendency of the first appeal of the trial court no such application to amend the prayer clause of the plaint for possession was filed by the respondents. Accordingly, the prayer for possession of the disputed land was not under consideration before the appellate court.

10. It appears from the impugned judgment that without any pleading or the prayer regarding possession in the plaint of the respondents, only on some whims, while affirming the decree of the trial court and dismissing the appeal, by invoking the provision of section 151 of CPC, the suit of the respondents was additionally decreed for possession and mesne profits as mentioned in sub para 2 and 3 of para-19 of the impugned judgment. It is apparent on the record that such decree passed in favour of the respondents by the appellate court is beyond the pleadings.

11. It is settled proposition of the law that beyond the pleadings of the suit, no prayer can be accepted by the court as laid down by the Apex Court in the matter of *Union of India Vs. E.I.D Parry (India) Ltd.*-(2000) 2 SCC 223 in which it was held as under :-

> "4. The suit was filed.....In the absence of the pleading to that effect, the trial court did not frame any issue on that question. The High Court of its own proceeded to consider the validity of the rule and ultimately held that it was not in consonance with the relevant provisions of the Railways Act, 1890 and consequently held that it was ultra vires. This view is contrary to the settled law that a question, which did not form part of the pleadings or in respect of which the parties were not at variance and which was not the subject-matter of any issue, could not be decided by the court. The scope of the suit was limited. The pleadings comprising of the averments set out in the plaint and the defence put up by the present appellant in their written statement did not relate to the validity of the rule struck down by the High Court. The High Court, therefore, travelled beyond the pleadings in declaring the rule to be ultra' vires. The judgment of the High Court, therefore, on this question cannot be sustained."

The atoresaid question is also answered by this court in the matter of *Municipal Corporation, Indore and another Vs. RETD.Col. Anil KAK and another*-2003(3) MPLJ 379. Thus, it is revealed from the aforesaid discussion that without any prayer of pleadings in the plaint, the decree for possession of the disputed land has been passed by the appellate court in favour of the respondents No. 1 to 5. The same is not sustainable.

12. I am of the considered view that where the sufficient provisions for initiating the proceeding for possession or for amendment in the suit in this regard, are available under the substantive law then by invoking section 151 of the CPC, no such relief can be granted by the court in favour of either of the parties.Granting the decree for possession the substantive law is well in existence, hence in the absence of the pleadings or the prayer in the plaint for possession of the disputed land, the suit of the respondents could not be decreed for such relief by invoking the provision under Section 151 of the CPC by the appellate court.

13. My aforesaid view is fully fortified by the decision of the Apex Court in the matter of *National Institute of Mental Health and Neuro Sciences, Appellant v. C. Parameshwara, Respondent*. AIR 2005 SC 242 in which it was held as under :-

> "12. In the case of *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal* reported in (AIR 1962 SC 527), it has been held that inherent jurisdiction of the Court to make orders *ex debito justitiae* is undoubtedly affirmed by section 151, CPC, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive. In the present case, as stated above, section 10, CPC has no application and consequently, it was not open to the High Court to bye-pass section 10, CPC by invoking section 151, CPC.

14. In view of the aforesaid, passing the decree of possession by the appellate court beyond the pleadings, is apparently perverse, and the same is not sustainable, hence by answering the substantial question of law accordingly in favour of the appellants, by allowing this appeal, the judgment and decree passed by the appellate court with respect of possession and mesne profits in sub para 2 and 3 of para 19 of the impugned judgment are hereby set aside, while the remaining part of the such judgment and decree, affirming the judgment and decree of the trial court, are hereby affirmed. The appeal is allowed to the extent indicated above. In the facts and circumstances of the case, there shall be no order as to the cost. Decree be drawn-up accordingly.

Appeal allowed.

I.L.R. [2010] M. P., 438
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
19 November, 2009*

KIRAN CHHABRA (SMT.) ... Appellant
Vs.
HITESH CHHABRA ... Respondent

Motor Vehicles Act (59 of 1988), Section 163-A - *Deceased borrowed Scooter from his father who was registered owner - Because of slip of Scooter deceased fell down and died due to head injury - L.Rs. of deceased stepped into the shoes of the owner - Owner could not himself be a recipient of compensation as liability to pay the same is on him - Claim petition rightly dismissed by tribunal.* (Paras 5 & 6)

*M.A. No.679/2006 (Indore)

KIRAN CHHABRA (SMT.) Vs. HITESH CHHABRA

मोटर यान अधिनियम (1988 का 59), धारा 163–ए – मृतक अपने पिता से, जो रजिस्टर्ड स्वामी थे, स्कूटर माँग कर ले गया – स्कूटर के फिसल जाने के कारण मृतक गिर पड़ा और सिर में आयी चोट के कारण उसकी मृत्यु हो गयी – मृतक के विधिक प्रतिनिधि स्वामी के स्थान पर आ गये – स्वामी स्वयं प्रतिकर का प्राप्तिकर्ता नही हो सकता क्योंकि उसका संदाय करने का दायित्व उसी पर है – अधिकरण द्वारा दावा याचिका उचित रूप से खारिज की गयी।

Cases referred :

2005(I) DMP 14 (HP), 2009 ACJ 1298, 1 (2007) ACC 446 (DB), 2009 ACJ 2020.

Atul Jaiswal, for the appellant

Mayank Upadhayay, for the respondent No.2.

ORDER

N.K. Mody, J. :–Being aggrieved by the award dated 18/11/2005 passed by X MACT, Indore in claim case No.28/2003 whereby in a death case claim petition filed by the appellants was dismissed, the present appeal has been filed.

2. Short facts of the case are that appellants filed a claim petition before the learned tribunal on 02/09/2003 alleging that deceased/Surendra Chhabra was the husband of appellant No. 1, father of appellant No.2 and son of appellants No.3 and 4. It was further alleged that on 11/11/2002 at about 21.45 PM Surendra Chhabra was going on his scooter bearing registration No. MP-09/JL/2072 which was owned by respondent No. 1 and insured with respondent No.2. It was also alleged that because of slip Surendra Chhabra fell down and sustained head injury. It was alleged that Surendra Chhabra was brought to the hospital where he passed away on 21/11/2002. It was prayed that since the offending vehicle was insured with respondent No.2, therefore, claim petition be allowed and compensation be awarded. The claim petition was contested by the respondent No.2 on various grounds including on the ground that respondent No. 1 is none else but the son of deceased. It was alleged that since the accident occurred on the part of negligence of deceased himself and also the fact that deceased was not having the valid and effective driving license at the relevant time, therefore, insurance company is not liable for payment of compensation. It was alleged that since income of the deceased has been assessed more than Rs.40,000/- per year, therefore, appellants are not entitled for any amount of compensation. It was alleged that since the deceased was borrower of the offending vehicle, therefore, the appellants were stepping in the shoes of respondent No.1 and not entitled for any compensation under Section 163-A of the Motor Vehicles Act. After framing of issues and recording of evidence, learned tribunal dismissed the claim petition filed by the appellants, against which the present appeal has been filed.

3. Learned counsel for the appellants argued at length and submit that since the income of the deceased was more than Rs.40,000/- per year, therefore, only claim petition filed by the appellants filed under Section 163-A of the Motor Vehicles

Act could not have been dismissed. It is submitted that this cannot be a ground for dismissal of claim petition. Learned counsel placed reliance on a decision in the matter of *National Insurance Co. Ltd. Vs. Amar Nath* 2005 (1) D.M.P. 14 (H.P.) wherein Scooter skidded and scooterist died due to head injury High Court of Himachal Pradesh held that requirements to be established are only factum of accident, age and income of deceased. It was held that insurance company is liable to pay compensation. Learned counsel further placed reliance on a decision in the matter of *Sarla Verma Vs. Delhi Transport Corporation* 2009 ACJ 1298 wherein Hon'ble Apex Court observed that compensation will be higher where deceased was ideal and not having any income. Reliance is also placed on a decision of this Court in the matter of *Smt. Savitridevi Vs. Ajay Navaria* in MA No.379/2003 decided on 17/09/2003 in a claim petition filed under Section 163-A of M.V. Act, this Court has awarded compensation of Rs.1,80,000/-. Lastly reliance was also placed on a decision of Division Bench of this Court in the matter of *Sitabai Vs. K.B. Saxena* 1 (2007) ACC 446 (DB) this Court held that in a accident case even if accident occurred due to negligent driving of deceased, then too, it is immaterial for disposal of claim petition filed under Section 163-A of Act. It was further held that since accident occurred by a vehicle which was owned by respondent No. 1 and insured with respondent No.2, therefore, they are liable to pay compensation. It is submitted that the appeal filed by the appellants be allowed and the impugned award passed by learned tribunal whereby the claim petition filed by the appellants was dismissed, be set-aside and the adequate compensation be awarded.

4. Learned counsel for the respondent No.2 submits that no illegality has been committed by learned tribunal in dismissing the claim petition filed by the appellants. It is submitted that the deceased himself was at fault and respondent No. I is the son of the deceased. It is submitted that as per Section 163-A of the Act liability to pay the compensation arises whether the insured or deceased was having the income as indicated in the II Schedule. It is submitted that II Schedule covers the victim from the income group of Rs.3,000/- per annum to Rs.40,000/- per annum. It is submitted that as per the claim petition income of the deceased was more than Rs.10,000/- per annum, therefore, appellants are not entitled for any compensation as per II Schedule of the Act in a claim petition filed under Section 163-A of the Act. Learned counsel placed reliance on a decision in the matter of *Ningamma Vs. United India Insurance Co. Ltd.* 2009 ACJ 2020 wherein in a case where a person borrowed a motor-bike from owner and met with an accident resulting in his death Hon'ble Apex Court has held that deceased cannot be held to be employee of the owner of the motorbike although he was authorized to drive the said vehicle by its owner. It was further observed by Hon'ble Apex Court that although the deceased was authorized to drive the said vehicle by its owner, therefore, he would step into the shoes of the owner- of the motorbike. It

was further held that legal representatives of a person driving a vehicle after borrowing it from the owner meets with accident without involving any other vehicle would not be entitled to claim compensation under Section 163-A of the Act. It is submitted that the appeal filed by the appellants be dismissed.

5. Undisputedly the respondent No. 1 was the son of the deceased and owner of the offending vehicle. It is also not in dispute that the accident occurred when the deceased was going on the offending vehicle as the scooter was skidded. Whether in such circumstances the legal representatives of deceased or a injured person is entitled for compensation under Section 163-A of the Motor Vehicles Act was taken into consideration by the Hon'ble Supreme Court in the matter of *Ningamma* (Supra) wherein it has observed that a bare perusal of said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle. In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the aforesaid motor vehicle in that event the liability to make payment of compensation is on the insurance company or the owner, as the case may be as provided under section 163-A. But if it is proved that driver is the owner of the motor vehicle, in that case the owner could not himself be a recipient of compensation as the liability to pay the same is on him. This proposition is absolutely clear on a reading of section 163-A of the MVA. Accordingly, the legal representatives of the deceased who have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation under section 163-A of the MVA.

6. In view of the aforesaid position of law and after taking into consideration all the facts and circumstances of the case and keeping in view the fact that deceased was the father of respondent No. 1, who was the owner of the offending vehicle, this Court is of the view that the deceased stepped into the shoes of the respondent No. 1, therefore, no illegality has been committed by earned tribunal in dismissing the claim petition filed by the appellant. In view of this, the appeal filed by the appellant is hereby dismissed. No order as to costs.

Appeal dismissed.

I.L.R. [2010] M. P., 442
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik
3 December, 2009*

GIRWAR SINGH ... Appellant
Vs.
JHANAK SINGH & ors. ... Respondents

Civil Procedure Code (5 of 1908), Section 151 & Order 8 Rule 1, Civil Courts Rules, M.P. 1961, Rule 110-A & 110-B - *Defendant's right to file written statement closed for want of not filing it within prescribed period of 90 days - However after the right to file written statement was closed, requisite document were supplied to the defendant by the plaintiff - Held - Rule 110-A of M.P. Civil Court Rules obliges the Court to pass proper order for supply of documents which are demanded by the defendant after appearance on account of having been filed with the plaint - Trial Court's order closing thereby right to submit written statement despite demand of documents by the defendant is illegal.* (Para 14)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 151 व आदेश 8 नियम 1, सिविल न्यायालय नियम, म.प्र. 1961, नियम 110–ए व 110–बी – प्रतिवादी का लिखित कथन पेश करने का अधिकार उसे 90 दिन की विहित कालावधि के भीतर पेश न करने के अभाव में समाप्त कर दिया गया – तथापि लिखित कथन पेश करने का अधिकार समाप्त होने के बाद, वादी द्वारा प्रतिवादी को अपेक्षित दस्तावेज प्रदाय किये गये – अभिनिर्धारित – म.प्र. सिविल न्यायालय नियम का नियम 110–ए उन दस्तावेजों के प्रदाय के लिए समुचित आदेश पारित करने के लिए न्यायालय को बाध्य करता है जिनकी वादपत्र के साथ पेश किये जाने के कारण प्रतिवादी द्वारा उपसंजाति के बाद माँग की जाती है – विचारण न्यायालय का प्रतिवादी द्वारा दस्तावेजों की माँग के बावजूद लिखित कथन पेश करने का अधिकार समाप्त करने का आदेश अवैध है।

Cases referred :
AIR 2006 SC 396, AIR 2007 SC 2571, AIR 2008 SC 2099.

D.R. Rahul, for the appellant.
None, for the respondents though served.

O R D E R

ABHAY M. NAIK, J. :–This First Appeal has been preferred by the defendant against the judgment and decree dated 23.12.2005 passed by the court of First ADJ Vidisha in Civil Suit No.46-A/2005.

2. Short facts relevant for the purpose of this appeal are that the plaintiff/ respondent No.1 instituted a suit for specific performance on the basis of alleged agreement of sale dated 25.6.2001 for consideration of Rs.70,000/- in respect of agricultural land in area 1.027 hectare comprised in survey No.335/2 situated in

*F.A. No.150/2006 (Gwalior)

village Sanoti, Tahsil and District Vidisha. According to the plaintiff, a sum of Rs.32,000/- was paid as part of consideration and agreement of sale was reduced into writing duly executed by defendant/appellant in his favour. Sale deed was to be executed upto 25.5.2002 after receiving balance consideration. This having not been done, a suit was instituted on 28.3.2005.

3. Defendant/appellant on giving appearance on 26.4.2005 sought time for engaging a lawyer. Case was adjourned to 12.5.2005 for filing written statement. However, the Presiding Judge was transferred in the meantime, consequently, the court was vacant on 12.5.2005 and 25.6.2005. On 11.7.2005, the case was transferred to the court of First ADJ Vidisha. However, Presiding Judge being on leave, the case was adjourned to 14.7.2005 and thereafter to 17.8.2005.

4. On 17.8.2005, defendant/appellant sought time to submit written statement. This was denied since period of 90 days had already elapsed by that time and accordingly, right to submit written statement was closed. Order sheet dated 17.8.2005 of the trial court reveals that on the same day, an application was submitted by the defendant under Section 151 of CPC with a prayer that the plaintiff may be directed to provide/supply copies of the documents relied upon by him and an opportunity to submit written statement may be granted. Pursuant thereto, copies of the documents were supplied by the plaintiff to the defendant/ appellant on 5.9.2005. Learned trial Judge on 19.9.2005 observed that the defendant/appellant did not take any objection about non receipt of documents on the earlier dates of hearing and did not submit written statement within 90 days from the date of appearance. Thus, it was found that the right to submit written statement was rightly closed. Accordingly, application under Section 151 CPC was dismissed on 19.9.2005. The suit proceeded without allowing the defendant/ appellant to submit the written statement. Learned trial Judge after recording the evidence of the parties, granted decree for specific performance in favour of the plaintiff vide the impugned judgment and decree. Aggrieved by the same, present appeal has been preferred.

5. Shri D.R.Rahul, learned counsel for the appellant made his submissions, whereas no one appeared for the respondents despite service.

6. It is contended by the learned counsel for the appellant that the right to submit written statement has been illegally closed, which caused a gross prejudice resulting into manifest injustice.

7. Considered the submissions and perused the record.

8. It is true that the learned trial Judge allowed cross examination and further allowed the defendant/appellant to adduce evidence. From the evidence on record it is revealed that the defence of the defendant/appellant was that his wife Kunwar Bai was suffering from blood cancer and money was needed by him for her treatment. A sum of Rs.23,000/- was obtained by him from the plaintiff as loan on

interest @ 3% p.m. on 25.6.2001. For the transaction of loan, he had brought a stamp of Rs.50/-, which was got signed from him in blank form. Further defence from the evidence on record seems to be that the defendant/appellant had repaid Rs.16,500/- in April 2002 after withdrawing it from the bank account of his younger brother. Further sum of Rs.15,400/- was allegedly paid in "Baisakh" 2002 after sale of 11 qtl. of "masoor" at the rate of Rs.1400/- per qtl.

9. From the aforesaid, it is amply clear that the defence of the defendant/ appellant was quite important and was not merely in the nature of denial. Moreover, stamp duty for the purpose of sale agreement on 25.6.2001 was prescribed as Rs.100/-, whereas the alleged sale agreement is on stamp of Rs.50/- only. Though, learned trial Judge in para 18 observed that on the reverse of Ex.P/1, it is endorsed that the stamp was meant for purchase agreement, on perusal of Ex.P/1, no such endorsement is found. It is observed that as per the endorsement the stamp was meant merely for agreement. No endorsement for the purpose of sale agreement is found on Ex.P/1. Thus, learned trial Judge has wrongly observed in para 18 that as per the endorsement, the stamp was meant for purchase agreement.

10. On perusal of the order sheets of the trial court, it is found that the defendant/ appellant gave appearance on 26.4.2005 and sought adjournment for engaging a lawyer. Suit was adjourned to 12.5.2005. On 12.5.2005 and 25.6.2005, the court was vacant on account of the Presiding Judge having been transferred. So there was no occasion for the defendant/appellant to make a demand for copies of the documents relied upon by the plaintiff. Thereafter, the case was transferred to the court of First ADJ Vidisha, however, again on 11.7.2005 and 14.7.2005, the Presiding Judge being on leave, the court was vacant and there was no occasion for the defendant/appellant to make a demand of copies of the documents referred to by the plaintiff in plaint. It was only on 17.8.2005 that the Presiding Judge was present and a prayer was made under Section 151 CPC demanding thereby the copies of the documents. Rule 110-A and 110-B of Madhya Pradesh Civil Court Rules are relevant for the purpose of this appeal, which are reproduced below :-

> "**110-A.** When the defendant appears after service of summons and demands copy of documents which have been filed along with plaint, the Court shall pass proper order for supply of such document.
>
> **110-B.** Whenever at any stage of the proceedings, any document is filed by either party then true copy thereof shall be supplied to other side."

Despite the aforesaid application, right of the defendant/ appellant to submit the written statement was closed on account of its non filing within a period prescribed under Order 8 Rule 1 CPC.

11. Hon'ble Supreme Court of India in the case of *Shaikh Salim Haji Abdul Khayumsab v. Kumar* (AIR 2006 SC 396) has observed :-

"11. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

15. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

16. It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order VIII is circumscribed by the words - "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form."

12. In a later decision, Apex Court in the case of *M/s R.N.Jadi and Brothers v. Subhashchandra* (AIR 2007 SC 2571) has observed :-

"8. Order VIII, Rule 1 after the amendment castes an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the Court and also does not specifically take away the power of the Court to take the written statement on record though filed beyond the time as provided for. Further, the nature of the provision contained in Order, VIII, Rule 1 is procedural. It is not a part of the substantive law. Substituted Order VII, Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases causing inconvenience to the plaintiffs and petitioners approaching the Court for quick relief and also to the serious inconvenience of the court faced with

frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried."

13. In the case of *Zolba v. Keshao* (AIR 2008 SC 2099), Hon'ble Supreme Court of India has observed that non - availability of the file with lawyer would constitute a sufficient cause for not filing the written statement within the period of limitation and the same would constitute sufficient cause for condoning the delay in filing the writing statement. It was further observed that the non-availability of record had prevented the defendant for filing the written statement within the period of limitation which was an exceptional case constituting sufficient cause for condoning the delay in filing the written statement. Accordingly, the matter was remitted back to the trial court to proceed with the hearing of the suit after accepting written statement.

14. The reasons of the learned trial Judge for closure of the defendant/appellant's right to file written statement and equally to dismiss the application under Section 151 of CPC are found to have been assigned ignoring Rule 110-A and 110-B of the M.P.Civil Court Rules (supra). Since the defendant/ appellant by way of submitting an application under Section 151 of CPC had made a demand on 17.8.2005 for supply of documents referred to in the plaint including the alleged sale agreement, it was obligatory on the part of the learned trial judge to ensure the supply of such documents to the defendant/appellant to enable him to prepare and submit a complete and effective written statement. Grant of opportunity to file written statement is not merely a formality. It is to be granted with a purposeful manner in order to enable the defendant to take a proper defence after perusing and examining the documents relied upon by the plaintiff. It is not merely a procedural formality. Mandatory character of Rule 110-A (supra) has been totally overlooked by the learned trial Judge while ordering the closure of right to file written statement and equally while dismissing the application under section 151 CPC. Thus, both the orders are not found sustainable in law. It is held that non-availability of the copies of documents with the defendant which were referred to in the plaint and relied upon by the plaintiff would constitute a sufficient cause for not filing the written statement within the period of limitation and the same would constitute a sufficient cause for condoning the delay in filing the written statement. Learned trial Judge ought to have allowed the application under Section 151 CPC by granting an opportunity to submit written statement with proper and complete defence. Therefore, the impugned judgment and decree are not sustainable in law for want of grant of opportunity to the defendant/appellant to submit his written statement.

15. In the result, appeal is allowed in part. Impugned judgment and decree are hereby set aside. Orders dated 17.8.2005 as well as 19.9.2005 of the learned trial

Judge closing thereby the defendant/appellant's right to file written statement as well as dismissing the application under section 151 of CPC are hereby set aside. Defendant/appellant shall appear in the trial Court on 6.1.2010. He may file written statement on that date or within further time as allowed by the learned trial Judge. Thereafter, the learned trial Judge shall proceed with the trial of the suit in accordance with law on merits. Notice to plaintiff as well as another defendant may be issued by the learned trial Judge for appearance on 6.1.2010. A certificate be issued to the defendant/appellant authorizing him to receive back from the Collector the full amount of court fees paid on the memorandum of appeal. Record be sent to the trial court immediately.

No order as to costs.

Appeal partly allowed.

I.L.R. [2010] M. P., 447
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik
3 Deeember, 2009*

IKRAR MOHAMMAD ... Appellant
Vs.
ISUB KHAN ... Respondent

A. Civil Procedure Code (5 of 1908), Order 6 Rule 7 & Order 20 Rule 4 - *Pleadings & Proof* - *Civil litigation proceeds on pleadings of parties and proof thereof except the facts and law which may be taken judicial note of* - *Decision of a case cannot be based on grounds outside the pleadings of the parties.* (Paras 7 & 8)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 7 व आदेश 20 नियम 4 – अभिवचन और सबूत – सिविल वाद पक्षकारों के अभिवचनों और उनके सबूत पर अग्रसर होता है सिवाय उन तथ्यों और विधि के जिनकी न्यायिक अवेक्षा की जा सकती है – किसी मामले का विनिश्चय पक्षकारों के अभिवचनों से बाहर के आधारों पर आधारित नही हो सकता है।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - *Bona fide need of a shop* - *During pendency of appeal, plaintiff acquired vacant possession of identical adjacent shop* - *After remand, plaintiff pleaded that adjacent shop is too small for his business* - *Trial Court gave a finding that the adjacent shop is equal in size & dimension and the alleged need ceased to be bona fide* - *Lower Appellate Court granted a decree that landlord needs both shops for his business* - *Held* - *Lower Appellate Court's judgment is beyond pleadings & proof and is based on surmises & conjecture* - *Appeal allowed.* (Paras 18 & 21)

*S.A. No.610/2004 (Gwalior)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – दुकान की वास्तविक आवश्यकता – अपील के विचाराधीन रहते हुए वादी ने निकटवर्ती समरूप दुकान का रिक्त कब्जा प्राप्त किया – प्रतिप्रेषण के बाद, वादी ने अभिवचन किया कि निकटवर्ती दुकान उसके कारोबार के लिए बहुत छोटी है – विचारण न्यायालय ने निष्कर्ष दिया कि निकटवर्ती दुकान आकार और लम्बाई–चौड़ाई में समान है और कथित आवश्यकता वास्तविक नही रही है – निम्न अपीलीय न्यायालय ने डिक्री प्रदान की कि भूस्वामी को अपने कारोबार के लिए दोनों दुकानों की आवश्यकता है – अभिनिर्धारित – निम्न अपीलीय न्यायालय का निर्णय अभिवचनों और सबूत के परे है तथा अनुमानों और अंदाज पर आधारित है – अपील मंजूर।

C. Civil Procedure Code (5 of 1908), Order 41 Rule 26 - *After remand, findings recorded by trial Court not challenged before Lower Appellate Court - Those findings can not be attacked in second appeal except on grounds envisaged u/s 100 CPC.* (Para 14)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 26 – प्रतिप्रेषण के बाद विचारण न्यायालय द्वारा अभिलिखित निष्कर्षों को निम्न अपीलीय न्यायालय के समक्ष चुनौती नही दी गई – उन निष्कर्षों को द्वितीय अपील में सि.प्र.सं. की धारा 100 के अन्तर्गत परिकल्पित आधारों के सिवाय आक्षेपित नही किया जा सकता।

Cases referred :

AIR 1953 SC 235, AIR 1956 SC 593, AIR 1979 Raj 87, AIR 1981 SC 1711, AIR 1975 SC 1409, (1999) 4 SCC 403, 1991 JLJ 642, 2001(2) JLJ 196, (2002) 2 SCC 223, 1984 MPWN SN 422, 1997(I) MPWN SN 142.

S.M.A. Naqvi with *D.D. Bansal,* for the appellant.
K.N. Gupta with *Prakhar Dengula*, for the respondent.

J U D G M E N T

ABHAY M. NAIK, J. :–This appeal involves a crucial question that whether the lower appellate court contrary to the finding of the Trial Court about absence of bonafide with regard to requirement under Section 12(1)(f) of M.P. Accommodation Control Act can grant a decree for eviction on its own notions beyond the pleadings as well as case projected in evidence.

1. This appeal is by the tenant against judgment and decree passed by the lower appellate court directing thereby eviction of the defendant/appellant from the suit shop. It has been admitted and heard on the following substantial question of law:-

> "Whether the finding of the learned first appellate court that the suit shop is still required for plaintiff's own business and he has no alternative suitable accommodation for the same in his possession inspite of possession of adjacent shop of same dimensions having been received by him from another tenant, is vitiated in the absence of specific plea to that effect by the respondent and also for want

of challenge of the finding recorded by the learned trial court vide its order dated 5-7-2004 ?"

2. Facts relevant for the purpose of this appeal are that the plaintiff/respondent instituted a suit for eviction and arrears of rent with allegations that the defendant is tenant in the shop owned by the plaintiff. He was inducted into tenancy @ 250/- p.m., vide rent note dated 17/1/96. Plaintiff is a poor labourer performing his work with the aid of hand-cart. He, bonafide, needs the suit shop to start his grocery business. Suit shop is in dilapidated condition. Its walls are quite weak and have developed cracks, which may fall down at any moment. It cannot be repaired without eviction. Defendant is in arrears of rent w.e.f. 17/1/96. A demand notice was issued on 31/7/2000, which was served upon him. Despite notice, defendant did not pay the rent nor did he vacate the suit shop, hence the suit.

3. Defendant/appellant submitted his written statement refuting thereby the claim of the plaintiff. It has been stated that the plaintiff suppressed the adjacent property belonging to him. It is further averred that the defendant did not execute the alleged rent-note dated 17/1/96. On the contrary, suit shop was obtained on rent w.e.f. 10/4/92 @ 200/- per month as rent and Rs.50/- per month as electricity charges. Defendant is not in arrears of rent, rather, he has been paying the rent timely . The alleged rent note dated 17/1/96 is a forged document. As regards alleged need, It is averred that the plaintiff has two more shops. Need of the plaintiff has accordingly been denied by the defendant. In special plea, defendant averred that the plaintiff disconnected the electricity of the suit shop on 21/3/01. On 24/3/01, new electric meter was installed with the consent of the plaintiff. Money order issued to the plaintiff of rent @ 250 p.m. was not accepted. Defendant has deposited a sum of Rs.2500/- in the court as rent w.e.f. April, 01 to January,02. Prior to April, 01, there was no balance towards rent. On account of disconnection of electricity, rate of rent is liable to be fixed.

4. After recording the evidence, learned trial judge decreed the suit in favour of the plaintiff on 26/8/03 on the ground under Section 12(1)(f) of the M.P. Accommodation Control Act, 1961. However, other grounds for eviction were declined. Aggrieved by it, Civil appeal No.23-A/04 was submitted. In this appeal, an application for amendment was submitted that the plaintiff had acquired vacant possession of adjacent shop from his tenant one Mushtaq Khan, Choice Tailor. In view of the subsequent event, the plaintiff is not entitled to seek eviction. This application was opposed on the ground that the said shop was quite small and was insufficient to run the business of grocery. Application for amendment was allowed by the learned lower appellate court vide order dated 11/5/04. Consequently, the learned lower appellate judge remitted back the matter to the trial court with a direction to allow the plaintiff to make consequential amendment and to record evidence after raising additional issue in respect of amended version.

5. Learned trial judge raised issue No.6 to the following effect:-

"Did bonafide need in respect of the suit shop cease to exist on account of acquiring vacant possession of the shop from Mushtaq Khan, Choice Tailor."

Thereafter, the evidence was recorded and the learned trial judge vide his order dated 5/7/04 held that the shop vacated by Mushtaq Khan, Choice Tailor is equal in size to that of suit shop and, thus, the plaintiff has acquired vacant possession of alternative non-residential accommodation of equal size. He held that the plaintiff has no bonafide need in view of subsequent acquisition of adjacent alternative shop. Finding of the learned trial judge was so received by the learned lower appellate court on 12/7/04. Case was fixed for final arguments on 28/7/04. Plaintiff did not submit objections to the findings of the trial court under Rule 26 of Order 41 of C.P.C. Learned lower appellate judge after hearing the arguments did not set aside the finding about the shop vacated by Mushtaq Khan, Choice Tailor but set out a new case that the plaintiff bonafide needs to run his business by combining the suit shop and the shop vacated by Mushtaq Khan, Choice Tailor because the shop vacated by Choice Tailor was insufficient. Accordingly, the appeal was declined and the decree of the trial court for eviction under Section 12(1)(f) of the M.P. Accommodation Control Act, 1961 has been confirmed by the lower appellate court, hence, the appeal.

6. Learned counsel for the parties made their respective submissions in respect of the substantial question of law already stated hereinabove.

7. Cardinal principle of civil litigation is that it proceeds on pleadings of parties and proof thereof except the facts and law which may be taken judicial note of. Rule 1 of Order 4 of C.P.C. lays down that every suit shall be instituted by presenting a plaint. Order 6 provides about the pleadings. According to its Rule 2 every pleading shall contain and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved. Rule 7 further lays down that no pleading shall, except by way of amendment raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. Exception is carved out by virtue of Rule 13 which lays down that neither party need in any pleading allege any matter of fact which the law presumes in his favour.

8. Hon. Supreme Court of India long back in the case of *Messrs. Trojan & Co. vs. RM. N.N. Nagappa Chettiar* (AIR 1953 SC 235) has held that it is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found.

Without an amendment of the plaint the court held was not entitled to grant the relief not asked for, more so, when no prayer was ever made to amend the plaint so as to incorporate in it an alternative case.

9. Thereafter in the case of *Nagubai Ammal and others Vs. B.Shama Rao and others* (AIR 1956 SC 593) the Supreme Court of India in para 12 has observed that evidence let in no issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence.

10. Suit for eviction was initially decreed by the learned trial judge on ground under Section 12(1)(f) of the M.P. Accommodation Control Act, 1961. It was found that the plaintiff needed bonafide the suit shop for starting grocery business therein as pleaded in the plaint. During pendency of Civil appeal under Section 96 of the C.P.C., an application under Order 6 Rule 17 C.P.C., was submitted by the defendant with allegation that the plaintiff has acquired vacant possession of the adjacent shop from tenant Mustaq Khan Choice tailor and his alleged need stands satisfied Amendment was allowed and the matter was remitted back to the trial court to decide the issue raised by way of amendment after granting opportunity to the plaintiff to make consequential amendment vide order dated 11/5/04. Plaint was thereafter amended by alleging that the shop vacated by Mustaq Khan Choice Tailor is quite small and is insufficient for grocery business. The allegation of the plaintiff with regard to the alleged bonafide need in paragraphs 3 and 3-A are to the effect that the plaintiff performs labour work with the aid of handcart. He bonafide required the suit shop to start grocery business and he has no other alternative non-residential premises of his own in the city of Shivpuri. By way of adding paragraph 3-A in the plaint it has been admitted that Mustaq Khan Choice Tailor has delivered vacant possession of the adjacent shop to the plaintiff. However, shop vacated by Mustaq Khan Choice Tailor, according to the plaintift, is too small and is insufficient to start and run grocery business in it.

11. In order to appreciate more effectively the pleadings made by the plaintiff with regard to the claim for eviction on the ground of alleged bonafide need under Section 12(1)(f) of the M.P. Accommodation Control Act, 1961, I feel it proper to reproduce verbatim paragraphs 3 and 3-A of the plaint:-

> 3. यह कि वादी हाथ ठेला से मजदूरी करता है इस कारण वादी को परचूनी की दुकान का व्यवसाय करने एवम चलाने हेतु विवादग्रस्त दुकान की वास्तविक रूप से सद्भावनापूर्ण आवश्यकता है इस हेतु वादी के स्वामित्व की कोई भी दुकान नगर शिवपुरी में रिक्त नहीं है इस कारण वादी प्रतिवादी से विवादग्रस्त दुकान खाली करा पाने का अधिकारी है।
>
> 3 (अ). यह कि विवादित दुकान से लगी दुकान को मुस्ताक खाँ च्वाइस टेलर्स

द्वारा खाली कर मुझ वादी को सुपर्द कर दी है परन्तु खाली दुकान काफी छोटी है व उसमें वादी परचुनी की दुकान नहीं कर सकता है क्योंकि खाली दुकान परचुनी की दुकान करने हेतु व चलने हेतु पर्याप्त स्थान नहीं है।

12. From perusal of the aforesaid plaint allegations it is crystal clear that specific case of the plaintiff was that he needed bonafide the suit shop to start and run the grocery business. While admitting the acquisition of vacant possession of the adjacent shop, his case is that it is too small for his proposed business of grocery. Thus, by no stretch of imagination it could be the case of the plaintiff that he needed the suit shop as well as adjacent shop and he proposes to start the proposed business of grocery after joining both the shops together. On the contrary, his specific averment as contained in paragraph 3-A was that the adjacent shop vacated by Mustaq Khan Choice Tailor was too small and insufficient to start and run the proposed grocery business. Even in the chief-examination recorded in the form of affidavit after incorporation of amendment, in the plaint as well as written statement, plaintiff has stated on oath that he is in receipt of vacant possession of the adjacent shop from Mustaq Khan Choice Tailor, which is too small and the plaintiff cannot conveniently run the proposed business of grocery in such adjacent shop on account of insufficiency. Thus, additional chief-examination of the plaintiff was also not suggestive of the fact that the plaintiff intends to start the proposed business of grocery in the suit shop as well as adjacent shop by clubbing them together. On perusal of his entire examination, i.e. chief-examination as well as cross-examination recorded after remand, it is clear that the plaintiff has maintained that he intends to start proposed business of grocery in the suit shop and the same is needed by him bonafide and that the shop vacated by Mustaq Khan, Choice Tailor is too small for the proposed business of grocery. Thus, there is no iota on record that the plaintiff intended to start the proposed business of grocery in both the shops by joining them together or otherwise and by no stretch of imagination it can be said that the defendant/appellant was aware of the plaintiff's intention to start the business of grocery in both the shops by joining together or otherwise. This is obviously a new case which has neither been pleaded nor proved by the plaintiff but has been made out by the learned lower appellate judge while granting a decree for eviction on such ground beyond the case set up in the pleadings and evidence. It is true that the pleadings should not be construed technically but should be construed liberally. It is equally true that pleadings have their own importance as observed by the Supreme Court of India from time to time in various decisions (supra). In the absence of specific pleading and proof it cannot be said that the defendant knew the plaintiff's case to seek eviction on the ground that he needed both the shops together and intended to start business of grocery in both the shops by joining them together or otherwise.

13. In the case of *Messrs. Trojan & co.* (supra) it has been clearly observed by the Supreme Court that the decision of a case cannot be based on grounds

outside the pleadings of the parties and it is the case pleaded that has to be found. Specific averments contained in paragraphs 3 and 3-A of the plaint have been already reproduced above in order to appreciate correctly the pleadings. Plaintiff could have availed the opportunity to make consequential amendment by pleading that looking to the size of the suit shop and adjacent shop he needed both the shops to start the proposed business of grocery. He did not choose to do so. Instead, his specific stand was that he though has received the vacant possession of the adjacent shop from one Mustaq Khan, Choice Tailor, same being too small for grocery business, he cannot conveniently start and run the proposed grocery business in it. Plaintiff did not at all plead and establish that his need was in respect of both the shops simultaneously by joining them together or otherwise. Instead of opting for it, he maintained about insufficiency of the subsequently acquired non-residential accommodation and insisted for eviction of the defendant/appellant from the suit shop for the alleged need of grocery business. After remand vide order dated 11/5/04 learned trial judge raised Issue No.6 that did bonafide need in respect of the suit shop cease to exist on account of acquiring vacant possession of the shop from Mustaq Khan choice tailor. In the evidence recorded pursuant to the remand order, plaintiff examined himself and witnesses, namely, Narsingh Joshi and Babulal Yadav. All these three witnesses have stated on oath with consistency that the shop vacated by Mustaq Khan Choice Tailor, is too small and is insufficient for the proposed business of grocery of the plaintiff. Thus, there is no iota in the evidence of the plaintiff that it was ever a case of him that the plaintiff intended or needed for his proposed grocery business, both the shops simultaneously. Even, in the cross-examination performed on behalf of the plaintiff on the statements of the defendant as well as his witnesses recorded on oath after remand, there is no such suggestion that the proposed business of grocery would be started in both the adjoining shops after joining them together or otherwise. It is also clear from the finding remitted by the learned trial judge vide judgment dated 5/7/04 that the shop vacated by Mustaq Khan Choice Tailor, is equal in size to that of the suit shop and thus the plaintiff having acquired alternative non-residential premises of the same size, his alleged bonafide need ceased to exist. This finding was called by the learned lower appellate court vide its remand order dated 11/5/04. Under Rule 26 of Order 41 of the Code of Civil Procedure, the plaintiff could have submitted objections before the lower appellate court. No such objections were submitted before the lower appellate court or even before this court. Plaintiff/respondent even at the said stage did not choose to submit that both the adjoining shops were needed for his proposed grocery business. Thus, the need of the plaintiff in the light of the pleadings and material on record could not have been considered for both the

adjacent shops for his proposed grocery business after joining them together or even otherwise.

14. Apart from the aforesaid, it may be seen that finding of fact remitted by the trial court vide its order dated 5/7/04 and received by the lower appellate court on 8/4/04 was not challenged by submitting objections under Rule 26 of C.P.C. Specific finding of the trial judge vide his order dated 5/7/04 is that the shop received by the plaintiff after institution of the suit from Mustaq Khan in vacant condition is equal in size to that of the suit shop and the alleged bonafide need of the plaintiff ceased to exist on account of having occupied it. This finding has not been reversed by the learned lower appellate judge and the same is not open to attack in this second appeal except on ground envisaged in Section 100 of C.P.C. No attempt ever has been made by the plaintiff to challenge the said finding in accordance with law. Same is therefore binding on this court. I may here successfully refer to Full Bench decision of Rajasthan High court reported in AIR 1979 Raj. 87 *(Chatar Lal Vs. Ramdas)*.

15. Suit giving rise to the present appeal was instituted on the basis of the alleged bonafide need in respect of the suit shop alone with proposed dimensions and size as averred in the plaint paragraph 3, stated hereinabove. Suit was decreed by the learned trial judge. During pendency of the civil appeal, plaintiff obtained vacant possession of adjacent non-residential shop from Mustaq Khan choice tailor. This was admitted by the plaintiff vide paragraph 3-A of the plaint added subsequently. His specific case was that the shop so acquired in vacant condition was too small and the plaintiff would not be able to run the proposed business of grocery in it on account of insufficiency. He did not plead that he intends to start and run the proposed business of grocery in both the adjacent shops. Instead, he maintained that the shop so acquired by him subsequently in vacant condition is too small and insufficient and that the plaintiff still needed the suit shop for his proposed grocery business. Learned trial judge while remitting the finding after remand found that the shop subsequently acquired by the plaintiff was equal in size to that of the suit shop and the alleged bonafide need of the plaintiff ceased to exist on account of plaintiff's obtaining vacant possession of the adjacent shop. No challenge was made by the plaintiff to this finding.

16. Hon'ble Supreme court of India in the case of *Hasmat Rai Vs. Raghunath Prasad* (AIR 1981 SC 1711) has observed that finding of fact ignoring incontrovertible admitted position which would non-suit the plaintiff if upheld would be travesty of justice. The burden being on the plaintiff to show that he had no other reasonably suitable accommodation for carrying on the business which he wanted to start in the suit premises, it was for the

plaintiff to show that he had not acquired possession from firm Goraldas Parmanand. Alternatively, the plaintiff should have shown that the said adjacent accommodation was not reasonably suitable for the business he wanted to start.

In the aforesaid case, the plaintiff rightly or wrongly took a stand that he not only wanted suit premises but also the adjoining premises of which he had obtained possession for starting his business. In the case in hand, no such stand was adopted by the plaintiff as is clear from plaint's averments paragraphs No. 3 and 3-A.

17. In the case of *P.Venkateshwarlu Vs. Motor & General Tradersw* (AIR 1975 SC 1409), the Hon'ble Supreme court of India has observed long back:-

> "If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy, Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice-subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice".

Proposition has been further affirmed that :-

> "-------for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed".

Thus, the court of appeal is held entitled to take into consideration cautious cognisance of events and developments subsequent to the institution of the proceedings.

18. In a later decision of the Apex Court in the case of *Prataprai N. Kothari Vs. Jophn Braganza* (1999)4 SCC 403 it has been held as settled law that in the absence of any plea no evidence is admissible. In the case in hand, there is neither plea nor evidence to support the findings of the learned lower appellate judge that the plaintiff/respondent needs bonafide suit shop as well as the adjacent shop to start proposed business of grocery. Plaintiff's suit is for eviction from the suit shop on the ground that it is required bonafide by the plaintiff to start grocery

business. At the time of institution of the suit, adjacent shop was not vacant. However, after its vacation in plaintiff's favour, the matter was remanded to trial Court for enquiry. Plaintiff instead of asserting need for both the shops maintained that he needed the suit shop because the adjacent shop was too small. Thus, there is no whisper either in pleadings or evidence that the suit shop being small, plaintiff needs both the shops together. Learned lower appellate judge considered the size of the shop and then treated it too small to run the business of grocery. It is his personal notion. He has failed to take into consideration that the bonafide requirement for grocery business depends on the personal approach coupled with the magnitude of business and the extent of investment proposed to be made in it. There is neither any such pleading nor evidence on record for this purpose. On the contrary, plaintiff has pleaded in specific that he was performing labour work with the aid of handcart. Such a person may run business in a shop even with smaller size. A person performing his job with handcart may run his business even of grocery in the suit shop as alleged by the plaintiff in specific in paragraph 3 of the plaint. In paragraph 3-A, he has mentioned that the adjacent shop subsequently obtained by him in vacant condition is quite small. He has, no where, pleaded that he intends to run his business in both the shops together. There are no standard specifications of size of shop for grocery business. A labour performing his job with hand-cart may remain contented even with the size, the suit shop is having. Learned lower Appellate Judge could not have imposed his personal notions about size of shop in the absence of pleadings and proof on the part of plaintiff. Thus, the finding of the learned Appellate Judge is based on conjectures and surmises and is founded on his personal notions, devoid of pleadings and proof in the present case. The same is not sustainable in law. Plaintiff having approached the court to seek eviction from the suit shop has been unable to prove that the adjacent shop obtained by him in vacant condition was, in any way, inferior in size or situation to the suit shop. This being so, no decree for eviction may be granted from the suit shop on the ground neither pleaded nor proved by the plaintiff/ respondent. Accordingly, the impugned judgment and decree stand vitiated. I may successfully refer for this purpose the decision of this court in the case of *Tikamchand Vs. Prakash Chandra* (1991 JLJ 642). In a recent decision in the case of *Deenanath Vs. Pooranlal* 2001(2) JLJ 196, Hon. Supreme Court of India while considering the reversal of a decree for eviction on ground under Section 12(1)(f) of the Act, by the High court has observed :-

> ".....Thus the legislative mandate being clear and unambiguous, the Court is duty-bound to examine not merely the requirement of the landlord as pleaded in the eviction petition but also whether any other reasonably suitable non-residential accommodation in his occupation in the city/town is available. The judgment/order of the Court/authority for eviction of a tenant which

does not show that the Court/authority has applied its mind to these statutory requirements cannot be sustained and the superior Court will be justified in upsetting such judgment/order in appeal/second appeal/revision. Bona fide requirement, on a first look, appears to be a question of fact. But in recording a finding on the question, the Court has to bear in mind the statutory mandate incorporated in Section 12(1)(f). If it is found that the court has not applied the statutory provisions to the evidence on record in its proper perspective then the finding regarding bona fide requirement would cease to be a mere finding of fact, for such erroneous finding illegally arrived at would vitiate the entire judgment. In such case the High Court cannot be faulted for interfering with the finding in exercise of its second appellate jurisdiction under Section 100 of the Code of Civil Procedure."

Hon'ble Apex Court in the case of *Union of India Vs. EID Parry (India) Ltd.* (2000)2 SCC 223 while considering the impact of pleadings has observed in para 4:-

"----------This view is contrary to the settled law that a question, which did not form part of the pleadings or in respect of which the parties were not at variance and which was not the subject-matter of any issue, could not be decided by the court. The scope of the suit was limited. The pleadings comprising of the averments set out in the plaint and the defence put up by the present appellant in their written statement did not relate to the validity of the rule struck down by the High court. The High Court therefore, travelled beyond the pleadings in declaring the rule to be ultra vires."

19. On behalf of the plaintiff/respondent reliance has been placed on this court's decision in the case of *K.C.Jain Vs. Gopi Bai* (1984) MPWN SN 422 to support the decree for eviction. In the case of *K.C.Jain* (supra) it has been observed that although the pleading of plaint para 10 are not happily worded, they also give an impression that the accommodation available to the respondent and to her husband was not sufficient to meet the family need. It was a case of bonafide need for residential purpose which depends on the strength of family, status in the society and financial condition etc. Suit giving rise to the present appeal is instituted by a landlord who was performing his job with handcart. He continued to maintain the pleadings and evidence that he needed the suit shop to start grocery business and the vacant non-residential premises obtained by him during pendency of lis was insufficient. It has been found as a fact that the suit shop and the adjacent shop were equal in size and situation. In the absence of pleadings and proof that the plaintiff intended to start grocery business in both the adjoining shops, the

alleged need of the plaintiff after obtaining the adjacent shop equal in size and dimension, ceased to exist as was rightly found by the learned trial judge. Learned lower appellate judge has committed an illegality in spelling out a new case that the need is for staring the grocery business in both the adjacent shops together, which is not permissible in law and is not therefore sustainable. Thus, the plaintiff/ respondent does not get any assistance from the decision of *K.C.Jain case* (supra).

20. Reliance placed by the respondent/plaintiff on 1997(I) MPWN SN 142 *(Husainibai Vs. Smt. Lalkunwarbai)* is also of no avail because the alternative shop was found insufficient. In the present case, shop vacated by another tenant is with equal dimensions and size as that of the suit shop. The plaintiff/respondent has no where pleaded the need in specific for both the shops together. Thus, the lower appellate court has obviously acted beyond the scope of pleadings and has thus committed an illegality. Accordingly, the substantial question of Law is answered affirmatively in favour of the appellant.

21. In the result, the appeal is hereby allowed. Impugned judgment and decree of the lower appellate court is hereby set aside. Finding of the learned trial judge vide judgment dated 5/7/04 is hereby affirmed. Ex consequenti, the suit of the plaintiff for eviction stands dismissed. No order as to costs.

Appeal allowed.

I.L.R. [2010] M. P., 458
APPELLATE CIVIL
Before Mr. Justice P.K. Jaiswal
7 December, 2009*

RAM KISHAN SONI ... Appellant
Vs.
DR. SURENDRA BAHARE ... Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) *- **Disclaimer of title** - Tenant denied title of plaintiff in written statement - Held - Even if a title of landlord is disclaimed in written statement, the ground u/s 12(1)(c) is made out.* (Para 15)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) – स्वत्व से इंकार – किरायेदार ने लिखित कथन में वादी के स्वत्व से इंकार किया – अभिनिर्धारित – यद्यपि लिखित कथन में भूस्वामी के स्वत्व से इंकार किया गया हो, धारा 12(1)(सी) के अन्तर्गत आधार गठित हो जाता है।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) *- **Disclaimer of title** - Tenant paid rent to plaintiff for 14 years after death of plaintiff's father - But denied the title of plaintiff in written statement - Held - Once the relationship of landlord and tenant is admitted or proved, tenant*

*S.A. No.1045/2009 (Jabalpur)

is estopped from denying the title of the landlord u/s 116 of Evidence Act - Denial of title by tenant not bona fide - Plaintiff entitled for decree u/s 12(1)(c). (Para 15)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) – स्वत्व से इंकार – किरायेदार ने वादी के पिता की मृत्यु के बाद वादी को 14 वर्ष तक किराया अदा किया – किन्तु लिखित कथन में वादी के स्वत्व से इंकार किया – अभिनिर्धारित – जब एक बार भूस्वामी और किरायेदार का सम्बन्ध स्वीकार कर लिया जाता है या साबित हो जाता है, तब किरायेदार साक्ष्य अधिनियम की धारा 116 के अन्तर्गत भूस्वामी के स्वत्व से इंकार करने से विबंधित हो जाता है – किरायेदार द्वारा स्वत्व से इंकारी सद्भावी नही – वादी धारा 12(1)(सी) के अन्तर्गत डिक्री का हकदार।

C. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - ***Bona fide need*** - *Plaintiff claiming ownership on the basis of Will - Defendant's plea that in absence of examination of attesting witnesses, due execution of the Will has not been proved - Held - In eviction suit, the question of title, if disputed, may incidently be gone into - Tenant paying rent to plaintiff for 14 years after death of plaintiff's father - Even in absence of examination of attesting witnesses of the Will, it cannot be said that plaintiff has failed to prove his ownership - Therefore, not open to tenant to question the validity of Will.* (Para 14)

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – वादी ने वसीयत के आधार पर स्वामित्व का दावा किया – प्रतिवादी का अभिवचन कि अनुप्रमाणक साक्षियों की परीक्षा के अभाव में वसीयत का सम्यक् निष्पादन साबित नही हुआ है – अभिनिर्धारित – बेदखली के वाद में, स्वत्व का प्रश्न, यदि विवादित किया जाए, आनुषंगिक रूप से देखा जा सकता है – किरायेदार ने वादी के पिता की मृत्यु के बाद वादी को 14 वर्ष तक किराया अदा किया – वसीयत के अनुप्रमाणक साक्षियों की परीक्षा के अभाव में भी यह नही कहा जा सकता कि वादी अपना स्वामित्व साबित करने में असफल हो गया है – इसलिए किरायेदार वसीयत की विधिमान्यता को चुनौती देने के लिए स्वतंत्र नही है।

D. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - ***Bona fide need*** - *Plaintiff needed the suit premises for providing facilities of Coloured Doppler and TMT - Defendant's plea that the plaintiff cannot handle the TMT and Doppler Test as he is not an expert in that branch - Held - Plaintiff can hire the services of expert for conducting the test of TMT and Coloured Doppler - Plaintiff's need genuine - Entitled for decree u/s 12(1)(f).* (Para 17)

घ. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – वादी को कलर डॉप्लर और टीएमटी की सुविधाएँ मुहैया कराने के लिए वादग्रस्त भवन की आवश्यकता – प्रतिवादी का अभिवचन कि वादी टीएमटी और कलर डॉप्लर का टेस्ट नही कर सकता क्योंकि वह उस शाखा में विशेषज्ञ नही है – अभिनिर्धारित – वादी टीएमटी और कलर डॉप्लर का टेस्ट करने के लिए विशेषज्ञ की सेवाएँ किराये पर ले सकता है – वादी की आवश्यकता वास्तविक – धारा 12(1)(एफ) के अन्तर्गत डिक्री का हकदार।

Cases referred :

(2007) SCC 225, AIR 1988 SC 1858, 1990 JLJ 209, AIR 1987 SC 2028, 2000(2) MPWN Note No. 142, 2002(1) MPWN (12) Page 23, 2009(5) MPHT 44, (1995) 6 SCC 580.

A.K. Jain, for the appellant.

P.R. Bhave with *Bhanu Yadav,* for the respondent.

ORDER

P.K. JAISWAL, J. :–Heard on admission

This is tenant's appeal under Section 100 CPC challenging the legality and validity of judgment and decree dated 2.7.2009 passed by XIX Additional District Judge, Jabalpur in Civil Appeal No.20-A/2009, confirming the judgment and decree passed by IV Civil Judge Class-I, Jabalpur in Civil Suit No.246-A/2006 whereby the suit of the respondent was decreed under Section 12(1)(c) and (f) of the M.P. Accommodation Control Act, 1961 (in short 'the Act').

2. Shankar Lal Bahare, father of the respondent had let out the suit accommodation consisting of a shop bearing house No.1219, Ganjipura Main Road, Jabalpur to the defendant-appellant by creating tenancy in his favour for non-residential purposes and the defendant is using the same by doing business of medical store in the name and style of Vikash Medical Store. The tenancy of the appellant is monthly and starts from the first day of each calendar month and ends with the last date of the same month. The suit house belongs to Smt. Laxmi Bai Bahare and Shankar Lal Bahare, mother and father of the respondent. After their death, by virtue of their registered Will dated 15.2.1988, the respondent became owner of the suit property and his name was mutated in the Corporation record and is paying all the taxes. After the death of respondent's father, the respondent recovered the monthly rent from the appellant. The appellant voluntarily paid the rent to the respondent. The respondent passed the rent receipt in favour of appellant as a landlord and owner of the suit shop. The appellant regularly paid the rent as owner to the respondent without any objection. The appellant attorned the respondent by paying the rent.

3. The respondent who is a medical practitioner is holding a degree of MBBS and M.D. (Medicine) and is running his clinic adjoining to the suit shop. He in his clinic provides the facility of consultation. Echo and ECG etc to his patients. He filed a suit on 5.5.2005 claiming eviction of the appellant-tenant on the ground that the shop was bona tide required by him to provide TMC and coloured doppler facility to his patients. Except the suit shop he has no other reasonable suitable non-residential accommodation for this purpose in the city of Jabalpur. It was also averred that he is the share-holder and Director of Mahakaushal Hospital, Jabalpur. The back portion of

the clinic and adjoining to the tenanted premises is in occupation of his wife Dr(Smt) Sushma Bahare who is running X-ray and Sonography Centre in the name and style of "Disha X-ray and Sonography Clinic Centre". The rent of the suit shop was Rs.300/-per month. He also served registered notice on 2.4.2005 and terminated the tenancy on expiry of the tenancy month ending on 30th April, 2005.

4. The appellant-tenant in his written statement admitted that he had taken the tenanted premises on rent from Shri Shankar Lal Bahare, father of the respondent on 16.5.1966 and since then he is in occupation of the said premises and after the death of Shankar Lal Bahare, respondent started receiving the monthly rent from the appellant. It is also contended that respondent is a rent collector does not ipso-facto become owner of the premises in terms of Section 12(1)(f) of the Act. He also denied that there was a real or genuine need of the shop by the respondent-plaintiff for any purpose, much less the business. As regards denial of title, he stated in para 3 of written statement that :

> "3. The defendant was inducted in the premises by the owner of the said shop namely Shri Shankar Lal Bahare, father of the plaintiff, on 16.5.1966 by virtue and in terms of an agreement. Since then, the defendant is in occupation of the said premises. However, after the death of Shri Shankar Lal Bahare, the plaintiff started receiving the monthly rent from the defendant. Needless to state that mere 'rent collector' does not *ipso-facto* become owner of a premises unless it is demonstrated by placing sufficient material on record to establish that the person seeking decree for eviction under Section 12(1)(f) of the Act is the owner of the premises in question in terms of the words used in section 12(1)(f) "if he is the owner thereof". The plaintiff having not pleaded anything to suggest as to how he claims himself to be the owner of the property, is not entitled to seek a decree of eviction on the said ground. It is however, not disputed that the defendant is running the medical store from the premises in the name and style of Vikas Medical Stores. So far as the map attached to the plaint is concerned the same is specifically denied being unauthentic, non-descriptive, evasive and incorrect. The plaintiff appears to have omitted deliberately mentioning the dimensions and measurements etc. in the said map for the reasons best known to him and in order to conceal the actual position."

5. It is not disputed by the appellant-tenant that plaintiff is collecting the monthly rent from him and after the death of Shankar Lal Bahare, it is the

plaintiff who is issuing the rent receipt and contended that the father of the plaintiff was the owner of the premises. In para 5 he stated that the respondent is a medical practitioner and is running his clinic adjoining to the suit premises and is providing the facility of consultation, ECO and ECG etc. to his patients but denied that the accommodation is insufficient to the respondent. It is also denied that the respondent has no other reasonable/ suitable non-residential accommodation for his use in the city of Jabalpur. In the written statement, the appellant clearly denied the title of the respondent. The respondent by way of amendment gave the detailed particulars about the execution of registered Will dated 10.2.1988 and also claimed the decree under Section 12(l)(c) of the Act on the ground that denial of the title by the appellant is likely to affect adversely and substantially the interest of the respondent and, therefore, he is entitled to evict the appellant on the ground under Section 12(l)(c) of the Act. The appellant amended the written statement and denied that the provisions of Section 12(l)(c) of the Act are attracted. It is also pleaded that for providing TMT, ECO, ECG and Doppler facility the medical practitioner must possess the degree in Radiology/ Radio Diagnosis. The respondent does not possess the said requisite qualification. He cannot under take to or run the activities like coloured doppler, ECO and TMT facility.

6. Learned Trial Court on consideration of evidence adduced by the parties held that the respondent was the owner and landlord of the suit premises and needed the same bona fide for starting his own business. It is also held that denial of title is not being bona fide, eviction was ordered on this ground also. On the aforesaid finding a decree of eviction was passed.

7. The appellant appealed against the said decree. The learned lower appellate court after appreciating the evidence on record has held that the respondent was owner of the suit shop and his need is real and genuine. On the aforesaid finding the lower appellate court also held that the requirement was bona fide and dismissed the appeal of the appellant.

8. It is also held that the appellant denied the derivative title of the respondent and, therefore. Trial court has not committed any legal error in granting the decree under Section 12(l)(c) of the Act.

9. Learned counsel for the appellant drew my attention to the averments made in the plaint and submitted that originally when the suit was filed on 7.5.2005, no averment was made as to how he is claiming the ownership of the shop in possession of the appellant. He by way of amendment in para 1 of the plaint has contended that the suit house belongs to mother and father of the plaintiff and they by virtue of Will bequeathed the same to him through registered Will and on the basis of that Will, the respondent became the owner of the suit property and his name was recorded as owner of the suit property. His submission was that for a decree under Section 12(l)(f) of the Act, the respondent has to prove as to how

he became owner of the suit shop. Due execution of the Will filed by the respondent has not been proved. He further submitted that the proof of attestation of the Will is the mandatory requirement. In the present case, due execution of the Will has not been proved and therefore the Courts below committed a legal error in holding that the respondent is the owner of the suit premises. In support of the said contention, he drew my attention to the decision of the Apex Court in the case of *Apoline D' Souza vs John D'Souza*, (2007) SCO 225. The submission of learned counsel for the appellant was that execution of the Will must be proved at least by one attesting witness, which has not been done in the present case and therefore no decree can be passed under Section 12(l)(f) of the Act.

10. In *Dilbagrai Punjabi v. Sharad Chandra*, AIR 1988 SC 1858, it was held that where a landlord claims eviction of his tenant from a non-residential premises on the ground of bona fide requirement of starting a business, it is essential that he also establishes that he is the owner of the disputed premises. As far as the title of Shankar Lal Bahare set out in para 1 is concerned, he was the owner and the landlord and that said Shankar Lal Bahare and his wife executed a registered Will dated 15.2.1988 transferring title to the present respondent. After the death of Shankarlal, appellant never disputed the title by way of paying the rent to the respondent who had issued rent receipts to the appellant. After the attornment as aforesaid, the terms and conditions of the tenancy continued to be the same. In Municipal Corporation after the death of Shankar Lal Bahare, the name of respondent was recorded as owner of the suit shop. This question also arose before the Apex Court in *Subhash Chandra v. Mohammad Sharif*, 1990 JLJ 209 in the context of the right of a tenant to challenge title of his landlord and it was clarified that though the doctrine of estoppel ordinarily applies where the tenant has been let into possession by the plaintiff, the same cannot be true about a case where the plaintiffs rights are founded on a derivative title. A tenant already in possession can challenge the plaintiffs claim on derivative title showing that the real owner is someone else but this is subject to the rule enunciated under S.116 of the Evidence Act. This section does not permit the tenant during the continuance of the tenancy, to deny that his landlord had, at the beginning of the tenancy, a title to the property. The rule is not confined in its application to cases where the original landlord brings an action for eviction. A transferee from such a landlord also can claim the benefit but that will be limited to the question of title of the original landlord at the time when the tenant was let in. It was also laid down that as far as the derivative title is concerned, a tenant is entitled to show that the plaintiff has not, as a matter of fact, secured a transfer from the original landlord or that the alleged transfer is ineffective for some other valid reason which renders the transfer to be non-existent in the eye of law. The Court further observed that "these exceptions, however, do not relieve the tenant of his duty to respect the title of the original landlord at the time of the beginning of the tenancy. In *Smt.*

Shanti Sharma v. Smt Ved Prabha, AIR 1987 SC 2028 the Apex Court had held that it is the burden of the landlord to prove that he is the owner in the sense that he would be able to occupy the house after eviction.

11. In the present appeal, it was never disputed by the appellant that Shankar Lal Bahare, father of Dr. Surendra Bahare was not the owner and landlord of the suit premises. Now, after Will was made in respondent's favour by his father and mother, the appellant paid rent to respondent and recognized him as his landlord for a period of more than 14 years. It is, therefore, not open to him to question the validity of Will. Taking the above into consideration, the respondent would be owner of the suit shop because he has right to occupy the same in his own right. He has a right against the tenant to occupy building himself and exclude anyone holding a title lesser them him. He is the owner of the suit accommodation within the meaning of Section 12(1)(f) of the Act. Once the title of the landlord is admitted by tenant by paying rent for a period of more than 14 years, it is not open to him to challenge the same, later. The decision of the Supreme Court in the case of *Subhash Chandra v. Mohammad Sharif* (supra) as noticed above would not permit him to do so. Section 116 of the Act would come into operation and act as a bar against him in the matter. Under the circumstances, the appellant could not be permitted to deny the title of the respondent.

12. The standard of proof of the ownership in such cases is not the same as it is to be adopted in title suit. In the case of *Zehra Bai (Mst) V. Jagmohan Arora,* 2000 (2) MPWN Note No.142, Gwalior Bench of M.P. High Court has held that it is not necessary for the land-lord to produce the document of her title when defendant had admitted the relationship of landlord and tenant. Once rent is paid to land-lady, she shall be landlord within the definition of the land-lord under the M.P. Accommodation Control Act.

13. In the case of *Jagdamba Prasad Khandelwal Vs. Shanti Devi,* 2002(1) MPWN (12) Page 23 it has been held that in an ejectment suit, the Court has to satisfy whether the Estate of the deceased is represented. Unless the 'Will' is disputed by other legal representatives, it is not open for tenant to challenge the 'Will'. Similar view is taken by the M.P. High Court in the matter of *Ram Vishal @ Vishali Kachhwaha vs Dwarka Prasad Jaiswal,* 2009(5) MPHT 44 wherein it has been held that in a suit for eviction between the landlord and tenant, the title of the landlord does not require strict investigation as required in the title suit, therefore, even in the absence of examination of the attesting witnesses of the Will, the approach of the Courts below, based on admission of the appellant does not appear to be contrary to law or record. The respondent-landlord by cogent evidence has proved that he is owner in the sense that he would be able to occupy the house after eviction. In such a legal situation, it would be reasonable to hold that though a tenant cannot convert an eviction suit into a suit challenging the title

of his landlord, it is the obligation of the landlord to satisfy the court before obtaining a decree for eviction that he was the owner of tenanted premises. The Apex Court in the case of *Dr Ranbir Singh vs Asharfi Lal,* (1995) 6 SCC 580 has held that the question of title of the property is not germane for decision of the eviction suit and may examine incidentally but cannot be decided finally. In a case where a plaintiff institutes a suit for eviction of his tenant based on the relationship of the landlord and tenant, the scope of the suit is very much limited in which a question of title cannot be gone into because the suit of the plaintiff would be dismissed even if he succeeds in proving his title but fails to establish the privity of contract of tenancy. In a suit for eviction based on such relationship the Court has only to decide whether the defendant is the tenant of the plaintiff or not, though the question of title if disputed, may incidentally be gone into, in connection with the primary question for determining the main question about the relationship between the litigating parties.

14. In view of the discussion aforesaid, this Court is of the opinion that the evidence on record fully establishes that respondent was the owner of the premises. After giving my anxious and serious consideration to the contentions of the learned counsel for the appellant, I find no force and substance in the submission made by the learned counsel for the defendant-appellant and the principles laid down by the Apex Court in the case of *Apoline D' Souza vs John D'Souza* (supra) will not be applicable in eviction suit. Even in the absence of examination of the attesting witnesses of the Will, it cannot be said that respondent has failed to prove his ownership over the suit premises, approach of the courts below based on admission of the appellant, does not appear to be contrary to law or record.

15. It is true that in the plaint as originally filed no ground under Section 12(1)(c) of the Act has been taken directly. The appellant in para 3 of his written statement denied the title of respondent and, therefore, the respondent amended the plaint and also prayed for decree under Section 12(1)(c) of the Act. It is well settled that even if a title of the landlord is dis-claimed in the written statement, the grounds is made out once the relationship of landlord and tenant is admitted or proved, tenant is stopped from denying the title of the landlord under Section 116 of the Evidence Act.

16. In the present case, the appellant denied the title of the respondent, denial of the title by appellant was not bona fide and learned courts below have not committed any error in passing the decree against the appellant under Section 12(1)(c) of the Act.

17. Coming to the next ground of eviction under Section 12(1)(f) of the Act, the case of the respondent was that he needed the suit accommodation for providing facilities of coloured doppler and TMT. The appellant Ram Kishan Soni (DW-I) in para 11 has deposed that the business for which the premises

was needed can only be done by the Radiologist. It is submitted by learned counsel for the appellant that the respondent is Post Graduate in Medicine and the operation of the TMC and coloured Doppler can be done only by Radiologist and not by anyone. In support of the said contention, he drew my attention to Ex.D-86 and submitted that the respondent cannot handle the TMT and Doppler test as he is not an expert in that branch and under the regulation 13(4) of M.P. Medical Council, Adhiniyam, 1987, he cannot be permitted to run the machines of TMT and coloured Doppler test. It is not the case of the respondent that he himself will operate TMT and Doppler machines, he can hire the services of expert for conducting the tests of TMT and Doppler to his patients. His case was that the premises was required for TMT and Doppler facilities. There is no bar that respondent cannot install T.M.T. and Doppler machines. Thus the aforesaid contention of the appellant cannot be accepted nor on the said fact it can be said that the need of the respondent is not genuine. Both the courts below after appreciating the oral and documentary evidence gave a finding that the need of the respondent is natural, real, sincere and honest. The said finding is based on appreciation of evidence on record. The finding given by the Courts below was a finding of fact and cannot be interfered at the stage of second appeal under Section 100 of CPC.

18. For the above mentioned reasons, no substantial question of law arises in this appeal. The appeal filed by the appellant has no merit and is liable to be dismissed.

19. It was lastly submitted by the learned counsel for the appellant that in case if this court comes to the conclusion that appeal filed by the tenant has no merit then he may be granted two months' time to vacate the suit premises because the appellant is in occupation of the suit premises for a period of more than 43 years.

20. Considering these facts, I am inclined to grant two months time to the appellant and it is directed that the appellant shall hand over the vacant possession of the suit premises on or before 7th February, 2010.

21. With the aforesaid, the appeal is dismissed.

Appeal dismissed.

I.L.R. [2010] M. P., 467
APPELLATE CIVIL
Before Mr. Justice P.K. Jaiswal
6 January, 2010*

NATIONAL GARAGE (M/S.) ... Appellant
Vs.
RAJVARDHAN SINGHAI ... Respondent

Accommodation Control Act, M.P. (41 of 1961), Section 13(1) - *Mesne profit higher than contractual rate - Permissibility - Appeal or revision preferred by a tenant against order or decree of eviction passed under the Act - It is open to the appellate or revisional Court to stay the execution of the order or the decree on terms including a direction to pay monthly rent at a rate higher than the contractual rent.* (Para 15)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 13(1) – संविदात्मक दर से अधिक अन्तःकालीन लाभ – अनुज्ञेयता – किरायेदार द्वारा अधिनियम के अन्तर्गत पारित बेदखली के आदेश या डिक्री के विरुद्ध अपील या पुनरीक्षण पेश – अपीलीय या पुनरीक्षण न्यायालय ऐसे निबंधनों पर जिनमें संविदात्मक किराये से अधिक दर से मासिक किराया अदा करने का निदेश सम्मिलित हो, आदेश या डिक्री का निष्पादन रोकने के लिए स्वतंत्र है।

Cases referred :

(2005) 1 SCC 705, (2009) 9 SCC 772, (2008) 5 SCC 287.

R.S. Tiwari, for the appellant.
A.K. Jain, for the respondent.

ORDER

P.K. JAISWAL, J. :–They are heard on I.A. No.2892/2009, an application for grant of stay and I.A. No.13292/2009, an application for modification of order dated 18.3.2009 granting ad interim stay against the dispossession of the appellants from the suit premise subject to payment of monthly rent at a rate higher than the contractual rent.

2. The suit premises is non-residential commercial premises ad measuring approximately 30,000 sq ft and situated on the main road from Russel Chowk to Fourth Bridge at Jabalpur. The suit premises was let out to the appellants somewhere in December, 1964 vide lease deed dated 9.12.1964 (Ex.D/7). Another lease deed was executed on 10.2.1967 (Ex.D/8). Ex.D/9 is the registered lease deed dated 1.12.1985. The appellants are paying rent by increasing 5% every year as per terms of the registered lease deed dated 1.12.1985. On 20th February, 2004 the respondents instituted a suit for eviction under Section 12(1)(f) and (m) of the M.P. Accommodation Control Act, 1961 and it was contended that the appellants are the tenants of the suit premises @ Rs.24,000/- per month. It was

*F.A. No.184/2009 (Jabalpur)

further pleaded that the premises in the occupation of the appellants was needed for expansion of the business of respondents No.1 to 3 and for that expansion of business, the respondents do not have any other suitable alternative non-residential accommodation of their own in the Corporation area of Jabalpur city.

3. The Trial Court after appreciating the oral and documentary evidence on record came to the conclusion that the premises in occupation of the appellants was needed by the respondents No.1 and as such a decree of eviction has been passed against the appellants by impugned judgment and decree dated 12.1.2009 directing them to hand over the possession of the premises within two months from the date of passing of the decree.

4. The appellants challenged the said judgment and decree by filing the present first appeal before this Court. This Court admitted the first appeal on 18.3.2009 and granted ad interim stay of the execution of impugned judgment and decree, so far as it relates to the eviction of the suit premises and directed that the eviction of the appellants shall remain stayed till further orders.

5. The respondents after service of notice from this Court filed an application for modification of stay order (I.A. No.13292/2009) and prayed that during the pendency of the appeal, the appellants are liable to pay reasonable mesne profit which may be equivalent to the market rent from the date of passing of the decree till the disposal of the first appeal. It is also averred that the appellants did not deposit the entire rent from the date of filing of the suit till the passing of the decree for eviction and, therefore, ad interim stay granted by this Court be vacated.

6. It is submitted by the learned counsel for the respondents-landlord that the amount of mesne profit fixed by the Trial Court is far less than the current market rent in that area and, therefore, the appellants be directed to pay the market rent @ Rs.7,50,000/- per month from the date of passing of the decree. In support of the said contention, he placed reliance on the decision of the Apex Court in the case of *Atma Ram Properties (P) Ltd vs Federal Motors (P) Ltd.*, reported in (2005) 1 SCC 705 and *State of Maharashtra and another vs Super Max International Private Limited and others*, reported in (2009) 9 SCC 772.

7. On the other hand, Shri R.S. Tiwari, learned counsel for the appellants defended the order dated 18-3-09 and submitted that the appellants are paying the rent by increasing 5% every year as per terms of registered lease deed dated 1.12.1985 (Ex.D/9) @ Rs.24,000/- per month. He further submits that the appellants were paying the rent @ Rs.28,140/- per month by increasing rent 5% every year during the pendency of the suit as well as during the pendency of this appeal and presently they are depositing rent @ Rs.35913/- per month after deducting TDS as per provisions of Income Tax Act, 1961. It is also submitted that initially when the premises was taken on rent in the year 1964, the rent was @ Rs.150/- per month and then Rs.801/- per month. He also drew my attention to

clause (3) of registered lease deed dated 1.12.1985 (Ex.D/9) which provides increase of rent by 5% every year. He submits that there is a condition of increase of rent by 5% which has been accepted by the parties and appellants are paying the rent accordingly which has been accepted by the respondents without any objection and therefore by the aforesaid conduct, they are estopped to claim rent at the market rate. With the aforesaid, appellants prayed for rejection of the application.

8. The appellants No.2 in para 9 of his deposition has deposed that he is in possession of 30,000 sq ft of land. Recently for widening of the road, the Municipal Corporation, Jabalpur has demolished the boundary wall constructed by the appellants and had taken possession of 800 sq ft out of the said accommodation of 30000 sq ft. The appellants are also paying electricity charges, water charges, corporation tax and property tax etc etc. as per terms and conditions of the Ex.D/9.

9. It is not in dispute that the suit property is situated on the main road from Russel Chowk to Fourth Bridge. The normal rent of the surrounding area is Rs.22-30/- per square feet. The respondents have filed a copy of lease agreement of surrounding area vide Ex.R/1 and R/2. Annexure R/1 is lease agreement dated 4.8.2008 effective from 1.6.2006, executed between Smt Suhag Rani Jain with others and M/s Max New York Life Insurance Company Ltd. in which it has been agreed that an amount of Rs.81,120/- would be the rent per month for an area of 3380 sq ft of construction portion and Rs.89232/- would be the enhanced rent from 1st August, 2009. Vide lease agreement Annexure R/2 which is in respect of the same area wherein it has been agreed between the parties that the rent payable for 4330 sq ft of carpet area would be @ Rs.22/- per sq ft i.e. Rs.95,260/- per month. The said rented premises are in respect of Jain Towers Russel Chowk, Jabalpur. The distance of Jain Tower is approximately 50-100 meter from the area in question.

10. The Apex court in the case of *Atma Ram Properties (P) Ltd vs Federal Motors (P) Ltd.* (supra) held that a right of the tenant to file an appeal is statutory but his prayer for grant of stay is appealable in exercise of equitable discretionary jurisdiction of the appellate court. While ordering the stay the appellate court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and it is postponing the execution of the order of eviction. There is every justification for the appellate court to put the appellant tenant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount, which is not necessarily the same as the contractual rate of rent which had been paid by the tenant during the trial court proceedings.

11. In *Atma Ram Properties (P) Ltd vs Federal Motors (P) Ltd.* (supra), the Apex Court in para 17, 18 and 19 observed as follows:

> "17. In the Delhi Rent Control Act 1958, the definition of a "tenant" is contained in clause (l) of Section 2. Tenant includes "any person

continuing in possession after the termination of his tenancy" [Section 2(l)(ii)] and does not include "any person against whom an order or decree for eviction has been made" [Section 2(l)(A)]. This definition is identical with the definition of tenant dealt with by this Court in *Chander Kali Bai* case. The respondent-tenant herein having suffered an order for eviction on 19.3.2001, his tenancy would be deemed to have come to an end with effect from that date and he shall become an unauthorized occupant. It would not make any difference if the order of eviction has been put in issue in appeal or revision and is confirmed by the superior forum at a latter date. The date of termination of tenancy would not be postponed by reference to the doctrine of merger.

18. That apart, it is to be noted that the appellate Court while exercising jurisdiction under Order 41 Rule 5 of the Code did have power to put the tenant-appellant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is statutory but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the appellate Court. While ordering stay the appellate Court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate Court to put the tenant-appellant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as the contractual rate of rent. In *Marshall Sons & Co. (I) Ltd. Vs. Sahi Oretrans (P) Ltd. & Anr., (1999) 2 SCC 325*, this Court has held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the Court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property.

19. To sum up, our conclusions are:-

(1) While passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and in so far as those proceedings are concerned. Such terms, needless to say, shall be reasonable;

(2) In case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (l) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree;

(3) The doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date."

12. In *Atma Ram Properties (P) Ltd vs Federal Motors (P) Ltd.* (supra), the Apex Court framed two issues arising for consideration as follows :-

"10..... This submission raises the following two issues: (i) in respect of premises enjoying the protection of rent control legislation, when does the tenancy terminate; and (ii) up to what point of time is the tenant liable to pay rent at the contractual rate and when does he become liable to pay compensation for use and occupation of the tenancy premises unbound by the contractual rate of rent to the landlord ?"

13. The Apex Court answered the first issue as follows :

"16. We are, therefore, of the opinion that the tenant having suffered a decree or order for eviction may continue his fight before the superior forum but, on the termination of the proceedings and the decree or order of eviction first passed having been maintained, the tenancy would stand terminated with effect from the date of the decree passed by the lower forum. In the case of premises governed by rent control legislation, the decree of eviction on being affirmed, would be determinative of the date of termination of tenancy and the decree of affirmation passed by the superior forum at any subsequent stage or date, would not, by reference to the doctrine of merger have the effect of postponing the date of termination of tenancy.

14. The second issue was answered as follows :

"(2) ..... With effect from that date [the passing of the decree of eviction], the tenant is liable to pay *mesne profits* or compensation

for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree." (words in parenthesis added) (emphasis supplied)

15. Recently in the case of *State of Maharashtra and another vs Super Max International Private Limited and others* (supra), the Constitutional Bench of the Apex Court considered the case of *Satyawati Sharma Vs. Union of India* (2008) 5 SCC 287 *& Atma Ram Properties (P) Ltd vs Federal Motors (P) Ltd.* (supra), and respectfully agreed with the view taken in *Atma Ram Properties (P) Ltd.* (supra) and held that in an appeal or revision preferred by a tenant against an order or decree of an eviction passed under the Rent Act it is open to the appellate or the Revisional Court to stay the execution of the order or the decree on terms, including a direction to pay monthly rent at a rate higher than the contractual rent.

16. In the case of *State of Maharashtra and another vs Super Max International Private Limited and others* (supra), it has been held that the amount of Rs.5,40,000 per month fixed by the Bombay High Court is reasonable and held that if the eviction decree is set aside than the status quo ante would be restored and the tenant would be entitled to get back all the amounts that he was made to pay in excess of the contractual rent. Here in the present case, the tenanted premises is around 28000-30000 sq ft and is situated at the prime location of commercial activity of Jabalpur city and rent of the adjoining area, within the vicinity of 50 sq meter is around Rs.22-30 per sq ft. The appellants are in possession of the premises since 1964. Now the tenant has been paying the rent @ Rs.28,140/- per month and adjoining premises have been recently let out on rent between year 2006 to 2008 @ Rs.22-30 per sq ft per month.

17. As per affidavit of appellants No.2 dated 4.3.2009 and the chart appended along with the affidavit, the appellants deposited the mesne profit up to the period of December, 2009. No counter affidavit has been filed by the respondents to disbelieve the statement and facts mentioned in the affidavit and, therefore the contention of respondents that no arrears of rent as per agreement dated 1.12.1985 (Ex.D/9) was deposited by the appellants nor they are paying it regularly during the pendency of the appeal, cannot be accepted at this stage.

18. Looking to these facts, it is directed that the appellant would deposit in the court Rs. 7/- per sq. ft i.e, Rs. 2,03,000/- (29000 x 7= 2,03,000/-) in addition to the contractual rent which could be paid directly to the respondents. The stay granted by this court on 18-3-09 shall continue during the pendency of the appeal, however, subject to the condition that the appellants shall deposit a sum of Rs.2,03,000/- commencing from the date of decree passed by the Trial Court.

Amount so fixed over and above the contractual monthly rent shall be deposited before the Trial Court until the appeal is decided so that the amount in deposit could be disbursed by this Court at the end of the appeal and the said deposit amount along with the accrued interest, should only be paid after the final disposal to civil suit depending upon the result of this appeal. The appellants are directed to deposit the said amount within a period of three months from today failing which the stay granted by this court on 18.3.2009 shall stand vacated automatically without further reference to the bench.

19. With the aforesaid I.A. No.13292/2009 and 2892/2009 are partly allowed and disposed of.

Order accordingly.

I.L.R. [2010] M. P., 473
APPELLATE CRIMINAL
Before Mrs. Justice Sushma Shrivastava
9 October, 2009*

VIJAY BAHADUR SINGH & ors. ... Appellants
Vs.
STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Section 304-B - *Dowry Death - Essential ingredients - Law discussed.* (Para 17)

क. दण्ड संहिता (1860 का 45), धारा 304–बी – दहेज मृत्यु – आवश्यक तत्व – विधि की विवेचना की गयी।

B. Penal Code (45 of 1860), Section 304-B - *Dowry Death - Suspicious circumstances - Parents of deceased were not informed soon about her death and dead body was hurriedly cremated with the result that no postmortem of the body could be conducted - It is held to be unnatural death.* (Para 19)

ख. दण्ड संहिता (1860 का 45), धारा 304–बी – दहेज मृत्यु – संदेहजनक परिस्थितियाँ – मृतक के माता–पिता को उसकी मृत्यु के बारे में तुरन्त सूचित नही किया गया और इस परिणाम के साथ त्वरित रूप से शव का दाहसंस्कार कर दिया गया कि शरीर का कोई शव परीक्षण न किया जा सके – इसे अप्राकृतिक मृत्यु होना अभिनिर्धारित किया गया।

C. Penal Code (45 of 1860), Section 304-B - *Dowry Death - Soon before death - Allegation of cruelty or harassment for demand of dowry is of the period of seven months prior to death - Instant case can hardly be term as soon before her death.* (Para 32)

ग. दण्ड संहिता (1860 का 45), धारा 304–बी – दहेज मृत्यु – मृत्यु के तुरन्त पूर्व – दहेज की माँग के लिए क्रूरता और तंग करने का अभिकथन मृत्यु के सात माह पूर्व की कालावधि का है – प्रस्तुत मामला मृत्यु के तुरन्त पूर्व के रूप में नही माना जा सकता।

*Cr.A. No.501/1996 (Jabalpur)

Cases referred :

2006(3) MPLJ 82, AIR 2003 SC 2865, (2003) 2 SCC 188, AIR 2005 SC 785, 2008 AIR SCW 8241, 2009 AIR SCW 536, (1991) 1 SCC 371, AIR 2005 SC 1411, AIR 2001 SC 3020, AIR 2004 SC 1731, 2009 AIR SCW 3598.

P.R. Bhave with *B.P. Yadav*, for the appellants.
Sudesh Verma, G.A., for the respondent/State.

J U D G M E N T

SUSHMA SHRIVASTAVA, J. :–This judgment shall govern the disposal of Criminal Appeal No.501/96 and Criminal Appeal No.504/96 arising out of the same judgment dated 9.3.96 passed by First Additional Sessions Judge, Rewa in S.T. No.25/91.

2. Appellants Vijay Bahadur, Hansavati and Rajeshwari Devi have been convicted under Section 498-A, 304-B and Section 201 of IPC and each of them sentenced to rigorous imprisonment for three years, seven years and three years with fine of Rs.200/- for the respective offences, while appellant Jaibharat has been convicted only under Section 201 of IPC and sentenced to rigorous imprisonment for three years with fine of Rs.200/- by the impugned judgment. Being aggrieved by the aforesaid order of conviction and sentence, appellants Vijay Bahadur, Hansavati and Rajeshwari Devi preferred Criminal Appeal No.501/96, whereas appellant Jaibharat preferred Criminal Appeal No.504/96.

3. According to prosecution, deceased Sheela Devi was married to one Prabhakar Singh of Village Bahera-Dabar, Mauganj, District Rewa in the year 1988. Deceased Sheela Devi (hereinafter referred to as 'deceased') died on 6.10.90, i.e., within seven years of her marriage. Prabhakar Singh, the husband of the deceased was in service at Sidhi and used to live there. Appellants Vijay Bahadur, Hansavati and Rajeshwari, who are respectively brother, mother and sister of the husband of deceased, used to harass her and subjected her to beating and torture for dowry complaining that her father had not given enough dowry. Deceased used to make oral complaints to her parents that the appellants were harassing her for more dowry. Dharmraj Singh, the father of the deceased, therefore, brought her to his place. However, in August 1990, appellants Vijay Bahadur and Jaibharat came and took the deceased with them to her matrimonial home for participating in the death anniversary of the wife of appellant Vijay Bahadur assuring that she would not have any problem; but on 6.10.90 she was done to death by the appellants and without informing the parents or the Police, her dead body was cremated. When Dharmaraj Singh came to know of her death from one Tilakdhari on 15.10.90, he made a written complaint to the Police on 16.10.90, on the basis of which an offence was registered against the appellants and was investigated. After due investigation, appellants were prosecuted under Section 498-A, 304-B, 201 of IPC and were put to trial.

4. Appellants Vijay Bahadur, Hansavati and Rajeshwari Devi were charged

under Section 498-A, 304-B and Section 201 of IPC, whereas appellant Jaibharat was charged only under Section 201 of IPC for causing disappearance of the evidence of commission of the offence of dowry death. Appellants abjured the guilt and pleaded false implication.

5. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, found the appellants guilty for the aforesaid offences and sentenced them as mentioned hereinabove by the impugned judgment, which has been challenged in this appeal.

6. Arguments of both the sides were heard. Record of the lower court is perused.

7. It was no longer disputed that deceased Sheela died in her matrimonial home within seven years of her marriage with Prabhakar Singh of village Bahera-Dabar, Mauganj, District Rewa. It was also not disputed that appellants Vijay Bahadur, Hansawati and Rajeshwari are the relatives of the husband of the deceased, being the brother, mother and sister of her husband. Learned Senior counsel appearing for the appellants, however, submitted that the trial court erroneously convicted them under Section 498-A, 304-B and 201 of IPC without there being any cogent and reliable evidence against them. Learned counsel for the appellants further submitted that the trial court did not appreciate the evidence properly and failed to consider that deceased Sheela met a natural death due to illness and as such there was no question of informing Police about her death and causing disappearance of evidence of the commission of offence of dowry death. Learned counsel for the appellants also submitted that appellant Jaibharat was also erroneously convicted without there being any evidence against him.

8. Learned counsel for the State, on the other hand, justified and supported the conviction and sentence of the appellants.

9. Evidence on record is perused. The prosecution has examined as many as fourteen witnesses to establish the guilt of the appellants. However, Raghuraj Singh (P.W-1), Raghupat Singh (P.W-2), Bihari Singh (P.W-3), Jaymanti (P.W-4) as well as Surajdeen (P.W-6), Mahesh Pratap Singh (P.W-7), Rajendra Singh (P.W-13) and Kanti Singh (P.W-14) have not supported the prosecution case and they have been declared hostile to prosecution. According to these witnesses (P.W-1 to P.W-4, P.W-6 and P.W-7), deceased Sheela died of short illness and her cremation was done as per prevailing customs. The conviction of the appellants is based on the testimony of related witnesses, namely, Dharmraj Singh (P.W-9), Shanti Devi (P.W-11), Jamadar Singh (P.W-12) and Thanedar Singh (P.W-10). Dharmraj Singh (P.W-9) & Shanti Devi (P.W-11) are the parents of the deceased, while Jamadar Singh (P.W-12) and Thanedar Singh (P.W-10) are her brothers. The written report (Ex.P-9) of the incident was lodged by Dharmraj Singh (P.W-9), the father of the deceased.

10. Dharmraj Singh (P.W-9) deposed in his evidence that when his daughter Sheela came back to his place two months after her marriage, she complained to her mother that her in-laws were harassing and humiliating her for dowry. According to P.W-9 Dharmraj Singh, an amount of Rs.15,000/- (fifteen thousand) was settled as dowry and he had paid Rs.8000/- (rupees eight thousand) in cash and articles worth Rs.2000/-(rupees two thousand), but he failed to pay remaining five thousand rupees due to his poor financial position. He had also complained to appellant Vijay Bahadur Singh about the harassment meted out to the deceased, but appellant Vijay Bahadur assured him that Sheela would not have any trouble in future, therefore, she was sent with him for matrimonial home. However, when his daughter Sheela came back again, she was not willing to go to her in-laws' place as they harassed her and she apprehended that they would kill her. Thereafter when appellants Vijay Bahadur and Jaibharat came back to take his daughter to her in-laws' place, he declined to send her with them, but on their assurance she was sent to her matrimonial home, and two-three months thereafter, she died. According to Dharmraj Singh (P.W-9), the in-laws of her daughter did not inform him about her death and he came to know it through one Tilakdhari, who returned from appellants' village. Thereafter, he left for their village and lodged a written report (Ex.P-9) at the Police Station.

11. Shanti Devi (P.W-11), the mother of the deceased also deposed in her evidence that amount of Rs.15000/- was settled to be given in the marriage of her daughter Sheela, out of which Rs.8,000/- and articles worth Rs.2000/- were given to her in-laws and a sum of Rs.5000/- remained to be paid; when her daughter came back after two months of her marriage, she disclosed that her mother-in-law, sister-in-law and brother-in-law were beating her complaining non-payment of money by her father. Deceased Sheela also used to tell her that remaining amount of dowry should be paid to her in-laws, otherwise she would be killed.

12. According to Shanti Devi (P.W-11), Sheela was taken back to her in-laws' place because of death of the wife of appellant Vijay Bahadur and when Thanedhar Singh (P.W-10) went to meet her, the appellants complained to him that Dharmraj Singh had not given remaining amount of dowry so they would kill his daughter, they also gave beating to the deceased before him. Deceased was then called back to her parents and she declined to go to her in-laws' place apprehending her death, but she was again taken back by appellants Vijay Bahadur and Jaibharat for participating in death anniversary of the wife of appellant Vijay Bahadur on the assurance given by appellant Jaibharat, but Sheela died thereafter. According to Shanti Devi (P.W-11), appellants never informed her of the death of her daughter Sheela and she came to know of the same from one Tilakdhari when he came from their village.

13. Thanedar Singh (P.W-10), the cousin brother of the deceased, also deposed that he had gone to village Bahera-Dabar seven months prior to the death of

deceased Sheela and happened to meet her at her place, where appellant Vijay Bahadur, his sister and mother (two other appellants) were also present. Appellant Jaibharat also came there. According to Thanedar Singh (P.W-10), appellants Vijay Bahadur and Jaibharat told him that Dharamraj Singh had not given the remaining amount of dowry of Rs.5000/-, therefore, Sheela would be killed anytime and she would also meet the same fate as the wife of appellant Vijay Bahadur had met. Her mother-in-law and sister-in-law also began abusing and beating her in his presence.

14. According to Jamadar Singh (P.W-12), the real brother of the deceased, appellants used to trouble and harass the deceased for remaining amount of dowry and when he had gone to take his sister two months after her marriage, her mother-in-law had asked him to make the payment, else Sheela would be killed. According to this witness, appellant Vijay Bahadur had also asked for money, thereafter he had brought back his sister; again when appellant Vijay Bahadur came to escort the deceased to her in-laws' place, it was agreed that when the crop would be ready, the money would be arranged and paid.

15. Jamadar Singh (P.W-12) further deposed that when Thanedar Singh (P.W-10) came back from the appellants' village and informed that Sheela was given beating for dowry in his presence, he brought back his sister Sheela, but she was again sent to her matrimonial home at the instance of appellants Vijay Bahadur and Jaibharat for participating in the death anniversary of appellant Vijay Bahadur's wife upon the assurance given by them, though his sister Sheela was weeping and not willing to go to appellants' place and thereafter she died; the intimation of her death was not given to them. P.W-12 Jamadar Singh also deposed that when he had gone to take back her sister for the second time, her mother-in-law had given her beating and told him that "तुम लोग चोर हो, और पैसा नही दे रहे हो".

16. The aforesaid related witnesses were cross-examined at length. Learned Senior counsel appearing for the appellants submitted that their evidence is not cogent and reliable and the theory of demand of dowry and cruelty to the deceased has been invented later on. Learned counsel for the appellants also submitted that there were no allegations of cruelty against appellants in the written report (Ex.P-9) and even in their evidence there were no specific allegation of cruelty against each of the appellants and these witnesses have tried to make a generalized statement against them. According to learned counsel for the appellants, the evidence of mother of the deceased, namely, Shanti Devi (P.W-11) suffered from material omissions and contradictions from her previous Police statement (Ex.D-2) regarding allegations of marpeet and demand of Rs.5000/- by the appellants made before Thanedhar (P.W-10). Learned counsel for the appellants also submitted that the brother of the deceased, namely, Jamadar Singh (P.W-12) had given a totally new theory in para 2 and 3 of his deposition, which was never narrated by

her mother Shanti Devi (P.W-11) and father Dharmraj Singh (P.W-9). Learned counsel for the appellants strenuously urged that virtually there was no such cogent and reliable evidence that deceased was subjected to harassment or cruelty in connection with the demand of dowry soon before her death or she met an unnatural death. Reliance was placed in this behalf on decision rendered by this court in the case of *Dinesh Kumar & Ors. Vs. State of M.P.* Reported in 2006(3) MPLJ page 82 and the decisions of the Apex Court in the case of *Hira Lal & Ors. Vs. State (Govt. of NCT) Delhi* reported in AIR 2003 Supreme Court page 2865 and *State of Karnataka Vs. M.V. Manjunathegowda and another* reported in 2003 (2) Supreme Court Cases page 188 and it was submitted that the presumption under Section 113-B of Evidence Act is a rebuttable presumption and it can operate only when the ingredients of offence under Section 304-B are proved.

17. No doubt, in order to establish the guilt under Section 304-B of IPC the essential ingredients of the offence have to be proved by the prosecution. As also held and reiterated by the Apex Court from time to time in catena of decisions reported in AIR 2003 Supreme Court page 2865 *(Hira Lal & Ors. Vs. State (Govt. of NCT) Delhi* (Supra), AIR 2005 Supreme Court page 785 *(Kamesh Panjiyar @ Kamlesh Panjiyar Vs. State of Bihar)* 2008 AIR SCW 8241 *(Baldev Singh Vs. State of Punjab)* and 2009 AIR SCW page 536 *(Prem Kanwar Vs. Sate of Rajasthan)* in order to attract Section 304-B of IPC the following essential ingredients are to be satisfied:-

(i) The death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances.

(ii) Such death should have occurred within seven years of her marriage.

(iii) She must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

(iv) Such cruelty or harassment should be for or in connection with demand of dowry.

(v) Such cruelty or harassment should be meted out to the woman soon before her death.

18. In the instant case, as said earlier, it was not disputed that deceased Sheela died at her matrimonial home within seven years of her marriage. Learned senior counsel for the appellants, however, submitted that it was a natural death, as evident from the testimony of the number of prosecution witnesses, who have deposed that deceased Sheela died due to illness and fever. It is pertinent to mention that the witnesses (P.W-1 to 4 and P.W-6 and 7), who have deposed about the illness of the deceased prior to her death, are hostile witnesses and they have also been confronted with their Police Statement in this regard, where they have given a different version against the appellants. A perusal of the evidence

of these witnesses, namely, Raghuraj Singh (P.W-1), Raghupat Singh (P.W-2), Bihari Singh (P.W-3), Jaymanti (P.W-4), Surajdeen (P.W-6) and Mahesh Pratap Singh (P.W-7) indicates that they are out to help the appellants and their evidence is not found to be dependable and acceptable. Some of the witnesses like Bihari Singh (P.W-3) and Jaymanti (P.W-4) have said that deceased Sheela was ailing and suffering from fever for last three-four days and was being given treatment of some Doctor of Mauganj, while the other witnesses like Raghuraj Singh (P.W-1), Raghupat Singh (P.W-2) have said that Sheela could not be taken to the Hospital, as no conveyance for Mauganj was available in the village; Surajdeen (P.W-6), on the other hand, said that when some efforts were made to take the deceased to Mauganj Hospital, she expired. There was also no medical prescription or any other document putforth on record to show that Sheela was taken to the Hospital or was treated by some doctor. Had she been suffering from fever or some ailment like chest pain etc., she must have been shown to some doctor in the village or nearby Hospital. Thus, the plea that Sheela was ailing and suffering from fever from last three-four days is not found to be acceptable in absence of any medical evidence on record.

19. It also transpires from the evidence of Dharmraj Singh (P.W-9), Shanti Devi (P.W-11) and Jamadar Singh (P.W-12), who are the parents and brother of the deceased, that they were not informed of the death of Sheela. The statement of mother, father and brother of the deceased to the effect that they were not informed of the death of deceased Sheela Bai by the appellants, has virtually remained uncontroverted during their cross-examination. Although a faint plea was taken by appellants Vijay Bahadur and Hansavati that the information was sent to the parents of the deceased through one Suresh Singh, but said Suresh Singh has not been examined. Thus, it appears to be an after thought. It is also abundantly clear from the evidence on record that the parents of the deceased or any member of the family of deceased from her parental side did not participate in the funeral or cremation of the deceased, which evidently took place next day noon and the deceased had died in the night. Had parents of the deceased been informed, someone from their family could have come to the village on the news of death of the deceased. Therefore, in view of these facts, the statement of the parents of deceased that appellants never informed them of the death of their daughter and they came to know of her death after few days through one Tilakdhari, cannot be disbelieved. The conduct of the appellants in not informing death of the deceased is quite suspicious. In view of the aforesaid facts that the death of the deceased Sheela was not informed to her parents and her cremation was done without informing and waiting for her parents and there was no medical evidence that deceased Sheela died of illness, the inevitable conclusion would be that deceased Sheela died under suspicious circumstance and her death occurred otherwise than in normal circumstance. The Apex Court in the case of *Smt*

Shanti and another Vs. State of Haryana reported in (1991)1 Supreme Court Cases 371 in the similar facts and circumstances, where the parents of the deceased were not informed soon about her death and appellants hurriedly cremated the dead body with the result that no postmortem of the body could be conducted, held that it was an unnatural death.

20. Similar view was taken by the Apex Court in the case of *Yashoda & another Vs. State of Madhya Pradesh* reported in AIR 2005 Supreme Court 1411 where the dead body of deceased was cremated hurriedly and her parents were informed later, it was held that death in such circumstance could not be considered to be normal. The citation referred to by learned senior advocate appearing for the appellants as reported in (2006)3 MPLJ page 82 *(Dinesh Kumar & Others Vs. State of M.P.* (Supra) is distinguishable on facts.

21. Now the next crucial point to be considered is whether deceased Sheela was subjected to cruelty or harassment in connection with demand of dowry soon before her death by the three appellants, namely, appellants Vijay Bahadur, Hansavati & Rajeshwari ?

22. Upon close examination of the entire evidence on record, it is revealed that deceased Sheela never complained about cruelty or harassment meted out to her in connection with demand of dowry by her in-laws to her father Dharmraj Singh(P.W-9) in person, as admitted by him in para 4 of his deposition. As per evidence of her mother Shanti Devi (P.W-11), her daughter Sheela had complained to her two months after her marriage that her mother-in-law, sister-in-law and brother-in-law used to beat her on the ground that her father had not made payment, while the death of her daughter Sheela took place nearly two years and four months after her marriage. She was also confronted with her Police statement (Ex.D-2) with regard to omission of her statement that Thanedar Singh (P.W-10) informed her that appellants had threatened to kill the deceased, if the remaining amount of dowry was not paid. Even Dharmraj Singh (P.W-9), the father of deceased did not make such a statement that Thanedar Singh (P.W-10) had informed that appellants had threatened to kill the deceased, if the remaining amount of dowry was not paid. Thus, it is obvious that P.W-11 Shanti Devi made exaggerated version in this behalf.

23. The statement of Thanedar Singh (P.W-10) that appellants Vijay Bahadur and Jaibharat Singh had told him that Dharmraj Singh had not paid remaining amount of dowry of Rs.5000/-, therefore, Sheela would be killed, also does not appear to be natural and reliable that such an eloquent threat for dowry to kill the deceased would be given. On the other hand, it transpires from the evidence of Dharmraj Singh (P.W-9) and Shanti Devi (P.W-11) that appellant Vijay Bahadur came to their place to take the deceased for her in-laws' place twice or thrice, but no demand for remaining amount of dowry of Rs.5000/- was ever made. This fact was clearly admitted by Dharmraj Singh (P.W-9) in para 16 of his deposition

and by Shanti Devi (P.W-11) in para 10 of her deposition. Apposite to point out that even if in the written report (Ex.P-9) lodged by father of the deceased Dharmraj Singh (P.W-9), no allegations of harassment of the deceased for dowry by appellants Vijay Bahadur, Jaibharat or Rajeshwari were made. Allegation of harassment of the deceased for dowry was made only against her mother-in-law, i.e. appellant Hansavati in the written report (Ex.P-9). The evidence of Thanedar (P.W-10) also does not clearly depict that the sister-in-law of the deceased, i.e. appellant Rajeshwari was beating her before him for dowry or she made any comments for non-payment of dowry by her parents.

24. Moreover, whatever incident was narrated by Thanedar Singh (P.W-10) was allegedly witnessed by him seven months prior to the death of the deceased, as he clearly deposed that he had gone to the place of Sheela seven months prior to her death.

25. Likewise, Jamadar Singh (P.W-12), brother of the deceased also gave a generalized and omni-bus statement that the mother-in-law, sister-in-law and brother-in-law of the deceased harassed and treated her cruelly, but did not give any concrete example of any incident of harassment or ill-treatment to the deceased soon before her death, and particularly nothing against appellants Vijay Bahadur and Rajeshwari in this behalf. His statement that the mother-in-law of the deceased had asked him to give money relates to the period when he had gone to take her sister for first 'Bida' two months after her marriage and admittedly Sheela was married in June 1988 and died in Oct. 1990. Thus, it was an old and stale incident and not "soon before" her death.

26. As per statement of Jamadar Singh (P.W-12), when he went for 'Bida' of his sister Sheela for the second time, her mother-in-law, i.e. appellant Hansavati had beaten his sister before him and complained to him for non-payment of dowry. As is evident from his testimony, he had gone to Sheela's place for the second time after he came to know from Thanedar Singh (P.W-10) that deceased was ill-treated by her in-laws and as mentioned earlier Thanedar Singh (P.W-10) had gone to place of deceased seven months prior to her death. Thus, this second incident of beating of the deceased by her mother-in-law before Jamadar Singh (P.W-12) also took place nearly seven months prior to her death and thereafter she was taken back to her parental home by his brother, as deposed by him.

27. Needless to emphasize that in cases of offence of dowry death the evidence of the related witnesses has to be carefully scrutinized. It would be profitable to quote the following observation made by the Apex Court in this connection in the case of *Sunil Bajaj Vs. State of M.P.* reported in AIR 2001 Supreme Court page 3020:-

> "Normally, in a criminal case accused can be punished for an offence on establishment of commission of that offence on the

basis of evidence, may be direct or circumstantial or both. But in case of an offence under Section 304-B IPC an exception is made by deeming provision as to nature of death as "dowry death" and that the husband or his relative, as the case may be, is deemed to have caused such death, even in the absence of evidence to prove these aspects but on proving the existence of the ingredients of the said offence by convincing evidence. Hence, there is need for greater care and caution, that too having regard to the gravity of the punishment prescribed for the said offence, in scrutinizing the evidence and in arriving at the conclusion as to whether all the above mentioned ingredients of the offence are proved by the prosecution."

28. Thus upon close scrutiny of the entire evidence on record, as aforesaid, it is found that the evidence against appellants Vijay Bahadur and Rajeshwari Devi regarding cruelty or harassment meted out to the deceased in connection with the demand of dowry is not dependable and acceptable. There is some evidence in this behalf against appellant Hansavati, the mother-in-law of the deceased, but as stated earlier, whatever evidence of cruelty and harassment, or demand of dowry made by her is of the time much prior to the death of the deceased, i.e. firstly at the time when Jamadar Singh (P.W-12) went to her place for first 'Bida' two months after her marriage and for the second time when he went for second 'Bida' nearly seven months prior to her death. As per evidence given by mother of deceased Shanti Devi (P.W-11), deceased had complained to her of the harassment and cruelty meted out to her when she came to her parental home two months after her marriage. Needless to repeat that the marriage of the deceased took place in June 1988 and she died in Oct. 1990.

29. It is abundantly clear from the evidence of Dharmraj Singh (P.W-9) that after Sheela was sent to her in-laws' place alongwith appellants Vijay Bahadur and Jaibharat, she died two-three months thereafter and there is no such evidence on record that in between this period deceased was subjected to harassment or cruelty in connection with the demand of dowry or any such demand was sent to the parents of the deceased by the appellants. On the other hand, it transpires from the evidence on record that when Sheela was finally taken to her in-laws' place by appellants Vijay Bahadur and Jaibharat, it was assured by them that she would be taken care of. The evidence of cruelty or harassment of the deceased for demand of dowry against appellant Hansavati, the mother-in-law of the deceased, is also of the period of seven months prior to her death. Any harassment of the deceased for dowry, seven months before her death can hardly be termed as "soon before" her death. Needless to repeat that there is no evidence against any of the appellants that deceased was again subjected to cruelty or harassment for dowry thereafter, as she remained with her parents in the meantime, and died two-three months after she finally left for her in-laws' place.

30. The Apex Court in the case of *Hira Lal & others Vs. State (Govt. of NCT) Delhi* (supra) reported in AIR 2003 Supreme Court 2865 has held that the expression "soon before" is very relevant where Section 113-B of the Evidence Act and Section 304-B of IPC are pressed into service. Prosecution is obliged to show that **"soon before"** the occurrence there was cruelty or harassment and only in that case presumption operates, **the evidence in that regard has to be led by the prosecution.**

31. The Apex Court in the aforesaid judgment and later on in the number of other judgments reported in AIR 2004 Supreme Court page 1731 *(Kunhiabdulla and another Vs. State of Kerala)*, 2009 AIR SCW page 536 *(Prem Kanwar Vs. State of Rajasthan)*, 2009 AIR SCW 3598 *(Raman Kumar Vs. State of Punjab)* has explained the expression 'soon before' as under:-

> ".....the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence."

32. In the instant case, as discussed above, there is no dependable evidence against appellants Vijay Bahadur and Rajeshwari that they subjected the deceased to cruelty or harassment in connection with the demand of dowry. There is no evidence against any of the appellants that deceased was subjected to cruelty or harassment in connection with demand for dowry during the period of two-three months when she finally stayed in her matrimonial home before her death. Whatever evidence of cruelty or harassment or demand for money is available against appellant Hansavati, the mother-in-law of the deceased also relates to the period much before about seven months prior to her death. As already said, harassment or cruelty meted out to the deceased seven months prior to her death, in my opinion, in the facts and circumstance of the instant case can hardly be termed as "soon before" her death. Thus, in aforesaid facts, neither any presumption under Section 113-B of the Evidence Act can be drawn, nor the offence of causing dowry death under Section 304-B of IPC can be said to have been proved either against appellant Hansavati or the remaining two appellants, namely, Vijay Bahadur and Rajeshwari.

33. In the wake of aforesaid, the conviction of the three appellants for the offence under Section 304-B of IPC cannot be sustained. Consequently, the conviction of these three appellants under Section 201 of IPC for causing disappearance of the evidence of dowry death also cannot be sustained. The conviction of appellants Vijay Bahadur, Hansavati and Raheshwari for the offences

under Section 304-B, 201 of IPC thus deserves to be set aside.

34. As regards the conviction of these three appellants under Section 498-A of IPC is concerned, as discussed above, there is no cogent and dependable evidence against appellants Vijay Bahadur & Rajeshwari Devi that deceased was subjected to cruelty or harassment for dowry by them. So the conviction of the appellants Vijay Bahadur & Rajeshwari Devi under Section 498-A also deserves to be set aside.

35. However, there is positive evidence against the mother-in-law of the deceased, namely, appellant Hansavati that she subjected the deceased to cruelty and harassment for dowry and thereby committed an offence under Section 498-A of IPC.

36. As regards the conviction of the appellant Jaibharat under Section 201 of IPC is concerned, there is nothing in entire evidence on record to hold him guilty for the aforesaid offence. Appellant Jaibharat admittedly is not the real uncle of husband of the deceased. The mere fact, that he came to escort the deceased alongwith other appellant to her in-laws' place and that he participated in the cremation of the deceased like other villagers, is not sufficient to establish his guilt under Section 201 of IPC in absence of any material evidence against him. The conviction of appellant Jaibharat under Section 201 of IPC also cannot be sustained and deserves to be set aside.

37. Consequently, the conviction of appellants Vijay Bahadur, Hansavati, Rajeshwari and sentence passed on them under Section 304-B, 201 of IPC as well as the conviction of appellant Jaibharat and sentence passed on him under Section 201 of IPC are set aside and they are acquitted of the aforesaid charges. The conviction of appellants Vijay Bahadur and Rajeshwari and sentence passed on them under Section 498-A of IPC are also set aside. However, the conviction of appellant Hansavati under Section 498-A of IPC is maintained.

38. As regards the sentence to appellant Hansavati under Section 498-A of IPC, as submitted, appellant Hansavati presently being a woman of more than 65 years of age, and considering the fact that incident of the case occurred way back in the year 1990 and that appellant Hansavati has already suffered imprisonment for nearly five months, interest of justice would be subserved, if the impugned sentence awarded to her under Section 498-A of IPC is modified and reduced to the period already undergone by her with an additional amount of fine of Rs.5000/- (five thousand only). Accordingly, the sentence of imprisonment awarded to appellant Hansavati under Section 498-A of IPC is modified and reduced to the period already undergone by her. However, she shall be liable to pay an additional amount of fine of Rs.5000/- (five thousand only) within a period of three months from today, failing which she shall suffer simple imprisonment for five months.

Both the appeals stand allowed to the extent indicated above.

Appeal allowed.

I.L.R. [2010] M. P., 485
APPELLATE CRIMINAL
Before Mr. Justice Rajendra Menon
23 November, 2009*

RANDHIR SINGH ... Appellant
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 376, Evidence Act, 1872, Section 3 - *Rape - Appreciation of evidence - Absence of exonerating circumstances to show that statement of prosecutrix is not trustworthy - Due weightage and credence should be given to the same and relied upon - Minor discrepancies in the statements of prosecutrix and her minor son are not fatal - Appeal dismissed.* (Para 12)

दण्ड संहिता (1860 का 45), धारा 376, साक्ष्य अधिनियम, 1872, धारा 3 – बलात्संग – साक्ष्य का अधिमूल्यन – यह दर्शाने के लिए दोषमुक्त करने वाली परिस्थितियों का अभाव कि अभियोक्त्री का कथन विश्वसनीय नही है – इसे सम्यक वरीयता और महत्व दिया जाना चाहिए और उस पर विश्वास करना चाहिए – अभियोक्त्री और उसके अवयस्क पुत्र के कथनों में मामूली अन्तर घातक नही है – अपील खारिज।

Cases referred :

AIR 1983 SC 753, (2008) 1 SCC 234, (1992) 3 SCC 615.

Jagat Sher Singh, for the appellant.
Dildar Singh, Dy.G.A., for the State.

J U D G M E N T

RAJENDRA MENON, J. :–Challenging his conviction under sections 376 and 450 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for 7 years and fine of Rs.1000/-, in default rigorous imprisonment for 6 months, and rigorous imprisonment for 5 years and fine of Rs.500/-, in default rigorous imprisonment for 3 months, this appeal has been filed by the appellant under section 374(2) of the Code of Criminal Procedure.

2. It is the case of the prosecution that on 27.11.1993, prosecutrix – PW/3 was sleeping in her house alongwith her children. At about 1.30 in the night intervening 27/28.11.1993, appellant entered the house forcibly, took away the prosecutrix to a place near the well, about 10-15 steps away from her house, committed rape on her and ran away. Prosecutrix is alleged to have informed her landlord and neighbour Ram Daroga – PW/4, thereafter she went to the Police Station and lodged a report on the next day, in the morning itself. On the basis of the aforesaid, investigation was conducted and after prosecution appellant is convicted as indicated hereinabove and, therefore, the appeal.

*Cr.A. No.386/1995 (Jabalpur)

3. Shri Jagat Sher Singh, learned counsel appearing for the appellant, argued that the prosecutrix is a married woman and at the relevant time when the offence is said to have been committed, she was about 23 years of age and it is a case where the prosecutrix has consented to the act and when her son, 10 year old Kaptan Singh – PW/6, saw the act between the prosecutrix and the appellant, she has falsely implicated the appellant. Taking me through the statement of the prosecutrix – PW/3, the statement of the doctor Dr. Sadhana Mishra – PW/2, who had examined the prosecutrix, and the statement of Kaptan Singh – PW/6, the 10 year old son of the prosecutrix, learned counsel emphasized that it is a case where consent of the prosecutrix to the act in question is established and, therefore, in convicting the appellant, learned Court below has committed error, which warrants interference.

4. Shri Jagat Sher Singh, learned counsel for the appellant, argued that in her statement PW-2 Dr. Sadhana Mishra clearly points out that no injury was seen on the person of the prosecutrix, whereas she has testified that she was forced to lie on the floor, she sustained some injury on her hip. Pointing out discrepancy in the statement of the prosecutrix – PW/3, the First Information Report lodged by her so also in the statement of her son Kaptan Singh – PW/6, and the difference in the story put forth by both these witnesses, learned counsel emphasized that the story put forth by the prosecution is not established. The discrepancies pointed out by Shri Jagat Sher Singh relates to closing the mouth of the prosecutrix by pushing a cloth, Kaptan Singh's following the prosecutrix when she was pulled out of the house and non-support of this version by Kaptan Singh himself and on the hue and cry raised by mother and son neighbours like Ram Daroga, who were staying in the opposite house, not coming out. Contending that the story put forth by the prosecutrix is unbelievable, learned counsel prays for acquittal of the appellant.

5. Shri Dildar Singh, learned Dy. Government Advocate, refutes the aforesaid and by taking me through the statement of witnesses available on record, submitted that the accused appellant is an influential person in the village, the prosecutrix is a very poor lady and there is no reason for the prosecutrix to falsely implicate the appellant. It is argued by him that some minor discrepancies in the statement of the prosecutrix and that of her son, a boy of 10 years, staying in a village is of no consequence, if the entire story put forth by them is analysed. Submitting that the story of the prosecution as made out by the prosecutrix is supported by the evidence of PW-6, a child witness, due credence should be given to the same and the conviction upheld. Accordingly, Shri Dildar Singh seeks for dismissal of this appeal.

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

7. From the statement of witnesses available on record, it is seen that prosecution had examined the following witnesses: PW-1 Dr. R.N. Upadhyay, Assistant

Surgeon, who had examined the accused appellant; PW-2 Dr. Sadhana Mishra, Lady Assistant Surgeon, who had examined the prosecutrix. Even though PW-2 Dr. Sadhana Mishra says that she did not find any injury on the person of the prosecutrix and no definite opinion can be given about rape, prosecutrix PW-3 implicates the appellant and accuses him of having committed the offence; PW-4 Ram Daroga is the landlord and neighbour of the prosecutrix, he has turned hostile; PW-5 Munshi, another witness who stays 2-3 houses away and has turned hostile; PW-6 Kaptan Singh, the 10 year old son of the prosecutrix and who has supported the story put forth by his mother, even though there may be some minor discrepancies in his statement; PW-7 is the Investigating Officer, ASI Dhaniram; PW-8 Manoj Kumar, Constable, who had prepared the spot map and other material; and, PW-9 H.P. Singh, Head Constable, who has received the report and lodged the same on the basis of the statement of the prosecutrix.

8. According to the prosecutrix, her husband had gone to Sagar on the date of the incident, she was sleeping in her house alongwith her children, which included her 10 year old son Kaptan Singh – PW/6. It is stated by her that as the latch of the door was broken, she had closed the door by putting a stone. According to her, in the night she heard the door being opened forcibly, appellant came in, caught hold of her hand, pulled her out of the house and took her about 10-15 steps away from the house, put a cloth on her mouth and committed the offence. Even though she says that in the police report she has not stated anything about putting the cloth on her mouth, but she testifies that her son also came when the entire act took place, he was crying and he was standing near her. The son PW-6 Kaptan Singh initially in his examination-in-chief says that on hearing the cries of his mother, he ran after her, the appellant slapped him and he went home, but in his cross-examination he says that he was sleeping and went out of his house when he saw his mother crying. Even though there are some discrepancies in the statement of this witness, but the fact remains that the prosecutrix and PW-6 Kaptan Singh, her son, are villagers and they may have got confused while withstanding the cross-examination by efficient lawyers. Some discrepancies here and there, in their statements, have to be ignored. In a case for an offence under section 376 IPC, due weightage and credence has to be given to the statement of the prosecutrix. If the statement of the prosecutrix in the present case is analysed, it is seen that she has clearly implicated the appellant as the person who has committed the offence and another aspect of the matter is that her testimony in material particulars is corroborated by the statement of her son, PW/6 Kaptan Singh. Statement of these two witnesses are enough to hold that the appellant had committed the offence.

9. At this stage, it would be appropriate to consider the principle laid down by the Supreme Court, for appreciating evidence in cases pertaining to offence under section 376 and importance to be given to discrepancies. In the famous case of

Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753, in paragraphs 5(6) and 5(7), it is so observed by the Supreme Court:

"5. xxx xxx xxx

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

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

xxx xxx xxx"

Thereafter, in paragraphs 6, 7 and 8, the matter is so dealt with:

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

7. It is now time to tackle the pivotal issue as regards the need for insisting on corroboration to the testimony of the prosecutrix in sex-offences. This Court, in *Rameshwar v. State of Rajasthan,* (1952) 3 SCR 377 at p. 386 : (AIR 1952 SC 54 at p. 57), has declared that corroboration is not the sine qua non for a conviction in a rape case. The utterance of the Court in Rameshwar may be replayed, across the time-gap of three decades which have whistled past, in the inimitable voice of Vivian Bose, J. who spoke for the Court-

> "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, ...

The only rule of law is that this rule of prudence must be present to the mind of the Judge or the Jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

8. And whilst the sands were running out in the time-glass, the crime graph of offences against women in India has been scaling new peaks from day to day. That is why an elaborate rescanning of the jurisprudential sky through the lenses of 'logos' and 'ethos', has been necessitated.

And, finally in paragraph 9, the principle so crystallized:

"9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. ....."

(Emphasis supplied)

10. If the case in hand and the statement of the prosecutrix, her son PW/6 Kaptan Singh are scrutinized in the backdrop of the aforesaid principle, it is the considered view of this court that the discrepancies pointed out by Shri Jagat Sher Singh, learned counsel, are not of much significance and may not make any difference to the final outcome, so as to disbelieve the story put forth by the prosecution. The aforesaid principle laid down by the Supreme Court in the case of *Bharwada Bhoginbhai Hirjibhai* (supra) is followed consistently in various cases and it is not necessary to burden this judgment with all such cases. Suffice is to refer to a subsequent judgment, in the case of *State of MP Vs. Babulal,* (2008) 1 SCC 234, wherein in paragraph 18, after referring to the case of *Bharwada Bhoginbhai Hirjibhai* (supra) and another judgment in the case of *State of Rajasthan Vs. Narayan,* (1992) 3 SCC 615, the principle is laid down to the effect that if a court of law finds the evidence of the prosecutrix truthful, trustworthy and reliable, conviction can be recorded solely on the basis of her testimony and no further corroboration is necessary.

11. Keeping in view the principles laid down as indicated hereinabove and on analyzing the material available on record, in the present case, this Court does not see any reason to disbelieve the statement of the prosecutrix, which is corroborated in material particulars with the statement of her own son PW/6 Kaptan Singh.

12. Normally, it is the settled principle of law that in the absence of exonerating circumstances available on record to show that the statement of the prosecutrix is not trustworthy, due weightage and credence should be given to be same and relied upon. In the present case, there is nothing to hold that the prosecutrix is falsely implicating the appellant. She has narrated about the incident as it has happened, immediately thereafter in the morning she had gone and informed PW-3 Ram Daroga, her landlord, about the incident and thereafter the prosecutrix herself had gone to the police station and lodged the FIR, even without waiting for her husband to come back. Kaptan Singh – PW/6, her ten-year-old son supports the story put forth by his mother, except for some minor discrepancies here and there. Evaluating the statement of the prosecutrix and that of her son Kaptan Singh – PW/6, this Court does not see any ground to interfere in the matter. The learned Court below has appreciated the statement of these witnesses and has convicted the appellant for the offence. In doing so, it is the considered view of this Court that the court below has not committed any error, warranting interference.

13. Accordingly, finding no error in the order passed convicting the appellant warranting interference in this appeal, the same is dismissed.

14. Appellant Randhbir Singh is on bail. He shall be taken back in custody for undergoing the remaining part of his sentence.

Appeal dismissed.

I.L.R. [2010] M. P., 490
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mr. Justice S.A. Naqvi

8 December, 2009*

SANJAY KUMAR ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. Evidence Act (1 of 1872), Sections 145 & 157 - *Complaint - Complainant not supporting prosecution case - Complaint made by him to CBI cannot be treated as substantive evidence - Former statement can be used for contradiction or corroboration - When complainant did not support prosecution story that demand was made by appellant, there was no substantive evidence - It was wrong on the part of trial Court to base decision on complaint made to CBI.* (Para 17)

क. साक्ष्य अधिनियम (1872 का 1), धाराएँ 145 व 157 – परिवाद – परिवादी ने अभियोजन मामले का समर्थन नही किया – उसके द्वारा सी.बी.आई. को किया गया परिवाद सारभूत साक्ष्य नही माना जा सकता – पूर्ववर्ती कथन खण्डन या सम्पुष्टि के लिए प्रयुक्त किया जा सकता

*Cr.A. No.1397/2005 (Jabalpur)

है – जब परिवादी ने अभियोजन की कहानी का समर्थन नही किया कि अपीलार्थी द्वारा माँग की गयी थी, तब कोई सारभूत साक्ष्य नही थी – सी.बी.आई. को किये गये परिवाद पर विनिश्चिय आधारित करना विचारण न्यायालय के पक्ष पर गलत था।

B. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) r/w 13(2) - ***Phenolphthalein test - First Phenolphthalein test in respect of solution of the pocket was found negative - Shirt was again sent for test and presence of phenolphthalein was found - Held - This throws considerable doubt about the presence of phenolphthalein in the pocket of the accused.*** (Paras 20 to 22)

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) सहपठित 13(2) – फिनॉल्थेलिन परीक्षण – जेब के विलयन के सम्बन्ध में प्रथम फिनॉल्थेलिन परीक्षण नकारात्मक पाया गया – कमीज पुनः परीक्षण के लिए भेजी गयी और फिनॉल्थेलिन की उपस्थिति पायी गयी – अभिनिर्धारित – यह अभियुक्त की जेब में फिनॉल्थेलिन की उपस्थिति के बारे में पर्याप्त शंका डालता है।

C. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - ***Motive - Appellant alleged to have demanded money for issuing Labour Payment Certificate - Prosecution failed to prove motive as at relevant time LPC was not required as wages of employees was being made through bank - Appeal allowed - Appellant acquitted.*** (Para 25)

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – हेतु – अपीलार्थी ने कथित रूप से लेबर पेमेंट सर्टिफिकेट जारी करने के लिए रुपयों की माँग की – अभियोजन हेतु साबित करने में असफल रहा क्योंकि सुसंगत समय पर एल.पी.सी. आवश्यक नही थी क्योंकि कर्मचारियों का वेतन बैंक के माध्यम से दिया जा रहा था – अपील मंजूर – अपीलार्थी दोषमुक्त।

Cases referred :

1990 MPLJ 239, 1994 MPLJ 30, AIR 1997 SC 2960, AIR 1976 SC 69, 2004(4) MPLJ 543, ILR [2008] MP 3026, AIR 2000 SC 3562, AIR 1979 SC 1408, 2002 AIR SCW 16, (2005) 6 SCC 211.

Anil Khare with *Som Mishra,* for the appellant.

Jayant Nikhra, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by **Rakesh Saksena, J. :**–Appellant has filed this appeal against the judgment dated 4th July,2005 passed by Special Judge (C.B.I.), Jabalpur in Special Case No.4/ 2003 convicting him under section 7 and section 13(1)(d) read with section 13(2) of the Prevention of Corruption Act, 1988 and sentencing him to rigorous imprisonment for one year with fine of Rs.1000/- and rigorous imprisonment for two years with fine of Rs.2000/- on each count respectively. Both the sentences have been directed to run concurrently.

2. Prosecution case is that on 29.10.2002, accused/appellant was working as Personnel Officer in Amlai Open Cast Mines (in short OCM), South Eastern Coalfield Limited (in short SECL), Sohagpur Area. It is said that accused demanded Rs.3000/- as bribe from complainant Pradeep Kumar Shukla (PW5) for issuing Labour Payment Certificate (hereinafter referred to as LPC) for the payment of wages of security guards of Maruti Security and Personnel Services (hereinafter referred to as MSPS) for the month of June, 2002. MSPS was a security agency, which had entered into a contract with SECL since the year 2001 for security of the property of SECL. For payment of wages to security guards and other employees of MSPS, a certificate about the payment of wages of the labours was required to be issued by an officer of SECL for certification that the wages of employees were being paid as per the requirement and that just payment was received by the security guards of MSPS. It is said that accused was required to issue the LPC to MSPS for the payment of wages of the month of June 2002. Pradeep Kumar Shukla (PW5) was working as security supervisor in MSPS and was representing it for the purpose of obtaining the labour payment bills of security guards of MSPS of Sohagpur Area of SECL. On 29.10.2002, when Inspector of CBI, Jabalpur Shri S.M.S.Chouhan (PW10) was camping at Shahdol, Pradeep Kumar Shukla (PW5) submitted a written complaint (Ex.P/5) to him stating that accused Sanjay Kumar was demanding Rs.3000/- for issuing the LPC for the month of May, 2002 without which the payment of wages for the month of June 2002 of the security guards of MSPS was held up. On the basis of aforesaid complaint (Ex.P/5), Inspector S.M.S.Chouhan (PW10) started investigation. He decided to lay a trap on Sanjay Kumar for catching him red-handed. On 29.10.2002, he summoned two officers from New India Assurance Company, Shahdol viz. S.K.Dwivedi (PW2) and Bhupat Kishore (PW3) at Hotel Surya, Room No.203 at about 4 p.m. where the team of CBI was staying. S.K.Dwivedi (PW2) was the Development Officer and Bhupat Kishore (PW3) was Administrative Officer in New India Assurance Company, Shahdol. When these witnesses reached hotel, they were introduced to complainant Pradeep Kumar Shukla (PW5). They read the complaint Ex.P/5 made by Pradeep Kumar Shukla and after verifying the authenticity of the complaint, signed on it.

3. Demonstration of pre-trap proceedings was done and Pradeep Kumar Shukla was asked to give the currency notes, which were to be delivered to accused by way of bribe. He handed over 30 notes of denomination of Rs.100/-, totalling Rs.3000/-. Numbers of the notes were recorded in pre-trap memorandum Ex.P/6; phenolphthalein powder was applied to the said notes and the notes were kept in the left pocket of the shirt of Pradeep Kumar Shukla. Pradeep Kumar Shukla was asked to not to touch these notes unless they were to be handed over to accused on his demand. S.K.Dwivedi was directed to accompany Pradeep Kumar Shukla as a shadow witness and was instructed to hear the talks taking place

between accused and the complainant and to give a signal after the tainted money was handed over to accused Bhupat Kishore (PW3) was instructed to accompany the trap team and to watch the proceedings.

4. The trap party with Pradeep Kumar Shukla proceeded on two vehicles for the residence of accused. Accused at that time lived at Sanjay Nagar, Amlai Zet hostel Room No.12. Pradeep Kumar Shukla and S.K.Dwivedi went to the room of accused and after about 15 minutes, at about 9:30 p.m. S.K.Dwivedi (PW2) came out of the room and gave signal to the trap party by igniting a cigarette with matchstick. The members of the CBI team entered Room No.12 of Sanjay Kumar. Inspector S.M.S.Chouhan (PW10) and another member of the team caught the wrists of both the hands of Sanjay Kumar and gave their introduction and informed him that he was caught for taking bribe of Rs.3000/- from Pradeep Kumar Shukla. Pradeep Kumar Shukla and S.K.Dwivedi informed that Sanjay Kumar had kept the notes in the left pocket of his shirt. Bhupat Kishore (PW3) took out the currency notes from the said pocket and tallied numbers of the notes with the numbers noted in the pre-trap memorandum. The notes were seized and sealed in an envelope. Hands of Sanjay Kumar were washed with sodium carbonate solution whereby the colour of the solution turned pink. The pocket of the shirt from which the currency notes were recovered was dipped in sodium carbonate solution, which gave pink colour. The solution was sealed and seized shirt was also wrapped in a paper and sealed. Hands of complainant were also washed with sodium carbonate solution and solution was sealed in a bottle. After completing the trap proceedings, Inspector S.M.S.Chouhan (PW10) recorded the post-trap memorandum Ex.P/7 which was signed by the members of the trap party. Some documents were seized from the office of SECL, OCM vide seizure memo Ex.P/9. FIR of the incident Ex.P/20 was recorded and investigation of the case was conducted by Paneer Salwam, CBI Inspector (PW9). He recorded the statements of witnesses and collected the relevant documents and obtained the sanction from Naresh Kumar Sharma (PW4), Chief Managing Director. Reports of Central Forensic Science Laboratory, New Delhi (in short CFSL) in respect of seized solutions were received. Though presence of phenolphthalein in the solution was found positive in other solution, but in Ex.-E the solution obtained after washing the pocket of the shirt of accused did not show the presence of phenolphthalein. After investigation, charge sheet was filed.

5. Accused abjured his guilt and pleaded false implication. He filed his statement under section 233(2) of the Code of Criminal Procedure stating that the whole episode was concocted by the officers of MSPS on false grounds. According to him, he never demanded money from Pradeep Kumar Shukla for issuing LPC after the month of April 2002. There was no ground for him to issue LPC as from that time payment of the labours was being made through the Bank for which LPC was not required. The requirement of grant of LPC was for verification that

the employees of MSPS were being paid their wages, but since from April 2002 the employees of MSPS were being paid through Bank, there was no justifiable ground for issuing LPC.

6. Prosecution, to substantiate its case examined ten witnesses viz. Lal Singh (PW1), S.K.Dwivedi (PW2), Bhupat Kishore (PW3), Naresh Kumar Sharma (PW4), Pradeep Kumar Shukla (PW5), Yogendra Tiwari (PW6), Avinash Sarkar (PW7), Barmeshwar Singh (PW8), Paneer Salwam (PW9) and S.M.S.Chouhan (PW10). Accused also in his defence examined two witnesses viz. Sanjay Amte (DW1), Manager of Hotel Surya, Shahdol and Lakhwinder Singh (DW2), an employee of MSPS. Complainant Pradeep Kumar Shukla (PW5) did not support the prosecution case by denying the demand of money by the accused. However, learned trial Court relying on the evidence of other prosecution witnesses held the accused guilty and convicted and sentenced him as mentioned above.

7. Shri Anil Khare, learned counsel for the appellant, contended that accused/ appellant was falsely implicated in the case. The case was concocted at the instance of officials of MSPS. There was no occasion for demand of any money from complainant Pradeep Kumar Shukla for issuance of LPC, as from April 2002 labour payment of MSPS was being made through the Bank. The officers of MSPS had made four complaints to CBI against the officers of SECL. In all the aforesaid complaints, the alleged amount of bribe was said to be Rs.3000/-. All the said complaints were made at Surya Hotel on 29.10.2002. He contended that it was not established from the evidence of prosecution witnesses that any demand was made by the accused. The evidence of the prosecution witnesses in that regard was inconsistent, discrepant and contradictory. Complainant Pradeep Kumar Shukla (PW5) himself did not say that any demand was made by the accused. Almost all the prosecution witnesses including the complainant admitted that at the relevant time no LPC was required to be issued since payment of wages of the employees of MSPS was being made through Bank since June 2002. He further contended that trap witnesses viz. S.K.Dwivedi (PW2) and Bhupat Kishore (PW3) were not independent witnesses. Their evidence was inconsistent and contradictory. At the time of passing of the alleged money, S.K.Dwivedi (PW2) had already left the room where the transaction is said to have taken place. He further contended that from the report of CFSL, it was clear that the pocket of the shirt of accused in which the tainted currency notes were allegedly kept did not contain traces of phenolphthalein. The evidence of sending the shirt again for test of phenolphthalein was suspicious. There was no evidence on record to indicate that the said seized shirt of accused was kept intact. The seal by which the shirt was sealed in the packet was not handed over to any independent person to rule out the possibility of tampering. The explanation given by the accused was probable and reliable and was substantiated by the prosecution witnesses itself apart from the evidence of defence witnesses. On the contrary, Shri Jayant Nikhra, learned counsel for

CBI, contended that the evidence of prosecution witnesses was reliable and sufficient to bring home the accusation against the accused. Complainant Pradeep Kumar Shukla (PW5) did not support the prosecution case because he had been sacked from the job. There was evidence on record to indicate that LPC was required to be issued for the month of May 2002. He contended that the evidence of S.K.Dwivedi (PW2) and Bhupat Kishore (PW3), who were independent witnesses, was trustworthy. It was established from the report of CFSL that the tainted currency notes were accepted by the accused and kept in the pocket. There was nothing on record to indicate that the shirt of accused was tampered with by anybody. He contended that even if the complainant did not support the prosecution case, the accused could be convicted if the offence was proved by other evidence on record. He justified the finding of conviction recorded by the trial Court.

8. We heard the learned counsel of both the sides at length and perused the impugned judgment and the evidence and material on record carefully.

9. It is not disputed by the appellant that he was working as Senior Personnel Officer in OCM of South Eastern Coalfield Limited, Sohagpur Area and was a public servant.

10. Learned counsel for the appellant argued that the prosecution failed to prove that the appellant had an opportunity to make demand of bribe from the complainant. Since the LPC was not required to be issued at the relevant time because the payment of wages of the employees of MSPS was being made through Bank. It was necessary to find out if there was any motive for payment of bribe in the fact situation of the present case.

11. Lal Singh (PW1), who was working as Accountant in OCM, SECL deposed that he had the file of MSPS containing the bill of wages (Ex.P/1) pertaining to period 1.6.2002 to 30.6.2002. The payment voucher of the bill (Ex.P/3) was also in the file. Bill Ex.P/1 was presented to Area Manager of OCM by MSPS on 1.7.2002. It was received in the Finance Department on 4.8.2002. The value of the bill was Rs.1,11,103/-. This bill was forwarded to Finance Manager Avinash Sarkar and was paid as per payment voucher Ex.P/3. He admitted that since the month of April 2002 the payment of the wages of the employees of MSPS was being done through the Bank, therefore, no LPC was required. He categorically stated that he knew accused Sanjay Kumar since about last 3 years. He was a good worker and his papers were always found correct.

12. Avinash Sarkar (PW7), Deputy Finance Manager of SECL explained the necessity of LPC. According to him, the certificate was required for verification that the payments to labours were being made correctly. It was a certificate to the effect that the payment of wages was made before the officer concerned. The certificate was used to be issued by the personnel officer. At the time of occurrence, accused Sanjay Kumar was working on the post of personnel officer.

This witness too admitted that LPC was not necessitated after the direction about the payment through Bank was issued. Referring to letter Ex.P/15, written by Area Security Officer of SECL, it was deposed by him that the bill Ex.P/14 was lying with the Accounts Department for want of LPC for the month of May 2002, however, this letter indicated that the payment to the staff/workers engaged by the concerned agency was being made through Bank from the month of April 2002, therefore, the payment for the month of June, 2002 may be released and necessary certificate could be submitted after collecting the required documents for the month of May 2002. This was done because the concerned agency was pressing hard for the payment in view of 'Deepawali' festival. This gives some indication that the payment of wages of the concerned agency i.e. MSPS were being made through the Bank from the month of April 2002. This witness further deposed that in respect of bill Ex.P/14 he had sought advice from the Finance Department by sending a note Ex.P/17 as to what should have been done as the LPC from the month of May, 2002 was not found, whereupon Mr. Barmeshwar Singh, Deputy Finance Manager had directed him to obtain the LPC from the concerned officer. In this regard, the evidence of Barmeshwar Singh (PW8) is also significant. Barmeshwar Singh (PW8) deposed that he had found the bill correct, therefore, he had recommended for concurrence for the payment. He deposed that in the document Ex.P/17, the then Assistant Finance Manager Mr. D. Chatterjee had directed him to obtain LPC. This direction was signed by Area Finance Manager Shri D.Chatterjee.

13. Learned counsel for the appellant contended that though this endorsement was made on Ex.P/17, but the Area Finance Manager Shri Chatterjee was not examined by the prosecution before the Court, therefore, this note cannot be made use of for holding that LPC was required at the relevant time, especially in view of the fact that Barmeshwar Singh (PW8), Finance Manager in cross-examination himself admitted that since April, 2002 the payment of labours was being made through Bank, therefore, no LPC was required. He admitted that letter Ex.D/4 dated 14.12.2001 was issued by Chief General Manager (Personnel and Administration) that only one time extension for a period of three months for making payment to Security Personnel of DGR Sponsored Security Agencies in cash was approved by the competent authority, however, they were informed that further payment to security personnel engaged by the Agencies will be made only through Bank by the concerned Security Agency. This witness deposed that by letter Ex.D/8 dated 2.4.2002, Deputy Chief Personnel Manager, Sohagpur Area had directed the officers of MSPS that they were allowed one time extension for three months only in the month of December 2001 and it was advised them for getting the Bank account opened for all their employees so that payment of March 2002 payable in April 2002 could be made through Bank but they did not inform the management whether the same had been opened or not. In the said

circumstances, the management shall be compelled not to allow them to make payment to their employees in cash and assurance was sought that the accounts were opened at the earliest so that the payment of the month of March 2002 could be released to their employees through Bank. Barmeshwar Singh (PW8) admitted that a letter Ex.D/9 was written by Chief General Manager, Sohagpur Area to CMD, SECL, Bilaspur on 8.2.2003 in reference to a petition filed by MSPS in the High Court. In Ex.D/9, it was indicated by the Chief General Manager that order to make payment through Bank was issued in the month of December 2001, which was extended up to April 2002. In between this, the MSPS adopted all efforts to avoid Bank payment with no results. They expressed so many problems in opening the Bank Account, but they reluctantly and half-heartedly responded and after long persuasion the payment could be made through Bank from April 2002. It was also expressed in the said letter that MSPS Management was so greedy for money that they assigned the management of the Company to those persons, who were arrogant and could threaten guards to extract money from their salary, but due to payment made through Bank, they were not getting chance and as such they were annoyed and frustrated. "This witness admitted that he heard many times that the officers of MSPS misbehaved with the officials of SECL.

14. In the light of the evidence of aforesaid witnesses when we examine the evidence of complainant Pradeep Kumar Shukla (PW5), it seems that accused Sanjay Kumar refused to give him LPC because it was not required. He stated that when he met accused for obtaining LPC, he told him that he would not give LPC because it was not required and that he had no role for getting his bill paid. This witness admitted that though he made a complaint to CBI that Sanjay Kumar was demanding money, but in fact he had not asked for any money. He admitted that the labour payment for the month of May 2001 was done by his company through Bank. In para 17 of his statement, he denied that in the month of October, 2002 accused asked him that if he wanted to get his bill passed early, he will have to pay for it. Though the fact that accused did not make any demand from him was omission in his police statement, yet his categorical statement before the Court that accused did not ask money from him casts serious doubt over the prosecution story that he demanded bribe for issuing LPC.

15. In *Jagdish Chandra Makhija Vs. State of Madhya Pradesh* (1990 MPLJ 239), it has been held that in a trap case when initial part of the story of demand and offer is found to be untrustworthy, testimony of the complainant cannot be accepted. In assessing the evidence of a witness, the background of the prosecution story should be kept in mind. Where the complainant seems to have no regard for the truth and admitted that he made a false complaint under the pressure of his officers, his testimony cannot be accepted. In cross-examination, complainant admitted that the officers of his Company had decided that three officers of SECL viz. S.K.Singh, Ajay Singh and Sanjay Kumar should be trapped. He was asked to

get accused Sanjay Kumar trapped. He disclosed that while writing the complaint application he told to Yogendra Tiwari (PW6) that Sanjay Kumar did not make any demand from him, Yogendra Tiwari (PW6) asked him to write as he instructed. He admitted that he made the complaint because he could not disobey the direction of his senior officer. It was Yogendra Tiwari who had taken him to CBI officers. Complainant admitted that since in the month of March 2002 the labour payment was being made through Bank, therefore, LPC was not required.

16. Yogendra Tiwari (PW6), Chief Executive Officer of MSPS, deposed that in the month of October, 2002 Pradeep Kumar Shukla informed him that the payment of the bill for the month of June 2002 was not being made because accused was not issuing LPC for the month of May 2002 and for issuing the same he was demanding bribe of Rs.3000/-. According to him, he then advised Shukla to make a report to CBI. In cross-examination, this witness was confronted with his police statement Ex.D/3 wherein these facts were not disclosed by him. In view of these material contradictions, his evidence does not inspire confidence. Learned counsel for the CBI argued that even if the complainant did not support the prosecution case and turned hostile, since he admitted his signatures on the complaint, the complaint Ex.P/5 proved the demand made by the accused. He further argued that the demand was also proved by the fact that complainant admitted before Yogendra Tiwari (PW6), S.K.Dwivedi (PW2) and Bhupat Kishore (PW3) that accused demanded bribe of Rs.3000/-. We are afraid that this argument of learned counsel cannot be accepted. Evidence of S.K.Dwivedi (PW2) and Bhupat Kishore (PW3) that Pradeep Kumar Shukla admitted before them that accused demanded bribe cannot be accepted in view of the fact that the complainant himself deposed that the false complaint was made by him under the pressure of the officers of his Company. Apart from that the complaint Ex.P/5 cannot be treated as substantive evidence.

17. In *Suresh Kumar Shrivastava Vs. State of Madhya Pradesh* (1994 MPLJ 30), it was held that the complaint cannot be treated as substantive evidence. It contained only a "former statement" of the complainant that accused had demanded money from him for showing favour to him. "Former Statement" could either be used to corroborate under section 157 of the Evidence Act of the complainant given in the Court or to contradict his evidence under section 145 of the Evidence Act. When complainant did not support the story that demand was made by accused, there was no substantive evidence or deposition of the witness before the Court, it would be wrong on the part of the trial Court to base a decision on what was merely a "former statement" of a witness contained in the complaint.

18. In view of the above discussion, we feel compelled to hold that it was not established beyond reasonable doubt that accused had an occasion to issue LPC that could have given him an opportunity to make a demand of bribe and to the complainant the occasion to offer the same.

19. Learned counsel for the appellant argued that the evidence of receipt of bribe money by the accused has not been established beyond the reasonable doubt. Whole episode was manufactured under conspiracy by the officers of security agency who entertained grudge against the officers of SECL for various reasons. The trap was arranged with the connivance of the officers of CBI who had assembled in hotel Surya at Shahdol. According to him, the explanation given by accused immediately at the time of trap and in the written statement submitted by him before the trial Court that he was falsely implicated under conspiracy was reasonable and probable under the circumstances of the case. S.K.Dwivedi (PW2), who was summoned as an independent witness from New India Insurance Company, deposed that he with Bhupat Kishore had reached Surya Hotel at 4:00 p.m. where he met CBI Inspector Chouhan and complainant Pradeep Kumar Shukla. After verification of the complaint from Pradeep Kumar Shukla, he saw the demonstration conducted by the CBI Inspector. Under the instruction of CBI Inspector, he went with Pradeep Kumar Shukla as a shadow witness to Zet hostel in Sanjay Nagar where accused was residing. Other members of the trap party stayed at some distance from the building and he and Pradeep Kumar Shukla went at the house of accused. Pradeep Kumar Shukla introduced him as his new incharge. There had been some talks about the pending bills of the Company. Thereafter accused enquired from Pradeep Kumar Shukla whether he had brought the money. Pradeep Kumar Shukla took out the money from his pocket and gave it in the right hand of the accused who kept it in his left side pocket of the shirt. According to him, accused assured him that his work shall be done. S.K.Dwivedi then went out and ignited a cigarette for giving signal to the trap party. Trap party came in the room and Inspector S.M.S.Chouhan caught hold of the hands of accused. According to this witness, accused uttered that "he committed mistake". Thereafter Bhupat Kishore took out money from the pocket of accused. The hands and the pocket of accused from which the currency notes were taken out, when washed with sodium carbonate turned pink. Numbers of the notes also tallied with the numbers of the notes, which had been given to complaint. Similar facts were deposed by Bhupat Kishore (PW3), however, he deposed that when CBI officer enquired from the accused as to where he had kept the bribe money, accused could say nothing. Bhupat Kishore admitted that he himself had not seen the complaint delivering money to accused. Both the aforesaid witnesses stated that the pocket of the shirt of accused was washed and the pink solution of sodium carbonate was seized. But when we turn to the evidence to complainant Pradeep Kumar Shukla (PW5), we find that he deposed that when he and S.K.Dwivedi went in the room of accused and asked him for passing the bill, accused asked them to come in the office next day. He took out Rs.3000/- from his pocket and wanted to give the same to accused but he refused to accept it. At the time when he offered money to accused, S.K.Dwivedi left and went out of the room.

According to complainant, when he insisted to give money, accused tried to return the same and, therefore, he kept the money on the bed and at that moment CBI team reached there and caught the hands of accused. Complainant stated that when Inspector Chouhan asked the accused that he had taken bribe, accused replied that he was falsely implicated.

20. Learned counsel for the State contended that complainant Pradeep Kumar Shukla was declared hostile, therefore, his evidence was unworthy of reliance. According to him, the acceptance of bribe money by accused was established by the fact that hands of the accused and pocket of his shirt contained traces of phenolphthalein, which was established by Central Forensic Science Laboratory (CFSL) report. Contrary to it, learned counsel for the accused contended that the fact that the tainted money was kept in the pocket by the accused was belied by the result of CFSL test in respect of the solution of the pocket, as it was found to be negative for the phenolphthalein test. CFSL report is Ex.P/33. Since for the first time CFSL report in respect of the solution of the pocket was found negative, the shirt was again sent for test of presence of phenolphthalein powder and a fresh report Ex.P/32 was received, according to which, presence of phenolphthalein was confirmed in the pocket.

21. Learned counsel for the accused vehemently argued that the second test report was not reliable. When the solution collected after washing the pocket of the shirt at the spot did not contain traces of phenolphthalein, it was highly improbable that the shirt would still contain the phenolphthalein at later stage. He argued that though it has been stated by the prosecution witnesses that the shirt was sealed at the spot, yet there was no evidence on record to indicate that the shirt was kept in safe custody and the seal with which it was sealed was also kept in safe custody of any independent person. The trap was conducted on 29.10.2002 whereas the shirt in question was received by CFSL on 3.2.2003. He placed reliance on *Mohd. Aman and another vs. State of Rajasthan* (AIR 1997 SC 2960) where, in regard to the period of custody of empty cartridge with the police, it was held that inordinate delay in sending the same for examination to ballistic expert raised doubt and gave rise to suspicion. There was delay of only 5 days but in those circumstances, it was held by the Apex Court that there was no justifiable reason for the delay. In *Mahmood Vs. State of Uttar Pradesh* (AIR 1976 SC 69), Apex Court held that after sealing the parcel of any article, the seal should not remain with the investigating agency. This principle was also followed by the High Court of *Madhya Pradesh in Vijay Singh Vs. State of Madhya Pradesh* [2004(4) MPLJ 543] and *Ganesh @ Ganesha @ Ganesh Prasad and another Vs. State of Madhya Pradesh* [I.L.R. (2008) M.P.3026].

22. The fact that initially the pocket of the shirt did not give traces of phenolphthalein and subsequently the phenolphthalein test gave positive result, in our opinion, throws considerable doubt about the presence of phenolphthalein in

the pocket of accused. This circumstance militates against the prosecution version that the accused received the tainted currency notes and kept it in his pocket. In these circumstances, the evidence of complainant that accused refused to accept money and, therefore, he kept it on the bed seems probable. It is also probable that when complainant insisted and accused refused to accept the bribe money, the hands of accused might have come in contact of tainted currency notes. In the above fact situation, the explanation furnished by accused that the officers of MSPS in connivance with the officers of CBI arranged a false trap, appears probable.

23. Learned counsel for the accused, referring to the evidence of Sanjay Amte (DW1), argued that the whole episode was a frame-up. On 20.10.2002, M.S.Chouhan, C.L.Patel, B.R.Prabhakar and Vinayak Dubey had come in his hotel Surya at Shahdol. Room No.201 was took in the name of V.Joshi and in this room 5-6 persons had stayed. Lakhvinder Singh (DW2) deposed that he along with his boss Yogendra Tiwari and Mr. Joshi had reached Surya hotel. Two persons from CBI who were in civil dress had accompanied them from Bhopal. Shakeel Ahmad, Advocate who was legal advisor of Maruti Security Company was also with them. Yogendra Tiwari had asked Mr.Gautam, Mr. Shukla and Joshi to write three complaints and had given money. When complainant Pradeep Kumar Shukla had told that accused had not demanded money, Yogendra Tiwari had asked him to do what he said. These facts find corroboration from the evidence of Pradeep Kumar Shukla (PW5) who deposed that on 29.10.2002 when he had gone to hotel Surya he had met Finance Manager Vinod Joshi and Devnath Gautam in one room. Chief Executive Yogendra Tiwari and former manager Lakhvinder Singh and Shakeel Ahmad were also present. According to him, officers of the Company had decided to get three persons viz. S.K.Singh, Ajay Singh and Sanjay Kumar trapped. He was asked to get Sanjay Kumar trapped though Sanjay Kumar never made any demand from him. He disclosed that Yogendra Dixit had introduced him to CBI people.

24. In *State of Madhya Pradesh Vs. J.B.Singh* [AIR 2000 SC 3562], Supreme Court observed that so far as payment is concerned, once complainant himself did not support the prosecution case, there is no material to establish the alleged payment said to have been made by complainant to the accused pursuant to the alleged demand. Therefore, all the necessary ingredients of the offence under section 5(1)(d) of the Prevention of Corruption Act as well as under section 161,IPC not having established, the order of acquittal is justified. In *Sita Ram Vs. State of Rajasthan* [AIR 1975 SC 1432] Apex Court held that when story of demand of bribe by the accused from the complainant was not proved and even the story of payment of money by the complainant was not established beyond reasonable doubt, the rule of presumption engrafted in section 4(1) could not be made use of for convicting the accused In *Suraj Mal Vs. The State (Delhi*

Administration) [AIR 1979 SC 1408], Apex Court held that in the case of bribery, mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. In *Punjabrao Vs. State of Maharashtra* [2002 AIR SCW 16], Apex Court observed "It is too well settled that in a case where the accused offers an explanation for receipt of the alleged amount, the question that arises for consideration is whether that explanation can be said to have been established. It is further clear that the accused is not required to establish his defence by proving beyond reasonable doubt as the prosecution, but can establish the same by preponderance of probability." Similar view was expressed by the Apex Court in case of *Ganga Kumar Shrivastava Vs. State of Bihar* [(2005) 6 SCC 211].

25. After scanning and analyzing the evidence adduced by the prosecution, we are unable to hold that prosecution was successful in establishing beyond reasonable doubt that there was any occasion for the accused to have demanded bribe from the complainant for issuing the LPC. It was not proved beyond doubt that at the relevant time such a certificate was required for payment of wages of the employees of MSPS, since the payment of wages of MSPS was already being made through the Bank. Apart from that, complainant Pradeep Kumar Shukla (PW5) himself did not support the prosecution version and categorically stated that no demand was made by the accused. Complaint (Ex.P/5) could not have been treated as substantive evidence in the absence of evidence of its maker. Complainant himself admitted that the complaint Ex.P/5 was made by him under coercion of the officers of his Company. In view of his admission, the evidence of other independent witnesses viz. S.K.Dwivedi (PW2) and Bhupat Kishore (PW3) was rendered of no use. Apart from the above facts, the fact that for the first time sodium carbonate solution in which the pocket of the shirt of the accused was dipped negatived the presence of phenolphthalein, created doubt about the acceptance of bribe money by the accused. Besides that, the conduct of CBI Inspector S.M.S.Chouhan (PW10) seemed to be suspicious. He could not say as to how long he had stayed in Surya Hotel. He could even not explain whether he was staying for one day, two days or three days. According to him, no information was given to people of Shahdol that he was staying at Shahdol and if anybody wanted he could have contacted him. It is suspicious that how the complainant approached to him for arranging trap. Inspector Chouhan even did not inform and obtain any instruction from the Superintendent of Police, CBI for taking any action against the accused. These facts clearly smack of some kind of under hand dealing and connivance with the officers of Maruti Agency.

26. In view of the discussions made hereinabove, we hold that the judgment of conviction and sentence passed by the trial Court is liable to be set aside on the ground that the findings of fact and appreciation of evidence are vitiated as the evidence adduced by the prosecution fell short of the test of reliability and

acceptability, and as such, it was not safe to convict the accused/appellant. For the reasons aforesaid, we set aside the impugned judgment of conviction passed by the trial Court and acquit the appellant of the charges levelled against him.

27. Appeal allowed.

Appeal allowed.

I.L.R. [2010] M. P., 503
APPELLATE CRIMINAL
Before Mr. Justice K.S. Chauhan
15 December, 2009*

HIMMAT SINGH ... Appellant
Vs.
STATE OF M.P. ... Respondent

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(x) - *Calling by caste - Appellant said "Chamarawala garra raha hai" - Held - Calling a person by caste with intent to insult or humiliate in a place within public view is an offence u/s 3(1)(x) of Act - Appeal dismissed.* (Paras 10 to 13)

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(x) – जाति से बुलाना – अपीलार्थी ने कहा "चमरावाला गर्रा रहा है" – अभिनिर्धारित – किसी व्यक्ति को लोक दृष्टिगोचर स्थान में अपमानित या शर्मिंदा करने के आशय से जाति से बुलाना अधिनियम की धारा 3(1)(x) के अन्तर्गत अपराध है – अपील खारिज।

Cases referred :

(2008) 8 SCC 435.

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

JUDGMENT

K.S. Chauhan, J. :–This criminal appeal under Section 374(2) of the Code of Criminal Procedure has been preferred being aggrieved by the judgment, finding and sentence dated 19.06.2003 passed by the Special Judge (Atrocities) Raisen in Special Case No.45/00 whereby the appellant has been found guilty under Sections 294, 506 of I.P.C. and 3(1)(x) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentenced to fine of Rs.200/- in default of payment of fine one month S.I. and fine of Rs.200/- in default of payment of fine one month S.I. and 6 months R.I with fine of Rs.100/- in default of payment of fine S.I. for 15 days respectively.

2. The prosecution case in short is that Kadorilal Chamar a member of the Scheduled Castes lodged report at Police Station Dehgaon on 20.03.2000 at 11.00

*Cr.A. No.970/2003 (Jabalpur)

AM to the effect that on that day at about 8.00 AM he was inviting the persons in the village on Holi Festival as soon as he came nearby to the house of Bhagwan Singh Sarpanch the appellant came there and started abusing him and said "madarchod tujhe kisne chowkidar banaya" he asked him not to abuse him denoting to the caste. The appellant tried to assault with shoe but he was caught by his brother Sher Singh, Bhagwan Singh Sarpanch, Kallu Baretha and Munna Singh have witnessed the incident. On this intimation the Crime No.30/2000 under Sections 294, 506 of I.P.C. and 3(1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was registered against the appellant. Spot map was prepared. The statements of the witnesses were recorded. After completing the usual investigation charge sheet was filed in the court of CJM Raisen who committed the case to Sessions Court for trial.

3. Appellant was charged under Sections 294, 506-B of I.P.C. and under Section 3(1)(x) of Scheduled Castes and Scheduled Tribes Act, (Prevention of Atrocities) Act, 1989. He denied the guilt and claimed to be tried mainly contending that he is innocent and has been falsely implicated in this case. Prosecution examined as many as five witnesses and appellant also examined one witness in his defence. After appreciating the evidence trial Court found him guilty under Sections 294 and 506 of I.P.C. and also under Section 3(1)(x) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentenced thereto as stated in para No.1 of the judgment. Being aggrieved by the judgment finding and sentenced passed by the trial Court the instant appeal has been preferred by the appellant on the grounds mentioned in the memo of appeal.

4. Shri Ashok Chakravarty, learned counsel for the appellant submitted that trial Court has not appreciated the evidence in proper perspective. Appellant has not abused him denoting his caste, therefore, no offence under Section 3(1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been made out. The finding of guilt is erroneous which deserves to be set aside and appellant is entitled for acquittal.

5. On the contrary Shri J.K.Jain, Dy. Advocate General appearing on behalf of respondent/State supported the impugned judgment finding and sentenced mainly contending that the prosecution has proved the case beyond reasonable doubt. Trial Court has rightly convicted and sentenced the appellant. It does not call for any interference hence appeal be dismissed.

6. The main point for consideration in this appeal is that whether the trial Court has committed any illegality in convicting the appellant under Sections 294, 506 of I.P.C. and under Section 3(1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989?

7. Kadori Lal (PW-1) is the complainant. He has clearly stated that he is chamar by caste. This fact has been admitted by the appellant also in his

examination of accused recorded under Section 313 of Cr.P.C. Therefore, it is proved that the victim is a member of scheduled caste.

8. Kadori Lal (PW-1) has given the evidence in support of the prosecution case. He has clearly stated that this appellant abused him denoting his caste and also tried to assault him by shoe. As soon as he tried to beat him Sher Singh caught hold of the appellant even thereafter he threatened him to kill. He lodged the report (Ex.P-1). The police prepared the map (Ex.P-2) during the course of investigation. Nothing has been brought in cross-examination so as to discredit his testimony. There is no reason to disbelieve his statement. His evidence is convincing. He appears to be a reliable witness. His evidence is acceptable.

9. Bhagwan Singh (PW-4) has also supported evidence of complainant Kadori Lal (PW-1). He has stated that appellant abused the victim saying "chamarawala garra raha hai". He also abused filthy languages. He has denied the suggestive question put in the cross-examination that on holi festival the people used to call chamar denoting him 'chamarawala'. He has also denied the suggestive questions that the appellant has been falsely implicated at his instance due to election rivalry. He has admitted that the appellant belongs to his family. Thus, Bhagwan Singh (PW-4) who is the member of the appellant family has given evidence against him. Nothing has been brought on record so as to discredit his testimony. His evidence also inspires confidence. The evidence of Narayan Singh (DW-1) that there is landed dispute between Bhagwan Singh and appellant and for this reason the appellant has been falsely implicated can not be accepted. There is no reason as to why Kadorilal would implicate this appellant at his instance. Kadorilal was chowkidar of that village and he had nothing to do with the landed dispute in between appellant and Bhagwan Singh (PW-4). The defence is only an after thought which is not acceptable. Trial court has rightly discarded the same.

10. There is ample evidence that appellant abused and threatened the member of the scheduled caste denoting his caste. It is also manifestly clear that on the day of incident there was holi festival and several persons were assembled there. He insulted complainant the member of the scheduled caste at the place which was in the public view.

11. The provisions of Section 3(1)(x)of Scheduled Caste and Scheduled Tribe (The Prevention of Atrocities) Act, 1989 are as follows:-

> "(1) Whoever, not being a member of Scheduled Caste or a Scheduled Tribe intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view." shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine".

12. In the case of *Swaran Singh and others vs. State* (2008) Volume 8 SCC 435 the Apex Court has held thus:-

"Calling a member of the Scheduled Caste "chamar' with intent to insult or humiliate him in a place within public view is certainly an offence under Section 3(1)(x) – of the act."

13. In the light of the aforesaid pronouncement of the Apex Court and keeping in view the facts and circumstances of the case, I am of the view that the prosecution has established the case beyond reasonable doubt against appellant and the court below has not committed any illegality in convicting the appellant for the offences charged. There is no infirmity, illegality, impropriety or perversity in the finding of the court below hence does not call for interference. Minimum sentence provided for the offence under Section 3(1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is awarded. Therefore it also does not call for interference. The appeal is meritless and deserves to be dismissed.

14. Consequently, appeal fails and is dismissed accordingly. The conviction and sentenced passed by the court below are hereby affirmed. The appellant is on bail. His bail bonds are cancelled. He is directed to appear before C.J.M. Raisen on 21.01.2010 for serving out the remaining part of the sentence.

Appeal dismissed.

I.L.R. [2010] M. P., 506
ARBITRATION APPEAL
Before Mr. Justice Arun Mishra & Mr. Justice S.C. Sinho
16 December, 2009*

B.C. BIYANI PROJECTS PVT. LTD. (M/S.) ... Appellant
Vs.
SSANGYONG ENGINEERING CONSTRUCTIONS COMPANY LTD. ... Respondent

Arbitration and Conciliation Act (26 of 1996), Section 41 - *Bank Guarantee - Invocation - Permissibility - To grant injunction powers of the Court - Held - Court cannot issue injunction u/s 41 of the Act r/w Order 39 Rule 1 & 2 CPC restraining the principal from invoking and encashing the guarantee except in cases of fraud or apprehension of irretrievable injustice to the contractor.* (Para 13)

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 41 – बैंक गारंटी – अवलंब–अनुज्ञेयता – व्यादेश अनुदत्त करने की न्यायालय की शक्तियाँ – अभिनिर्धारित – न्यायालय कपट या ठेकेदार को अपूरणीय अन्याय की आशंका के मामलों के सिवाय प्रिंसीपल को गारंटी का अवलंब लेने और उसे भुनाने से निषेधित करते हुए अधिनियम की धारा 41 सहपठित सि. प्र.सं. के आदेश 39 नियम 1 व 2 के अन्तर्गत व्यादेश जारी नही कर सकता।

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*Ar.A. No.12/2008 (Jabalpur)

B.C. BIYANI PROJECTS PVT. LTD. (M/S.) Vs. SSANGYONG ENG. CONS. CO. LTD.

Cases referred :

(1988) 1 SCC 174, AIR 1991 SC 1994, AIR 1986 SC 1924, (1996) 5 SCC 450, (1994) 6 SCC 597, AIR 1996 SC 2268, (2006) 7 SCC 416.

Rajesh Pancholi, for the appellant.

R.S. Jaiswal with Manoj Kushwaha, for the respondents.

J U D G M E N T

The Judgment of the Court was delivered by ARUN MISHRA, J. :–This Arbitration Appeal has been filed under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act of 1996) assailing the order passed by the Court of First Additional Judge to the Court of First Additional District Judge, Narsinghpur in Misc. Arbitration Case No. 9/2008.

2. M/s B.C.Biyani Projects Pvt. Ltd filed an application under section 9 of the Act of 1996 in the backdrop of the fact that M/s B.C.Biyani Projects Pvt. Ltd entered into an agreement with Ssangyong Engineering Constructions Company Ltd. for providing all adequate labour plant, machinery, construction equipment and all other resources-financial and administrative etc required in order to perform the work order under the project signed between Ssangyong Engineering Constructions Company Ltd. and National Highways. The work in question which was to be performed, was given to Ssangyong Engineering Constructions Company Ltd by National Highway Authorities of India (for short NHAI) for construction of four laning of Jhansi-Lakhanadon section Km.351.0 to Km.405.7 of NH-26 in the State of Madhya Pradesh on 12.4.2006. The agreement of subcontract between appellant and Ssangyong Engineering Constructions Company Ltd was entered into on 2.8.2006, period of completion of the work was 30 months. It is not in dispute that in the agreement of subcontract, clause 27 provides for arbitration in case any dispute arises between the parties.

3. It was submitted by M/s B.C.Biyani Project Pvt. Ltd in the application filed under section 9 of the Act of 1996 that the appellant company have expertise in constructing and completing the work assigned to it by Ssangyong Engineering Constructions Company Ltd under package No. ADB-II/C-9 of NHAI and the appellant company mobilized all resources including the financial, administrative, manpower and machineries as were required to undertake the work in amicable manner as detailed in the agreement and schedule of work. The appellant had also furnished performance guarantee in the form of irrevocable and unconditional Bank Guarantee @ 1% of the contract price of Rs. 203,50,43,148/-. The Bank Guarantee was furnished for a sum of Rs. 2 Crores with UCO Bank, through Branch Manager Bhusawal District Jalgaon. It was also submitted that it was necessary for Ssangyong Engineering Constructions Company Ltd to obtain prior permission of NHAI, however, the appellant was kept in dark and was informed

that permission has already been obtained. Appellant performed the work. It appears that employing of an agency under subcontract was objected to by NHAI. The NHAI warned Ssangyong Engineering Constructions Company Ltd to discontinue the subcontract otherwise main contract was threatened to be terminated. Thus fraud was played with the appellant. Appellant performed the work of more than Rs. Five Crores, payment of which was received by the appellant. The plight of the appellant did not stop up to the termination of agreement of subcontract by Ssangyong Engineering Constructions Company Ltd on 2.8.2006. Due to termination of agreement dated 24.4.2008 effort was being made to invoke the Bank Guarantee. There was non cooperation of Ssangyong Engineering Constructions Company Ltd in referring the matter for Arbitration as per clause 27 of the agreement. Appellant would like to invoke the arbitration clause and move to the court for appointment of Arbitrator under section 11 of the Act of 1996. Prayer was made in the application to restrain Ssangyong Engineering Constructions Company Ltd from encashment of Bank Guarantee furnished by the appellant to the bank in the interest of justice.

4. Application was resisted by Ssangyong Engineering Constructions Company Ltd. It was submitted that there is no arbitration clause in Bank Guarantee dated 23.5.2007 and the Bank Guarantee being a separate contract is governed by the terms and conditions. Its an unconditional Bank Guarantee and there was default on the part of the appellant of not completing the work. Appellant did not complete even 10% of the work in approximately one year and eight months before contract was terminated. The appellant was not entitled for the injunction as Ssangyong Engineering Constructions Company Ltd had the right to invoke the Bank Guarantee in view of the breach of contract, no fraud was played. Allegation with respect to fraud have been specifically denied. It was mentioned in the agreement itself that the main contract has been given by NHAI of which the appellant was well aware and responsibility to correspond with the NHAI was that of Ssangyong Engineering Constructions Company Ltd, thus this fact was to the knowledge of the appellant right from beginning, no fraud was played. In fact permission was sought from NHAI for approving the subcontract which was not approved by NHAI as apparent from correspondence, thus it cannot be said that Ssangyong Engineering Constructions Company Ltd had committed any fraud with the appellant.

5. The learned First Additional District Judge by the impugned judgment held that it cannot be said that fraud was played by Ssangyong Engineering Constructions Company Ltd with the appellant. Injunction prayed for has been declined, hence instant appeal has been preferred by appellant M/s B.C.Biyani Project Pvt. Ltd under section 37 of the Act of 1996.

6. Shri Rajesh Pancholi, learned counsel appearing for the appellant has submitted that Ssangyong Engineering Constructions Company Ltd has committed serious kind of fraud with the appellant. They knew it very well that sub contract was

prohibited and prior permission of NHAI ought to have been obtained, which was not obtained. He has also submitted that work has been done by the appellant in the project of NHAI, thus there is no right with the Ssangyong Engineering Constructions Company Ltd to invoke the Bank Guarantee. More so when subcontract was prohibited without prior permission. The 93% of the amount was to be paid to the appellant and 7% was to be retained by the Ssangyong Engineering Constructions Company Ltd, huge amount has been spent in mobilization advance and other expenditure has also been incurred. Real reason for termination can be culled out from communication (A-21) dated 23.7.2007 which are minutes of the meeting of Ssangyong Engineering Constructions Company Ltd, in which it has been mentioned that due to pressure of NHAI, it was necessary to cancel the subcontract. He has further submitted that the appellant has spent a sum of Rs. 57 Crores as mentioned in communication A-22 dated 28.7.2007. Though documents A-21 and A-22 were not placed on record before the Court below, they have been filed for the first time before this Court, appellant's counsel has prayed for consideration of aforesaid communications in the interest of justice. He has also relied upon the decisions, to be referred later.

7. Shri R.S.Jaiswal, Sr. Counsel with Shri Manoj Kushwaha appearing for the respondents has supported the judgment and has relied upon clause 3.1, 3.2, 10 and 23 of the agreement of subcontract. He has also relied upon communication (R-1) dated 24.4.2008 in which various reasons have been culled out for termination of contract. He has submitted that Bank Guarantee is irrevocable and unconditional, it has been rightly invoked as contract has been terminated, it was invocable in the event of termination of contract. The Bank Guarantee being unconditional, there is no equity in favour of the appellant to restrain Ssangyong Engineering Constructions Company Ltd from invoking the Bank Guarantee. It is purely a contractual matter. No case of fraud is made out in the facts and circumstances of the instant case. Facts were to the knowledge of the appellant. Appellant was aware that permission had also been applied to NHAI and NHAI had not granted the permission and there was no progress of work made, consequently subcontract had to be terminated as per the communication (R-1) dated 24.4.2008. No case is made out so as to make interference. He has also relied upon various decisions, to be referred later.

8. First question for consideration is whether the fraud, as alleged, had been played by Ssangyong Engineering Constructions Company Ltd with appellant M/s B.C.Biyani Project Pvt. Ltd. Clause 3.1 of the agreement (A-2), which has been placed on record, provides for furnishing of performance guarantee in the form of an irrevocable and unconditional Bank Guarantee from a reputable bank which is acceptable to Ssangyong, in terms thereof the Bank Guarantee was submitted. As per clause 3.2 the said Bank Guarantee can be invoked by Ssangyong at its discretion in case of termination of this agreement as per 'Termination of Agreement'

clause hereinbelow and/or as and when the Ssangyong Engineering Constructions Company Ltd is satisfied that any loss has been caused or might be caused to it because of any overt or covert act of appellant while executing the project.

9. Clause 4.21 of the agreement is quoted below :-

> 4.21 Biyani shall not correspond with NHAI in any capacity not even as a representative of Ssangyong. All letter correspondence in connection with work order shall be done by Ssangyong only. Default in any respect will be treated as breach of condition of this Agreement. Biyani's responsibilities described under this Clause are not to be constructed as limiting in any manner.

It is apparent from the aforesaid clause that the main contract with Ssangyong Engineering Constructions Company Ltd was to the knowledge of appellant right from beginning and they had undertaken not to correspond with NHAI even as representative of Ssangyong Engineering Constructions Company Ltd, thus they knew it fully well that permission of NHAI was necessary for subcontract. Prima facie it cannot be said that they were not aware of the existence of agreement. The mentioning of the aforesaid condition was enough to put at guard the appellant to make enquiry as to the nature of main agreement. In case they were not aware of the terms and condition of main agreement, it cannot be said that they had exercised reasonable and due diligence. Thus the knowledge of the existence of the terms and conditions of the main agreement can be imputed. It was incumbent upon the appellant to gather information as to terms and conditions of the main agreement while they entered into sub contract with Ssangyong Engineering Constructions Company Ltd. It cannot be said that any fraud was played as agreement was to the knowledge of the appellant.

10. Clause 23 of the agreement provides for consequences of default by Biyani/ Termination of agreement. Clause 23(1) contains the events which were to be treated breach of the agreement. Clause 23(1) is quoted below :-

> (a) fails to perform or observe any of its obligations, covenants, conditions hereunder or in the Main Agreement or any other document, to be performed and observed.
>
> (b) fails to execute and complete the works and remedy any defects in strict accordance with the Main Agreement to the satisfaction of the Engineer as appointed by NHAI.
>
> (c) sub-contracts, assigns or part with any work allocated to it or the benefits or rights under this Agreement without prior written approval or consent of Ssangyong
>
> (d) fails to rectify the defects and deficiencies whatsoever as pointed out by the Ssangyong

(e) fails to follow the instructions, directions etc. issued by Ssangyong

(f) acts or conducts in breach of the Main Agreement conditions executed between Ssangyong and Employer/Engineer.

(g) becomes bankrupt or insolvent or its progress payment from Ssangyong attached by any third party or is made subject matter of a garnishee order.

(h) makes any Misrepresentation in pursuance of this Agreement or during the performance/execution of the work.

(i) fails to furnish or renew the Bank Guarantee under this Agreement.

(j) fails to pay more than three monthly lease rentals/hire charges.

(k) deals directly with NHAI directly/indirectly – communicates will NHAI as a sub-contractor of Ssangyong in writing or otherwise or corresponds in writing with NHAI as a representative of Ssangyong.

(l) failure to maintain confidentially of this agreement.

Clause 27 provides for Arbitration.

In the instant case we find that for the various reasons culled out in communication (R-1) dated 24.4.2008, the contract has been terminated. Following reasons were given for termination of contract :-

(i) Until now, the progress of this project is approximate 10% despite 23 months have already passed since commencement of the project; from this pace, it is not possible to complete the Project within the stipulated time specified in the contract.This is breach of the Subcontract under the Subclause 2.1, 2.2, 4.1, 4.16 and 23.1 (a), (b), (c), (f) and/or Memorandum of Understanding on 20th Aug. 2007.

(ii) The equipment and machinery brought by M/s B.C. Biyani Projects Pvt. Ltd. were out of order most of the time and not up to the mark as per the requirement of the NHAI projects. Also, the repairing and maintenance were not taken due care within the time frame. Inspite of reminders for deployment of requisite number of equipment and machinery, same was never adhered by M/s B.C. Biyani Projects Pvt. Ltd. Which caused direct impact on the Project and hampered the progress to a great extent.

(iii) Work programme was not submitted on time, weekly and monthly reports were also not submitted.

(iv) M/s B.C. Biyani Projects Pvt. Ltd failed to submit even IPC which is for payment from NHAI, which was breach of subclause 4.1, 4.4, 4.19, 4.16 and 23.1(a), (b), (c), (f) and/or MOU of subcontract.

(v) Instruction of Project Manager were not followed.

(vi) M/s B.C. Biyani Projects Pvt. Ltd was unable to pay the bills of suppliers, labourers and their employees in cue course of time.

(vii) the project suffered loss to a great extent due to M/s B.C. Biyani Projects Pvt. Ltd.'s incapability for utilization of Manpower and Machinery in a best practical way.

(viii) M/s B.C. Biyani Projects Pvt. Ltd. Took finance from SREI Finance Company for some of your plants and machinery which we have purchased from M/s B.C. Biyani Projects Pvt. Ltd under the sale deed as a security and M/s B.C. Biyani Projects Pvt. Ltd. Could not pay its installments at stipulated period to the financer. This is also a breach of subclause 4.1, 4.4, 4.19, 4.16 and 23.1(a), (b), (c), (f) and/or MOU of subcontract.

11. On facts it is submitted by Shri Rajesh Pancholi, learned counsel appearing for the appellant that an application has been filed by the appellant before this Court for appointment of Arbitrator, which is pending consideration. It is also stated that no order has been passed in the said application nor any injunction has been prayed for. Fact is placed on record.

12. Clause 59.1 of the main contract enteted into between Ssangyong Engineering Constructions Company Ltd and NHAI provides that all specialists, merchants, tradesmen and others executing any work or supplying any goods, materials, Plant or services for which Provisional Sums are included in the Contract, who may have been or be nominated or selected or approved by the Employer, or the Engineer, and all persons to whom by virtue of the provisions of the Contract the Contractor is required to subcontract shall, in the execution of such work or the supply of such goods, materials, Plant or services, be deemed to be subcontractors to the Contractor and are referred to in this Contract as nominated Subcontractors.

It appears from the correspondence (R-12) dated 4.6.2007 written by NHAI to Ssangyong Engineering Constructions Company Ltd that sub-contractorship to the appellant was turned down by NHAI. Various reasons have been given, for not approving the appellant's subcontractor ship. It also appears that there was some dispute with respect to certificate filed of the officers of NHAI, they were alleged to be forged. There is dispute on facts whether these certificates were obtained by the appellant or by personnels of Ssangyong Engineering Constructions Company Ltd. We are not entering into that aspect, but the fact remains that NHAI was informed as to subcontractor ship and in view of clause 59, it could

not be said that any fraud was played by Ssangyong Engineering Constructions Company Ltd.

Shri Rajesh Pancholi, learned counsel appearing for appellant has submitted that NHAI was informed belatedly about subcontractor ship not immediately, thus it was a case of fraud played. He has also submitted that agreement of subcontractor ship was as a matter of fact never sent to the NHAI.

We do not find any of the submission to be acceptable so as to advance the cause for grant of injunction. After going through the pleadings made in the application under section 9 of the Act of 1996 we are not satisfied that any fraud was played as right from the beginning appellant was aware of the main agreement. A reading of letter (R-1/8) also indicates that NHAI was apprised about the subcontractor ship and considering the conditions mentioned in the agreement of subcontract, we are of the opinion that no fraud was played, as alleged.

13. It is necessary to restrain invocation of the Bank Guarantee as it is irrevocable and unconditional one, so as to make out prima facie case of fraud as held by the Apex Court in *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.* - (1988) 1 SCC 174. The Apex Court has laid down that in case of Bank Guarantee, Court cannot issue injunction under section 41 of Arbitration Act read with Rules 1 and 2 of Order 39 CPC restraining the principal from invoking and encashing the guarantee except in cases of fraud or apprehension of irretrievable injustice to the contractor. In the instant case we are not satisfied that prima facie case of fraud has been made out. Appellant has failed to make out a case of fraud.

14. The Apex Court in *General Electric Technical Services Company Inc., v. M/s Punj Sons (P) Ltd. And another* – AIR 1991 SC 1994 has laid down that when there is unconditional Bank Guarantee, Court cannot grant injunction restraining the principal from invoking and encashing the Bank Guarantee in the absence of fraud or likelihood of irretrievable injustice between parties. It is only in the case of fraud or in case beneficiary wants to take unjust advantage, injunction can be granted not otherwise.

15. Similar is the law laid down by the Apex Court in *Centax (India) Ltd. v. Vinmar Impex Inc. and others* – AIR 1986 SC 1924; Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd. And another – (1996) 5 SCC 450; *State Trading Corporation of India Ltd. v. Jainsons Clothing Corporation and another* - (1994) 6 SCC 597. It has also been laid down by the Apex Court that contract of Bank Guarantee is independent between the beneficiary and person with whom primary contract has been entered into. It is distinct from the primary contract. In the instant case as per the terms and conditions mentioned in the Bank Guarantee, the Bank Guarantee has become invocable due to breach and violation of agreement. In the instant case, we do not find any ground so as to restrain its invocation.

In *Hindustan Steel Works Construction Ltd. v. Tarapore and Co. and another* - AIR 1996 SC 2268, the Apex Court has laid down that when there is unconditional Bank Guarantee furnished, Bank's obligation is absolute. No distinction can be drawn between guarantee for due performance of works contract or towards security deposit. Obligation of Bank remains same. It has to be discharged in manner provided in Bank Guarantee. In the instant case, we do not find any exceptional circumstances to grant relief. Counsel for appellant has also relied upon the aforesaid decision of Hindustan Steel Works Construction Ltd., but we find that the aforesaid decision is of no help to the appellant as each case has to depend upon its own facts.

16. Counsel for the appellant has also relied upon the decision of Apex Court in *Hamza Haji v. State of Kerala and another* – (2006) 7 SCC 416 in which concept of fraud has been considered and it has been held by Apex Court that when a decision is vitiated by fraud, proper course would be to approach the court which had rendered the decision for redressal. It has also been held that in case any deliberate suppression of fact is there which was fundamental to entitlement of relief sought and found the claim on the basis of a non existent fact, amounts to practising fraud on court, such fraud vitiates the decision/order of the court. In the instant case we find that there was no suppression right from the beginning. Appellant was aware of the main agreement. Either he knew the terms and conditions of the agreement or it was his duty to ascertain it by exercising due diligence which is expected of a person of ordinary prudence, thus knowledge can be attributed to the appellant of the terms and conditions of the agreement which was entered into between NHAI and Ssangyong Engineering Constructions Company Ltd.

Shri Rajesh Pancholi, learned counsel appearing for appellant has also relied upon the decision of Apex Court in *Nangia Constructions India (P) Ltd. vs. National Buildings Construction Corporation Ltd. And others* 41 (1990) DLT 359, to submit that in the similar facts Delhi High Court granted injunction on invocation of Bank Guarantee. Each case with respect to fraud has to be decided by considering the facts so pleaded and agreement entered into. In the instant case we have considered the facts and agreement and we are of the opinion that prima facie no fraud has been committed. Thus we are not inclined to interfere in the order passed by the court below.

17. Resultantly, the appeal fails and is liable to be dismissed, same is hereby dismissed. However, we leave the parties to bear their own costs as incurred of this appeal.

Appeal dismissed.

I.L.R. [2010] M. P., 515
CIVIL REVISION
Before Mr. Justice Alok Aradhe
18 January, 2010*

ANJALI SHUKLA (SMT.) ... Applicant
Vs.
SUNIL KUMAR SHUKLA ... Non-applicant

A. Hindu Marriage Act (25 of 1955), Section 19 - ***Court to which petition shall be presented - Territorial jurisdiction - Maintainability*** - *Issue relating to maintainability of proceedings on the ground of lack of territorial jurisdiction is a mixed question of law & facts and can only be decided after recording of evidence.* (Para 14)

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 19 – न्यायालय जिसमें याचिका पेश की जायेगी – क्षेत्रीय अधिकारिता – पोषणीयता – क्षेत्रीय अधिकारिता के अभाव के आधार पर कार्यवाहियों की पोषणीयता से सम्बन्धित विवाद्यक विधि और तथ्य का मिश्रित प्रश्न है और केवल साक्ष्य के अभिलेखन के बाद ही विनिश्चित किया जा सकता है।

B. Hindu Marriage Act (25 of 1955), Section 19 - ***Court to which petition shall be presented - Territorial jurisdiction - Preliminary issue*** - *Issue relating to maintainability of proceedings on the ground of lack of territorial jurisdiction cannot be dealt with as preliminary issue.* (Para 14)

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 19 – न्यायालय जिसमें याचिका पेश की जायेगी – क्षेत्रीय अधिकारिता – प्राथमिक विवाद्यक – क्षेत्रीय अधिकारिता के अभाव के आधार पर कार्यवाहियों की पोषणीयता से सम्बन्धित विवाद्यक को प्रारम्भिक विवाद्यक के रूप में नही बरता जा सकता।

C. Hindu Marriage Act (25 of 1955), Section 19 - ***Court to which petition shall be presented - Territorial jurisdiction*** - *Prayer of rejection of the plaint at the threshold - Scope of the scrutiny is extremely limited and only averments made in the plaint have to be seen.* (Para 10)

ग. हिन्दू विवाह अधिनियम (1955 का 25), धारा 19 – न्यायालय जिसमें याचिका पेश की जायेगी – क्षेत्रीय अधिकारिता – प्रारम्भ में वादपत्र की नामंजूरी की प्रार्थना – जाँच का क्षेत्र अत्यंत सीमित है और केवल वादपत्र में किये गये प्रकथनों को ही देखा जाना चाहिए।

D. Hindu Marriage Act (25 of 1955), Section 19 - ***Residence - Meaning*** - *The expression 'residence' does not mean temporary residence but the habitual residence or a residence which is intended to be permanent for future as well and apart from the actual period of stay, the intention of the parties is also required to be seen.* (Para 12)

घ. हिन्दू विवाह अधिनियम (1955 का 25), धारा 19 – निवास – अर्थ – शब्द

*C.R. No.270/2009 (Jabalpur)

'निवास' का अर्थ अस्थायी निवास नही है बल्कि सामान्य निवास या ऐसा निवास भी है जो भविष्य के लिए स्थायी होना आशयित है और रुकने की वास्तविक कालावधि के अलावा पक्षकारों का आशय भी देखा जाना अपेक्षित है।

Cases referred :

AIR 1982 SC 3, AIR 1977 All 1997, AIR 1992 MP 260, AIR 1975 SC 105, (1991) 1 SCC 451, (2003) 1 SCC 557, AIR 1979 MP 153.

Arun Kumar Choubey, for the applicant.

Satyam Agrawal, for the non-applicant.

ORDER

ALOK ARADHE, J. :–Invoking the jurisdiction of this Court under Section 115 of the Code of Civil Procedure, the applicant-wife has called in question the legality and validity of the order dated 15.5.2009 by which the objection to maintainability of the proceeding under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') on the ground of lack of territorial jurisdiction has been turned down.

2. In order to appreciate the challenge made to impugned order reference to few facts is necessary. Admittedly, applicant and non-applicant got married as per Hindu rites on 9.5.2006 at Bhopal. The non-applicant/husband has filed a petition under Section 13 of the Act seeking dissolution of marriage in the Court of Additional Judge to the Court of First Additional District Judge, Sehore. On receipt of notice of proceedings, the applicant-wife entered appearance and raised an objection with regard to the maintainability of the proceeding on the ground of lack of territorial jurisdiction. In the objection it was inter alia stated that from perusal of paragraph 2 of the petition under Section 13 of the Act, it is apparent that the parties had last resided together in Bhopal. In paragraph 8 it was stated that the non-applicant stayed in hotel Crescent for a period of three days i.e. from 22nd July to 24th July, 2007. An objection was raised that the Court at Sehore has no territorial jurisdiction to entertain the proceeding under Section 13 of the Act. Trial Court vide order dated 15.5.2009 held that from perusal of paragraph 13 of the petition under Section 13 of the Act, it is apparent that the parties resided together on 26.7.2007 at Sehore. The applicant-wife no where in her application stated that where she resided lastly with non-applicant. It was further held that the question of jurisdiction is a mixed question of law and fact and can be decided only by recording evidence. Accordingly, the application was rejected and it was observed that in case the applicant-wife in her written statement makes an averment with regard to jurisdiction of the Court, the same shall be tried as preliminary issue.

3. Mr. A.K. Choubey, learned counsel for the applicant, assailing the order passed by the trial Court has submitted that from perusal of paragraphs 8 and 9 of the petition under Section 13 of the Act, it is apparent that the parties have resided

together for a brief spell of five days i.e. from 22nd July to 26th July, 2007 at Sehore. The learned counsel for the appellant placing reliance on the decision of the Supreme Court in *Smt. Jeewanti Pandey v. Kishan Chandra Pandey,* AIR 1982 SC 3 has contended that in order to give jurisdiction on the ground of residence something more than temporary stay is required. Therefore, the Court at Sehore has no territorial jurisdiction to entertain the petition.

4. Mr. Satyam Agrawal, learned counsel for the non-applicant, on the other hand, has argued that from perusal of paragraphs 8 and 9 of the petition, it is apparent that the husband resided in a hotel only on account of non-availability of accommodation for a period from 22nd July, 2007 to 24th July, 2007. It is further stated by him that the averments made in paragraphs 8 and 9 of the petition reveal that on 24th July, 2007 the non-applicant/husband arranged for an accommodation on rent and started residing with the applicant. However, the applicant went away. It is argued by him that that period of actual stay is not relevant but the intention of the parties has to be seen. The learned counsel for the non-applicant has also placed reliance on the decision in *Smt. Jeewanti Pandey* (supra) and *Smt, Santosh Kumari v. Om Prasad Chopra,* AIR 1977 All 1997 and the decision of this Court in *Pushpa Datt Mishra v. Smt. Archana Mishra,* AIR 1992 MP 260 in support of his contentions.

5. Section 19 of the Hindu Marriage Act, 1955 which is relevant for the purpose of the controversy involved in the instant case is reproduced below for facility of reference:-

> "19. Court to which petition shall be presented. - Every petition under this Act shall be presented to the District Court within the local limits of -whose ordinary original Civil Jurisdiction -
>
> (i) the marriage -was solemnized, or
>
> (ii) the respondent, at the time of the presentation of the petition, resides, or
>
> (iii) the parties to the marriage last resided together, or
>
> (iii-a) in case the wife is the petitioner, where she is residing on the date of presentation of the petition, or
>
> (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive." (Emphasis supplied)

From perusal of Section 19, it is apparent that the petition under the provisions

of the Act can be presented to the District Court within the local limit of whose original civil jurisdiction the parties to marriage last resided together.

6. The expression 'resided' has not been defined in the Act. It is therefore, permissible to refer to dictionary to find out the general sense in which the word is understood in common parlance. [See Principles of Statutory Interpretation by Justice G.P. Singh, 11th Edition, page 338]

7. In Black's Law Dictionary, 6th Edition, expression 'reside' means to settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place.

8. In Webster Dictionary 'to reside' has been defined to mean "to dwell permanently or for any length of time' and words like dwelling house or abode are held to be synonymous.

9. In *V. Narsimha Rao and others v. Y Venkata Lakshmi and another,* (1991) I SCC 451 the Apex Court in the context of Section 19 of the Act quoted with approval earlier decision of the Apex Court in *Smt. Satya v. Teja Singh,* (1975) I SCC 120 = AIR 1975 SC 105 and held that residence does not mean the temporary residence for the purpose of obtaining divorce but habitual residence or residence which is intended to be permanent for future as . well.

10. In the context of aforementioned legal position, I may advert to the averments made in the petition under Section 13 of the Act. It is well settled in law that while dealing with a prayer for rejection of a petition, at the threshold, the scope of scrutiny is extremely limited. Only averments made in the plaint or petition have to seen. [See: *Saleem Bhai and Others v. State of Maharashtra,* (2003) I SCC 557] From perusal of paragraphs 1 and 2 of the petition, it is apparent that after the marriage of applicant and non-applicant was solemnized on 9.5.2006, they resided at Bhopal. From perusal of averments of paragraph 8 it is clear that since the non-applicant did not have the accommodation of his own therefore, he stayed in a hotel for a period from 22nd July, 07 to 24th July, 07. He arranged an accommodation on rent at Diwanbag, Sehore on monthly rent of Rs.2,000/- and resided with the applicant up to 26th July, 2007. In the instant case, from perusal of the averments made in paragraph 8 of the petition it is apparent that non-applicant/husband took an accommodation on rent at Diwanbag, Sehore at a monthly rent of Rs. 2000/- per month. In other words, from the action of the non-applicant/husband in arranging for an accommodation on rent. an inference can be drawn that he is intended to reside with the applicant permanently in the accommodation for future as well In other words. it was not a temporary residence.

11. Reference to decision of the .Supreme Court in *Smt. Jeewanti Pandey* (supra) is necessary. Both the parties have relied on the aforesaid judgment.

Learned counsel for the applicant has relied on paragraph 12 whereas learned counsel for the non-applicant has relied on paragraph 13 of the aforesaid judgment In the aforesaid case, the parties originally belonged to a village situate within the territorial jurisdiction of District Judge, Almora and got married at New Delhi. Admittedly, husband and wife both last resided together in Delhi. Husband filed the petition in the Court of District Judge, Almora on the ground that the parties were resident of a village within the territorial jurisdiction of the District Court at Almora. The Supreme Court in the factual matrix referred to supra held that the District Judge, Almora had no jurisdiction to entertain a petition for dissolution of marriage. It has been held by the Supreme Court in paragraph 12 of the judgment that in order to give jurisdiction on the ground of residence something more than temporary stay is required. It must be more or less of a permanent character and of such a nature that the Court in which respondent is sued is his natural forum. It has been further held that the word 'reside' is not free from ambiguity and is capable of variety of meaning according to circumstances to which it is applicable. It is further held that expression reside in the context of Section 19 of the Act must mean actual place of residence and not a legal or constructive residence. Word 'residence' is a flexible one and has many shades of meaning and must take its colour from the context for which it appears and must not be read in isolation.

12. From perusal of decision in *Y. Narsimha Rao* (supra) the principle of law which can be deduced is that for the purpose of jurisdiction under Section 19 of the Act the expression 'residence', does not mean temporary residence but the habitual residence or a residence which is intended to be permanent for future as well. Therefore, apart from the actual period of stay, intention of parties is also required to be seen.

13. This Court in *Pushpa Datt Mishra* (supra), where the wife resided with the husband for a brief period of twenty days at a place where the husband was posted, has held that duration of stay is not material. The wife is expected to live at a place where the husband lives and if that is the place where the parties last resided together, it would be sufficient to confer jurisdiction on the Court of that place.

14. From perusal of the averments made in the petition by non-applicant/husband in paragraph 8 and 9 of the petition, it is apparent that he had taken an accommodation on rent. Whether that accommodation was intended to be permanent for future as well, is a question of fact which can be determined only by recording evidence. Therefore, in the instant case, the issue relating to maintainability of the proceeding on the ground of lack of territorial jurisdiction is a mixed question of law and fact and can be decided only after recording evidence. The Full Bench of this Court in *M/s. Ramdayal Umraomal v. M/s Pannalal Jagannathji*, AIR 1979 MP 153 has held that an issue relating to jurisdiction can be tried as preliminary issue if it can be disposed of without recording

any evidence which is not the case here. Therefore, issue relating to maintainability of the proceeding on the ground of lack of territorial jurisdiction cannot be dealt with as preliminary issue.

15. In view of my preceding analysis, I hold that on the basis of averments in the petition under Section 19 of the Hindu Marriage Act it cannot be held at this stage that the Court at Sehore has no territorial jurisdiction. The issue relating to territorial jurisdiction of the Court at Sehore to entertain the proceeding under Section 19 of the Hindu Marriage Act can only be decided after recording evidence. Therefore, it is observed that if the applicant files a written statement in which a plea with regard to maintainability of the proceeding before the Court at Sehore on the ground of lack of territorial jurisdiction is raised, trial Court shall frame an issue and decide the same after recording evidence without being influenced by the observations made in this order.

16. Accordingly, the impugned order is modified to the extent mentioned above. With the aforesaid direction, the revision petition filed by the applicant stands disposed of. However, there shall he no order as to costs.

Revision disposed of.

I.L.R. [2010] M. P., 520
CRIMINAL REVISION
Before Mr. Justice Rakesh Saksena
9 December, 2009*

YASHPAL SINGH ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - ***Police investigation - Magistrate directed S.P. to take legal action instead of directing Officer Incharge of Police Station to register FIR - Police also did not submit its report in terms of S. 173 of Code - Such order cannot be said to have been passed u/s 156(3) of Code.*** (Para 12)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – पुलिस अन्वेषण – मजिस्ट्रेट ने पुलिस थाने के भारसाधक अधिकारी को एफ.आई.आर. दर्ज करने का निदेश देने के बजाय एस.पी. को विधिक कार्यवाही करने का निदेश दिया – पुलिस ने भी संहिता की धारा 173 के निबंधनों के अनुसार रिपोर्ट पेश नही की – ऐसा आदेश संहिता की धारा 156(3) के अन्तर्गत पारित किया जाना नही कहा जा सकता।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3) & 202 - ***Jurisdiction of Magistrate - If a complaint of a cognizable offence is made, power u/s 156(3) of Code can be invoked by Magistrate.*** (Para 8)

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*Cr.R. No.1205/2009 (Jabalpur)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3) व 202 – मजिस्ट्रेट की अधिकारिता – यदि किसी संज्ञेय अपराध का कोई परिवाद किया जाता है, तो मजिस्ट्रेट द्वारा संहिता की धारा 156(3) के अन्तर्गत शक्ति का अवलंब लिया जा सकता है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 202 - *Nature of investigation - Object is not to envisage a fresh case on police report but to assist Magistrate in completing the proceedings already instituted upon a complaint before him.* (Para 8)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 202 – अन्वेषण की प्रकृति – उद्देश्य पुलिस रिपोर्ट पर नया मामला परिकल्पित करना नही है बल्कि मजिस्ट्रेट को उसके समक्ष किसी परिवाद पर पहिले से संस्थित कार्यवाहियों को पूर्ण करने में सहायता करना है।

D. Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 - *Locus standi of State to file revision - Discussed.* (Paras 19 to 21)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 – राज्य का पुनरीक्षण पेश करने का अधिकार – विवेचना की गयी।

Cases referred :

AIR 1997 SC 3104, (2008) 2 SCC 409, (2008) 3 SCC 542, (2007) 12 SCC 641, (2006) 1 SCC 627, (2002) 1 SCC 71, (1999) 7 SCC 467, AIR 1959 AP 659.

Manish Datt with *Anil Khare & Shashank Upadhyay,* for the applicant.
J.K. Jain, Dy.A.G., for the non-applicant/State.
P.C. Paliwal, for the objector.

ORDER

Rakesh Saksena, J. :–Applicant Yashpal singh has filed this revision against the order dated 6.7.2009 passed by First Additional Sessions Judge, Tikamgarh in Criminal Revision No. 41/2009, whereby the order dated 24.2.2009 passed by Judicial Magistrate First Class, Niwadi in Crime No. 307/2008 of Police Station Prithvipur District Tikamgarh was set aside.

2. In short, facts of the case are that on 28.11.2008 at about 1.30 A.M. complainant Anurag Nayak lodged the report with police Prithvipur that while the voting of Legislative Assembly Constituency, Prithvipur was in progress at about 4.30 P.M. accused Brijendra Singh Rathore along with Yashpal Singh and other accused persons forced voters to vote in favour of Brijendra Singh. When rival candidate Sunil Nayak reached there and opposed the activities of accused persons, on exhortation of Brijendra, Yashpal Singh took out a revolver and fired it at Sunil Nayak, as a result of injury, Sunil Nayak died in Medical College, Jhansi. On the above report, crime no. 307/2008 was registered under Sections 302 and 307 of the Indian Penal Code against Brijendra Singh, Yashpal Singh and other accused persons.

3. According to applicant, in the same incident, he had also suffered gun shot

injury. He had also submitted a report to Superintendent of Police, Tikamgarh on 28.11.2008 stating that at the time of occurrence Sunil Nayak and his associates wanted to damage the electronic voting machine as they expected his defeat. They wanted to disturb the election process with a view to get the election of booth no. 53 rejected. Sunil Nayak abused him and exhorted other persons to kill him. Sunil Nayak's son Anurag Nayak snatched sten-gun from one of the gunners which was resisted by the gunners. In the process of snatching gun back from Anurag Nayak the bust of sten-gun went off, due to which he, Sunil Nayak and a gunner of Sunil Nayak suffered injuries. Police people took him to Jhansi for treatment and subsequently sent him to Kanpur, where he was operated. According to him, he had given oral report to Station Officer, Sunil Dhurve at the spot, but his report was not recorded. Even on his written report, no action was taken.

4. Since no action was taken by the police, Yashpal Singh sent an application to Chief Judicial Magistrate, Tikamgarh on 28.12.2008, praying that action be taken under Section 156(3) of the Code of Criminal Procedure on his report dated 28.11.2008. Chief Judicial Magistrate, Tikamgarh made over this application to Judicial Magistrate, First Class, Niwadi, who had jurisdiction to deal with it. By order dated 9.1.2009, Judicial Magistrate First Class sent the written application dated 28.11.2008 to Superintendent of Police Tikamgarh directing him to take action according to law. In compliance of the aforesaid direction, Station Officer of Police, Prithvipur submitted a report before the Magistrate on 19.2.2009 stating that the detailed investigation was conducted by the police in Crime No. 307/2008, which was registered on the report lodged by Anurag Nayak. Yashpal Singh was arrested in connection with that crime and the charge sheet was filed before the concerned court against 12 accused persons on 16.2.2009. It was further stated that Yashpal Singh had made the aforesaid application on false grounds to create his defence. After discussing the evidence of witnesses which was recorded under Section 161 of the Code of Criminal Procedure in Crime No. 307/2008 and drawing inferences on that basis, Station Officer of Police Prithvipur requested the Court to decide the application made by Yashpal Singh on the basis of record of Crime No. 307/2008.

5. Since no action was taken by the police by registering the first information report on the basis of allegations made by applicant, Yashpal singh filed an other application under Section 156(3) of the Code of Criminal Procedure in the Court of Magistrate on 20.2.2009. Taking into consideration the allegations made by the applicant in his report and application, learned Magistrate allowed the said application and directed police to register the first information report and supply its copy to complainant and to proceed according to law. It was further directed that after investigation, report be submitted on 20.3.2009.

6. Aggrieved by the aforesaid order, State filed revision before the First Additional Sessions Judge, Tikamgarh mainly on the ground that since previously

an application under Section 156(3) of the Code was filed by the applicant and the police had submitted its report that the allegations made by the applicant were false and baseless, learned Magistrate committed error in entertaining second application under Section 156(3) of the Code of Criminal Procedure and directing registration of the First Information Report.

7. Learned Sessions Judge allowed the revision and set aside the order passed by the learned Magistrate on the ground that when a report was filed by the police then Magistrate could have proceeded under the provisions of Section 190(1)(a) and 190(1) (b) of the Code of Criminal Procedure and should not have entertained the second application under Section 156(3) of the Code of Criminal Procedure.

8. Aggrieved by the order passed by learned Additional Sessions Judge, applicant has filed this revision. Learned counsel for the applicant contended that the order passed by learned Additional Sessions Judge was illegal and incorrect and was liable to be set aside. According to him, learned Magistrate had not proceeded under the provisions of Section 156(3) of the Code when first application was sent to him by the applicant from Jail. No first information report was registered by the police and no investigation was conducted, not even the statement of complainant i.e. Yashpal Singh was recorded, therefore, it could not be held that the first application was treated as an application under Section 156(3) of the Code of Criminal Procedure. Per contra, learned counsel for the State and the objector contended that the second application under Section 156(3) of the Code was barred, because a report had already been submitted by the police on 19.2.2009.

9. I have heard the learned counsel of both the sides and perused the record.

10. In *Madhu Bala Vs. Suresh Kumar and others*-AIR 1997 SC 3104, the Apex Court held as under:

> " Whenever a Magistrate directs an investigation on a `complaint' the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the Police Rules. Therefore, the direction of a Magistrate asking the police to `register a case' makes an order of investigation under Section 156(3) cannot be said to be legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(1) of the Code which empowers the Police to investigate into a cognizable `case' and the Rules framed under the Police Act, 1861 it (the Police) is duty bond to formally register a case and then investigate into the same . The provisions of the Code, therefore, does not in any way stand in the way of Magistrate to direct the police to register a case at the police station and then investigate into the same. When an order for investigation under

Section 156(3) of the Code is to be made the proper direction to the police would be to register a case at the police station treating the complaint as the First Information Report and investigate into the same."....Once such a direction is given under sub section (3) of Section 156 the police is required to investigate into that complaint under sub-section (1) thereof and on completion of investigation to submit a `police report' in accordance with Section 173(2) on which a Magistrate may take cognizance under Section 190(1)(b) but not under 190(1)(a). Since a complaint filed before a Magistrate cannot be a `police report' in view of the definition of `complaint' referred to earlier and since the investigation of a `cognizable case' be the police under Section 156(1) has to culminate in a `police report' the complaint – as soon as an order under Section 156(3) is passed thereon-transforms itself to a report given in writing within the meaning of Section 154 of the Code, which is known as the First Information Report (FIR). As under Section 156(1), the police can only investigate a cognizable 'case' it has to formally register a case on that report."

11. Learned counsel for the applicant relying on (2008) 2 SCC 409- *Sakiri Vasu Vs. State of Uttar Pradesh and others* submitted that once an application under Section 156(3) was filed it was duty of the Magistrate to direct the Officer Incharge of the Police Station to register the First Information Report of a cognizable case and to investigate. In the present case, since on sending an application from jail by the applicant, Magistrate asked Superintendent of Police to take action according to law, it cannot be held that the said application was treated an application under Section 156(3) of the Code. In *Sakiri Vasu* (supra) the Apex Court held as under:

> " In view of the above mentioned legal position, we are of the view that although Section 156(3) is very briefly worded, there is an implied power in the Magistrate under Section 156(3) Cr.P.C. to order registration of a criminal offence and/or to direct the officer in charge of the police station concerned to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same. Even though, these powers have not been expressly mentioned in Section 156(3) CrPC, we are of the opinion that they are implied in the above provision".

12. In Section 156(1) of the Code of Criminal Procedure, it has been provided that that any Officer Incharge of a Police Station may without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over

the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII. Sub section (3) provides that any Magistrate empowered under Section 190 may order such an investigation as above mentioned. It is thus clear that while a Magistrate proceeds under Section 156(3) of the Code of Criminal Procedure, he has to direct to the Officer Incharge of the Police Station for registration of the criminal offence and to proceed with investigation. But in the case in hand, learned Magistrate by order dated 9.1.2009 directed Superintendent of Police, Tikamgarh to take legal action instead of directing Officer Incharge of the Police Station to register the First Information Report. Thus, it cannot be held that the learned Magistrate treated the application sent by applicant from Jail as an application under Section 156(3) of the Code of Criminal Procedure. Even the police did not submit its report in terms of Section 173 of the Code of Criminal Procedure, which was essential for it, had it treated the order of Magistrate one under Section 156(3) of the Code of Criminal Procedure.

13. In *Divine Retreat Centre Vs. State of Kerala and others*-(2008) 3 SCC 542, the Apex Court observed:-

> "38. This Court in *M.C.Mehta (Taj Corridor Scam) Vs. Union of India* upon analysis of the relevant provisions of the Code held that after completion of the investigation if it appears to the investigating officer that there is no sufficient evidence, he may decide to release the suspected accused. If, it appears to him that there is sufficient evidence or reasonable ground to place the accused on trial, he has to take necessary steps under Section 170 of the Code. "In either case, on completion of the investigation he has to submit a report to the Magistrate under Section 173 of the Code in the prescribed form who is required to consider the report judicially for taking appropriate action thereof." We do not propose to deal with the options available in law to the Magistrate and even to a victim or informant as the case may be."

14. Thus, in my opinion the order dated 9.1.2009 passed by the Magistrate could not have been treated as an order passed under Section 156(3) of the Code and the learned Additional Sessions Judge was not right in treating the aforesaid order under Section 156(3) of the Code of Criminal Procedure.

15. Learned Additional Sessions Judge held that the Magistrate was not empowered to direct the investigation under Section 156(3) of the Code of Criminal Procedure in the instant case, because it could be a case under Section 307 of the Indian Penal Code which was exclusively triable by the Sessions. This was held in view of the proviso attached to Section 202(1) of the Code of Criminal Procedure. In my opinion, the aforesaid finding of the learned Additional Sessions Judge is misconceived and is based on incorrect interpretation of the provisions

of the Code. Section 156(3) and Section 202 of the Code of Criminal Procedure operate in distinct spheres and different stages. Section 156(3) of the Code of Criminal Procedure can be utilized only at pre-cognizance stage, whereas Section 202 comes in the picture after cognizance has been taken by the Magistrate, when the Magistrate is in seisin of the case. In the case of a complaint regarding commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a) of the Code of Criminal Procedure. But, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3) of the Code of Criminal Procedure. Thus the object of an investigation under Section 202 is not to envisage a fresh case on police report, but to assist the Magistrate in completing the proceedings already instituted upon a complaint before him.

16. In *Dilawar Singh Vs. State of Delhi*-(2007) 12 SCC 641 the Apex Court observed in paragraph 18 as under:

> "6. Section 156 falling in Chapter XII, deals with powers of police officers to investigate cognizable offences. Investigation envisaged in Section 202 contained in Chapter XV is different from the investigation contemplated under Section 156 of the Code.
>
> 7. Chapter XII of the Code contains provisions relating to 'information to the police and their powers to investigate', whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on a complaint. Provisions of the above two chapters deal with two different facets altogether, though there could be a common factor i.e. complaint filed by a person. Section 156, falling within Chapter XII deals with powers of the police officers to investigate cognizable offences, True, Section 202, which falls under Chapter XV, also refers to the power of a Magistrate to 'direct an investigation by a police officer'. But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code.
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> 8. The various steps to be adopted for investigation under Section 156 of the Code have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer in charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that chapter can be

commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.

9. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202 (1) of the Code makes the position clear that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202 (1) i.e.

'or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.'

10. This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offences, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the Officer in charge of the police Station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could

February-10 (First)

take further steps contemplated in Chapter XII of the Code only thereafter.

12. The above position was highlighted in *Suresh Chand Jain Vs. State of M.P.*- (2001) 2 SCC 628."

17. Similar view was taken by the Apex Court in *Mohd. Yusuf Vs. Afaq Jahan (Smt.) and another*- (2006) 1 SCC 627.

18. Apart from the above position of law, the factual situation which is revealed on perusal of the report submitted by police before the Magistrate in the instant case on 19.2.2009 is that the police did not register the formal FIR on the basis of accusation made by the applicant; police did not record the statement of complainant viz. Yashpal Singh or any other witness under Section 161 of the Code of Criminal Procedure and did not submit the report in terms of provisions of Section 173 of the Code of Criminal Procedure. Thus, the order passed by the learned Magistrate on 9.1.2009 could not be and was not treated by the police under Section 156(3) of the Code of Criminal Procedure, therefore, the second application filed by the applicant before the Magistrate and the order dated 24.2.2009 passed by the learned Magistrate was well within jurisdiction of the Magistrate.

19. Learned counsel for the applicant argued that the State had no locus standi to file revision challenging the order of Magistrate as the State is expected to act fairly and impartially for both, the complainant as well as the accused. If, it was brought to the notice of the Investigating Officer that accused had also suffered injuries, it was duty of the Investigating Officer to fairly investigate the accusation if any made by the accused. In *Kashiram and others Vs. State of M.P.* -(2002) 1 SCC 71, the Apex Court observed:-

"22. The Investigating Officer having found one of the accused having sustained injuries in the course of the same incident in which those belonging to the prosecution party sustained injuries, the investigating officer should have at least made an effort at investigating the cause of, and the circumstances resulting in, injuries on the person of accused Prabhu. Not only the investigating officer did not do so, he did not even make an attempt at recording the statement of accused Prabhu. If only this would have been done, the defence version of the incident would have been before the investigating officer and the investigation would not have been one-sided."

20. In *Shiv Kumar Vs. Hukum Chand and another* -(1999) 7 SCC 467 the Apex Court observed as under:

" The Legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the

case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle or conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution, would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor."

21. A Division Bench of the High Court of *Andhra Pradesh in Medichetty Ramakistiah Vs. State of A.P.*- AIR 1959 AP 659 observed as under:

" A prosecution, to use a familiar phrase, ought not to be a persecution. The principle that the Public Prosecutor should be scrupulously fair to the accused and present his case with detachment and without evincing and anxiety to secure a conviction, is based upon high policy and as such courts should be astute to suffer no inroad upon its integrity. Otherwise there will be no guarantee that the trial will be as fair to the accused as a criminal trial ought to be. The State and the Public Prosecutor acting for it are only supposed to be putting all the facts of the case before the Court to obtain its decision thereon and not to obtain a conviction by any means fair or foul. Therefore, it is right and proper that courts should be zealous to see that the prosecution of an offender is not handed over completely to a professional gentleman instructed by a private party."

22. For the aforesaid reasons, this revision is allowed. The impugned order dated 6th July, 2009 passed by the Additional Sessions Judge, Tikamgarh in Criminal Revision No. 41/2009 is set aside and the order dated 24.2.2009 passed by the learned Judicial Magistrate First Class, Niwadi is restored.

Revision allowed.

UMMED SINGH Vs. STATE OF M.P.

I.L.R. [2010] M. P., 530

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Piyush Mathur

23 October, 2009*

UMMED SINGH & ors. ... Applicants

Vs.

STATE OF M.P. ... Non-applicant

A. Penal Code (45 of 1860), Sections 420, 467, 468 & 471 - *Obtaining arms license by suppressing pendency of criminal case - Applicant disclosed pendency of six criminal cases in his application for grant of arm licence - Such declaration was found to be true by S.P. and Arm license was granted - Subsequently, it was found that one more case was pending which was not disclosed in the application - Held - Cheating or fraud could not be brought into the matter in absence of mens rea or criminal intention of securing arms licence by concealment of remaining solitary criminal case - No prosecution could be launched except for dealing the matter under the provisions of Arms Act only.* (Paras 9, 10 & 15)

क. दण्ड संहिता (1860 का 45), धाराएँ 420, 467, 468 व 471 – दाण्डिक मामले के लम्बन को छिपाकर आयुध लायसेंस अभिप्राप्त करना – आवेदक ने आयुध लायसेंस प्रदान किये जाने के लिए अपने आवेदन में छः दाण्डिक मामलों के लम्बन को प्रकट किया – पुलिस अधीक्षक द्वारा ऐसी घोषणा सत्य होना पायी और आयुध लायसेंस प्रदान किया गया – तत्पश्चात् यह पाया गया कि एक और मामला लम्बित था जो आवेदन में प्रकट नही किया गया – अभिनिर्धारित – शेष एकमात्र दाण्डिक मामले के छिपाव द्वारा आयुध लायसेंस प्राप्त करने की आपराधिक मनःस्थिति या आपराधिक आशय के अभाव में छल या कपट मामले में नही लाया जा सका – केवल आयुध अधिनियम के उपबंधों के अन्तर्गत मामले में कार्यवाही करने के सिवाय कोई अभियोजन प्रारम्भ नही किया जा सकता।

B. Words and Phrases - *Remedy - When a statute provides for a particular remedy, then appropriate action should be taken there under and as such prosecution of applicants seems to be patently illegal.* (Para 13)

ख. शब्द और वाक्यांश – उपचार – जब कोई कानून किसी विशिष्ट उपचार का उपबंध करता है, तब उसी के अन्तर्गत समुचित कार्यवाही की जानी चाहिए और इस रूप में आवेदकों का अभियोजन प्रत्यक्षतः अवैध प्रतीत होता है।

Cases referred :

1992 Supp (1) SCC 335, (2004) 1 SCC 691, (2009) 1 SCC 706, (2007) 10 SCC 110, (2009) 7 SCC 234.

T.C. Singhal with *D.S. Chauhan,* for the applicants.

Mohd. Irshad, Panel Lawyer, for the non-applicant/State.

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*M.Cr.C. No.5027/2006 (Gwalior)

UMMED SINGH Vs. STATE OF M.P.

ORDER

PIYUSH MATHUR, J. :–This petition is filed by the Accused/Petitioners under Section 482 of Code of Criminal Procedure seeking quashment of the charges, framed against them in relation to the Criminal Case No. 1086/2005, by the Judicial Magistrate First Class, Morena under Sections 420, 467, 468 & 471 of IPC as also for quashment of Order Dated 14.07.2006 passed by Vth Additional Sessions Judge (Fast Track Court), Morena in Criminal Revision No. 241/2005, whereby it has dismissed the Criminal Revision by finding the Charges to be properly framed against the Petitioners.

2. The facts giving rise to the present petition, demonstrates that a criminal case bearing Crime No. 279/2004 was registered against the Petitioners at Police Station Kotwali, Morena, under Sections 420, 467, 468 & 471 of IPC on account of alleged concealment of material information, while obtaining Arms Licence, under the Arms Act.

3. The Petitioners had applied for the grant of Arms Licence to the District Magistrate, Morena, wherein they had disclosed all material information including the fact of pendency of as many as six criminal cases against them, as well as against their family members and mainly on this ground they had applied for grant of Arms Licence for protection of themselves as well as their family members and property.

4. The Application was processed and the matter was investigated upon by the District Magistrate with the assistance of the report of Superintendent of Police, Morena, wherein looking to the peculiar circumstances, it was recommended by the Superintendent of Police that in view of pendency of the criminal cases against the Petitioners it would be justified, if the Arms Licence could be given to them for protection of their life, their family members and their property.

5. The recommendation Letter of Superintendent of Police Dated 04.06.2003 was considered by the District Magistrate and the Licences were issued in favour of the Petitioners, but subsequently, it was found that the information about one more criminal case being Criminal Case No. 225/85 registered under Sections 307, 147, 148 & 149 IPC was not given by the petitioners alongwith the application form, therefore, on that basis a communication was sent by Superintendent of Police, Morena for registration of criminal case against the Petitioners and on this basis an FIR was registered and ultimately after filing of charge-sheet, the Judicial Magistrate, Morena has framed charges against the petitioners. The Petitioners had challenged the Order framing of Charge before the Court of Sessions, but the Criminal Revision has been rejected, against which the present Petition has been preferred under Section 482 of the Code of Criminal Procedure.

6. I have heard Learned Counsel for the parties and perused the record of

the case. A perusal of the entire record and the impugned order demonstrates that the Superintendent of Police and the District Magistrate being custodians of "Law and Order" and Licencing Authority have thoroughly examined the necessity of issuance of Arms Licence and thereafter alone the decision to grant licence was taken, for issuance of Arms Licence to the present petitioners and as such it could not be said that concealment or not disclosure of information about remaining one matter was motivated with an intention to cheat or defraud the Licencing Authority.

7. For appreciating the nature of allegation, it would be appropriate to notice the basic elements of Sections 420, 467, 468 and 471 of IPC, therefore, the text of these Sections are quoted herein below :-

> ***Section 415: Cheating:-*** *Whoever, by deceiving any person, fraudulently or property to any person, or to consent that any person shall retain any property, or intentionally induces the persons so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is to "cheat".*
>
> ***Section 420: Cheating and Dishonesty inducing delivery of property:-*** *Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*
>
> ***Section 467: Forgery of Valuable Security, Will, etc. :-*** *Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

Section 468: Forgery for the purpose of Cheating :- Whoever commits forgery, intending that the document (or electronic record) forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 471: Using as genuine a forged Document or Electronic Record:- Whoever fraudulently or dishonestly uses as genuine any document (or electronic record) which he knows or has reason to believe to be a forged document, (or electronic record) shall be punished in the same manner as if he had forged such document (or electronic record).

8. The provisions contained in Sections 420, 467, 468 and 471 of IPC clearly demonstrate that there should be a clear element of cheating and fraud in the action or inaction of the applicant and there should be an apparent intention to deceive the person or authority for the purpose of getting an unlawful benefit or advantage, but here the applicants had categorically disclosed the information about the pendency of series of Criminal Cases against them and by disclosing this fact, they had specifically sought Arms Licence for the protection of their person and property. The petitioner No. (1) Ummed Singh had made categorical declaration of the details of the pending Criminal Cases, against him and other co-applicants (being co-petitioners in the present Petition) and his family members and since all the applications were filed together and processed together and common report and recommendation were made by the Superintendent of Police, it could not be said that any lapse or lacuna on the part of other Co-Petitioners could be treated to have been motivated with some criminal intention to commit cheating or fraud.

9. It is true that the disclosure of material information is necessary for processing an Application seeking grant of Arms Licence to an applicant and the record shows that the petitioners have disclosed almost the entire details of pending criminal cases and have submitted application form for issuance of Arms Licence for protection of their persons and property as well as their family members and therefore, it could not be believed that there was any deliberate concealment of information about the solitary criminal case. Since, the petitioners have honestly made disclosure of pending criminal cases against them in the application form, and adequate information about its correctness was available with the District Magistrate in the form of recommendation of the Superintendent of Police, therefore, it could not be said that either the petitioners have made concealment of the material information or the Investigating Authority was unaware of the fact of pending cases against the petitioners.

10. Therefore, in the peculiar facts and circumstances of the case, it appears that there was no criminal intention of the petitioners in not disclosing about the remaining criminal case, pending against them while submitting the application form and as such, no case of concealment of material information is even prima facie made out. Since the record fails to demonstrate that there exist a criminal intention even in the mind of the alleged wrong doer, therefore, it could not be said that they have committed either of the offences. The elements of cheating require that one has to deceive or induce any person, fraudulently or dishonestly to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induce the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and that act or omission causes or likely to cause damage or harm to that person in body, mind, reputation or property and since, all these mandatory elements are missing, it cannot be said that even a prima facie case exist against the petitioners for being tried in relation to the alleged commission of offence in terms of Sections 420, 467, 468 & 471 of IPC.

11. The Supreme Court of India has cautioned the High Court that charges should be quashed in very rare circumstances and for ascertaining such circumstances, the necessary guidance flows from a celebrated judgment of State of *Haryana and Others Vs. Bhajan Lal and Others* 1992 Supp. (1) SCC 335, wherein the Supreme Court has broadly categorized some exigencies wherein the Court can interfere. The relevant observations of the Apex Court are quoted herein below :-

> *(1) Where the allegations made in the first information report or the complaint, even if they are taken at their Face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
>
> *(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*
>
> *(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*
>
> *(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-*

cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provisions in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

12. While reiterating the direction of *Bhajan Lal* (supra) the Supreme Court has further observed in several subsequently decided cases viz. *State of M.P. Vs Awadh Kishore Gupta and Others* reported in 2004 (1) SCC 691 and in the latest case of *Mahindra & Mahindra Financial Services Limited and Another Vs. Rajiv Dubey* reported in 2009 (1) SCC 706 that when the proceedings/ prosecution clearly amount to an abuse of process of law, then the Court should certainly exercise its inherent powers for preventing abuse of process of law.

13. The Superintendent of Police, upon receiving information about non-disclosure of complete information about pending cases, could have sought cancellation of the Arms Licence and while exercising Administrative and/ or quasi-judicial powers, the Licencing Authority i.e. the District Magistrate could have passed appropriate Orders, instead of resorting to launching the prosecution, in the peculiar facts and circumstances of the case, strictly within the scope and sphere of the provisions of the Arms Act. The Supreme Court, while dealing with an issue of cheating in Commercial Transaction and viewing it from the angle of Criminal Prosecution has observed in the case of *Anil Ritolla @ A.K. Ritolia Vs. State of Bihar and Another* reported in (2007) 10 SCC 110 that when the statute provide for a particular remedy, then appropriate action should be taken there under and as such the action of Superintendent of Police, in initiating prosecution and the prima facie view of the Court below in framing the charges, seems to be patently illegal.

14. The Supreme Court, while evaluating the conduct of the accused in some what similar lines has observed in the case of *V.V.S. Rama Sharma and Others Vs. State of U.P. and Others* (2009) 7 SCC 234 that the conduct of the accused was not amounting to the commission of an offence and since in the present case also, the Petitioners had made categorical disclosure of the fact of pendency of as many as six Criminal Cases against them, no fault could be found out or criminal intention could be gathered in committing such a lapse of not disclosing yet another Criminal Case.

15. Therefore, in the peculiar facts and circumstances of the case it would be appropriate to quash the charges imposed by the Court below against the accused petitioners under Sections 420, 467, 468 and 471 of IPC with a view to do substantial justice and also to prevent abuse of process of Court, because even when the entire material available on record is evaluated and examined on prima facie basis, it fails to constitute the elements of cheating and/or fraud. Therefore, the charges framed by the Court below against all the Five accused persons viz. Ummed Singh, Rajendra Singh, Raghuvir Singh, Vakil Singh and Pratap Singh under Sections 420, 467, 468 and 471 of IPC are quashed and the Order passed by the Vth Additional Sessions Judge (Fast Track Court), Morena in Criminal Revision No. 241/2005 on Date 14.07.2006 is also quashed.

16. The petition succeeds and is hereby allowed. The Charges framed against the Petitioners/Accused are quashed. No order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 536
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra
10 November, 2009*

GAUTAM KALLOO (DR.) & anr. ... Applicants
Vs.
STATE OF M.P. ... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code, 1860, Section 188 - *Complaint for violation of the Model Code of Conduct - Number of seats available for admission were increased after the election to the State Legislative Assembly was announced - Such declaration would not fall within ambit of Clause VII(vi) of Model Code issued by Election Commission of India - Any violation of Model Code could only give rise to an election offence - Investigation of offence punishable u/s 188 IPC quashed.* (Paras 4 & 5)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड संहिता, 1860,

*M.Cr.C. No.11722/2008 (Jabalpur)

धारा 188 – आदर्श आचार संहिता के उल्लंघन के लिए परिवाद – राज्य विधान सभा के निर्वाचन की घोषणा के बाद प्रवेश के लिए उपलब्ध सीटों की संख्या बढ़ाई गयी – ऐसी घोषणा भारत के निर्वाचन आयोग द्वारा जारी आदर्श संहिता के खण्ड VII(vi) की परिधि के भीतर नही आयेगी – आदर्श संहिता के किसी उल्लंघन से केवल निर्वाचन अपराध पैदा हो सकता था – भा.द.सं. की धारा 188 के अन्तर्गत दण्डनीय अपराध का अन्वेषण अभिखंडित।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 195(1)(a)(i), Penal Code, 1860, Section 188 - *Complaint for violation of the Model Code of Conduct - Cognizance of such offence can be taken only on the complaint in writing of the Secretary of the Election Commission of India or of some other public servant to whom he is administratively subordinate.* (Para 7)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195(1)(ए)(i), दण्ड संहिता, 1860, धारा 188 – आदर्श आचार संहिता के उल्लंघन के लिए परिवाद – ऐसे अपराध का संज्ञान केवल भारत के निर्वाचन आयोग के सचिव के या किसी अन्य लोक सेवक के, जिसके वह प्रशासनिक तौर पर अधीनस्थ है, लिखित परिवाद पर ही लिया जा सकता है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 2(d) - *Complaint as defined u/s 2(d) of the Code does not include a police report.* (Para 7)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 2(डी) – संहिता की धारा 2(डी) के अन्तर्गत यथा परिभाषित परिवाद पुलिस रिपोर्ट को सम्मिलित नही करता।

Cases referred :

AIR 1968 All 100, (1994) 4 SCC 95, AIR 1992 SC 604.

P.N. Dubey, for the petitioners.

Chanchal Sharma, G.A., for the respondent/State.

ORDER

R.C. Mishra, J. :–This is a petition, under Section 482 of the Code of Criminal Procedure (for short 'the Code'), for quashing the investigation into Crime No.686/2008 registered at Police Station Adhartal, Distt. Jabalpur in respect of the offence punishable under Section 188 of the IPC.

2. The FIR leading to registration of the case is, in essence, based on the report (Annexure P-3) submitted by Mr. Pravesh Sharma, Principal Secretary, Farmer Welfare and Agriculture Development, Madhya Pradesh, Bhopal, after a preliminary inquiry into the complaint (Annexure P-2) made against the petitioners and Gopal Bhargawa, the then Minister for Agriculture, for violation of the Model Code of Conduct (for brevity 'the Model Code') by increasing the number of seats available for admission to 2-year Diploma Course on Horticulture at Horticulture Vocational Education Institute in Ranguan, Garhakota Distt. Sagar from 40 to 50.

3. According to the petitioners, the investigation is an abuse of the process of the law for the following reasons –

(i)There is no violation of the Model Code at all.

(ii)Cognizance of the offence can not be taken by any Court of law firstly, for want of complaint of a competent authority and secondly, due to expiry of the prescribed period of limitation.

(iii)Even if the contents of the FIR are taken at their face value, no offence under Section 188 of the IPC would be made out.

While opposing the prayer for quashing the investigation, learned Govt. Advocate has pointed out that the petitioners are apparently guilty of non-compliance with the order issued by Election Commission of India in the form of the corresponding guideline laid down in the Model Code. In response, learned counsel for the petitioners has submitted that the proposed investigation is, in fact, an example of misuse of his official position by Mr. Pravesh Sharma at the instance of one Dr. H.B.S. Bhadoriya, Associate Professor, who is not inclined to resume his teaching duties at Veterinary College, Jabalpur and had exerted undue influence on the petitioners to allow him to continue as Deputy Secretary of the Agricultural Department at Bhopal. However, it would not be desirable to enter into the factual aspect of the matter.

4. Adverting to the legal aspects involved, it may be observed that the Model Code only lays down how the political parties, contesting candidates and party in power should conduct themselves during the process of elections. It contains guidelines for their general conduct, electioneering, holding meetings and processions, poll day activities and functioning of the party in power etc. Accordingly, any violation of the Model Code could only give rise to an election offence.

5. Admittedly, the number of seats available for admission were increased only after the election to the State Legislative Assembly was announced. However, such a declaration would not fall within the ambit of sub-clause (vi) of Clause VII of the Model Code issued by Election Commission of India. The report of inquiry conducted by Dharmendra Nath, IAS (Retd.) under the orders of the Chancellor of the University also contains reference to the reply of petitioner no.1 that the decision to add seats was taken by the Board. In this view of the matter, none of the petitioners could be treated as violator of the Model Code.

6. Further, as explained by a Division Bench of Allahabad High Court in *Ram Manohar Lohia v. State* 1968 Alla 100 –

> "Section 188 does not make punishable any act as such but only when it is done in disobedience to an order duly promulgated by a public servant lawfully empowered to do so. In the absence of such an order the act would remain altogether unaffected by the provisions of the section and it is the order prohibiting the act that has the effect of attaching to it the penalty of the section".

7. This apart, by virtue of the provisions of Section 195(1)(a)(i) of the Code, cognizance of the offence in question can be taken only on the complaint in writing of the Secretary of the Election Commission of India or of some other public servant to whom he is administratively subordinate (See. *State of U.P. v. Mata Bhikh* (1994) 4 SCC 95) and 'complaint' as defined under Section 2(d) of the Code does not include a police report.

8. The inquiry report, referred to above, also clearly reflects that the actions against the petitioners were initiated only after the University had transferred Dr. H.B.S. Bhadoria, ex-officio Deputy Secretary back to his academic post in Veterinary College, Jabalpur but, while dealing with the question of quashing of the FIR and consequent investigation under the inherent powers, it would not be desirable to delve further into the merits of the allegations made by the petitioners against Dr. H.B.S. Bhadoria or Mr. Pravesh Sharma.

9. For these reasons, the case against the petitioners falls within category nos.(6) and (7) of the cases, as summarized by the Apex Court in *State of Haryana v. Bhajan Lal* AIR 1992 SC 604, attracting interference under inherent powers.

10. In the result, the petition stands allowed. The FIR and the consequent investigation are hereby quashed. However, nothing contained herein shall preclude the Election Commission of India from initiating action against the petitioners in accordance with law.

Petition allowed.

I.L.R. [2010] M. P., 539
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Piyush Mathur
27 November, 2009*

KIRTI PRAKASH SAXENA ... Applicant
Vs.
STATE OF M.P. & anr. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 177, Dowry Prohibition Act, 1961, Sections 4 & 6 - *Jurisdiction* - *Complaint discloses that cause of action arose at Bhopal - Criminal Court at Guna has no jurisdiction to entertain the complaint - Complainant given liberty to institute fresh complaint before the Court of competent jurisdiction.* (Paras 13, 16 & 17)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 177, दहेज प्रतिषेध अधिनियम, 1961, धाराएँ 4 व 6 – अधिकारिता – परिवाद से प्रकट होता है कि वाद कारण भोपाल में उत्पन्न हुआ – गुना के दाण्डिक न्यायालय को परिवाद ग्रहण करने की कोई अधिकारिता नही है – परिवादी को सक्षम अधिकारिता वाले न्यायालय के समक्ष परिवाद संस्थित करने की स्वतंत्रता दी गई।

*M.Cr.C. No.7126/2008 (Gwalior)

Cases referred :

2005 CrLR (MP) 435, 2009 CrLR (MP) 453, (2004) 8 SCC 100, (2007) 1 SCC 262, 2006(1) MPLJ 205.

Shishir Saxena, for the applicant.
Mukund Bhardwaj, P.P., for the non-applicant No.1/State.
N.P. Dwivedi, for the non-applicant No.2.

ORDER

PIYUSH MATHUR, J. :–This petition under Section 482 of the Code of Criminal Procedure (hereinafter for short the "Code") is preferred against an Order Dated 2.8.2008 passed by the Second Additional Sessions Judge, Guna, in Criminal Revision No.401/07, which arose out of an Order Dated 4.10.2007 passed by the Judicial Magistrate First Class, Guna, in Criminal Case No.363/2006, wherein the Courts below, while examining the provisions of Sections 177 and 178 of the Code, have found that inspite of accrual of Cause of Action at Bhopal, the Criminal Court at Guna has the jurisdiction to take Cognizance of the Offences, punishable under Sections 4 and 6 of the Dowry Prohibition Act, 1961 (hereinafter for short the "Act").

2. The facts of the case demonstrate that the complainant Smt. Archana Saxena got married with present Petitioner Kirti Prakash Saxena at Bhopal on Date 18.3.2003 and she resided at Bhopal uptill Date 12.11.2004 and on account of continuing cruelty by her In-Laws, Smt. Archana Saxena left the matrimonial home, on her own and reached the house of her parents at Guna.

3. Smt. Archana Saxena has submitted a Complaint before the Judicial Magistrate First Class, Guna, praying for taking Cognizance of the Complaint, in terms of Sections 4 and 6 of the Act by describing that her Marriage was solemnized at Bhopal and the entire dowry items were handed over to the husband at Bhopal, but since she is presently residing at Guna, after leaving the matrimonial home, therefore, the Criminal Court at Guna has the jurisdiction to take Cognizance of her Complaint. The Learned Magistrate took the cognizance of the matter and issued process to the Husband, who submitted an application under Section 177 of the Code and raised a Preliminary Objection about the Territorial Jurisdiction that since none of the cause of action have accrued to the complainant at Guna, therefore, the Criminal Court situated at Guna would have no jurisdiction either to issue process to the husband or to try the offence.

4. The Learned Magistrate heard the parties on the application preferred under Section 177 of the Code and passed an Order on Date 4.10.2007 by finding that the Territorial Jurisdiction to deal with the complaint, regarding the scope of Section 4 of the Act, would be exclusively available with the Criminal Court at Bhopal, but the Criminal Court at Guna would have jurisdiction in relation to the Complaint made about the demand and return of Dowry as per Section 6 of the

Act. This is how the Learned Magistrate has partially allowed the application by granting liberty to the wife to approach the Competent Court at Bhopal for the purposes of Section 4 of the Act and has found the Complaint to be entertainable by Criminal Court at Guna in relation to Section 6 of the Act.

5. The husband Kirti Prakash Saxena has preferred a Criminal Revision against the Order passed on Date 4.10.2007 by the Judicial Magistrate First Class, Guna, by demonstrating that Section 177 of the Code provides for the exclusivity of the jurisdiction of the Criminal Court, where the cause of action accrues to a complainant and since no part of cause of action has accrued to the complainant at Guna, in absence of continuity of the chain of events, the Judicial Magistrate, Guna, ought not to have entertained the complaint for the purposes of Sections 4 and 6 of the Act.

6. The Additional Sessions Judge Guna, has rejected the Revision Petition by finding that the Criminal Court at Guna was having Territorial Jurisdiction in relation to both the offences punishable under Sections 4 and 6 of the Act. Aggrieved by the rejection/dismissal of the Revision Petition, the husband Kirti Prakash Saxena has now preferred this Petition under Section 482 of the Code, before the High Court.

7. The contention of the learned Counsel for the Petitioner revolves around the scope of Section 177 of the Code to contend that from a bare perusal of the complaint and the allegations levelled therein, it is evident that the marriage was solemnized at Bhopal and the alleged dowry articles were handed over to the husband/his family members at Bhopal and even the alleged cruelty was played at Bhopal and in view of the plain reading of the pleadings of the complainant, the Criminal Court at Guna would have no jurisdiction and as such Section 177 of the Code would come into play by vesting jurisdiction only in the Criminal Court at Bhopal, as Criminal Court at Guna cannot assume such jurisdiction in itself, which is not statutorily vested in it.

8. The Learned Counsel for the Respondent has drawn my attention to the contents of the Complaint and the averments made about the events of marriage, handing over of dowry items and cruelty played with the complainant at Bhopal and has stressed for extending the scope of Section 177 of the Code to the extent by applying the provisions, to clothe the complainant with the jurisdiction, in terms of Section 178 of the Code, on account of her present abode at Guna, however, he expressed his inability to pick up even a solitary instance from the reading of the complaint to connect the same with the factum of accrual of cause of action at Guna.

9. The Code of Criminal Procedure prescribe for the Territorial Jurisdiction of the Criminal Court, and also conceptualize about the existence and accrual of a cause of action, like Civil Matters and a bare reading of Sections 177 and 178 of

the Code demonstrate that the Statute does take care of the events of accrual of the cause of action, for connecting the same with the Territorial Jurisdiction of a Criminal Court. For ready reference, the text of Sections 177 and 178 of the Code is quoted hereinbelow ;

> "**177. Ordinary place of inquiry and trial.**--Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.
>
> **178. Place of inquiry or trial.**- (a) When it is uncertain in which of several local areas an offence was committed, or
>
> (b) where an offence is committed partly in one local area and partly in another, or
>
> (c) where an offence is a continuing one, and continues to be committed in more local areas than one, or
>
> (d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas."

10. A bare perusal of the Complaint, lodged by Smt. Archana Saxena demonstrate that she has made exclusive averments about the events of marriage and handing over of the dowry items and the incidents of cruelty at Bhopal alone as also about the factum of leaving the matrimonial home, on her own, but the Complaint does not comprehend about any element of cause of action, which could have accrued to her within the Territorial Jurisdiction of the Criminal Court situated at Guna. Therefore, it is difficult to accept the contention of Shri N.P. Dwivedi, Learned Counsel for the Respondent that on account of her present place of residence, the Criminal Court at Guna can usurp the jurisdiction, which is not vested in it, on account of the geographical/territorial limitation.

11. Learned Counsel for the Petitioner Shri Shishir Saxena has placed reliance on the wordings used in Sections 4 and 6 of the Act to demonstrate that the occasion of a demand of dowry and the supply of the dowry items has to necessarily have a nexus with the 'Place', where these events take place and item supplied and since the demand of dowry is alleged to have been made at Bhopal only and the marriage has also taken place at Bhopal, the Territorial Jurisdiction would exclusively vest with the Criminal Court at Bhopal only. Since the wordings contained in Sections 4 and 6 of the Act have a direct bearing with the decision of this case, both the provisions are, therefore, quoted hereinbelow for ready reference ;

> "**4. Penalty for demanding dowry.**- If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be

less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees;

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months."

6. Dowry to be for the benefit of the wife or her heirs.- (1) Where any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman--

(a) if the dowry was received before marriage, within three months after the date of marriage; or

(b) if the dowry was received at the time of or after the marriage, within three months after the date of its receipt; or

(c) if the dowry was received when the woman was a minor, within three months after she has attained the age of eighteen years;

and pending such transfer, shall hold it in trust for the benefit of the woman.

(2) If any person fails to transfer any property as required by sub-section (1) within the time limit specified therefor, or as required by sub-section (3), he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years or with fine which shall not be less than five thousand rupees, but which may extend to ten thousand rupees or with both.

(3) Where the woman entitled to any property under sub-section (1) dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being:

Provided that where such woman dies within seven years of her marriage, otherwise than due to natural causes, such property shall,--

(a) if she has no children, be transferred to her parents; or

(b) if she has children, be transferred to such children and pending such transfer, be held in trust for such children.

3(A) Where a person convicted under sub-section (2) for failure to transfer any property as required by sub-section (1) or sub-section (3) has not, before his conviction under that sub-section, transferred such property to the woman entitled thereto

or, as the case may be, her heirs, parents or children the Court shall, in addition to awarding punishment under that sub-section, direct, by order in writing, that such person shall transfer the property to such woman or, as the case may be, her heirs, parents or children within such period as may be specified in the order, and if such person fails to comply with the direction within the period so specified, an amount equal to the value of the property may be recovered from him as if it were a fine imposed by such Court and paid to such woman, or, as the case may be, her heirs, parents or children.

(4) nothing contained in this section shall affect the provisions of section 3 or section 4."

12. To strengthen the submissions, the Counsel for the Petitioner has placed reliance on the two judgments of this Court which are reported as 2005 Cr.L.R. (MP) 435 *Shakuntala Sharma v. State of MP* and 2009 Cr.L.R.(MP) 453 *Jitendra & Ors. v. State of MP* to demonstrate that only that Criminal Court would have jurisdiction to try an offence where the actual and exclusive cause of action has accrued to the Complainant and unless the cause of action is scattered in part or has accrued in different territorial jurisdictions of different Criminal Court (in which circumstance, Section 178 of the Code would come to the rescue of the complainant) no other Criminal Court can entertain a complaint, where no cause of action has accrued to a complainant.

13. The Supreme Court has ruled in the matter of *Y. Abraham Ajith and others v. Inspector of Police, Chennai and another,* (2004) 8 SCC 100, in relation to an offence committed in term of Sections 498-A and 406 of IPC read with Section 4 of the Act that the offence shall "Ordinarily" be inquired into and tried by a Court, within whose local jurisdiction it was committed and unless an exception to this general rule exists, no Criminal Court shall usurp the jurisdiction, only on account of the fact of filing of a Complaint, within its territorial jurisdiction. The relevant discussion about the accrual of the cause of action and the application of the principles of Sections 177 and 178 find mention in the Judgment where the Supreme Court has observed :-

"15. The expression â€œcause of action" has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the proceeding including not only the alleged infraction, but also the infraction coupled with the right itself. Compendiously, the expression means every fact, which it would be necessary for the complainant to prove, if traversed, in order to support his right or grievance to the judgment of the

court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove such fact, comprises in "Cause of action".

16. The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts.

17. The expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases for sitting; a factual situation that entitles one person to obtain a remedy in court from another person. In Black's Law Dictionary a "cause of action" is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment. In Words and Phrases (4th Edn.), the meaning attributed to the phrase "cause of action" in common legal parlance is existence of those facts, which give a party a right to judicial interference on his behalf.

18. In Halsbury's Laws of England (4th Edn.) it has been stated as follows :

> " "Cause of action" has been defined as meaning simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. "Cause of action" has also been taken to mean that a particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

14. In yet another Case of *Manish Ratan and others v. State of MP & another,* (2007) 1 SCC 262, the Supreme Court, while dealing with an identical dispute of the place of inquiry and trial, had examined about the existence of the territorial jurisdiction of Criminal Court situated at Jabalpur and Datia and found that since the entire set of evidence described in the complaint/report discloses the accrual of the cause of action at Jabalpur, the proceedings pending at Datia would not be justified because no cause of action accrued at Datia.

15. In the case of *Alok and another v. State of MP,* reported as 2006 (1) MPLJ 205, this Court, while following the dictum of the Supreme Court, has also found that the entire cause of action in relation to the raising of the demand of dowry and ill-treatment, was not found to have accrued within the territorial jurisdiction of the Criminal Court at Shajapur, but the jurisdiction vests with the Criminal Court at Bhopal.

16. In view of the entire facts and legal provision, it becomes crystal clear that when the entire cause of action or rather the entire bundle of facts contained in the Complaint, narrate about the accrual of the cause of action to complainant Smt. Archana Saxena at Bhopal, the Criminal Court at Bhopal alone would have the Territorial Jurisdiction to adjudicate the matter as also to take Cognizance of the matter and the Criminal Court at Guna would have no Territorial Jurisdiction to either entertain a Complaint under Section 4 or Section 6 of the Dowry Prohibition Act, 1961 and as such the two Orders passed by the Additional Sessions Judge, Guna and the order passed by the Judicial Magistrate, Guna, on Dates 2.8.2008 and 4.10.2007 are hereby set aside and quashed.

17. Since this Court has found that the Criminal Court at Bhopal would have the exclusive jurisdiction to deal with the Complaint, where the complainant has raised the grievance in relation to the offences in terms of Sections 4 and 6 of the Dowry Prohibition Act, 1961, this Court grants liberty and allow the Complainant to institute a fresh/independent Complaint before the Competent Criminal Court at Bhopal, for seeking adjudication and decision on her Complaint.

18. Consequently, this petition preferred under Section 482, Cr.P.C. succeeds and is allowed with the aforesaid liberty to the Complainant.

Petition allowed.
