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THE HIGH COURT OF MADHYA PRADESH

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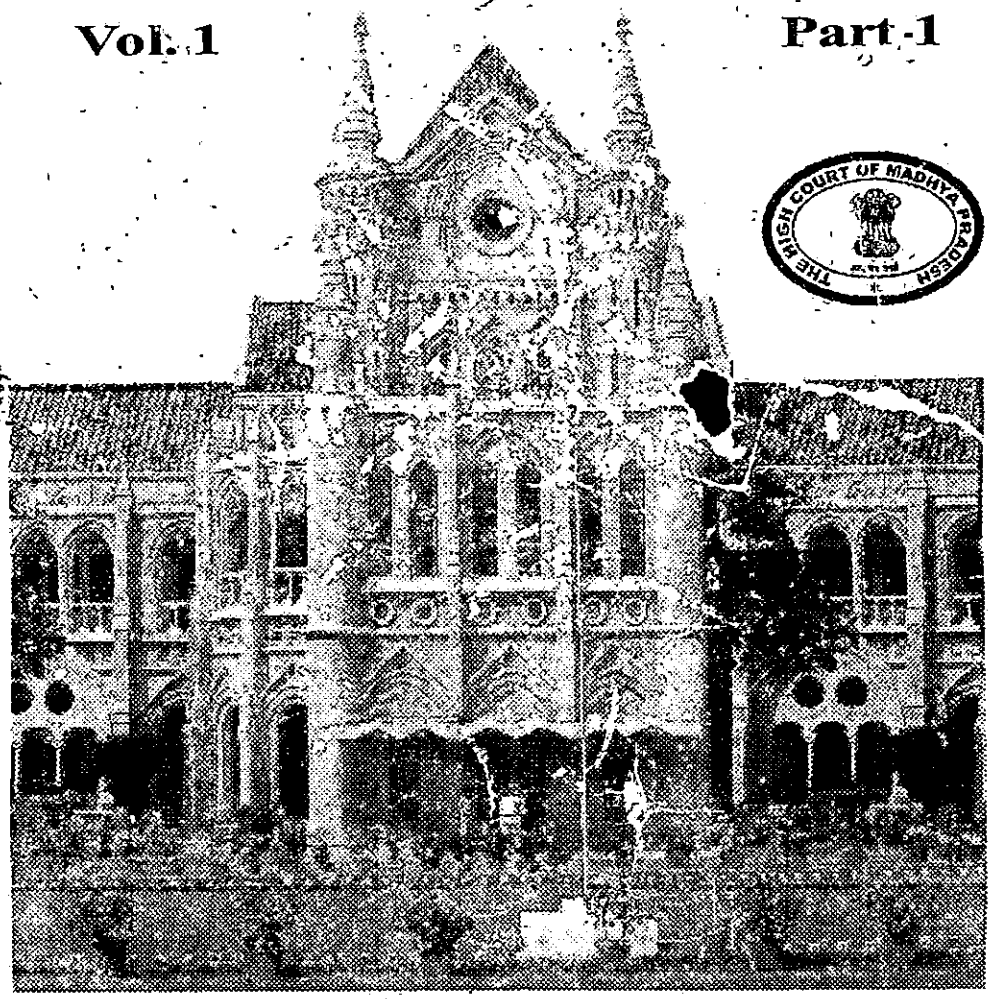

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2010

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JUSTICE SUBHASH SAMVASTSAR

Born on 20-12-1947. After obtaining LL.B. degree joined the Bar in 1972. Was appointed as Deputy Government Advocate in March 1988 and Government Advocate in March 1989.

Elevated as Additional Judge of the High Court of Madhya Pradesh in April, 2002. Took oath as Judge of the High Court of Madhya Pradesh on 21st March, 2003 and demitted office on 20/12/2009.

We wish his Lordship a healthy, happy and prosperous life.

Farewell

Hon'ble Mr. Justice R. S. Garg, bids farewell to the demitting Judge :-

Today, it reminds me of the Royal Seat of State of Gwalior and its throne. Similia repeat in different forms. It is always a matter of pride for all of us to see Justice Samvatsar the throne of Gwalior Bench of High Court. Here, no persons, be they advocates or clients, whosoever came in contact with Justice Samvatsar, would have a different passion as we all have today, regarding His Lordship's charismatic and aristocratic way of working & style.

Before bidding warm adieu to His Lordship, let me acknowledge that Justice Samvatsar is endowed with personality which manifests itself in myriad ways. His magnanimity, simplicity and depthness of thoughts evoke a range of feelings in everybody. These emotions permeate magically through his silent yet eloquent presence everywhere. Infact, it is difficult to avoid being overwhelmed by the abundance of qualities evinced in his personality.

Needless to state here that Justice Samvatsar comes of a very renowned judicial family of Late Justice Shri S.M, Samvatsar, Lordship's brother is also a leading lawyer at Indore.

To recount, Justice Samvatsar was born on 20-12-1947 at Indore and completed His education by taking up degrees in B.A. & LL.B. from Indore itself. Justice Samvatsar is the youngest son of Late Justice S.M. Samvatsar.

Justice Subhash Samvatsar is an able son of His illustrious father Late Justice Shankar Madhav Samvatsar. Lordship's father was one of the most leading and reputed lawyers of Indore. In 1953, he was elevated to the Bench of the former Madhya Bharat High Court. Lordship's father died in harness at Gwalior on 10th November, 1957.

Justice Subahsh Samvatsar not only treaded the path shown by His late father but inspired the persons, who came in contact, to imbibe the qualities in life.

Justice Samvatsar started practice in 1972 with Shri G.M. Chaphekar, Senior Advocate. In due recognition to the services rendered for the cause of law and looking to the public interest, the State Govt. appointed him as a Deputy Govt. Advocate in 1988 and again as a Govt. Advocate in 1989. Acknowledging the excellence in all faculties of law, Justice Samvatsar was elevated to the Bench in this Court on 01-04-02.

In Hindu-mythology, "Samvatsar" means a year and characterizing the title, Justice Samvatsar very well proved to be an "Era" for the High Court which will be recorded in golden letters in the annals of this Court.

His clairvoyance towards legal issues ranks him in the foremost cadres of higher judiciary. It was his dedication to the work which enabled Justice Samvatsar to touch pristine heights in all faculties with no exception. Justice Samvatsar delivered many reportable Judgments settling stymied issues in law which will guide the young generation for many years.

His simplicity endeared him amongst the members of the Bar and the staff as well. He left such indelible prints which can not be erased for years to come. Rate of disposal of cases recorded substantial increase during his tenure at Gwalior Bench. Justice Samvatsar is possessed with uncommon tenets of patience, insight knowledge & simplicity at Board which make him a perfect jurist.

It wouldn't be exaggerated to describe his tenure at Gwalior Bench as golden period for the system as a whole. His unflinching devotion to the cause of judicial system, earned name. It was his leadership qualities which cemented the Bench-Bar relation to a cordial-concrete.

In the end, I on my behalf and on behalf of the Judges of this Court wish His Lordship long, happy, healthy & prosperous life.

Thank you very much.

Shri R. D. Jain, Advocate General of M. P., bids farewell :–

Justice Subhash Samvatsar is ,completing his tenure as a judge tomorrow. There are lesser number of Judges who are remembered after they demit their office and Hon'ble Justice Subhash Samvatsar is one of them whose memory would continue in the minds of advocates and whose absence will be felt in judicial circles of Gwalior. Often, innovative, never controversial and believer in equitable dispensation of justice, your lordship has become ideal in your own way. Born on 20th Dec. 1947, and appointed as Judge of the High Court on 1st April 2002. Your contribution as a judge will always guide the new advocates and will be a treasure for members of Bar. Several controversial issues were solved by your Lordship and we can find in Your long tenure, judements on every subject and your approach was always pro-public. Whether it is the matter of grant of injunctions or election matters, execution, succession, juvenile justice, prohibition of dowry, municipalities or any other subject, you were always guided by the principle of equity and good conscience. In the fields of administrative law and the constitutional law you have rendered a large number of important decisions and your Lordship's approach towards the problems was always distinct from the hackneyed theme. You believed in doing justice which should be full and complete. Your ultimate vision was to interpret the law in such a way as to achieve the final goal for which the legal concepts have been developed. Your Lordship interpreted the law in such a manner that the purpose and object of law-makers is not frustrated. Wherever you found any creases in the procedural law, You ironed them out.

While adjudging a case, a judge should not be oblivious of the sense of justice and norms of humanity. Your Lordship believed that while doing justice the requirement of constitution and fate of a man sitting on the last point should not be ignored. You tried to wipe out the tears of those who were in distress.

Your belief is that the proper role of a Judge is to do justice between the

parties and if there is any rule which comes in the way of justice then the Judge can legitimately ignore it, provided it is within the legitimate limit. You believe in the words of Thomas Ruller that " Be you ever so high, the law is above you."

Your Lordship always emphasized and behaved in a cool, quite and temperate manner and your Lordship never lost temper under any provocation. My Lord was the advocate of individual freedom but not at the cost of society.

In a span of seven years, your Lordship has pronounced several judgements which would be remembered in the years to come. Your crusade for law reforms and commitment to poorer sections of society as also dedication towards work was endearing. Your quest for justice was heartening. Your ideas have gone too far but always within the limits of law and your quality of work will always be remembered and cherished. The landmark judgements you have delivered will help to humanize our legal system and those judgements which have given a new direction to law will always be remembered.

If we adopt the phraseology of justice Iyer it can be said that " bar is the judge of judges and no judge can avoid or escape the verdict of the bar." On this occasion we give our unanimous declaratory verdict on behalf of law officers of the State and the verdict is a decree of affection and admiration in your Lordships favour and the bar is not only the judge of your Lordship but in several ways also your Judgement-debtor.

We pray your Lordship's happy and health life so that you may enlighten the new generation in the times to come.

Shri D. K. Katare, President High Court Bar Association, Gwalior, bids farewell :–

Your Lordship Hon'ble Justicf Subhash Samvatsar is now demitting the office after his long inning of about eight years as a Judge of this Court.

Your Lordship was born on 20-12-1947 at Indore and did his education at Indore. He did his B.A. and L.L.B. From Indore. He is a great son of Late Justice S.M. Samvatsar, He Started his Practice in 1972 with Shri G.M. Chafekar Sr. Advocate till 2002, Your Lordship was appointed as Deputy Government Advocate in 1988 and Govt. Advocate in 1989 There after Your Lordship resigned from the office of Govt. Advocate and Soon thereafter was elevated to the Bench of M.P. High Court & took oath on 01-04-2002.

Your Lordship was a true Judge and High Court Bar Association Gwalior was Privileged to have a versatile personality for such a long period for Eight years at Gwalior Bench . The elevation and posting of Your Lordship was widely acclaimed and welcomed by the Bar Association and the litigant were always seen smiling while walking out from the court room of your Lordship expressing the fact that Your Lordship was a Generous and kind hearted person and would

not let any body go empty hand. Few months earlier Your Lordship gifted a computer in Memory of his Fathar to the Bar.

Father of Your Lordship Late Justice S.M. Samvatsar was a well Known judge of M.P. High Court and his Son too has lived upto the expectation of the mass . Your Lordship has delievered number of landmark judgements during his tenure, as a Judge and he would be remembered by his Judgements.

At the cost of repetition I will again say that your lordship was the choice and respected by every member of the high court Bar Association.

A widely acclaimed Personality would now leave us emotions does not always runs down the face but the heart speaks about every thing and it is a Very emotinal moment for each one us and his place will always remain vacant. The distance not means spaces and he would always remain in the heart of each members of the bar.

We wish and pray for a prosperous and bright long life To Hon'ble Justice Shri Subhash Samvatsar and his family.

Farewell Speech delivered by Hon'ble Shri Justice Subhash Samvatsar :–

I am grateful to all of you for the kind words & the sentiments expressed by you on the occasion of my demitting the office of the Judge of the High Court. I consider myself to be the most fortunate for having all the time the love and affection from all of you ignoring my shortcomings and failures.

2. I started my profession as a Lawyer in the year 1973, that is, almost after fifteen years of the death of my father Late Hon. Justice S.M. Samvatsar who enjoyed a great reputation - both in Bar and the Bench. His reputed legal erudition has helped me a lot in building up my standing and the career.

3. I joined the Chamber of Shri G.M. Chaphekar, advocate and worked with him for almost 30 years. He is my Guru and played the most important role in carving my career. I am nothing but everything due to him and him only.

4. The other person who played a vital role is my elder brother Shri V. S. Samvatsar, who from the very beginning of my career started transfering his briefs to me and gave me full opportunity to appear and argue cases in the High Court in earlier part of my career. Without him, it was not possible to achieve what I have achieved in my life.

5. I am also thankful to Hon. Shri Justice V.S. Kokje, who showed tremendous faith in me while transferring his entire office at the eve of his elevation as a Judge of the High Court.

6. At Indore, there are large number of people who helped me at various stages of my career. Though it is not possible for me to mention their names due to shortage of time, still I shall be failing in my duty, if I do not express my gratefulness to them. I am thankful to all of them.

7. Eventually, I was elevated to the Bench of Madhya Pradesh High Court. After my elevation, myself and .Justice Menon was called by Hon..the Chief Justice Bhawani Singh in his Chamber and we were told that we are to be posted at Gwalior. He told us that Gwalior is known as "Kala-pani" and both of us should work hard to change this image. After coming to Gwalior, I tried my best to achieve this object but do not know up-to what extent I succeeded.

8. Initially, I was not happy with my posting at Gwalior for several reasons. One of them was that my father Late Shri S.M. Samvatsar breathed his last at Gwalior and as per the belief of my mother and other family members, Gwalior was an inauspicious city. However, this belief came to be falsified and I find this place to be one of the most auspicious places where I have been blessed with a daughter-in-law and a cute grand-daughter.

9. I came and joined as a judge of this High Court at Gwalior on 8th April, 2002. At that time, Gwalior was totally a strange city for me. Before joining as a Judge I was knowing very few persons at Gwalior. One of then was Late Shri J. P. Gupta, Senior Advocate, a pride of legal field of Gwalior. I had an opportunity to oppose him in number of Criminal Appeals at Indore when I was a Government Advocate.

10. I met Shri K.N. Gupta, Senior Advocate and Shri SMA Naqvi, Advocate, when I came to argue a case before Board of Revenue just before I was elevated as Judge. They opposed me in the said case. Shri Santosh Bajpayee was engaged by my client lo assist me in that case.

11. Apart from these few lawyers, all of you were strangers to me. But very soon I found that the Bar at Gwalior is very co-operative, loving and modest and started feeling that Gwalior has become my second home and all the members of the Gwalior Bar are my family members.

12. At Gwalior, I learned very much from all of you. I never hesitated in meeting any one of you even in my Chamber. I was never shy of calling the senior members like Shri R.D. Jain. Shri K.N. Gupta, Shri Vinod Bhardwaj, Shri V.K. Saxena etc to discuss my difficulties in solving legal problems and they guided me and helped me in deciding legal issues. I am thankful to them. I am grateful to all the members of Gwalior Bar for extending their full love and affection to me despite my shortcomings. Without their cooperation, it was not possible for me to discharge my duties.

13. At Gwalior, I find number of junior upcoming lawyers, who were coming well prepared in their cases and arguing the matter with hard labour. I wish all the junior lawyers that their seniors should start parting with their briefs to these young lawyers. I wish successful life to all these juniors.

14. I am thankful to Justice Garg for coming to Gwalior on this occasion. He is my old friend, with whom I have friendly relations for about 38 years.

15. I am also thankful to my colleague Justice Shri S.S. Jha, who guided me as an elder brother, Hon. Mr. Justice Rajendra Menon, who treated me as his elder

brother and all other brother Judges who have co-operated me in discharge of my duties.

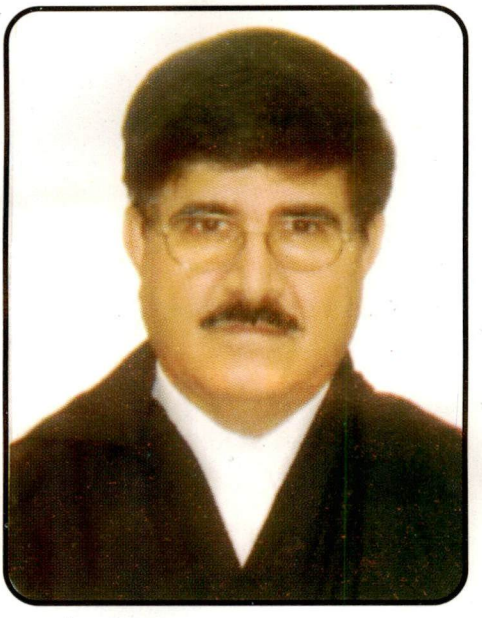
16. I am also thankful to my wife and family members for co-operating with me in every walk of my life.

17. Today numbers of lawyers from Indore Bar have come from Indore to attend this ceremony irrespective of their busy schedule. This reflects love and affection they are having in their heart for me. I am grateful to all of them.

18. While discharging the duties of the Office of a Judge at Gwalior, simultaneously, I had to discharge certain administrative chores being the Administrative Judge of this Bench Registry. I have always received the fullest co-operation, with smiling gesture, of officers and employees of this Registry right from a lift-man to that of Principal Registrar, including my personal staff. I very much appreciate their co-operation and wish them all a very happy, prosperous and cheerful iife.

19. While bidding Adieu, I thank you all once again.

JAI HIND



JUSTICE SYED ALI NAQVI

Born on 24th of December, 1947. Joined Judicial Service as Civil Judge, Class-II, on 09/09/1970. Promoted as Civil Judge, Class-I, on 14/06/1982, as Chief Judicial Magistrate on 22/03/1984 and promoted as officiating District Judge on 15/06/1987, granted selection grade on 23/11/1994, super-time scale on 08/05/1999. Worked as Additional Registrar, High Court of M.P., Bench Gwalior from 28/02/1995 to May, 1996 and also worked as District Judge, Sidhi, Chhindwara and Jabalpur. At the time of appointment as Additional Judge of High Court Madhya Pradesh, was posted as Director Prosecution, Bhopal.

Elevated as Additional Judge of Madhya Pradesh High Court on 18/10/2005. Took oath as Permanent Judge on 26/2/2008 and demitted office on 24/12/2009.

We wish his Lordship a healthy, happy and prosperous life.

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Farewell

Hon'ble Shri S. Rafat Alam, Chief Justice, bids farewell to the demitting Judge :–

We have assembled here to bid an affectionate farewell to Justice Syed Ali Naqvi who is demitting office today.

Hon'ble Mr. Justice Syed Ali Naqvi was born on 24.12.1947. He joined Judicial Service as Civil Judge Class II on 09.09.1970, promoted as Civil Judge Class-1 on 14.06.1982 as C.J.M. on 22.03.1984 and promoted as officiating District Judge on 15.06.1987. He was granted selection grade on 23.11.1994 and super-time scale on 08.05.1999. He worked as Additional Registrar, High Court of Madhya Pradesh, Gwalior from 28.02.1995 to May, 1996. He worked as District and Sessions Judge Sidhi, Chhindwara and Jabalpur. Before his elevation he held the post of Director, Prosecution, Bhopal. He was appointed as Additional Judge of the High Court of Madhya Pradesh on October 18, 2005 and made a Permanent Judge on February 26, 2008.

Justice Naqvi has been a Judge of very cool temperament and he has discharged his duties as a Judge silently but efficiently. He has dealt with Civil and Criminal matters with equal proficiency. He has delivered several landmark judgments which adorn the Law Journals.

Justice Naqvi was member of various Administrative Committees and his suggestions and advice during the meetings were found very useful. This Court after his retirement will be deprived of his valuable advice and suggestions and a void would be created.

His vast knowledge and experience will continue to be useful to the society even after his retirement.

On behalf of brother Judges and on my behalf, I wish Hon'ble Mr. Justice Syed Ali Naqvi and Mrs. Naqvi all happiness, good health and a long life.

Shri R. D. Jain, Advocate General of M. P., bids farewell :–

We have assembled here to bid farewell to Hon'ble Justice S.A. Naqvi who is demitting the office as a Judge of this Court on 24th December, 2009.

After completing the graduation he passed LL.B. from Law College, Shajapur. My Lord Justice Naqvi joined Judicial Service as Civil Judge, Class-II on 9th Sept.1970, promoted as Civil Judge, class-I on 14.6.1982 and as C.J.M. in 1984. My Lord was promoted as officiating District Judge on 15.6.1987. He also worked as Additional Registrar, High Court of MP, Gwalior from 28.2.1995 to May, 1996. Hon'ble Justice Naqvi also worked as District Judge, Sidhi, Chhindwara and Jabalpur.

My Lord Justice Naqvi has been with us for quite a long time in different capacities as judicial officer and most of his time was spent in or around Gwalior.

We have memories and impressions which My Lord has left on us and which would be everlasting. At the time of assumption of office My Lord expressed gratitude to 'God' and stated that "by the grace of Almighty God I achieved this august office". It is this faith in God, which guided my Lord in your entire career as a judicial officer and as Judge of the High Court. You are a great believer in religious attainments. The father of Justice Naqvi namely Syed Israr Ali was also a judicial officer. He inherited certain basic qualities from his father. Your father led a very simple life and his sense of dispensation of justice was well known to all and Justice Naqvi imbibed those qualities. My Lord Justice Naqvi devoted his entire career as a judicial officer and as a Judge of the High Court for welfare of mankind. His father was a religious person and Justice Naqvi is an able successor of his father's legacy. My Lord always strived hard to dispense with justice in such a manner that the needy and common man may not be frustrated and a Citizen of this country may live with honour.

During your tenure as High Court Judge, you were very popular amongst the newcomers who always preferred to appear before your Lordship. As a Judge, you always tried to protect children from criminal surroundings. That shows your inclination to create a situation where the minor offenders may improve as a better Citizen. In civil matters also you have rendered certain landmark judgments, which will guide the legal fraternity in the years to come.

Justice Deepak Verma once said quoting Aristotle - " One can become angry-that is easy, but to be angry with the right person, to the right degree, at the right time, for the right purpose and the right way is not easy" and My Lord has great quality of controlling his anger even when there was provocation. It is such a sterling quality that we will never forget.

We wish that My Lord may live a very long and healthy life in times to come and may serve the society during his life time so that his experiences may benefit the society, new comers in the profession in particular and all the lawyers in general.

Shri Radhelal Gupta, Asstt. Solicitor General, Union of India, bids farewell :–

With heavy heart we are bidding Farewell to My Lord Hon'ble Shri Justice S.A.Naqvi who is demitting the Office on 24th Dec. 2009.

My Lord Hon'ble Shri Justice S.A.Naqvi, the extra ordinary but pertinent queries coming from the other corner of the division bench very soon attracted the attention of the bar and my Lord's extra ordinary legal acumen and knowledge was noticed by bar. Then bar realized that this gentleman known as Mr. Justice Naqvi is really devoted to protect the cause of justice and he is man of independent thinking.

The Members of the legal fraternity are greatly influenced with Lordships

deep wisdom and experience as well as with Lordships gentle, courteous and polite behaviour by which his Lordship has given inspiration to all of us. As a Judicial Officer your Lordship has started his career on 9th Sept 1970 and right from that day has devoted yourself in dispensing justice by holding different offices. Your Lordships remarkable performance as Hon'ble Judge of High Court of MP will be remembered with respect and regard in the history of this great temple of justice. Your Lordships judgments were full of wisdom and reflect humanitarian approach and sympathy for the common man. Your Lordships great administrative experience has also given great help to improve the judicial administration in the State.

His Lordship has decided the cases to the best of his firm fidelity and floriferous ability. His discipline, work ethics and helping behaviour were the outstanding virtues. He has been a great teacher and preacher to all the advocates. He always had a great respect for the lawyers deeming them to be an important section of the society. His valuable commitment and devotion for justice were unique.

Undoubtedly after demitting your Lordships Office, we the members of the legal fraternity will be deprived of your Lordships able guidance.

Yesterday, matchless speech delivered by my Lord in Bar room imposed thrilling silence and made the audience spellbound. Bar has had to realize that there are so many hidden gems in the bench whose eloquence is tremendous.

In the end I am trying to summarize the personality of my Lord in the following words of Urdu couplet.

कोई ना कर सका उसके कद का अंदाजा।
वो आसमॉ है, मगर सर झुकाए फिरता है॥

I, on behalf of Govt of India all the Law Officers of Central Govt and on my own behalf, express my best wishes for good health, happiness and peace for the days to come to your Lordship.

Shri R. P. Agrawal, President, High Court Advocates' Bar Association, Jabalpur, bids farewell :–

We have assembled here today to bid farewell to Hon'ble Justice Syed Ali Naqviji on his demitting office after having served for about 35 years as Judicial Officer and for more than 4 years as Judge of this Court. Although, my Lord's tenure as Judge ofthis Court was short yet during such brief tenure my Lord worked very hard in dispensation of justice. My Lord has been a Judge in its true sense. He gave very patient hearing and delivered justice tampered with mercy and human considerations.

It would not be out of place to mention that when the High Court Advocates' Bar Association invited my Lord in a farewell function, he conveyed his desire that the function should be speech free and, I, in turn conveyed his Lordships

desire to my Secretary but he could not resist his temptation and requested my Lord to speak a few words. The few words that my Lord spoke caught the imagination of all the Hon'ble Judges present and lawyer members of the Association. We could know the secret of his success which was that he meticulously followed the teachings of his parents. In Hindu Mythology, parents are regarded as next to God and those who served their parents are adequately rewarded by the Almighty. My Lord also imbibed in himself the teachings of his parents and by their blessings rose to the exalted position of a High Court judge. We did not know earlier that my Lord is also a good orator and had we known it earlier we would have organized his lecture on some topic. We would be seeking an opportunity to invite my Lord on some befitting occasion.

My Lord has a son who is in job in Delhi and the only daughter is married to Shri Khalid Noor Fakhruddin, a practicing lawyer of this Court. My Lord has thus no liabilities and he has nothing to regret.

I hope that the rich judicial experience earned by my Lord would be utilized for rendering service to the mankind.

I, on behalf of theHigh Court Advocates' Bar Association and my own behalf wish my Lord and Madam Naqvi a happy and peaceful life.

Shri Anil Khare, President, M. P. High Court Bar Association, bids farewell :–

My Lord Hon'ble the Chief Justice, My Lords the Companion Judges, Officers of the Registry, Judges of the Subordinate Court, Distinguished Guest, Ladies and Gentlemen.

On this moment of parting with Justice Shri Syed Ali Naqvi, I stand here today to say goodbye to him with a heavy heart on behalf of M.P. High Court Bar Association.

Justice Shri Syed Ali Naqvi was born on 24.12.1947. After completing his education, he joined the judicial services. During the said tenure, he exemplified devotion and sincerity.

My Lord was elevated as an Additional Judge of this Court on 18.10.2005 and was made permanent judge on 26.2.2008. The above profile of My Lord is indicative of his long and the successful journey in the fraternity of law. In this long innings as a judge he always left a mark in the minds and hearts of the lawyer. The attitude and behaviour of my Lord towards the bar was always outstanding.

The tenure of My Lord as a judge of this Court though short left everlasting imprints in our hearts. According to the Service book My Lord is demitting the office as a judge; we hope that this would not be an end to the journey in the legal sphere. My Lord would continue to serve the down trodden with his vast knowledge and ability which he acquired during his tenure as a judge.

The behaviour of My Lord was always courteous towards the members of the Bar. He was charming and ever smiling while functioning as the judge of this Court.

Though the voyage of My Lord as a judge has reached one harbour but we hope that many more harbours are yet to be seen by a man who is able and lively.

I on behalf of the M.P. High Court Bar Association and on my own behalf wish him good health and success for the future. I also wish that all the goodness of Almighty be showered upon you.

Shri S. C. Datt, Senior Advocate, Jabalpur, bids farewell :–

I rise on behalf of the Senior Advocates' Council to offer you good wishes and on your demitting the office of Judge of M.P. High Court tomorrow on 24th December, 2009.

We had occasion to appear before your Lordship and we found your Lordship courteous, never losing temper, take up the points, understand it and solve it in the best possible manner. Your Lorship has written some very good Judgment.

I am certain that your Lordship is leaving the office with clean heart and satisfaction that your Lordship has worked to the best of your ability.

I on my own behalf and on behalf of Senior Advocates' Council bid you a respectful farewell and wish you and your family long healthy and fruitful life and we also wish that your qualities are utilized by the State in same other assignment.

Shri Khalid Noor Fakhruddin, Member, State Bar Council of M. P. Jabalpur, bids farewell :–

We have assembled here to give farewell to My Lord Hon'ble Shri Justice Syed Ali Naqvi on demitting the office as Judge of High Court on 24th Dec. 2009.

With the blessings of Almighty God Justice Naqvi started his career under the guidance of his late father Syed Isrrar Ali Naqvi who was also a judicial officer of this Court. The basic teachings were given to him by his mother at home, who is a religious lady. At a very young age he become a Civil Judge and with honesty, hard work and dedication to do justice for the people he made his name by delivering good judgements, because of his sincerity & merit he was elevated as High Court Judge on 18th Oct. 2005, thereafter for some period he had worked at Gwalior and Indore bench of this High Court.

He is known in legal fraternity for his cool temperament & for judicial sharpness. In his 39 years of career as a Judicial Officer he has delivered many landmark judgements which are milestones and guiding factor to all of us. He is having a very jovial nature, My Lord use to teach the art of advocacy to junior members of the Bar, and had encouraged them.

That his better half Mrs. Arman Naqvi and his family members were always there to encourage and support him.

I on behalf of about 70,000 Advocates of State Bar Council of Madhya Pradesh and on my own behalf express the deep sense of gratitude towards his Lordship for rendering excellent services to the judicial fraternity.

We wish him good health, happy and peaceful days. Ameen.

Farewell Speech delivered by Hon'ble Shri Justice S. A. Naqvi :–

I am grateful to the Almighty God, who had bestowed upon me, August responsibility of administering justice, who gave me courage to perform pious and noble duty.

I am thankful for the views expressed for me. I am aware of my short comings, I have tried to perform my duty, with utmost devotion, harmony, and sympathy. I am really highly obliged by the co-operation of senior and junior members of the bar association. Though, I know saying that, "Out of sight, out of mind, "but I assure all of you that I am going with an impression on my heart and soul which is everlasting. Once again, I thank you all from bottom of my heart.

I have learnt too much from my senior and junior brother judges and sister judges. They always extended co-operation in my day to day working. I have memorable impressions of brotherhood, elderhood humanity & jointness which are treasure for my future life and would luminate my way of life. Overwhelmed for love and affection, bestowed by respected dear brother and sister judges upon me.

I bow to my parents, my father late Shri Syed Issar Ali Naqvi was member of M.P. Judiciary. He possessed pious and saintly qualities. He dispensed judicial work with dignity, honesty and was a dedicated judicial officer. His way of life was very simple, he was very religious, and kind hearted. I am indebted to him and always tried to follow his principles. My mother brought me up and my four brothers and two sisters in such a way which paid all of us in our whole life. I am lucky that still her blessings are with me and with whole of my family.

I would not do justice if at this occasion, I would forget my wife Smt. A.B.Naqvi (Arman Bano Naqvi), my son S. Shoeb Hassan Naqvi daugther Saba Iram Naqvi, Now Saba Fakhruddin and my son-in-law Khalid Noor Fakhruddin. My wife and children never put undue demands. They were satisfied to life, whatever, I provided them. They stood firm behind me in all odds. It is their force which gave me courage to work honestly, fairly and fearlessly. I am nothing without them. I am highly grateful to their co-operation at every walk of 'my life. I and my family fought jihad, whole of our life in quest of ourselves. As holy prophet (SAWA) preached quote:

"The most excellent jihad is that for the conquest of ourself"

I always learnt lesson of patience from my parents. Holy Prophet (SAWA) and Imam (AS) to keep away misfortunes misdeed from my whole family, well preached by Imam Ali (AS) quote:

"With patience misfortunes are no misfortunes"

I am grateful to Hon'ble Justice Shri R.V. Raveendran.Judge of Supreme court and Hon'ble Justice Shri A.K. Patnaik, Judge of Supreme court for their guidance and faith showed upon me and members of the collegium. I am also grateful to Hon'ble Janab Syed Rafat Alam Chief Justice of High Court of M.P for his kind guidance for present and future.

I also thank to Judges of subordinate Judiciary, associated with me, for their co-operation and well wishes extended to me. I am also thankful to my friends for their well wishes and also my staff, who extended fullest co-operation to me in dispensing justice, about forty years of journey as a judicial officer and judge of High court.

I believe that if "Iman is Mukammal" person would luminate like sun without fail, day and night, as expressed by poet:

" Jahan Mein Iman Wale Maninde Khursheed Hote hein."

"Idhar Doobey Udhar Nikle,

Udhar Doobey Idhar Nikale"

I again thank you all.

NOTES OF CASES SECTION

Short Note

(1)

N.K. Mody, J

BABULAL

Vs.

GAFUR & anr.

Negotiable Instruments Act (26 of 1881), Section 138 - *Presumption - Service of notice - Complainant sent notice to accused by registered post with A.D. and U.P.C. on correct address - Accused is Ex-Sarpanch of the village - The endorsement of the postman to the effect that he has visited the house of accused seven times for service of notice but accused was not available at the time of delivery - Presumption ought to have been drawn in favour of complainant about service of notice.* AIR 1989 SC 630, 1999 CrLJ 4606, 2006(2) NIJ 210 (SC), 2008(2) NIJ 446 (SC), 2009(1) NIJ 103 (Del) (NOC) (ref.).

"It is evident that the notice was issued by the appellant on 23.02.99 by registered post acknowledgment due. The registered envelope shows the endorsement of postman to the effect that postman has visited the house of respondent No.1 on 25.02.99, 26.02.99, 27.02.99, 28.02.99 and 03.03.99 and has put a remark that the addressee was not available at the time of distribution of letter. Registered letter is Ex. P/5 which bears address to the effect "Gafur S/o Ghisa Ji Ajmeri, (Ex-Sarpanch), Semly, Post Masia Kher Khedi, District Mandsaur. Ex. P/8 is another registered letter which was sent to the respondent No.1 where the address of respondent No.1 is mentioned as Gram Digaon, Post Digaon, District Mandsaur. It also bears postal endorsement which indicates that postman has visited the house on 24.02.99 and 01.03.99 and has put the remark to the effect "not found" and lastly it was retured with the endorsement of the postman that respondent is not available at the time of delivery. Ex.P/9 is receipt of Under Postal Certificate, which goes to show that notice was also sent Under Certificate of Posting."

"It is not a case of respondent No.1 that the address written on Ex.P/5, P/8 and P/9 is not correct, appellant has sent the notice by registered post acknowledgment due and also Under Certificate of Posting on two addresses. Respondent No.1 is Ex-Sarpanch of the village. The endorsement of the postman is that respondent No.1 was not available at the time of delivery. Since the appellant had issued the notice, not only by registered post but also by UPC and the registered notice has returned with the remark that the respondent No.1 was not found at the time of delivery, presumption ought to have been drawn in favour of appellant.

In the facts and circumstances of the case, learned Sessions Court committed error in allowing the appeal filed by the respondent No.1 and acquiting the respondent No.1. In view of this, appeal filed by the

appellant is allowed and the judgment dated 30.10.02 passed by Sessions Judge, Mandsaur in Criminal Appeal No.180/02 is set-aside and the judgment dated 04.09.02 passed by the learend CJM, Mandsaur in Criminal Case No.997/99 is restored."

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – उपधारणा – सूचनापत्र की तामील – परिवादी ने अभियुक्त को रजिस्टर्ड पोस्ट मय ए.डी. और यू.पी.सी. से सही पते पर सूचनापत्र भेजा – अभियुक्त गाँव का पूर्व सरपंच है – डाकिये का इस आशय का पृष्ठांकन कि वह सूचनापत्र की तामील के लिए सात बार अभियुक्त के घर गया किन्तु परिदान के समय अभियुक्त उपलब्ध नही था – परिवादी के पक्ष में सूचनापत्र की तामील के बारे में उपधारणा की जानी चाहिए थी। AIR 1989 SC 630, 1999 CrLJ 4606, 2006(2) NIJ 210 (SC), 2008(2) NIJ 446 (SC), 2009(1) NIJ 103 (Del) (NOC) (संदर्भित).

A.K. Nalvaya, for the appellant.
Gaurav Verma, for the respondent No.1.

***Cr.A. No.253/2003 (Indore), D/- 3 August, 2009.**

Short Note
(2)

Mrs. Indrani Datta, J

BALVEER
Vs.
STATE OF M.P.

Criminal Procedure Code, 1973 (2 of 1974), Section 311 - ***Re-examination of prosecutrix - Prosecutrix already examined cannot be permitted to be re-examined on the basis of subsequent affidavit filed by her.*** 1997(I) MPWN 138, 2000(1) MPLJ 5, 2002(3) MPLJ 354, (2005) 10 SCC 701, (2006) 9 SCC 549, (2004) 12 SCC 229, (2006) 2 SCC (Cri) 568 (ref.).

"In the present case, prosecutrix was examined on 28.03.2009. Thereafter, after seven months of examination, she has filed one affidavit for re-examination on the ground that in the affidavit she has stated that in fact, no incident of rape has been committed with her and earlier what she has stated in the Court was false."

"Trial Court has rightly rejected the application filed by prosecutrix/ complainant for getting her re-examination on the basis of affidavit. The order passed by trial Court is proper and legal and call for no interference by the High Court."

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – अभियोक्त्री की पुनःपरीक्षा – अभियोक्त्री, जिसकी पूर्व में परीक्षा हो चुकी हो, को उसके द्वारा पेश पश्चात्वर्ती शपथपत्र के आधार पर पुनःपरीक्षा की अनुमति नही दी जा सकती। 1997(I) MPWN 138, 2000(1) MPLJ 5, 2002(3) MPLJ 354, (2005) 10 SCC 701, (2006) 9 SCC 549, (2004) 12 SCC 229, (2006) 2 SCC (Cri) 568 (संदर्भित).

Deependra Raghuvanshi. for the the applicant.
R.D. Agrawal, P.L., for the non-applicant/State.

***Cr.R. No.838/2009 (Gwalior), D/- 10 November, 2009.**

Short Note
(3)

Dipak Misra & R.K. Gupta, JJ

BOARD OF SECONDARY EDUCATION, BHOPAL
Vs.
RAKESH KEWAT & anr.

Law of Torts - ***Vicarious liability - Compensation - Due to fault committed by the Board, petitioner's result was declared late - It resulted in the loss of entire year forcing the petitioner to reappear in the class XII examination - Single Judge awarded compensation of Rs.25,000 for mental agony and loss of entire year - Writ Appeal - Held - Petitioner is innocent cannot become a victim because of fault of the Board - Board is vicarious liable to pay compensation to the grieved student - Judgement affirmed by D.B. - Writ Appeal dismissed.***

"The Board, which has bestowed the responsibility under the Statute and the Regulations to conduct the examination, is expected to have the requisit expertise and is expected to be extremely cautious and vigilant. No acts of the Board should be done in hurry as it deals with life and career of young students."

"The Board cannot advance a spacious plea that it has to conduct examination for lakhs of students and, therefore, this kind of mistake may sometime happen because for the Board it may be conducting an examination but for the students it is the lifetime participation in the life and for life of a student. A single lackadaisical act of the Board can mar the career and destroy the life. No statutory authority which has the responsibility towards the students can be unfair to them. It is worth noting that a student who is at fault is bound to suffer. He who gets involved in copying are indulges in malpractice, has to face the wrath of law. But, a pragnant one, he who is innocent, cannot become a victim because of fault of the Board. Whoever may be the authority at fault, it is the vicarious liability of the Board to pay compensation to the grieved student, the writ petitioner. Therefore, we are disposed to think that the learned Single Judge has appositely awarded compensation of Rs.25000/- keeping in view the relief sought for by the writ petitioner, for the relief clause there is a prayer for grant of compensation.

Ex consequenti, we perceive no merit in this appeal and accordingly, the same stands dismissed in limine."

अपकृत्य विधि – प्रतिनिधिक दायित्व – प्रतिकर – मण्डल द्वारा की गई भूल के कारण याची का परीक्षा परिणाम देरी से घोषित किया गया – इसके परिणामस्वरूप याची को पूरे एक साल का नुकसान हुआ और उसे मजबूरन कक्षा 12वीं की परीक्षा में पुनः बैठना पड़ा – एकल न्यायाधीश ने मानसिक त्रास और एक साल के नुकसान के लिए 25,000 रुपये प्रतिकर अधिनिर्णीत किया – रिट अपील – अभिनिर्धारित – याची निर्दोष है और उसे मण्डल की भूल के कारण शिकार नही बनाया जा सकता – मण्डल व्यथित छात्र को प्रतिकर अदा करने के लिए प्रतिनिधिक रूप से दायी है – खण्ड न्यायपीठ द्वारा निर्णय की पुष्टि की गई – रिट अपील खारिज।

Vivek Mourya, for the appellant.

***W.A. No.402/2009 (Jabalpur), D/- 29 June, 2009.**

Short Note

(4)

K.S. Chauhan, J

FULLOO @ PHOOLSINGH
Vs.
STATE OF M.P.

A. Penal Code (45 of 1860), Section 376 - *Rape - Age of Prosecutrix - Prosecutrix is residing in a small village - In that village, neither Kotwar Book is kept nor there is any school - Father and uncle of the prosecutrix states that she is 14 to 15 years of age - Raiologist also opined that her age was below 15 years - Prosecution succeeded in proving that prosecutrix was below 16 years of age.*

क. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – अभियोक्त्री की उम्र – अभियोक्त्री एक छोटे गाँव में निवासरत – उस गाँव में न तो कोटवार पुस्तिका रखी जाती है और न ही वहाँ कोई विद्यालय है – अभियोक्त्री के पिता और चाचा ने कथन किया कि उसकी उम्र 14 से 15 वर्ष है – रेडियोलॉजिस्ट ने भी यह राय दी कि उसकी उम्र 15 वर्ष से कम थी – अभियोजन यह साबित करने में सफल हुआ कि अभियोक्त्री की उम्र 16 वर्ष से कम थी।

B. Penal Code (45 of 1860), Section 376, Criminal Procedure Code, 1973, Section 154 - *Delay in lodging FIR - Explanation - Record shows that prosecutrix was constantly in fear of the appellant - Therefore, she could not disclose the incident to any body - Prosecution has explained the delay in making the FIR - Delay does not adversely affect the prosecution case.*

ख. दण्ड संहिता (1860 का 45), धारा 376, दण्ड प्रक्रिया संहिता, 1973, धारा 154 – एफ.आई.आर. दर्ज कराने में विलम्ब – स्पष्टीकरण – अभिलेख दर्शाता है कि अभियोक्त्री सतत् रूप से अपीलार्थी के भय में थी – इसलिए, वह किसी को घटना प्रकट नही कर सकी – अभियोजन ने एफ.आई.आर. दर्ज कराने में हुआ विलम्ब स्पष्ट किया है – विलम्ब अभियोजन के मामले को प्रतिकूल रूप से प्रभावित नही करता है।

S.C. Datt with *G.P. Patel,* for the appellant.
R.P. Tiwari, G.A., for the respondent/State.

***Cr.A. No.79/1995 (Jabalpur), D/- 27 November, 2009.**

Short Note

(5)

N.K. Mody, J

SUNIL @ SONU & anr.
Vs.
SMT. SARITA CHAWLA

A. Protection of Women from Domestic Violence Act (43 of 2005), Sections 18 & 31, Protection of Women from Domestic Violence Rules, 2006, Rule 6 - ***Economic Violence*** - *As per Rule 6, application of the aggrieved person u/s 12 of the Act is required to be filed in Form No.II - Sub-clause (iii) of Clause 4 of Form No.I deals with economic violence, according to which not providing money for maintenance or food, clothes, medicines etc. is amounting to economic violence for which the Court is empowered to pass a protection order - Therefore, interim order of maintenance u/s 18 is a protection order and on account of breach of protection order, the proceedings can be initiated against the respondent u/s 31 of the Act.*

"It is evident that the interim order passed by the learend trial Court regarding the payment of maintenance was confirmed by the appellate Court as the appeal was dismissed on account of delay. The interim order was not further challenged. Thus, same has attained finality. Now the only question which requires consideration is whether the interim order passed by the learned trial Court, whereby the maintenance was awarded is a protection order and on account of breach of protection order, the proceedings can be initiated against the petitioner under Section 31 of the Act. Section 18 of the Act empowers the Court for passing a protection order against a respondent, who commits any act of domestic violence in exercise of powers conferred by Section 37 of the Act the Central Government has framed the Rules. As per Rule 6 every application of the aggrieved person under Section 12 of the Act is required to be filed in form II. Sub-clause III of form I deals with economic violence according to which not providing money for maintenance or food, clothes, medicine etc is amounting to the economic violence for which the Court is empowered to pass a protection order."

क. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 18 व 31, घरेलू हिंसा से महिलाओं का संरक्षण नियम, 2006, नियम 6 – आर्थिक हिंसा – नियम 6 के अनुसार व्यथित व्यक्ति का अधिनियम की धारा 12 के अन्तर्गत आवेदन प्ररूप क्र. II में पेश किया जाना अपेक्षित है – प्ररूप क्र. I के खण्ड 4 का उपखण्ड (iii) आर्थिक हिंसा से सम्बद्ध है जिसके अनुसार भरण–पोषण के लिए धन या भोजन, कपड़े, दवाईयों आदि का प्रबंध न करना आर्थिक हिंसा की कोटि में आता है जिसके लिए न्यायालय संरक्षण आदेश पारित करने के लिए सशक्त है – इसलिए, धारा 18 के अन्तर्गत भरण–पोषण का अंतरिम आदेश एक संरक्षण आदेश है और संरक्षण आदेश के भंग के कारण प्रत्यर्थी के विरुद्ध अधिनियम की धारा 31 के अन्तर्गत कार्यवाहियाँ प्रारम्भ की जा सकती हैं।

B. Protection of Women from Domestic Violence Act (43 of 2005), Sections 28 & 12 - *Proceedings are governed by the provisions of Cr.P.C. - However, the Court is not prevented from laying down its own procedure for disposal of an application u/s 12 of the Act.*

"As per sub-section (1) of Section 28 of the Act the proceedings are required to be governed by the provisions of Cr.P.C. As per sub-section (2) of Section 28 the Court is not prevent from laying down its own procedure for disposal of an application under Section 12 of the Act. In the facts and circumstances of the case, where no amount of maintenance has been paid by the petitioner, no illegality was committed by the learned trial Court in initiating the proceedings under Section 31 of the Act."

ख. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 28 व 12 – कार्यवाहियाँ द.प्र.सं. के उपबंधों से शासित होती हैं – तथापि, न्यायालय अधिनियम की धारा 12 के अन्तर्गत आवेदन के निस्तारण के लिए अपनी स्वयं की प्रक्रिया निर्धारित करने से निवारित नही है।

P.M. Bapna, for the applicant.
A.S. Rathore, for the non-applicant.

***Cr.R. No.594/2009 (Indore), D/- 31 August, 2009.**

INDU JAIN Vs. STATE OF M. P.

I.L.R. [2010] M. P., 1

SUPREME COURT OF INDIA

Before Mr. Justice Altamas Kabir & Mr. Justice Markandey Katju

23 October, 2008*

INDU JAIN ... Appellant

Vs.

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

Criminal Procedure Code, 1973 (2 of 1974), Section 240, Penal Code, 1860, Sections 304 Part II & 330 - *Framing of charges - Custodial death - Charges framed against officers u/s 304 Part II but dropped u/s 330 IPC - Whereas, HC directed to frame charges u/s 323/34 IPC - Held - Deceased was asthmatic - Despite that he was detained in wholly unhygienic conditions which triggered his asthmatic attack leading to his death on account of asphyxia - Injuries found on the body of deceased - Prima facie case made out for framing of charges u/s 304 Part II & 330 IPC - Order of Sessions Judge framing charge u/s 304 Part II IPC restored - Also direction issued to frame charges u/s 330 IPC.* (Paras 31 to 36)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 240, दण्ड संहिता, 1860, धाराएँ 304 भाग II व 330 – आरोपों की विरचना – अभिरक्षा में मृत्यु – अधिकारियों के विरुद्ध भा.द.सं. की धारा 304 भाग II के अन्तर्गत आरोप विरचित किये गये किन्तु धारा 330 के अन्तर्गत छोड़ दिये गये – जबकि, उच्च न्यायालय ने भा.द.सं. की धारा 323/34 के अन्तर्गत आरोप विरचित करने का निदेश दिया – अभिनिर्धारित – मृतक दमा से पीड़ित था – इसके बावजूद उसे पूर्णतः अस्वास्थ्यकर दशा में निरुद्ध रखा गया जिसके कारण उसे अस्थमा का दौरा आया और श्वासावरोध के कारण उसकी मृत्यु हो गयी – मृतक के शरीर पर क्षतियाँ पायी गयीं – भा.द.सं. की धारा 304 भाग II व 330 के अन्तर्गत आरोपों की विरचना के लिए प्रथम दृष्ट्या मामला बनता है – सेशन न्यायाधीश का भा.द.सं. की धारा 304 भाग II के अन्तर्गत आरोप विरचित करने का आदेश पुनःस्थापित किया गया – भा.द.सं. की धारा 330 के अन्तर्गत आरोप विरचित करने का भी निदेश जारी किया गया।

Cases referred :

(2001) 4 SCC 333, (2004) 1 SCC 525, (2005) 1 SCC 568, (1996) 9 SCC 766, (1996) 6 SCC 129, AIR 1980 SC 1780, 2008(1) Scale 86.

J U D G M E N T

The Judgment of the Court was delivered by ALTAMAS KABIR, J. :–This Special Leave Petition and four other Special Leave Petitions have been filed against the judgment and order of the Madhya Pradesh High Court dated 11th September, 2006, whereby the order of the Sessions Judge, Bhopal, framing charges against the accused under Section 304 Part II I.P.C. in Sessions Trial No. 212 of 2005 was set aside and directions were given to frame charge only under Section 323/34 I.P.C. As all the Special Leave Petitions arise

*Cr.A. No.1683/2008

out of the common judgment of the High Court, the same are being heard together. Leave is accordingly granted in all the five Special Leave Petitions (Crl.) Nos. 6010 and 5473 of 2006, filed by Mrs. Indu Jain, No. 2132 of 2007 filed by the State of Madhya Pradesh, No. 2584 and 2588 of 2007 filed by the accused.

2. In order to appreciate the different stands taken by the different appellants in the matter, some relevant facts are reproduced hereinbelow which will have a bearing on the final decision in these appeals.

3. On 14th July, 2004, officers of the Special Police Establishment (Lokayukta), Bhopal, headed by Shri B.P. Singh and Shri Mokham Singh Nain, who are the appellants in the appeals arising out of S.L.P. (Crl) No. 2584 and 2588 of 2007 and accused in the complaint filed by Ms. Indu Jain, the appellant in the appeals arising out of S.L.P. (Crl.) Nos. 6010 of 5473 of 2006, set a trap for one Shri R.K. Jain, Deputy Commissioner, Commercial Tax, Bhopal, and arrested him for taking a bribe of Rs.2,000/- from one of Mr. Chhajed, Tax Consultant, at 5.30 p.m. On 15th July, 2004, prior to 9 a.m. Shri Jain was found unconscious in the bathroom of the office of the Lokayukta, Bhopal, and was taken to Hamidiya Hospital, Bhopal, for treatment. The records of the hospital show that when Shri Jain was brought to the hospital at 9 a.m. on 15th July, 2004, his body had neither any pulse nor respiration and recordable blood pressure and even heart sounds were absent. Though resuscitation measures were undertaken, including cardiac pulmonary resuscitation (C.P.R.), there was little response and Shri Jain was declared dead at 1.30 p.m. on the same day.

4. The Post Mortem examination of the deceased, which was conducted on 15th July, 2004, itself, at about 4 p.m. revealed certain injuries on the body, which included broken ribs, but the cause of death was shown to be on account of asphyxia within six hours of the post mortem examination.

5. On completion of investigation, the investigating agency filed a charge-sheet before the trial court on 12th May, 2004, and on 15th July, 2005, the learned Sessions Judge framed charges against the five accused persons, namely, B.P. Singh, Mokham Singh Nain, Badri Nihale, Ramashish and Silvanus Tirki under Section 304 Part-II I.P.C., but dropped the charge under Section 330 I.P.C.

6. Aggrieved by the framing of charge under Section 304 Part II I.P.C., accused Mokham Singh Nain filed Criminal Revision No. 1203 of 2005, while the other four accused filed Criminal Revision No. 1204 of 2005, before the Madhya Pradesh High Court at Jabalpur. On the other hand, on account of the dropping of charges under Section 330 I.P.C. Mrs. Indu Jain, widow of the deceased, filed Criminal Revision No. 1114 of 2005. All the revisional applications were heard together by the High Court which by its order dated 11th September, 2006, set aside the charge framed by the learned Sessions Judge and directed that charge could only be framed under Section 323/34 I.P.C.

7. As mentioned hereinbefore, these five appeals have been filed against the said judgment and order of the High Court.

8. Appearing in these appeals on behalf of Mrs. Indu Jain, the widow of the deceased, Mr. P.S. Patwalia, learned Senior counsel submitted that the order of the Madhya Pradesh High Court impugned in these appeals, was quite clearly against the Police Report submitted under Section 173(2) of the Code of Criminal Procedure. It was submitted that from the arrest memo of the deceased in connection with Crime No. 97 of 2004 it would be very clear that accused B.P. Singh while arresting the deceased recovered two inhalers from his person, but allowed the deceased to retain them as he was suffering from Asthma. However, during his overnight custody in the office of the Lokayukta, Bhopal, he was kept in a room, which was wholly unsuitable to a person suffering from asthma.

9. Over the condition of the deceased while in the custody of the Special Police Establishment (Lokayukta) who had arrested and detained him in the office of the Lokayukta on 14th July, 2004, and his discovery in an unconscious condition in the morning of 15th July, 2004, a report was lodged by the Station House Officer of Kohefiza Police Station on the basis whereof a First Information Report under Section 330 I.P.C. was registered. In addition to the above, a written report was also made by Shri Akhilesh Jain, brother of the deceased to Kohefiza Police Station in which it was alleged that the accused persons had arrested the deceased and had taken him to an unknown destination from where he was brought to Hamidiya Hospital in a serious condition, and, ultimately, succumbed to his injuries. It was alleged that the accused persons had tortured the deceased on account of which he had died.

10. Mr. Patwalia submitted that once R.K. Jain was declared to be dead, as part of the investigation into the offence complained of, Shri O.P. Dixit, the Senior Scientist of the mobile unit of the District Police Force, made a physical inspection of the room in the office of the Lokayukta where the accused had kept the deceased in custody before his death and submitted a report of his inspection. In his report Shri Dixit categorically mentioned the fact that the condition of the room was not at all suitable for detaining a person suffering from a respiratory disease such as asthma, in custody. He plainly indicated that the room in question was completely unsuitable for such a patient as it was filled with dust and cobwebs and the deceased was treated unhumanly and against the principles of ethical human conduct. Shri Dixit also observed from the report of the Forensic Science Laboratory, that it is evident that the conduct of the accused was one of gross negligence and misdemeanor. It was further observed that for a person who was suffering from asthma, the deceased ought not to have been left alone inside the unhygienic room and at least someone, such as a family member or a friend, should have been allowed to remain present with him. Shri Dixit recommended appropriate action to be taken against the accused for dereliction of duty, which was duly supported by the report of the Forensic Science Laboratory.

11 Mr. Patwalia submitted that having regard to the fact that the accused persons were police officers belonging to the Special Establishment of the Lokayukta and also having regard to the nature of the offence, the investigation of the case was handed over from the local police to the Criminal Investigation Department (CID) and upon completion of the investigation a charge-sheet was submitted before the trial court on 12th May, 2005, and, as mentioned hereinbefore, on perusal of the material on record, the learned Sessions Judge on 15h July, 2005, framed charges against all the five accused under Section 304 Part II IPC but dropped the charge under Section 330 IPC.

12. Mr. Patwalia submitted that when the materials on record clearly indicated that R.K. Jain had died because of deliberate ill-treatment and negligence at the hands of the appellants, while in their custody, the High Court had erred in coming to the conclusion that the said materials did not disclose an offence under Section 330 IPC. Mr. Patwalia submitted that apart from the evidence of physical torture of the deceased, which would be supported by the post-mortem report, the opinion of Dr. Satpathi, who conducted the post-mortem examination is that R.K. Jain's death was on account of asphyxia, namely, oxygen hunger on account of choking. According to Mr. Patwalia the cause of death fitted in with the report submitted by Mr. Dixit on the basis of which the First Information Report came to be recorded.

13. Mr. Patwalia urged that in spite of the evidence available at the stage of framing charge, the High Court turned a blind eye to the physical condition of the deceased and the indifferent manner in which he was treated and kept in custody in the office of the Lokayukta in conditions which triggered the asthmatic attack which ultimately led to the death of R.K. Jain in custody. Mr. Patwalia urged that although sufficient material was available before the High Court for framing charge under Section 304 Part II IPC, along with the charge under Section 330 IPC, the High Court quite erroneously dropped the charge under Section 304 Part II and also Section 330 IPC and observed that only a charge under Section 323/34 IPC had been established under the aforesaid report. Mr. Patwalia submitted that the order of the High court impugned in the appeal was liable to be set aside with a direction to the trial court to consider afresh the framing of charges under Sections 304 Part II and 330 IPC, along with the charge under Section 323/34 IPC.

14. As far as the other appeal filed by Ms. Indu Jain is concerned, the arguments made in this appeal will also cover the points raised in the said appeal.

15. In the appeal filed by the State of Madhya Pradesh, Ms. Vibha Dutta Makhija, learned counsel, contended that this was not only a case for framing of charge under Sections 323 with Section 34 thereof, but this is fit a case where charges ought to have been framed against the accused under Sections 302 and 330 IPC as well. Repeating the manner in which the deceased R.K. Jain had been arrested and thereafter kept in custody of the Special Police Establishment attached to the Lokayukta office, Ms. Makhija reiterated the findings of Mr. Dixit

which pointed to the direct involvement of all the accused persons in the commission of the offence.

16. According to Ms. Makhija the bare facts of the incident which occurred with the arrest of R.K. Jain on 14th July, 2004, establish the fact that Shri Jain died while in the custody of the Special Police Establishment and it was yet to be proved on evidence as to how R.K. Jain died on account of asphyxia when he was detained in the office of the Lokayukta. Ms. Makhija also pointed out that when the deceased had been brought to the Hamidiya Hospital in Bhopal at 9 a.m. on 15th July, 2004, his body did not record any pulse or respiration or blood pressure and there was no heart sound either. Ms. Makhija submitted that although he remained in such condition till he was declared to be dead at 1.30 p.m., there was almost no response from R.K. Jain even after being administered cardiac pulmonary resuscitation. He continued to remain in such condition till he was formally declared to be dead. Ms. Makhija submitted that by keeping the deceased, who suffered from respiratory problems, in a closed room without windows which was clearly uninhabited for a long time on account of the dust and cobwebs collected therein which triggered an asthmatic attack which led to R.K. Jain's death, a clear case of an offence under Sections 302 and 330 IPC had been made out against the appellants. Counsel's submissions were fully supported by the report, which showed six injuries on the person of the deceased. Injury No.1 was a contusion on the scalp. Injury Nos. 2 and 3 were lacerations on the lip and mouth. Injury Nos. 4 and 5 were broken ribs, while injury No.6 was a laceration on the neck of the deceased.

17. Ms. Makhija contended that this being a clear case of custodial death on account of the treatment meted out to the deceased by detaining him in wholly unhygienic conditions completely unfit for a patient of asthma, both the trial court as well as the High Court erred in not framing charge against the appellant and the other accused persons under Section 330 IPC. The matter was further confounded by the order of the High Court quashing the charge against the accused persons under Section 304 Part II IPC.

18. On legal submissions, Ms. Makhija submitted that the opinion of the doctor at the time of framing charges cannot be conclusive and the same would have to be considered at its face value during the trial itself. Ms. Makhija submitted that at the stage of framing charge, the Court is not required to go into a detailed examination of the material filed by the Investigating agency under Section 173 Cr.P.C. At the said stage, the Court, on perusal of the materials before it, is only required to find out whether a prima-facie case is made out to proceed against the accused. Ms. Makhija submitted that it is settled law that the High Court should not ordinarily interfere with the framing of charges by the trial court, unless some glaring injustice is noticed.

19. Ms. Makhija referred to the decision of this Court in *Om Wati (Smt.) and Anr. Vs. State,* [2001 (4) SCC 333] in support of her aforesaid submissions. She also referred to the decision of this Court in *State of Maharashtra vs. Salman Salim Khan,* [2004 (1) SCC 525] wherein this Court cautioned the trial court as well as the High Court regarding arriving at a decision as to the sufficiency or otherwise of the material to frame charge, as the prosecution case gets pre-empted to that extent since during the course of trial, even if the Magistrate comes to a different conclusion, it may not be possible for him to pass orders accordingly. The learned Judges observed that there was limitation to the inherent power of the High Court under Section 482 Cr.P.C. and though it is open to the High Court to quash charges framed by the trial Court the same could not be done by weighing the correctness or sufficiency of the evidence. It was further observed by this Court that it is only at the stage of trial that the truthfulness, sufficiency and acceptability of the evidence, can be adjudged.

20. Ms. Makhija lastly referred to the three-Judge Bench decision of this Court in *State of Orissa vs. Debendra Nath Padhi,* [2005 (1) SCC 568] in which the question decided differently in the case of *Satish Mehra vs. Delhi Administration,* [1996 (9) SCC 766] was referred to. In *Satish Mehra's case*, a two Judge Bench of this Court had decided that at the stage of framing of charge, the trial Judge was competent to look into the material produced on behalf of defence at the time of framing of charge in order to come to a decision as to whether it was at all necessary to frame charges on the material produced on behalf of the prosecution as well as the defence. Answering the reference in the negative, the three-Judge Bench overruled the view expressed in Satish Mehra's case and held that at the said stage of framing charge, the Court was only required to look into the material produced on behalf of the prosecution in deciding whether a particular case was fit to go to trial.

21. Ms. Makhija, while questioning the decision of the learned Sessions Judge to drop charges against the accused persons under Section 330 IPC, submitted that neither the Sessions Court nor the High Court even thought of framing charge under Section 302 IPC against the accused persons.

22. Appearing for the accused in the appeal filed by Indu Jain, who are also the appellants in the appeals arising out of SLP(C) No. 2584 and 2588 of 2007, Mr. K.T.S. Tulsi, learned senior counsel, submitted that the order of the High Court did not call for any interference since the charge-sheet does not disclose the ingredients of the charge framed against the accused persons under Section 323/ 34 IPC. Mr. Tulsi submitted that there is no direct evidence that the accused persons had ever assaulted the deceased and the First Information Report shows that R.K. Jain died due to asphyxia. Referring to the statement of Dr. Satpathi who had examined the deceased, and was also one of the doctors who conducted the Post Mortem examination Mr. Tulsi submitted that the broken ribs and the

laceration marks on both sides of the lower lips were the result of attempts made in the Hospital to resuscitate the deceased It was submitted that the opinion of the Medical Experts and the Post-Mortem Report established that R K Jain died on account of asphyxia and that he had obstructive lung disease which block the airways and his death was, therefore, natural and not on account of any violence while in custody.

23. Mr. Tulsi submitted that apart from the above, Dr. V.K. Sharma, Professor and Head of the Department of Medicine, Gandhi Medical College, Bhopal, whose opinion was sought for by the CID, Police Head Quarters, Bhopal had indicated that the fracture of the ribs could have been caused while external cardiac massage or CPR was being administered to R.K. Jain in an attempt to revive him. Dr. Sharma also stated that the fracture of ribs can also be caused while external cardiac massage, with artificial respiration and chest compression, was being undertaken. He also opined in his Report that a severe attack of asthma could result in the condition in which R.K.Jain was found and such attack could have been triggered by heavy mental tension, dust, cobwebs cold weather or the presence of allergens in the atmosphere and pollution.

24. Mr. Tulsi submitted that in view of the circumstances in which R.K. Jain was arrested and thereafter kept detained in the office of the Lokayukta, the constable who formed part of the raiding party had been suspended for dereliction of duty but was ultimately reinstated, as in the preliminary inquiry the charge of negligence and dereliction of duty was held not to have been proved. Mr. Tulsi referred to the Judgment and order passed by the learned Sessions Judge on 28h July, 2005, while deciding the question as to whether there was sufficient ground for framing charge against them under Section 330, 323/34 and 304(2) Indian Penal Code. Referring to paragraph 14 of the order, Mr. Tulsi pointed out that the learned Sessions Judge had himself held that it could not be definitely said that no cause of death had been indicated in the Post-mortem Report. In fact, on behalf of the Investigating Authorities, a letter was written on 16th July, 2004 to the Director, Gandhi Medical College, Bhopal, asking for information as to whether nature of the injuries on deceased R.K.Jain were simple or grievous in nature or whether in ordinary circumstances, the death of the deceased could have been on account of injuries found on the deceased. The most pertinent question that was asked was as to what was the cause of death. In the reply sent by Dr. Satpathi, Director of the Medical Legal Unit of the Hospital, it was mentioned that the injuries found on the body of the deceased were simple in nature which were not sufficient to cause death. It was stated that death was due to asphyxia. In fact, in the said letter, Dr. Satpathi by way of a footnote indicated that injury Nos. 2,3,4 and 5 on the lips and ribs on both sides of the body had been caused in the Hospital during treatment and it had no relation with the death of R.K. Jain.

25. In support of his aforesaid submission, Mr. Tulsi referred to the well-known

Bhopal Gas Tragedy case, namely, *Keshub Mahindra vs. State of M.P.*, [1996 (6) SCC 129], in which while considering the provisions of Section 299 and 304 Part II IPC, it was observed that the accused must have done an act which caused the death of a person with the knowledge that by such act he would likely to cause death. While considering the width of the powers that could be exercised by the High Court under Section 482 Cr.P.C. in relation to Sections 227 and 228 thereof, it was held that at the stage of framing of charge the Court had no jurisdiction to go into the merits of the allegations, which could be gone into at the time of the trial, but at the same time before any charge could be framed under Section 304 Part II, the materials on record must at least prima-facie show that the accused is guilty of culpable homicide and that the act which had caused the death of the victim had been caused at least with the knowledge that such act was likely to cause death.

26. Mr. Tulsi submitted that though there was no definite conclusion as to the manner in which R.K. Jain had died, at least it was established that he died due to asphyxia which is the consequence of respiratory breathing problems which the deceased suffered from and had nothing to do with an offence under Section 323 IPC under which provision charge had been framed against the accused persons.

27. Mr. S.K. Gambhir, learned senior advocate appearing for the respondent Nos. 5 and 6, while adopting the submissions made by Mr. Tulsi, added that from the sheet of Progress and Treatment given by the Hospital it will be revealed that R.K. Jain was brought to the Hospital at 9 a.m. in a comatose condition and that cardio respiratory resuscitation was started immediately and cardiac activity was regained after 15 or 20 minutes. It was pointed out that the Progress and Treatment Given sheet also indicated that as part of the resuscitation attempts an endotracheal intubation was done, after which the deceased was placed on a mechanical ventilator at about 10.15 a.m. However, inspite of the attempts made to revive R.K.Jain, he ultimately died because of choking of breath caused by respiratory breathing failure. Mr. Gambhir submitted that there was no material on record to indicate that R.K. Jain died a homicidal death so as to attract the provisions of Section 304 IPC. In short, Mr. Gambhir submitted that there was no material before the learned Trial Judge for framing charge under Section 323/34 IPC against the respondent nos. 4, 5 and 6.

28. Relying on the decision of this Court in the case of *Kewal Krishan vs. Suraj Bhan & Anr.*, [AIR 1980 SC 1780] Mr. Gambhir claimed that Section 227 of the Code was meant to prevent prolonged harassment to an accused and if the Judge was not convinced that there was sufficient ground to proceed against the accused, he was required to discharge the accused and to record his reasons for doing so. In the said decision it was observed that at the stage of framing of charge, the Magistrate was not required to weigh the evidence as if he was the trial court. He was only required to see whether the complaint made out a prima

facie case triable by the Court of Session, which would be sufficient for issuing process to the accused and committing them for trial to the Court of Session.

29. Mr. Gambhir concluded his submissions by urging that in the absence of any reliable material regarding the involvement of the respondent Nos. 4, 5 and 6 in respect of the charge under Section 323/34 IPC, the charge framed against the respondents was liable to be quashed.

30. We have carefully considered the submissions made on behalf of the respective parties, having particular regard to the fact that R.K.Jain had died while in the custody of the Officers of the Special Police Establishment (Lokayakuta), Bhopal, in the office of the Lokayukta, Bhopal.

31. It has been sufficiently established that the deceased was a patient of asthma which could cause asphyxia which was ultimately said to be the cause of R.K. Jain's death. It is also clear that notwithstanding his serious respiratory problem, the deceased was kept in a windowless room which was full of dust and cobwebs which are known allergens for triggering an asthma attack, which can be fatal, as in this case. The injuries found on the body of the deceased may have been caused during attempts at resuscitation, but all the said circumstances can only be considered during a proper trial and not on the basis of surmises at the time of framing charge where on the strength of the charge sheet only a prima facie satisfaction about the commission of an offence has to be arrived at by the trial court. Therefore, while rejecting the submissions made by Mr. Tulsi and Mr. Gambhir that there were no materials on record to frame charge against the accused persons even under Section 323/34 IPC, we cannot but observe that on a prima facie view of the matter, there is ground to proceed against the accused persons even under Section 304 Part II IPC. On that score, we are inclined to agree both with Mr. Patwalia and Ms. Makhija that the High Court had erred in quashing the charge framed against the accused persons under Section 304 Part II and observing that in view of the materials on record only a charge under Section 323 could be brought against the accused persons.

32. Although, Ms. Makhija has strenuously urged that charge under Section 302 IPC should also have been framed against the accused persons, we are not inclined to accept the same as at this stage there is little to establish an intention on the part of the accused to willfully cause the death of R.K. Jain.

33. As has been observed in *Kewal Krishan's case* (supra), at the stage of framing of charge, the Court is not required to go into the details of the investigation but to only arrive at a prima facie finding on the materials made available as to whether a charge could be sustained as recommended in the charge sheet. The same view has been subsequently reiterated in *Devendra Padhi's case* (Supra) and in the case of *Bharat Parikh vs. Union of India,* [2008 (1) Scale page 86] wherein the holding of a mini trial at the time of framing of charge has been deprecated.

34. This brings us to the next question as to whether the Trial court as well as the High court was justified in dropping the charge under Section 330 IPC since R.K. Jain's death took place while he was in custody. The important question is whether a prima facie case can be said to have been made out for a charge to be framed under Section 330 IPC. Since the cause of death has been shown to be asphyxia on account of detention of the deceased in unhygienic conditions despite his respiratory problems and the injuries to the ribs and mouth of the deceased could possibly have been caused by the attempts made by the doctor at the Hospital to resuscitate the deceased, who had been brought to the Hospital in a comatose condition, with the body showing no signs of pulse, respiration or blood pressure, prima facie a case is made out for framing of charge under Section 330 IPC. The sheet showing the progress and treatment of the accused on arrival at the Hospital, also corroborates the same and it also mentions the fact that cardiac pulmonary resuscitation was immediately started and the patient was also put on mechanical ventilator as part of the attempts at resuscitation. Apart from indicating that the patient had died of asphyxia, the medical opinion does not give any reason for such asphyxia and even in reply to the queries made on behalf of the investigating authorities the reply received from Dr. Satpathi, as to the cause of death, was that it had occurred due to asphyxia, but as to how it had occurred was under investigation.

35. In this regard, the materials submitted by the Investigating Authority in its Final Report under Section 173 Cr.P.C. does establish the fact that the deceased had been kept in a room which was highly unsuitable for a person suffering from respiratory problems. In fact, as was indicated by Shri O.P. Dixit, the Senior Scientist of the Mobile Unit of the District Police Force the condition of the room where the deceased had been detained was completely unsuitable for a patient of asthma as it was filled with dust and cobwebs which was sufficient to trigger an asthmatic attack which could have caused asphyxia which ultimately led to R.K. Jain's death.

36. We are, therefore, convinced that the appeals filed by Indu Jain and that filed by the State of Madhya Pradesh must be allowed in part. We, accordingly, allow the same and set aside the order of the High Court impugned in these appeals. While restoring the order of the learned Sessions Judge framing charge against the accused persons under Section 304 Part II IPC, we also direct that charges also be framed against the accused persons under Section 330 Indian Penal Code.

37. The three appeals filed by Ms. Indu Jain and the State of Madhya Pradesh are allowed to the aforesaid extent.

38. As far as the appeals arising out of SLP (Crl.) Nos. 2584 and 2588 of 2007 filed by the accused are concerned, the same are dismissed.

Appeal allowed.

I.L.R. [2010] M. P., 11
SUPREME COURT OF INDIA
Before Mr. Justice R.V. Raveendran & Mr. Justice J.M. Panchal
20 February, 2009*

RASIKLAL ... Appellant
Vs.
KISHORE ... Respondent

A. Criminal Procedure Code, 1973 (2 of 1974), Section 436 - *Grant of bail for bailable offence - The right to claim bail granted by S. 436 in a bailable offence is an absolute and indefeasible right - In bailable offences there is no question of discretion in granting bail as the words of S. 436 are imperative - The only choice available to the officer or the court is as between taking a simple recognizance of the accused and demanding security with surety.* (Para 6)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 436 – जमानतीय अपराध में जमानत का दिया जाना – किसी जमानतीय अपराध में धारा 436 द्वारा प्रदत्त जमानत का दावा करने का अधिकार आत्यंतिक और अजेय अधिकार है – जमानतीय अपराधों में जमानत दिये जाने में विवेकाधिकार का कोई प्रश्न नही है क्योंकि धारा 436 के शब्द आज्ञापक हैं – अधिकारी या न्यायालय को केवल अभियुक्त का सामान्य मुचलका लेने और प्रतिभू सहित प्रतिभूति की माँग करने के मध्य विकल्प उपलब्ध है।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 482 & 436 - *Cancellation of bail - A person accused of a bailable offence is entitled to be released on bail pending his trial, but he forfeits his right to be released on bail, if his conduct subsequent to his release is found to be prejudicial to a fair trial - This forfeiture can be made effective by invoking the inherent powers of the High Court u/s. 482.* (Para 7)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 482 व 436 – जमानत का रद्दकरण – जमानतीय अपराध का कोई अभियुक्त व्यक्ति उसका विचारण लम्बित रहने के दौरान जमानत पर छोड़े जाने का हकदार है, किन्तु वह जमानत पर छोड़े जाने के अपने अधिकार को खो देता है, यदि उसके छोड़े जाने के पश्चातवर्ती उसका आचरण ऋजु विचारण पर प्रतिकूल प्रभाव डालने वाला पाया जाता है – यह समपहरण धारा 482 के अन्तर्गत उच्च न्यायालय की अन्तर्निहित शक्तियों का अवलम्ब लेकर प्रभावी किया जा सकता है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 436(2) -*S. 436(2) empowers any Court to refuse bail without prejudice to action u/s 446, where a person fails to comply with the conditions of bail bond - However, bail granted in bailable offence can be cancelled on various grounds (some illustrative grounds are stated in para 8), but cannot be cancelled on the ground that complainant was not heard.* (Para 8)

*Cr.A. No.343/2009

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 436(2) – जहाँ कोई व्यक्ति जमानतपत्र की शर्तों का अनुपालन करने में असफल हो जाता है, वहाँ धारा 436(2) किसी न्यायालय को धारा 446 के अन्तर्गत कार्यवाही पर प्रतिकूल प्रभाव डाले बिना जमानत देने से इंकार करने के लिए सशक्त करती है – तथापि, जमानतीय अपराध में प्रदत्त जमानत विभिन्न आधारों पर रद्द की जा सकती है (कुछ आधारों के दृष्टांत पैरा 8 में बताये गए हैं), किन्तु इस आधार पर रद्द नही की जा सकती कि परिवादी को नही सुना गया था।

D. Natural Justice - *Principle of natural justice is not a 'mantra' to be applied in vacuum in all cases - They are not required to be complied with when it will lead to an empty formality.* (Para 10)

घ. नैसर्गिक न्याय – नैसर्गिक न्याय का सिद्धांत कोई मंत्र नही है जो सभी मामलों में निर्वात् में लागू किया जाए – उनका अनुपालन किया जाना अपेक्षित नही है जबकि वह केवल औपचारिकता मात्र हो।

Cases referred :

(1958) SCR 1226, (1967) 3 SCR 926, JT 2008(2) SC 584, (1996) 3 SCC 364, (2005) 3 SCC 409.

J U D G M E N T

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

2. The appellant is accused in Criminal Complaint No.1604 of 2005 filed in the court of learned Judicial Magistrate First Class, Indore, M.P., for alleged commission of offences punishable under Sections 499 and 500 of the Indian Penal Code and assails the order dated March 24, 2008, rendered by the learned Single Judge of High Court of Madhya Pradesh, Bench at Indore, in Criminal Revision No.1362 of 2006 by which bail granted to the appellant by the learned Judicial Magistrate First Class, Indore, M.P. on December 1, 2006 is cancelled on the ground that the order granting bail was passed by the learned Judicial Magistrate First Class, Indore, without hearing the original complainant and was, therefore, bad for violation of principles of natural justice.

3. It is the case of the respondent that the appellant gave an interview on December 15, 2004 on Star News TV Channel and defamed him. The respondent, therefore, filed a Criminal Complaint No. 1604 of 2005 in the court of learned Judicial Magistrate First Class, Indore, M.P. on January 27, 2005 for alleged commission of offences punishable under Sections 499 and 500 of the Indian Penal Code. The learned Judicial Magistrate examined the respondent on oath as required by Section 200 of the Code of Criminal Procedure, 1973 and issued summons to the appellant for commission of alleged offences under Sections 499 and 500 of the Indian Penal Code vide order dated May 9, 2006. The appellant appeared before the court on November 20, 2006 and submitted an application under Section 317 of the Code of Criminal Procedure, 1973 seeking exemption for personal

appearance along with vakalatnama of his counsel. In the said application prayer for grant of bail was also made. The application was fixed for hearing on December 26, 2006. However, on December 1, 2006 the appellant filed an application mentioning his appearance before the court and to consider his prayer for grant of bail under Section 436 of the Code of Criminal Procedure, 1973 as offences alleged to have been committed by him under Sections 499 and 500 of the Indian Penal Code are bailable. The application was heard on the day on which it was filed. The learned Magistrate noticed that the offences alleged to have been committed by the appellant were bailable. Therefore, the appellant was admitted to bail on his furnishing a surety in the sum of Rs.5,000/- and also furnishing a bond of the same amount. While enlarging the appellant on bail the learned Magistrate imposed a condition on the appellant that he would appear before the court on each date of hearing or else he would be taken into custody and sent to jail. The order dated December 1, 2006 passed by the learned Judicial Magistrate further indicates that in compliance of the direction issued by the court the appellant furnished a bail bond in the sum of Rs.5,000/- and also executed a bond for the said amount and that the bail bonds were accepted by the court after which the appellant was released on bail.

4. The respondent, who is original complainant, filed Criminal Revision No. 1362 of 2006 in the High Court of Madhya Pradesh, Bench at Indore, on December 26, 2006 for cancelling the bail granted to the appellant by the learned Judicial Magistrate First Class, Indore, on the ground that he was not heard and, therefore, the order was violative of principles of natural justice. The learned Single Judge, before whom the revision application was notified for hearing, had issued notice to the appellant but the appellant did not remain present before the High Court. The revision application filed by the respondent was taken up for final disposal on March 24, 2008. The learned Single Judge, by order dated March 24, 2008, has cancelled the bail granted to the appellant by the learned Judicial Magistrate on the ground that the respondent, who was original complainant, was not heard and, therefore, the order granting bail violates the principles of natural justice. After cancelling the bail granted to the appellant the learned Single Judge remitted the matter to the court below with a direction that the matter be taken up according to law between the parties relating to the grant of bail to the appellant. Feeling aggrieved the appellant has invoked appellate jurisdiction of this Court under Article 136 of the Constitution.

5. This Court has heard the learned counsel for the parties and taken into consideration the documents forming part of the appeal.

6. As is evident, the appellant is being tried for alleged commission of offences punishable under Sections 499 and 500 of the Indian Penal Code. Admittedly, both the offences are bailable. The grant of bail to a person accused of bailable offence is governed by the provisions of Section 436 of the Code of Criminal Procedure, 1973. The said section reads as under: -

"436 - **In what cases bail to be taken** - (1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:

Provided that such officer or Court, if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Explanation. - Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 or section 446A.

(2) Notwithstanding anything contained in sub- section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446."

There is no doubt that under Section 436 of the Code of Criminal Procedure a person accused of a bailable offence is entitled to be released on bail pending his trial. As soon as it appears that the accused person is prepared to give bail, the police officer or the court before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the court to be reasonable. It would even be open to the officer or the court to discharge such person on his executing a bond as provided in the Section instead of taking bail from him. The position of persons accused of non-bailable offence is entirely different. The right to claim bail granted by Section 436 of the Code in a bailable offence is an absolute and indefeasible right. In bailable offences there is no question of discretion in granting bail as the words of Section 436 are imperative. The only choice available to the officer or the court is as between taking a simple recognizance of the accused and demanding security with surety. The persons

contemplated by Section 436 cannot be taken into custody unless they are unable or willing to offer bail or to execute personal bonds. There is no manner of doubt that bail in a bailable offence can be claimed by accused as of right and the officer or the court, as the case may be, is bound to release the accused on bail if he is willing to abide by reasonable conditions which may be imposed on him.

7. There is no express provision in the Code prohibiting the court from re-arresting an accused released on bail under Section 436 of the Code. However, the settled judicial trend is that the High Court can cancel the bail bond while exercising inherent powers under Section 482 of the Code. According to this Court a person accused of a bailable offence is entitled to be released on bail pending his trial, but he forfeits his right to be released on bail if his conduct subsequent to his release is found to be prejudicial to a fair trial. And this forfeiture can be made effective by invoking the inherent powers of the High Court under Section 482 of the Code. [See: *Talab Haji Hussain vs. Madhukar Purushottam Mondkar and another* (1958 SCR 1226)] reiterated by a Constitution Bench in *Ratilal Bhanji Mithani v. Asstt. Collector of Customs and Anr.* (1967 (3) SCR 926)].

8. It may be noticed that sub-Section (2) of Section 436 of the 1973 Code empowers any court to refuse bail without prejudice to action under Section 446 where a person fails to comply with the conditions of bail bond giving effect to the view expressed by this Court in the above mentioned case. However, it is well settled that bail granted to an accused with reference to bailable offence can be cancelled only if the accused (1) misuses his liberty by indulging in similar criminal activity, (2) interferes with the course of investigation, (3) attempts to tamper with evidence of witnesses, (4) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (5) attempts to flee to another country, (6) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (7) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. However, a bail granted to a person accused of bailable offence cannot be cancelled on the ground that the complainant was not heard. As mandated by Section 436 of the Code what is to be ascertained by the officer or the court is whether the offence alleged to have been committed is a bailable offence and whether he is ready to give bail as may be directed by the officer or the court. When a police officer releases a person accused of a bailable offence, he is not required to hear the complainant at all. Similarly, a court while exercising powers under Section 436 of the Code is not bound to issue notice to the complainant and hear him.

9. The contention raised by the learned counsel for the respondent on the basis of decision of this Court in *Arun Kumar vs. State of Bihar and another* [JT 2008 (2) SC 584], that the complainant should have been heard by the Magistrate before granting bail to the appellant, cannot be accepted. In the decision relied

upon by the learned counsel for the respondent challenge was to the order passed by a learned Single Judge of the Patna High Court quashing the order passed by the learned Fast Track Court holding that the respondent No. 2 therein was not juvenile and, therefore, there was no need to refer his case to the Juvenile Justice Board for ascertaining his age and then for trial. The High Court was of the view that the prayer was rejected only on the ground that two or three witnesses were examined and though the accused was in possession of school leaving certificate, mark sheet, etc. to show that he was a juvenile, the prayer could not have been rejected. This Court found that the High Court in a very cryptic manner had observed that the application of the accused deserved to be allowed and directed the court below to consider the accused as a juvenile and proceed accordingly. Before this Court it was submitted by the learned counsel for the informant that the documents produced had been analysed by the trial court and it was found at the time of framing charge that he was major without any doubt. The grievance was made on behalf of the informant before this Court that the High Court did not even consider as to how the conclusions of the trial court suffered from any infirmity and merely referring to the stand of the accused and even without analyzing the correctness or otherwise of the observations and conclusions made by the trial court the learned Single Judge came to the conclusion that the accused was a juvenile. This Court concluded that the High Court had failed to notice several relevant factors and no discussion was made as to how the conclusions of the trial court suffered from any infirmity. It was also noticed by this Court that no notice was issued to the appellant before the matter was disposed of. In view of the above position the order impugned in the appeal was set aside by this Court. To say the least, the facts of the present case are quite different from those mentioned in the above reported decision. Therefore the ratio laid down in the said decision cannot be applied to the fact of the instant case.

10. Even if notice had been issued to the respondent before granting bail to the appellant, the respondent could not have pointed out to the court that the appellant had allegedly committed non-bailable offences. As observed earlier, what has to be ascertained by the officer or the court is as to whether the person accused is alleged to have committed bailable offences and if the same is found to be in affirmative, the officer or the court has no other alternative but to release such person on bail if he is ready and willing to abide by reasonable conditions, which may be imposed on him. Having regard to the facts of the case this Court is of the firm opinion that the bail granted to the appellant for alleged commission of bailable offence could not have been cancelled by the High Court on the ground that the complainant was not heard and, thus, principles of natural justice were violated. Principles of natural justice is not a 'mantra' to be applied in vacuum in all cases. The question as to what extent, the principles of natural justice are required to be complied with, will depend upon the facts of the case.

They are not required to be complied with when it will lead to an empty formality (See *State Bank of Patiala vs. S.K. Sharma* (1996 (3) SCC 364) and *Karnataka State Road Transport Corporation vs. S.G. Kotturappa* (2005 (3) SCC 409). The impugned order is, therefore, liable to be set aside.

11. For the foregoing reasons the appeal succeeds. The order dated March 24, 2008, passed by the learned Single Judge of High Court of Madhya Pradesh, Bench at Indore, in Criminal Revision No. 1362 of 2006 cancelling the bail granted to the appellant by the learned Judicial Magistrate is hereby set aside and order dated December 1, 2006, passed by the learned Judicial Magistrate First Class, Indore, M.P., in Criminal Complaint No. 1604 of 2005 is hereby restored.

12. The appeal accordingly stands disposed of.

Appeal disposed of.

I.L.R. [2010] M. P., 17

SUPREME COURT OF INDIA

Before Mr. Justice R.V. Raveendran & Mr. Justice K.S. Radhakrishnan

7 December, 2009*

KAMAL NAYAN MISHRA ... Appellant

Vs.

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

A. **Service Law - Constitution, Article 311 - *Termination without notice or enquiry - A confirmed employee holding a civil post terminated without notice or enquiry on furnishing wrong information in attestation form during the course of employment - Held - Once a probationer is confirmed in the post, his position and status becomes different as he gets the protection of Article 311 - If it is found that the confirmed government servant has given any false information during the course of employment, that will have to be treated as misconduct and punishment can be imposed only after subjecting him to an appropriate disciplinary proceeding as per the relevant service rules.*** (Para 8)

क. सेवा विधि – संविधान, अनुच्छेद 311 – बिना किसी सूचना या जाँच के सेवा समाप्ति – सिविल पद धारण करने वाले एक स्थायी कर्मचारी की सेवा नियोजन के अनुक्रम में अनुप्रमाणन फॉर्म में गलत जानकारी देने पर बिना किसी सूचना या जाँच के समाप्त की गयी – अभिनिर्धारित – जब कोई परिवीक्षाधीन व्यक्ति पद पर स्थायी हो जाता है तब उसका स्तर और प्रास्थिति भिन्न हो जाता है क्योंकि वह अनुच्छेद 311 का संरक्षण प्राप्त कर लेता है – यदि यह पाया जाता है कि किसी स्थायी शासकीय कर्मचारी ने नियोजन के अनुक्रम में काई मिथ्या जानकारी दी

*C.A. No.8317/2009

है, तब उसे कदाचरण माना जायेगा और उसे सुसंगत सेवा नियमों के अनुसार समुचित अनुशासनिक कार्यवाही के अध्यधीन रखने के बाद ही दण्ड अधिरोपित किया जा सकता है।

B. **Service Law - Constitution, Article 311** - *The ratio decidendi of Ram Ratan Yadav's case [(2003) 3 SCC 437] is not applicable in this case - There are several features in this case which distinguish it from Ram Ratan Yadav's case - Discussed.* (Para 9)

ख. सेवा विधि – संविधान, अनुच्छेद 311 – राम रतन यादव के मामले [(2003) 3 SCC 437] के विनिश्चय–आधार इस मामले में लागू किये जाने योग्य नही हैं – इस मामले में कई लक्षण हैं जो इसे राम रतन यादव के मामले से विभेदित करते हैं – विवेचना की गई।

C. **Service Law - Constitution, Article 311** - *In the attestation form, it was a term that an employee could be terminated without notice if he furnishes false informations - Held - Such term may bind a probationer, but not a confirmed government servant - No term in the attestation form nor any consent given by government servant can take away the constitutional safeguard provided to a government servant under Article 311.* (Para 11)

ग. सेवा विधि – संविधान, अनुच्छेद 311 – अनुप्रमाणन फॉर्म में यह निबंधन था कि किसी कर्मचारी की सेवा, यदि वह मिथ्या जानकारी देता है तो बिना किसी सूचना के समाप्त की जा सकती है – अभिनिर्धारित – ऐसा निबंधन परिवीक्षाधीन व्यक्ति को बांध सकता है किन्तु स्थायी शासकीय सेवक को नही – अनुप्रमाणन फार्म का कोई निबंधन या शासकीय सेवक द्वारा दी गई कोई सम्मति शासकीय सेवक को अनुच्छेद 311 के अन्तर्गत दिये गये संवैधानिक संरक्षण से दूर नही ले जा सकती।

Cases referred :

(1983) 2 SCC 217, (2003) 3 SCC 437.

O R D E R

The Order of the Court was delivered by **R.V. RAVEENDRAN, J.** :–Leave granted. Heard the parties.

2. Appellant was appointed as a Peon in the Water Rasources Department (Bansagar Project) in the State of Madhya Pradesh on 24.7.1980. Nearly a decade later, on 22.8.1989, the appellant was charge-sheeted in a criminal case for the offences under sections 148, 324/149, 326/149 and 506 IPC. He was acquitted by judgment dated 9.9.2004 passed by Judicial Magistrate First Class, Rewa, M.P.

3. In the year 1994, the appellant was required to submit an attestation form giving his personal data in regard to his educational qualifications, antecedents etc. He filled up and submitted the said form on 27.10.1994. Column 12 of the said form relevant for our purpose contained three queries. The said queries and appellant's answers thereto are extracted below :

Sl. No.	Query	Answer
12(a)	Have you ever been arrested, prosecuted, kept under detention or bounded down/fined, convicted by a Court of law for any office of debarred/disqualified by any public service commission, from appearing at its examinations/selections or debarred from taking any examinations rusticated by any University or any other educational authority institution ?	No
12(b)	Is any case pending against you in Court of law, University of any other educational, authority/institution at the time of filling up this attestation form ?	No
12(c)	If the answer to 12(a) or 12(b) is 'yes' full particulars of the case, arrest detention, fine, conviction sentence etc. and the nature of the case pending in the Court/ University/ Educational authority, etc. at the time of filling up this or should be given.	No

The form also required the appellant to certify that the information given by him in the said form was correct and that if any information was found to be false or incomplete in any material respect, the appointing authority may terminate him from the service without giving notice or showing cause.

4. The Chief Engineer, Bansagar Project (second respondent), referred the attestation form for verification of particulars. After such verification, the Deputy Inspector General of Police, Special Cell, Bhopal, by letter dated 14.7.1995 informed the second respondent that appellant had furnished wrong information in regard to the queries in column 12 of the attestation form. On receipt of such report, no show cause notice or charge sheet was issued to the appellant. The appellant continued to work. Nearly seven years later, abruptly the second respondent issued an office order dated 7.3.2002 terminating the services of appellant forthwith "for giving wrong information and concealment of facts in attestation form at the time of initial recruitment and therefore unfit for Government service". The appellant challenged his termination A learned Single Judge of the High Court dismissed the writ petition by order dated 11.10.2007, upholding the termination, relying upon the decision of this Court in *Kendriya Vidalaya*

Sangathan v. Ram Ratan Yadav - 2003 (3) SCC 437. The writ appeal filed by the appellant was dismissed on 1.5.2008. Appellant has challenged the said order by this appeal by special leave.

5. The appellant submitted that there was no intentional suppression or misrepresentation in the attestation form. He claims that he has only basic education, that he was given to understand that he should answer the queries in column No. 12 with reference to the position as on the date of his appointment in the year 1980; that he therefore answered truthfully all the three queries in column 12 in the negative; and that he did not realise that clauses (b) and (c) of column 12 required him to state the particulars as on the date of filling up of attestation form. He also contended that being a regular confirmed employee, his services could not have been terminated without an enquiry under the relevant service rules, and the termination is violative of Article 311 of the Constitution of India. On the other hand, the respondents contend that the matter is squarely covered by the decision of this Court in *Ram Ratan Yadav*. The respondents contend that the said decision recognised the right of the employer to terminate any employee without an enquiry, if it is found that he had given false or incorrect information in the personal attestation form. On the contentions urged, two question arise for consideration :

> (i) Whether the ratio decidendi of the decision in *Ram Ratan Yadav* apply to this case? Does it hold that state government could dismiss or remove the holder of a civil post, without any enquiry or opportunity to show cause, once it is found that he has given incorrect/false information in the personal attestation form?
>
> (ii) Whether the termination of the appellant is valid?

Re: Question (i)

6. We may first refer to the context in which the issue was examined in *Ram Ratan Yadav* (supra). Yadav who possessed the degrees of BA, B.Ed. and M.Ed. was appointed as a Physical Education Teacher by the Kendriya Vidyalaya Sangathan vide the appointment order dated 16.12.1997. Clause (4) of the offer of appointment stated that he would be on a probation for a period of two years. Clause(8) of the offer of appointment required him to submit an attestation form, after duly filling it with the required particulars. Clause (9) of the offer of appointment provided that suppression of any information will be considered a major offence for which the punishment may extend to dismissal from service.

6.1) Yadav submitted an attestation form dated 26.6.1998, wherein he answered two of the queries thus :

> "12. Have you ever been prosecuted/kept under detention or bound down/fined, convicted by a court of law for any offence? - 'No';

13. Is any case pending against you in any court of law at the time of filling up this attestation form? - No'."

On the said attestation form being referred for verification, it was found that the information furnished by him was false and that a criminal case under section 323, 341, 294 and 506-B read with section 34 IPC was pending against him. He was therefore terminated from service, by the Sangathan, by memorandum dated 7/8.4.1999, as being unfit for employment. The Tribunal upheld the termination. The High Court set aside his termination on the ground that the criminal case against him was subsequently withdrawn by the Government and the offences alleged did not involve any moral turpitude so as to disqualify him for employment. The said decision was reversed by this Court. This Court held that the purpose of requiring an employee to furnish information under clauses 12 and 13 of the attestation form was to assess his character and antecedents for continuation in service: that suppression of material information and making a false statement in reply to queries (12) and (13) had a clear bearing on the character, conduct and antecedents of a person employed as a teacher in a school; and therefore the employer was justified in terminating his service during the period of probation. This court did not accept Yadav' s claim that he did not understand the contents of the questions which were in English, as it found that the Tribunal had recorded a finding of fact, after examination of the record, that Yadav was highly qualified and was aware of the significance and meaning of the said queries, and had deliberately entered false responses. This court also pointed out that neither the gravity of the criminal offence nor the ultimate acquittal therein was relevant when considering whether a probationer who suppresses a material fact (of his being involved in a criminal case, in the personal information furnished to the employer), is fit to be continued as a probationer.

6.2) Therefore, the ratio decidendi of Ram Ratan Yadav is, where an employee (probationer) is required to give his personal data in an attestation form in connection with his appointment (either at the time of or thereafter), if it is found that the employee had suppressed or given false information in regard to matters which had a bearing on his fitness or suitability to the post, he could be terminated from service during the period of probation without holding any inquiry. The decision dealt with a probationer and not a holder of a civil post, and nowhere laid down a proposition that a confirmed employee holding a civil post under the State, could be terminated from service for furnishing false information in an attestation form, without giving an opportunity to meet the charges against him.

Re: Question (ii)

7. A confirmed government servant is the holder of a civil post entitled to the benefits of the safeguards provided by Article 311 of the Constitution. On the other hand, a probationer does not have any substantive right to hold the post, and

is not entitled to the protection under Article 311. A probationer's services can be dispensed with during the period of probation, or at the end .of the probation period, if his service is found to be unsatisfactory or if he is found to be unfit for appointment. In *Ajit Singh vs. State of Punjab* - 1983 (2) SCC 217, this Court explained why termination of a probationer is permissible without an inquiry:

> "If a servant could not be removed by way of punishment from service unless he is given an opportunity to meet the allegations if any against him which necessitates his removal from service, rules of natural justice postulate an enquiry into the allegations and proof thereof. This developing master servant relationship puts the master on guard. In order that an incompetent or inefficient servant is not foisted upon him because the charge of incompetence or inefficiency is easy to make but difficult to prove, concept of prohibition was devised. To guard against error of human judgment in selecting suitable personnel for service, the new recruit was put on test for a period before he is absorbed in service or gets a right to the post. Period of probation gave a sort of locus pententiae to the employer to observe the work, ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserved a right to dispense with his service without anything more during or at the end of the prescribed period which is styled as period of probation. Viewed from this aspect, the courts held that termination of service of a probationer during or at the end of a period of probation will not ordinarily and by itself be a punishment because the servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to. (See *Purshotam Lal Dhingra v. Union of India* -1958 SCR 828). The period of probation therefore furnishes a valuable opportunity to the master to closely observe the work of the probationer and by the time the period of probation expires to make up his mind whether to retain the servant by absorbing him in regular service or dispense with his service."

8. *Ram Ratan Yadav* (supra) held that the services of a probationer who gave wrong information in regard to material particulars having a bearing on his fitness or suitability for appoinment, can be terminatad without giving any opportunity to show cause against the proposed termination. But once a probationer is confirmed in the post, his position and status becones .different as he gets the protection of Article 311. If it is found that the governnent servant who is holder of a civil post, has given any false information during the course of employment, that will have to be treated as a misconduct, and punishment can be imposed only

after subjecting him to an appropriate disciplinary proceedings as per the relevant service Rules.

9. There are also several other features in this case which distinguish it from Ram Ratan Yadav. First is that Ram Ratan Yadav related to an employee of Kendriya Vidyalaya Sangathan, who did not have the protection of Article 311 of the Constitution of India, whereas in this case we are concerned with a government servant protected by Article 311. Second is that the attestation form in this case, was required to be furnished by the employee, not when he was appointed, but after fourteen years of service. The third is that while action was promptly taken against the probationer, in the case of *Ram Ratan Yadav*, within the period of probation, in this case even after knowing that appellant had furnished wrong information, the respondents did not take any action for seven long years, which indicated that the department proceeded for a long time on the assumption that the wrong information did not call for any disciplinary or punitive action. The belated decision to terminate him, seven years later was unjustified and violative of Article 311.

10. If the appellant had been issued .a charge sheet or a show cause notice he would have had an opportunity to explain the reason for answering the queries in column 12 in the manner he did. He could have explained that he did not understand the queries properly and that he was instructed to furnish the information as on the date of appointment. In fact his contention that he was required to answer the queries in column (12) with reference to the date of his appointment; finds support from the termination order, which says that the appellant was terminated for giving wrong information and concealment of facts in the attestation form at the time of initial recruitment. This clearly implies that he was expected to reply the queries in column 12 with reference to his initial appointment, even though clauses 12(b) and (c) of the form stated that the information should be as on the date of signing of the attestation form. The explanations given by the appellant, would have certainly made a difference to the finding on guilt and the punishment to be imposed. But he could not give the said explanations as there was no show cause notice or enquiry. The termination order is also unsustainable, as the statement therein that the appellant had given wrong information and concealed the facts at the time of initial recruitment, is erroneous.

11. The learned counsel for respondents drew our attention to the Instructions to the Employees in the preamble to the Attestation Form and the undertaking contained in the verification certificate by the employee at the end of the attestation form, which puts him on notice that any false information could result in termination of his service without enquiry. It is contended that as the attestation form stated that an employee could be terminated without notice, if he furnishes false information, the employee is estopped from objecting to termination without notice. The said contention may merit acceptance in the case of a

probationer, but not in the case of a confirmed government servant. No term in the attestation form, nor any consent given by a government servant, can take away the constitutional safeguard provided to a government servant under Article 311 of the Constitution. A seven Judge Bench of this Court held in *Moti Ram Deka v. General Manager, N.E. Frontier Railway,* [1964 (5) SCR 683], observed as follows while negativing a contention that a person who enters service by executing a contract containing a rule contrary to Article 311, with open eyes, cannot be permitted to challenge the validity of the said rule or the contract :

> "In our opinion, this approach may be relevant in dealing with purely commercial cases governed by rules of contract; but it is wholly inappropriate in dealing with a case where the contract or the Rule is alleged to violate a constitutional guarantee afforded by Article 311(2);..... Let us then test this argument by reference to the provision of Art. 311(1). Art. 311(1) provides that no person to whom the said article applies shall be dismissed or removed by an authority subordinate to that by which he was appointed. Can it be suggested that the Railway Administration can enter into a contract with its employees by which authority to dismiss or remove the employees can be delegated to persons other than those contemplated by Art. 311(1) ? The answer to this question is obviously in the negative, and the same answer must be given to the contention that as a result of the contract which embodies the impugned Rules, the termination of the railway servant's services would not attract the provisions of Art. 311(2), though, in law, it amounts to removal."

12. We also find from an examination of the terms of the attestation form that termination without notice or inquiry was contemplated only in the context of furnishing false information in and around the time of the appointment. Note (1) of the preamble warns that "the furnishing of false information or suppression of any factual information. in the attestation form would be a disqualification and is likely to render the candidate unfit for employment. Similarly the certificate at the end of the attestation form states that "I am not aware of any circumstances which might impair my fitness for employmant under government. I agree that if the above information is found false or incomplete in any material respect, the appointing authority will have a right to terminate my services without giving notice or showing cause." Be that as it may.

13. The termination of appellant without an inquiry or hearing was illegal and invalid. In the normal course, we would have set aside the termination and directed reinstatement with consequential benefits., reserving liberty to the employer to initiate disciplinary proceedings. But the peculiar facts of this case

require us to adopt a slightly difference approach to do complete justice between the parties. We have already pointed out that there are clear indications that the appellant was bonafide under the impression that he was required to give the particulars sought in column (12) of the form with reference to the date of his appointment. Further, the entire matter relates to an attestation form given in 1994 and appellant has already been out of service for more than seven years on account of the illegal termination from service without inquiry on 7.3.2002. We are therefore of the view that interests of Justice would be served if the appellant is reinstated with continuity of service and other consequential benefits, dispensing with any further disciplinary action. The appellant will not entitled to any salary for the period 7.3.2002 till today.

14. We accordingly allow this appeal, set aside the Judgments of the learned Single Judge and the Division Bench. The writ petition filed by the appellant before the High Court is allowed, setting aside the termination order dated 7.3.2002. Respondents are directed to reinstate the appellant with continuity of service and other consequential reliefs (except salary for the period 7.3.2002 till date).

Appeal allowed.

I.L.R. [2010] M. P., 25
WRIT APPEAL
Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice S. Samvatsar
31 July, 2009*

ATMA RAM SHARMA ... Appellant
Vs.
STATE OF M.P. & anr. ... Respondents

A. **Service Law - Police Regulations, M.P., Regulation 70-A -** ***Out of turn promotion - Relevant date - Appellant was given out of turn promotion in 1997 for his exemplary gallantry act in 1992 - Petition filed that he should be given promotion from the date of incident - Single Judge held that there is no provision in Regulation 70-A that out of turn promotion is to be given w.e.f. the date of the incident - Writ Appeal - Held - D.B. affirmed the judgment - Writ Appeal dismissed.*** (Para 5)

क. सेवा विधि – पुलिस विनियम, म.प्र., विनियम 70–ए – बिना पारी पदोन्नति – सुसंगत तारीख – अपीलार्थी को उसके 1992 के अनुकरणीय वीरतापूर्ण कार्य के लिए 1997 में बिना पारी पदोन्नति दी गई – याचिका पेश की गई कि उसे घटना की तारीख से पदोन्नति दी जानी चाहिए – एकल न्यायाधीश ने अभिनिर्धारित किया कि विनियम 70–ए में कोई उपबंध नही है कि बिना पारी पदोन्नति घटना की तारीख से दी जानी चाहिए – रिट अपील – अभिनिर्धारित – खण्ड न्यायपीठ ने निर्णय की पुष्टि की – रिट अपील खारिज।

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*W.A. No.229/2009 (Gwalior)

ATMA RAM SHARMA Vs. STATE OF M. P.

B. Service Law - *Delay and laches - Appellant was given out of turn promotion in 1997 for his exemplary gallantry act in 1992 - Held - Appellant had approached High Court after lot of delay - If the appellant is given promotion w.e.f. 07.09.1992, then all those officers who were promoted between 1992 to 1997 would be adversely affected - Single Judge rightly dismissed the writ petition on the ground of delay & laches.* (Para 7)

ख. सेवा विधि – विलम्ब और उपेक्षा – अपीलार्थी को उसके 1992 के अनुकरणीय वीरतापूर्ण कार्य के लिए 1997 में बिना पारी पदोन्नति दी गई – अभिनिर्धारित – अपीलार्थी ने काफी विलम्ब बाद उच्च न्यायालय से निवेदन किया था – यदि अपीलार्थी को 07.09.1992 से पदोन्नति दी जाती है तब वे सभी अधिकारी जो 1992 से 1997 के मध्य पदोन्नत किये गये, प्रतिकूल रूप से प्रभावित होंगे – एकल न्यायाधीश ने रिट याचिका विलम्ब और उपेक्षा के आधार पर उचित रूप से खारिज की।

Cases referred :

(2008) 10 SCC 115, (2008) 1 MPLJ 320.

D.K. Katare, for the appellant.

Vivek Khedkar, for the respondents/State.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE** :–This is an appeal filed under Section 2 (1) of the Madhya Pradesh Uccha Nyayalaya (Khand Nyay Peeth Ko Appeal') Adhiniyam, 2005 against the order dated 29/4/2009 passed by learned Single Judge of this Court in Writ Petition No. 1679/2009(s).

2. The facts relevant for disposal of this appeal briefly are that the appellant was selected: and appointed on the post of Sub-inspector, Police on 1/6/1983.0n 7/9/1992, when the appellant was posted as S.H.O. (P), Police Station Bhander, Tehsil Picchore, District Shivpuri; he apprehended a number of accused persons and controlled law and order situation with lot of courage and in the incident he suffered several injuries because of pelting of stones and bricks by a crowd. For his exemplary gallantry act, he was recommended and awarded police medal. His case was then recommended for out of turn promotion under Regulation 70-A of the Madhya Pradesh Police Regulations. Thereafter, he was promoted out of turn to the post of Inspector with effect from 31/12/1997 i.e. the date on which he joined in the promoted post. The appellant then filed a representation saying that he should have been given the promotion to the post of Inspector with retrospective effect i.e. with effect from 7/9/1992, when the incident took place and the appellant displayed his extraordinary courage, but by order dated 18/2/2009, his representation was rejected by the Government. The appellant then filed writ petition No. 1679/ 09 (s) before this Court, but by impugned order dated 29/4/2009, the learned Single Judge has dismissed the writ petition. Aggrieved, the appellant has filed this appeal.

3. Shri Katare, learned counsel for the appellant submitted that since the incident in which the appellant displayed extraordinary courage took place on 7/9/

1992, he should have been given out of turn promotion under Regulation 70-A of Madhya Pradesh Police Regulations with effect from 7/9/1992. He submitted that others have been given the benefit of out of turn promotions from the date of the incident, but the appellant has been denied out of turn promotion from the date of incident. He cited a Division Bench judgment of this Court in *State of M.P. and others vs. Mahendra Kumar Sharma,* 2008 (1)M.P.L.J. 320 for the proposition that the Court can in appropriate cases direct the promotion with retrospective effect.

4. We have perused the impugned order passed by learned Single Judge and we find that the learned Single Judge has examined the provision of Regulation 70-A of the Madhya Pradesh Police Regulations and has held that Regulation 70-A does not state that out of turn promotion has to be granted from the date of the incident in which the Constable or Police Officer rendered any meritorious or distinguished service.

5. Regulation 70-A of the Madhya Pradesh Police Regulation is quoted hereinbelow:-

> "70-A. Notwithstanding anything contained in Regulation 70, a Constable may be promoted to the rank of Head Constable by the Superintendent of Police with the prior approval of the Director General of Police .and a Head Constable to the rank of Assistant Sub-Inspector by the Deputy Inspector General of Police with the Prior; approval of the Director General of Police if he has distinguished himselfin antidacoity operations, law and order situations or shooting competitions or in some other field of duty or who has been awarded the President's Police Medal for Gallantry or for meritorious/distinguished services, if he considers him suitable for promotion. Similarly the Inspector General of Police may promote an Assistant Sub-Inspector to the rank of Sub-Inspector and a Sub-Inspector to the rank of an Inspector on similar grounds it found suitable for promotion and subject to the prior approval of the Director General of Police. The number of Officers promoted under this Regulation shall not exceed 10 per cent."

On a reading of aforesaid Regulation 70-A, we do not find any provision therein that out of turn promotion is to be given with effect from the date of the incident in which a Constable or a Police Officer displayed outstanding courage or distinguished service in course of his duties. Hence, the view taken by the learned Single Judge that Regulation 70-A does not provide for out of turn promotion from the date of incident is absolutely correct.

6. We further find from the impugned order that the learned Single Judge has referred to the judgment of the Supreme Court in *C. Jacob vs. Director of*

Geology and Mining and another, (2008)10 SCC 115 in which it has been held that while dealing with the question of delay and laches in service matters, the Court should not grant relief to a person who has approached the Court after two decades of termination and has deprecated relief for consideration of such stale claims. The learned Single Judge thereafter has held that the appellant had approached this Court after lot of delay and therefore is not entitled to seniority from the date of incident and has accordingly dismissed the writ petition.

7. In our view, the approach of learned Single Judge on the question of delay is correct. If the appellant is given promotion with effect from 7/9/1992 when the incident took place in which he has displayed extraordinary courage, then all those officers who were promoted between 1992 to 1997 would be adversely affected as they will become junior to the appellant. The delay on the part of the appellant in approaching this Court was therefore fatal to the writ petition and the learned Single Judge has rightly dismissed the writ petition on the ground of delay and laches.

8. In the judgment of the Division Bench of this Court in *State of M.P. and others vs. Mahendra Kumar Sharma* (supra) cited by Shri Katare, we find that in the facts of that case, the Screening Committee which considered the case of *Mahendra Kumar Sharma* for out of turn promotion had turned down his case for out of turn promotion on 27/5/2003 and the learned Single Judge before whom, *Mahendra Kumar Sharma* had filed the writ petition took the view that the Screening Committee ought to have recommended the case of *Mahendra Kumar Sharma* for out of turn promotion with effect from 27/5/2003 and the Division Bench only upheld the view taken by the learned Single Judge in that case. Therefore, neither the learned Single Judge nor the Division Bench has taken a view that *Mahendra Kumar Sharma,* who was entitled to promotion with effect from 1/12/2002 when Mahendra Kumar Sharma participated in the anti dacoity operation and displayed extraordinary courage. The Division Bench judgment of this Court in *State of M.P. and others vs. Mahendra Kumar Sharma* (supra) is, therefore, of no assistance to the appellant.

9. For the aforesaid reasons, we are not inclined to admit this appeal and we accordingly dismiss the same.

Appeal dismissed.

I.L.R. [2010] M. P., 29

WRIT APPEAL

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

27 August, 2009*

SUNIL KUMAR SAXENA ... Appellant

Vs.

HOLY CROSS ASHRAM HIGHER SECONDARY SCHOOL, DATIA & ors. ...Respondents

A. Constitution, Articles 226 & 227 - *Termination of employee of an unaided educational institution - Action challenged in W.P. - Held - W.P. is maintainable against unaided educational institutions if element of public law is involved - Grievance of employee is personal in nature and therefore, element of public law is not involved - W.P. not maintainable.* (Paras 22 & 23)

क. संविधान, अनुच्छेद 226 व 227 – सहायता न पाने वाली शैक्षणिक संस्था के कर्मचारी की सेवा समाप्ति – कृत्य को रिट याचिका में चुनौती – अभिनिर्धारित – सहायता न पाने वाली शैक्षणिक संस्था के विरुद्ध रिट याचिका पोषणीय है यदि लोक विधि का कोई तत्व अन्तर्ग्रस्त हो – कर्मचारी की शिकायत की प्रकृति व्यक्तिगत है और इसलिए लोक विधि का तत्व अन्तर्ग्रस्त नही है – रिट याचिका पोषणीय नही।

B. Constitution, Article 12 - *Mere violation of rules by any citizen or person will not include him in the definition of Article 12 - If a person violates any particular law, it will not mean that he will be amenable to writ jurisdiction under Article 226/227.* (Para 24)

ख. संविधान, अनुच्छेद 12 – किसी नागरिक या व्यक्ति द्वारा नियमों का केवल उल्लंघन उसे अनुच्छेद 12 की परिभाषा में सम्मिलित नही करेगा – यदि कोई व्यक्ति किसी विशिष्ट विधि का उल्लंघन करता है तो इसका यह अर्थ नही होगा कि वह अनुच्छेद 226/227 के अन्तर्गत रिट अधिकारिता के अध्यधीन होगा।

Cases referred :

AIR 1989 SC 341, 1999(1) MPLJ 23, AIR 1984 SC 1110, T*eresion Carmel Education Society vs. Shrimati Nirmala Gangajaliwale* [W.A. No.167/2006 decided on 15.05.2008 at Gwalior], *Sandeep Kumar Mishra vs. State of M.P.* [W.P. No.1176/2004(S) decided on 06.09.2009 at Gwalior], AIR 2003 SC 355, AIR 2005 SC 3226, (2006) 7 SCC 680, (1997) 3 SCC 571, (2005) 4 SCC 649, C.A. No.8783/2003 decided on 19.07.2007.

V.K. Bhardwaj with *Anand Bhardwaj,* for the appellant.
K.N. Gupta with *Vijay Sundaram,* for the respondent No.1.
Vivek Khedkar, G.A., for the respondents/State.

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*W.A. No.138/2009 (Gwalior)

J U D G M E N T

The Judgment of the Court was delivered by **S. Samvatsar, J.** :–This writ appeal is filed by the petitioner assailing order dated 25/2/2009 passed by learned single Judge of this Court in Writ Petition No.2837/08 (s) whereby the writ petition filed by the present appellant stood dismissed on the ground that the writ petition was not maintainable.

2. Brief facts of the case are that the appellant approached this court stating that he was appointed as a direct recruit with respondent No.1 Holy Cross Ashram Higher Secondary School, Datia as a lecturer (Chemistry) on 1/2/2005 and since then he was imparting education to the students of Classes X to XII. It is alleged that the respondent school is affiliated to Board of Secondary Education, Madhya Pradesh, Bhopal and is governed by the provisions of Madhya Pradesh Madhyamik Shiksha Adhiniyam, 1965. On 4/2/2008, the appellant applied to the respondent No.1 institution for grant of experience certificate. The respondent institution issued a certificate showing the designation of the appellant as Assistant Teacher (Science) on 6/2/2008. Appellant protested against the same on which the petitioner was orally asked to resign and is services were dispensed with by an oral order. Hence, he approached this Court by filing a writ petition under Articles 226/227 of the Constitution.

3. Respondent institution, on notice in the writ petition, filed its short reply raising a plea that the respondent school is an unaided institution and is, therefore, not amenable to writ jurisdiction under Article 226 of the Constitution. It was contended by the respondent that the respondent institution is a minority institution and does not fall within the definition of the "State" as defined in Article 12 of the Constitution of India.

4. The learned writ court held that unaided educational institutions are amenable to writ jurisdiction of this Court only if element of public law is involved, hence, the writ petition filed by the petitioner is not maintainable. The learned writ court, therefore dismissed the writ petition. Hence, this appeal.

5. Shri V.K.Bhardwaj, learned senior advocate with Shri Anand Bhardwaj, appearing on behalf of the appellant, contended that the learned writ court has committed error in holding respondent institution is not a "State" within the meaning of Article 12 of the Constitution of India. He contended that the respondent is governed by statutory rules namely Madhya Pradesh Madhyamik Shiksha Adhiniyam, 1965 (herein after, referred to as "Adhiniyam"). He invited attention of this Court to Section 28 (2) (d) of the Adhiniyam which gives powers to the Board to make regulations. Board is defined in 2(a) of the Adhiniyam and means the Board of Secondary Education established under section 3. Clause (d) of Section 28(2) of the Adhiniyam gives powers to the Board to make regulations imposing conditions of recognition of institutions for purposes of admission to the

privileges of the Board, the qualification and condition of service of teachers and framing of a School Code to ensure a minimum standard of efficient and uniform management of such institutions. Thus, according to Shri Bhardwaj, it is the statutory duty of the Board of Secondary Education to lay down qualifications and conditions of service of teachers and frame a School Code to ensure minimum standard of education.

6. Counsel for the appellant has also invited attention of this Court to Regulations 70,71 and 78 framed under the Adhiniyam. Regulation 70 framed under the Adhiniyam provides that the Regulations shall apply to all non-Government educational institutions. Regulation 71 provides for service conditions of all Principals, Headmasters, Lecturers, and teachers, except those appointed temporarily for a period of less than one year. Regulation 78 provides that managing committee of the institution shall not terminate the service or reduce the pay of any teacher or lecturer appointed on a written contract without holding a full enquiry into the charges against him.

7. Thus, according to Shri Bhardwaj under this regulation, services of the present appellant cannot be terminated and his services are protected by virtue of Regulation 78. He contended that as there are statutory rules governing the service conditions of the appellant which are applicable to the respondent institution, it cannot be said that the respondent institution is not covered by Article 12 of the Constitution of India.

8. To support the contention, learned counsel for the appellant placed reliance on a decision of the Apex Court in the case of *Vidya Dhar Pandey vs. Vidyut Grij Siksha Samiti and others,* AIR 1989 SC 341. In that case, the institution was held to be amenable to writ jurisdiction of the High Court under Article 226/ 227 of the Constitution of India. However, from perusal of the said judgment, it appears that in that case, the school was 100 percent aided by the State Government while in the case in hand, the respondent institution is not receiving any aid. Therefore, aforesaid judgment is quite distinguishable on that ground.

9. Another judgment relied upon by the learned counsel for the appellant is *Neeti Bhan vs. Miss Hill Education Society, Lashkar,* 1999 (1) MPLJ 23. In that case, this Court entered the writ petition by holding that the teachers appointed in an unaided recognized school are entitled to statutory protection in regard to security of tenure; such teachers cannot arbitrarily be subjected to rule of "hire and fire". In the aforesaid judgment, of course, single Bench of this Court has held that teachers of an unaided recognised school are entitled to protection and the said institution is amenable to writ jurisdiction.

10. Next judgment relied upon by the learned counsel for the appellant is *Indra Pal Gupta vs. The Managing Committee, Model Inter College, Thora,* AIR 1984 SC 1110. From perusal of the facts of the said case, it is not clear whether

the institution I.e. Model Inter College was an aided institution or not or was a private institution and the question about maintainability of the writ petition against unaided institution was not considered by the Apex Court in that case.

11. Learned counsel for the appellant then relied upon an unreported Division Bench decision of this Court in the case of *The Teresion Carmel Education Society vs. Shrimati Nirmala Gangajaliwale* (W.A. No. 167 of 2006 decided on 15/5/2008 at Gwalior). In that case, the Division Bench has held that an unaided institution is amenable to writ jurisdiction of the High Court relying upon Apex Court judgment in the case of *K. Krishnamacharyulu vs. Sir Venkateshwara Hindu College of Engineering and another* (1997) 3 SCC 571 by holding that element of public duty is present in retiring a teacher at the age of 58 years when the age of retirement of a teacher is 60 years. Special Leave Petition (Civil) No.20 17-20418 was preferred by the institution against the judgment of this Court, which stood dismissed by the Apex Court vide order dated 29/8/2008 leaving the question, whether writ was maintainable against an unaided institution not receiving grant-in-aid, open.

12. In another unreported decision of this Court in the case of *Sandeep Kumar Mishra vs. State of M.P.* (W.P).No.1176/04 (s) decided on 6/9/2007 at Gwalior) single Bench of this Court had entertained a writ petition filed by the employee challenging his termination order in view of the provisions of Madhya Pradesh, Ashaskiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmachariyon Ke Vetano Ka Sandaya) Adhiniyam, 1978. Having perused the facts of that case, it is clear that in that case, the institution was getting grant-in-aid from the State Government and therefore, the provisions of the Adhiniyam were applicable. Said Adhiniyam applies only to aided institutions.

13. Another judgment relied upon by the learned counsel for the appellant is in the case of TMA *Pai Foundation vs. State of Karnataka,* AIR 2003 SC 355. In para 64 of the aforesaid judgment, the Apex Court has laid down that a teacher or member of staff of an educational institution should go to civil court for the purpose of seeking redressal is not in the interest of general education. The dispute between the management and the staff of educational institution must be decided speedily and without the excessive incurring of costs. It would, therefore, be appropriate that an educational tribunal be set up in each district in a State. Thus, in the aforesaid judgment, the Apex Court was not considering the case where a terminated employee has approached the High Court for setting aside his termination order.

14. Replying to the arguments raised by the learned senior advocate for the appellant, Shri K.N.Gupta, learned Senior Advocate appearing for the respondent institution has contended that the respondent institution is a minority institution and has protection under Article 30 of the Constitution of India which provides

that a minority institution has right to establish and administer educational institutions of their choice. He contended that since the minority institutions have choice of establishing institutions, therefore, rules framed by the State Government are not applicable.

15. The argument raised by the learned counsel for the respondent institution cannot be accepted because the law is framed by the State Government that Adhiniyam of 1965 applies to all school imparting secondary education. Under Article 30 of the Constitution only protection which is provided to a minority institution is that their status of shall not be affected and they have right to establish and administer educational institutions of their choice. However, it does not mean that they are not bound by any law and they are free to adopt the policy of "hire and fire". Minority institutions cannot violate the provisions of Articles 14 and 16 of the Constitution of India. They cannot be permitted to act arbitrarily in any manner.

16. Learned Senior Advocate for the respondent institution then relied upon a decision of the Apex Court in the case of *P.A.Inamdar vs. State of Maharashtra,* AIR 2005 SC 3226. In paragraph 94 of the said judgment, the Apex Court has held that the right to establish an educational institution for charity or for profit, being an occupation, is protected by Article 19(1) (g) of the Constitution, notwithstanding the fact that the right of a minority to establish and administer an educational institution would be protected by Article 19 (1)(g), yet the Founding Father of the Constitution felt the need of enacting Article 30. The reasons are too obvious to require elaboration. Article 30(1) is intended to instill confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institution of their choice. Article 30(1) though styled as a right, is more in the nature of protection for minorities. But for Article 30 an educational institution even though based on religion or language, could have been controlled or regulated by law enacted under clause (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious or linguistic minorities are concerned, educational institutions of their choice will enjoy protection from such legislation. However, such institutions cannot be discriminated against by the State solely on account of their being minority institutions. The minorities being numerically less qua non minorities, may not be able to protect their religion or language and such cultural values and their educational institutions will be protected under Article 30. Thus, as per the aforesaid judgment, the object of Article 30 of the Constitution is to give protection to minority institutions to protect their religion, language and culture. In paragraph 106 of the said judgment, the Apex Court has further held that the State may prescribe reasonable regulations to ensure the excellence of the educational institutions to be granted aid or to be recognised. To wit, it is open to the State to lay down conditions for recognition such as, an institution must have a particular amount of funds or properties or number of students or standard of education and so on.

17. Thus, the judgment in the case of *P.A.Inamdar* (supra) lays down that the State Government is free to frame regulations for controlling the educational institutions run by minorities.

18. In the case of *Sushmita Basu vs. Ballygunge Siksha Samity and others,* (2006) 7 SCC 680 the Apex Court has laid down that writ petition will not lie against unaided institutions for implementing the recommendations of pay commission with retrospective effect in absence of any statutory provisions directing private unaided institutions to implement the recommendations. In judicial review, the High Court cannot direct a private school, recognized and unaided, to implement the recommendations of the pay commission. Thus, the judgment in the case of Sushmita Basu is quite distinguishable.

19. In the case of *K. Krishnamacharyulu and others vs. Sri Venkateshwara Hindu College of Engineering and another,* (1997) 3 SCC 571, the Apex Court has held that writ petition against an unaided private institution is maintainable. In that case, the Apex Court has held that if element of public interest is involved then writ petition against private educational institution can be heard.

20. In the case of *Zee Telefilms Ltd vs. Union of India and others,* (2005) 4 SCC 649, the Apex Court was examining the question whether Cricket Control Board is a "State" within the meaning of Article 12. Hence, the said judgment is also distinguishable on facts.

21. The last judgment relied upon by the learned counsel for the appellant is *S.K.Varshney vs. Principal, Our Lady of Fatima H.S.S. & ors* (Civil Appeal No8783/03 decided on 19th July, 2007). In that case, a writ petition was filed against termination of an employee. Writ petition filed by the employee was dismissed by the High Court holding that no writ would lie against unaided private institution as also that no element of public law is involved in the matter.

22. Thus, the law laid down by the Apex Court in the cases of *K. Krishnamacharyulu, Sushmita Basu and S.K.Varshney* (supra) is that writ petition against an unaided educational institution is maintainable provided that element of public law is involved. The Apex Court in the case of *S.K.Varshney* (supra) has laid down that in case of termination, no public law is involved as the grievance of the petitioner is personal in nature.

23. In such circumstances, we hold that no writ petition is maintainable against an unaided educational institution; same will lie if element of public law is involved. In a case of termination of an employee the grievance is personal in nature and therefore, element of public law is not involved.

24. Contention of Shri Bhardwaj, learned Senior Advocate for the appellant that there are statutory rules, i.e. the Adhinivam and Regulations framed thereunder and its violation is concerned, this ground also of no help to the appellant because mere violation of rules by any citizen or person will not include him in the definition

of Article 12 of the Constitution of India. If a person violates any particular law, it will not mean that he will be amenable to writ jurisdiction under Article 226/227 of the Constitution of India.

25. Hence, the learned writ court has rightly dismissed the writ petition which does not call for any interference in this writ appeal.

26. Resultantly, writ appeal has no merit and is dismissed.

Appeal dismissed.

I.L.R. [2010] M. P., 35
WRIT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta
14 May, 2009*

TABASSUM BANO (SMT.) ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Constitution, Article 226 - *Writ of Habeas Corpus - Custody lawful or unlawful - Petitioner gave birth to a child soon after death of her husband - Doctor after having dialogue with elder sister of petitioner gave child to resp. Nos. 3 & 4 - Since then they are bringing up the child - Resp. No. 3 & 4 are now not returning the child - Held - It could not be said that child was not given with the consent of petitioner - Child attending the school and is mentally alert - No material that child was taken by fraud or force - Child not in unlawful custody - Petition dismissed.* (Paras 44 to 46)

क. संविधान, अनुच्छेद 226 – बंदी प्रत्यक्षीकरण की रिट – अभिरक्षा वैधानिक या अवैधानिक – याची ने अपने पति की मृत्यु के तुरन्त बाद एक शिशु को जन्म दिया – चिकित्सक ने याची की बड़ी बहन से बात करने के बाद प्रत्यर्थी क्र. 3 व 4 को शिशु दिया – तब से वे शिशु का पालन–पोषण कर रहे हैं – प्रत्यर्थी क्र. 3 व 4 अब शिशु को नही लौटा रहे हैं – अभिनिर्धारित – यह नही कहा जा सकता कि शिशु को याची की सम्मति से नही दिया गया – शिशु स्कूल जाती है और मानसिक रूप से सतर्क है – कोई सामग्री नही कि शिशु को कपट या बल से लिया गया था – शिशु अवैधानिक अभिरक्षा में नही – याचिका खारिज।

B. Constitution, Article 226 - *Writ of Habeas Corpus - Scope - Court is not prevented from holding enquiry into facts - However, full scale trial is not appropriate in such proceedings* (Para 46)

ख. संविधान, अनुच्छेद 226 – बंदी प्रत्यक्षीकरण की रिट – विस्तार – न्यायालय तथ्यों की जाँच करने से निवारित नही है तथापि ऐसी कार्यवाहियों में पूर्ण पैमाने का विचारण समुचित नही है।

C. Constitution, Article 226 - *Writ of Habeas Corpus - Question*

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*W.P. No.10661/2008 (Jabalpur)

of custodian or guardian of the child need not be decided in these proceedings. (Para 47)

ग. संविधान, अनुच्छेद 226 – बंदी प्रत्यक्षीकरण की रिट – इन कार्यवाहियों में शिशु के अभिरक्षक या संरक्षक के प्रश्न का विनिश्चय नही करना चाहिए।

Cases referred :

AIR 1960 SC 93, AIR 1986 MP 221, 1977(II) MPWN 79, 2005(3) MPLJ 319, AIR 1964 SC 1625, AIR 1969 MP 23, AIR 1971 MP 235, AIR 1982 SC 792, AIR 1987 SC 3, (2000) 10 SCC 333, AIR 2002 Ker 16, (1999) 8 SCC 525, (2008) 9 SCC 413, AIR 1985 All 29, AIR 1973 SC 2090, (2001) 5 SCC 247, AIR 2008 SC 2262, AIR 2009 SC 557, AIR 1983 AP 257, AIR 1953 Cal 339.

Sanjay Agrawal, for the petitioner.

Rajendra Tiwari with *Jayant Nikhra & R.K. Tripathi,* for the respondent Nos.3 & 4.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–The expose' of the factual matrix has its own unconventional singularity and does manifest special individual characteristics necessitating a keen scrutiny of the nuances of law relating to a writ of habeas corpus on one hand in relation to a claim pertaining to the custody of the female child by the petitioner on the substratum that she is the natural mother and hence, has the absolute right to have the custody and the private respondents have no legal right in the remotest sense to advance a claim and on the other, the negation of the same by the respondents 3 and 4 on the fulcrum that there is no illegal detention and further on the sub-structure that regaining of custody by the petitioner is not a routine matter bereft of consideration of the welfare of the child which is paramount and is also to be taken note of in a writ of this nature.

2. The facts which are imperative to be stated are that the petitioner had entered into wedlock with one Usman Mansuri who died in the year 2004. After expiration of four months, she gave birth to a female child on 06.10.2004 at Orai in the clinic of one Dr.Sandhya Gupta. A birth certificate in that regard has been brought on record as Annenxure-P-1. A further document, namely, 'Jachcha Bachcha Raksha' card has also been brought on record as Annexure-P-2. Due to the death of her husband, the petitioner suffered from depression and in such a situation Dr.Sandhya Gupta, after having dialogue with the elder sister of the petitioner, Zarina Bano, gave the custody of the child to the respondent No.3 with an understanding that as soon as the petitioner would recover the female would be returned to the petitioner. It is putforth that the respondent No.3 is the friend of one Manoj Jain who is the brother of Dr.Sandhya Gupta and that is how he came into the picture. Zarina Bano, as setforth, had handed over the child, Ku.Alia, to the respondent no.3 with an understanding that she would be given back to her

younger sister as soon as she recovered from her illness. After recovering from illness the petitioner demanded her child to be given back to her from the respondent No.3 who informed that she was living with the respondent No.4 at Yadgar Chowk, Cantt. Sadar, Jabalpur and asked for the child but the respondent no.4 refused to part with the child. The aforesaid circumstances led her to file an application under Section 98 of the Code of Criminal Procedure before the Sub Divisional Magistrate, Jabalpur who, after recording certain statements, directed restoration of the child to the petitioner by order dated 29.7.2008. Being dissatisfied with the said order, the petitioner preferred a revision before the learned Sessions Judge, Jabalpur who set-aside the order as per Annexure-P-10 on 19.10.2008. Reference has been made to the statement made before the Sub Divisional Magistrate, Jabalpur. There is an assertion that an application for review was filed before the learned Sessions Judge wherein the respondents 3 and 4 filed a false birth certificate of the child, Ku.Alia @ Ku.Vanshika, as per Annexure-P-11.

3. It is contended that as per the legal advice, the present habeas corpus petition has been filed seeking restoration of the child. It is pleaded that the respondent no.3 is having his married wife, Sujata Pillai, and as they were issueless, they have adopted one Vanshaj from some Christian Association. The respondent no.4, Asha Pillai, is not the legally married wife and is living in the servant quarter No.16 and the respondent no.3 has illicit relationshi with the respondent no.4. It is urged that Ku.Alia has been named as Vanshika by the respondent no.3 who is the daughter of the petitioner and she was taken by the respondent No.3 from Orai when she was one month old. It is putforth that the refusal to return the custody of Ku.Alia tantamounts to illegal detention of the child. It is highlighted that the petitioner is a Post Graduate having Masters Degree in Music from Indrakala Sangeet Vishwa Vidyalaya, Khairagarh and is a part time teacher imparting education in music at Bundelkhand Kala Sangeet Post Graduate Music College. She is also giving her services in the clinics of Dr.Manoj Diwolia and Dr.Anil Gupta. From all the three sources, she is earning about Rs.20,000/- per month and has a very good family background and is capable of looking after the child. It is contended that Ku.Alia was given to the respondent No.3 without the consent of the petitioner and, therefore, she is illegally detained by the respondents 3 and 4 and hence, a direction should be issued to handover the child, Ku.Vanshika, to the petitioner.

4. A counter affidavit has been filed by the respondents 3 and 4 contending, inter alia, that the child was born as a premature one in seven months and there was an effort to terminate the pregnancy by joining hands with the doctor but when the child was born alive, it was handedover to the respondents. Though the doctor helping the petitioner in the entire episode could not be named for want of knowledge yet Dr.Sandhya Gupta who had been examined before the Sub Divisional Magistrate in the proceeding under Section 96 of the Code of Criminal Procedure

had stated that she had handed over the child lying on the table with all faith and hope of survival without disclosing the names of the parents, in a way, concealing the same. The respondents who were in need of the child accepted and treated it as a blessing of God. The name of the child was also concealed which shrouds the entire affair in great mystery and the same also relates to the paternity of the child. It is also contended that the maternity of the child claimed by the petitioner is not admitted but there was an unsuccessful attempt to terminate the pregnancy which was followed by wilful desertion from behind the curtain and that is evincible from the material brought before the Sub Divisional Magistrate. It is averred that the respondent had taken pains to keep the child alive at the initial stage and thereafter taken good care to bring her upto the age of four years. The action of the petitioner is not bonafide and the conduct reeks with malafide. It is setforth that it is difficult to conceive that the petitioner who was mentally unsound at the time of birth of the child has become normal without production of proper certificate. Reference has been made to the deposition of the sister of the petitioner and others to show how the entire story seems to be incredible inasmuch as the petitioner is the resident of Orai, District Jalaun (U.P.) and the respondents who are the residents of Jabalpur and unknown to the petitioner could have been given temporary custody of the child. It is also contended that the welfare of the child is the paramount consideration and the respondents are in a position to look after the child and have been looking after and they do not have even the slightest motive to subject the child to human trafficking as alleged by the petitioner. It is alleged that the petitioner is not sure of the maternity and that is why an application for conducting DNA test was filed before the learned Sessions Judge, Jabalpur in criminal revision. It is contended that when the child was handed-over to the respondents, there is no illegal or unlawful detention, at any point of time. In fact, the petitioner had deserted and neglected to take care of the child and, therefore, she is disqualified to have the custody of the minor and the respondents are entitled to custody. It is urged that the matter basically pertains to the custody of the child which is to be decided by the proper forum and, therefore, this Court should not interfere in a writ of habeas corpus.

5. A rejoinder affidavit has been filed by the petitioner stating, inter alia, that her husband died on 24.5.2004 in Gajraraja Kshitsha Mahavidyalaya Swashasi Sanstha Evam Jayarogya Shiksitsha Samu, Gwalior as is reflectable from Annexure-P-14 and she was suffering from continuous depression for the period 2004-2006. It is contended that she had some prescriptions but they are not available inasmuch as she has never thought that it would be required and, therefore, she did not retain them. It is pleaded that the petitioner had taken the mobile number of the respondent no.3 from Dr.Sandhya Gupta and she has been asking him to return the child. It was not easy for her to travel all along from Orai to Jabalpur but, since nothing ensued, she had to come to Jabalpur to take proper action. It is

contended that Ku.Alia was born in the eighth month and not in the seventh month as stated by the respondents and that she never wanted to terminate the pregnancy. It is also highlighted that she is the natural mother and hence, she has the legal right to have the custody of the child and the respondents 3 and 4 have no right in law whatsoever to have the custody of the child and, therefore, they are bound in law to restore the child to the petitioner. Emphasis has been laid on the false birth certificate produced by the respondents before the learned Sessions Judge and how the application under Section 340 of the Cr.P.C. has been filed for proceeding against the same. It is asseverated that the respondent no.4 is not the legally married wife of the respondent no.3 and the respondent no.3 is in the visiting terms with the respondent no.4. It is averred that the petitioner is not leading a immoral life and never neglected the child. It is asserted that she has sufficient means to look after the child and the welfare of the child can be properly taken care of.

6. An affidavit has been filed by the respondent no.3 stating that on receiving information from Manoj Gupta that a female child is available at Orai and for getting the same his sister could help him. The third respondent consulted his wife, the respondent no.4, who agreed to take the female child on adoption. Thereafter, they proceeded to Orai and found that the child was prematurely born and the said fact was also confirmed by Dr.Sandhya Gupta. Despite best efforts, Dr.Sandhya Gupta did not disclose the parentage of the child but the respondent no.4, who was eager to satisfy herself with motherly emotions accepted the offer and brought the child. It is further contended that in December, 2004, he received a call from Dr.Sandhya Gupta that the mother of the child would be reaching Jabalpur but she would only see the child and go back. Thereafter, the petitioner came to Jabalpur in December, 2004 and after staying in a local hotel for about two days insisted to take the child. The said demand disturbed the entire locality and he was compelled to communicate to Dr.Sandhya Gupta who could only reply that she could not help if the mother had demanded the child. As setforth, the petitioner had taken away the child and with great difficulty, he consoled his wife that they would adopt another child. Towards the end of December, 2004, he received a call to reach Mumbai immediately with his wife and meet the person concerned and brought the child back to Jabalpur. At that juncture, she promised that she would never come in the way and requested to treat the child as her own. A year back she came to Jabalpur and the respondents gave her good treatment and took her around Jabalpur. On a query being made she said that she was to return to Orai where her mother was lying ill with cancer and she would be required to take her for specialized treatment. As requested, the respondents arranged Rs.30,000/- and gave her and thereafter she left Jabalpur. It is further averred that the petitioner has been asking money from the respondents and the respondents have been giving money and the said fact has been admitted in her statement recorded before the Sub Divisional Magistrate. In the affidavit, doubts have been cast on the maternity of the mother on the foundation that they had treated her to

be the mother on the basis of the statement made by Dr.Sandhya Gupta but they have no knowledge as to whether the child is from Hindu or Muslim family. It is also averred that the child is going to school at present. An allegation has been made that the petitioner may sell the child or engage her in trafficking. It is also asseverated that no certificate of mental illness has been produced and abandonment of the child is writ large. A grave doubt is expressed with regard to the maternity of the child.

7. A reply has been filed to the said affidavit stating, inter alia, that a total imaginary story has been introduced. The facts have been controverted denied by way of affidavit.

8. We have heard Mr.Sanjay Agrawal, learned counsel for the petitioner, and Mr.Rajendra Tiwari, learned senior counsel alongwith Mr.Jayant Nikhra and Mr.R.K.Tripathi, Advocates for the respondents no.3 and 4.

9. At the very outset, it is condign to state that Mr.Sanjay Agrawal, learned counsel, has very fairly stated that in this petition, he has not challenged the order passed by the Sub Divisional Magistrate or that of the learned Sessions Judge, Jabalpur and it has to be adjudicated strictly within the parameters of law relating to habeas corpus. In support of the petition, the learned counsel for the petitioner has raised the following contentions:-

(a) The petitioner is a Muslim lady and, therefore, personal law has to be made applicable on all fours and, therefore, the question of claim of any adoption by the respondents No.3 and 4 does not arise.

(b) The petitioner, as pleadings would go a long way to show, is the mother of the child and hence, is the natural guardian who alone is entitled to have the custody of the child.

(c) The respondents No.3 and 4 have no semblance of legal right to retain the child and, therefore, it has to be concluded with certitude that the child is to be restored to the custody of the petitioner.

(d) The female child was never given to the respondent No.3 or to the respondent No.4 on the consent of the petitioner as she was suffering from depression and, therefore, from the very beginning, the child has been illegally detained by the respondents. Assuming there is consent, when the petitioner demanded her child, it has to be construed that the consent was withdrawn and it was the legal obligation on the part of the respondent to handover the child to the natural guardian.

(e) In the absence of legal right, the concept of welfare of the child as the paramount consideration does not arise especially in

a writ of habeas corpus as the mere proof of illegal detention is a good ground to get the child released from the illegal detention.

(f) The pleadings of the respondents are absolutely inconsistent and an endeavour has been made to retain the child under any circumstance which clearly exhibits the improper conduct of the respondents as a consequence of which they invite the ineligibility to themselves to custody of the child. The denial of motherhood of the petitioner by the respondents shows extreme malice and that is acvfactor to be taken into consideration for issue of writ of habeas corpus.

(g) The factum of religion is an essential aspect and that cannot be ignored while determining the custody of the child.

(h) The respondent No4 is a concubine of the third respondent and the said facet has not been disputed by the respondents 3 and 4 and, therefore, it can be indubitably held that the respondent No.4 being a person of loose character cannot be allowed the custody of a minor child.

10. Learned counsel for the petitioner to bolster the aforesaid submissions has commended us to the decision rendered in *Gohar Begum vs. Suggi alias Nazma Begum and others,* AIR 1960 SC 93, *Mumtaz Begum vs. Mubarak Hussain,* AIR 1986 MP 221, *Mohammad Mehboob Khan vs. Rahmit Bi and others,* 1977 (2) MPWN Note 79, *Wazid Ali vs. Rehana Anjum,* 2005 (3) MPLJ 319. Learned counsel has also commended us to Mulla Principles of Mahomedan Law, The Personal Law of Muslims by Faiz Badruddin Tyabji, Outlines of Muhammadan Law and passages from a Hand-book of Mahomedan Law by Babu Ram Verma.

11. Mr.Rajendra Tiwari, learned senior counsel alongwith Mr.Jayant Nikhra and Mr.R.K.Tripathi, Advocates combatting the aforesaid submissions has raised the following proponements.

(i) Submission that fin the absence of any legal right of the respondents 3 and 4 the petitioner is entitled to custody as a natural mother is unsustainable.

(ii) The stand put forth that the respondents are in illegal custody of the child is wholly unacceptable as the child was handed over to them and there was consent from the very beginning.

(iii) The contention that when the custody of the child was asked for, the consent should be deemed to be withdrawn does not stand to reason as the entire factual matrix is to be appreciated to arrive at the conclusion in that regard.

(iv) The welfare of the child as a paramount consideration has to

be taken into consideration while dealing with the petition for corpus and it cannot be said that the said facet has to be kept at bay solely on the ground that the petitioner has some proof to be the natural mother of the child.

(v) The petitioner has disqualified herself to be the custodian of the child since she has shown negligence by her conduct and in fact the material brought on record would go a long way to show that she terminated the pregnancy and abandoned the child after premature delivery.

(vi) The contention that the petitioner was suffering from mental depression has not even established in the remotest sense in the absence of any document which would include the prescription and hence, an adverse inference has to be drawn that she had deliberately abandoned the child and a consent was given by the sisters and doctors to give the child to the respondent and the aforesaid would clearly show that the petitioner was really never interested in the child. The interest in the child, as it appears, developed for some unfathomable reasons after she grew up, may be with a purpose to extract money from the respondents.

(vii) The allegation that the respondent No.4 is a concubine of the third respondent is a malicious pleading and the submission that there is no denial of the same is totally inconsequential inasmuch as it is not a case for dealing with inter se status between the respondents 3 and 4 but the custody of the child. In any case, the terms "no comment" used in the counter affidavit would not affect the status of the respondents 3 and 4.

(viii) The accentuated submission that the personal law would exclusively govern the field, is sans substratum since the personal law is to be read in harmony with the provisions of the Guardian and Wards Act regard being had to the interest of the child.

(ix) The choice of the child cannot be totally brushed aside while deciding the habeas corpus petition and she cannot be allowed to suffer a traumatic experience at this tender age.

(x) The devotion and dedication of the fourth respondent has to be taken into consideration inasmuch as the child is in a mental and physical healthy condition with her and the same gets more significant when the factual backdrop is scrutinised with keener ken that the petitioner had abandoned the child leaving her to her fate to dye. The endeavour of the respondents for survival of the child is also to be taken note of for the purpose of custody.

(xi) Various stand and stance put forth by the parties are in the realm of disputed question of facts and an inquiry is the warrant in the case of this nature. It is to be done in an appropriate proceeding before the competent court of law where all the relevant factors for the purpose of custody of the child can be gone into.

(xii) The evidence cannot be totally thrown overboard but should be looked into to find out the truth and to arrive prima facie conclusion where the respondents have illgally detained the child to invite the issue of a writ of habeas corpus.

(xiii) The learned counsel for the respondents have also commended us to the decision rendered in *Gohar Begum* (supra)

12. Regard being had to the aforesaid submissions raised at the Bar we shall refer to the authorities commended to us. Be it noted, the learned counsel for both the parties have relied on the decision in *Gohar Begum* (supra). In the said case the appellant was an unmarried Sunni Muslim woman who had a female illegitimate child, namely, Anjum. She submitted an application to the High Court for recovery of the child from the respondent and the application met with unsuccess. It was her case before the Apex Court that the child Anjum was taken by the respondent to Pakistan with the consent of the appellant while she had gone to Khandala. After the respondent returned from Pakistan with Anjum the appellant asked the respondent to send the child to her but she declined to do so. Because of the said fact situation, the appellant compelled to approach the High Court under Section 491 of the Cr.P.C. and the High Court directed the appellant to move the Civil Court under the Guardian and Ward Act for custody of the child. Their Lordships took note of the certain facts in paragraph 6 which are as follows:

"6....The child Anjum is the illegitimate daughter of the appellant who is a moslem woman. The child was at the date of the application less than six years' old and now she is just over seven years old. The appellant is a singing girl by profession and so is the respondent. The appellant stated in her affidavit that the respondent was in the keeping of a man and this the respondent has not denied. It is not the respondent's case that she is a married woman leading a respectable life. In fact she admits that she allowed Trivedi to live in her flat with the appellant as his mistress and took money from him for "Lodging and Boarding Charges". Trivedi has sworn an affidavit acknowledging the paternity of the child and undertaking to bring her up properly as his own child. He is a man of sufficient means and the appellants has been for a considerable time living with him as his mistress."

13. Thereafter their Lordships proceeded to opine in paragraphs 7 and 8 as under:

> *"7. On these undisputed facts the position in law is perfectly clear. Under the Mohammedan law which applies to this case, the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no matter who the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child. Her refusal to make over the child to the appellant, therefore, resulted in an illegal detention of the child within the meaning of S. 491. This position is clearly recognised in the English cases concerning writs of habeas corpus for the production of infants. In R. v. Clarke, (1857) 7 El. & Bl. 186: 119 ER 1217 Lord Campbell C. J. said at p. 193:*
>
> *"But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty."*
>
> *The courts in our country have consistently taken the same view. For this purpose the Indian cases hereinafter cited may be referred to. The terms of S. 491 would clearly be applicable to the case and the appellant entitled to the order she asked.*
>
> *8. We therefore think that the learned Judges of the High Court were clearly wrong in their view that the child Anjum was not being illegally or improperly detained. The learned Judges have not given any reason in support of their view and we are clear in our mind that that view is unsustainable in law."*

14. Mr. Sanjay Agrawal, learned counsel has laid immense emphasis on the said paragraphs to bolster the submission that it is a clear cut case of illegal detention by the respondents and the welfare of the child is totally inconsequential. Mr. Tiwari has commended us to paragraphs 9 and 13 of the said judgment. We think it apposite to reproduce the same.

> *"9. Before making the order the court is certainly called upon to consider the welfare of the infant concerned. Now there is no reason to think that it is in the interest of the child Anjum to keep her with the respondent. In this connection it is relevant to state that at some stage of the proceedings in the High Court the parties appeared to have arrived at a settlement whereby it had been agreed that the child Anjum would be in the custody of the appellant and the respondent would have*

access to the child. The learned Judges of the High Court, however, were not prepared to make an order in terms of this settlement because, as they said, "It did not appear to be in the interest and welfare of the minor". Here again they give no reason for their view, Both parties belong to the community of singing girls. The atmosphere in the home of either is the same. The appellant as the mother can be expected to take better care of the child than the respondent. Trivedi has acknowledged the paternity of the child. So in law the child can claim to be maintained by him. She has no such right against the respondent. We have not been able to find a single reason how the interests of the child would be better served if she was left in the custody of the respondent and not with the appellant.

xxxx xxx xxx xxx

13. It is further well established in England that in issuing a writ of habeas corpus a court has power in the case of infants to direct its custody to be placed with a certain person. In R. v. Greenhill, (1836) 4 Ad &El 624 at p. 640: 111 ER 922 at p. 927 Lord Denman C. J. said:

"When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody."

See also (1857) 7 El. & Bl. 186: 119 ER 1217. In Halsbury's Laws of England, Vol. IX, Art. 1201 at page 702 it is said:

"Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas corpus; and the custody awarded to the proper person."

Section 491 is expressly concerned with directions of the nature of a habeas corpus. The English principles applicable to the issue of a writ of habeas corpus, therefore, apply here. In fact the courts in our country have always exercised the power to direct under S. 491 in a fit case that the custody of an infant be delivered to the applicant: see Rama Iyer v. Naatraja Iyer, AIR 1948 Mad 294, Zara Bibi v. Abdul Razzak, 12 Bom LR 891 and Subbaswami Goundan v. Kamakshi Ammal,

ILR 53 Mad 72: (AIR 1929 Mad 834). If the courts did not have this power, the remedy under S. 491 would in the case infants often become infructuous."

15. In *Mohd. Ikram Hussain vs. State of U.P. And others,* AIR 1964 SC 1625 the Apex Court expressed the view as under:

"19. In our opinion the writ nisi in this case for the production of Kaniz Fatima should have been preceded by some more enquiry. It is wrong to think that in habeas corpus proceedings the court is prohibited from ordering an inquiry into a fact. All procedure is always open to a Court which is not expressly prohibited and no rule of the Court has laid down that evidence shall not be received, if the Court requires it. No such absolute rule was brought to our notice. It may be that further evidence would have borne out what Mahesh stated and then the order could always be passed for the production of Kaniz Fatima; but if the evidence did not bear out what Mahesh alleged then the order which the appellant disobeyed and for which he has to suffer imprisonment would never have been passed. The learned Judges failed to notice that Mahesh's affidavit was that she was pregnant for 6 months and not as they state that she ran away early in June 1960 because she became pregnant. It would be difficult to hide such an advanced pregnancy till June 20, 1960 when she left the house."

16 In *Bhagwati Bai vs. Yadav Krishna Awadhiya and others,* AIR 1969 MP 23 a Division Bench of this Court after referring to the decision in *Gohar Begum* (supra) has expressed the view as follows:

"8. But it must be remembered that this prerogative writ is an extraordinary remedy and the writ is issued where, in the circumstances of the particular case, ordinary remedy provided by the law, is either not available or is ineffective or inadequate. Otherwise, a writ will not be issued; it will be open to the person aggrieved to seek the ordinary remedy. Thus the power of the High Court in granting the writ is qualified and has to be used in the exercise of judicious and sound discretion. For restoration of custody of a minor from a person, who according to the personal law, is not his legal or natural guardian, the ordinary remedy lies under the Hindu Minority and Guardianship Act or the Guardians and Wards Act, as the case may be, and it is only in exceptional cases

that the rights of the parties to the custody of the minor will be determined on a petition for, habeas corpus. (See M. Basavalingam v. M. Swarajyalakshmi, AIR 1957 Andh Pra 704).

9. It cannot be said that an application under Section 491, Criminal Procedure Code by a guardian for custody of the minor cannot lie just because there is the ordinary remedy provided by the law. The paramount consideration in every such case is the welfare of the minor. The best interest of the child is the primary consideration; the right of the guardian is secondary and it will not be enforced by issuance of the writ when it is in conflict with the former consideration. If that paramount consideration does not call for the writ to be issued, it will be refused and the applicant would be left to resort to the remedy provided under the ordinary law. The underlying principle is that the guardian's claim to the custody of the child is not a right in the nature of property but, indeed, it is a right in the nature of trust for the benefit of the minor. Where there is imminent danger to the health or safety or morals of the minor, an interim order for production of the minor becomes necessary."

17 In *Budhulal Shankarlal vs. An Infant-Child (not named) and others,* AIR 1971 MP 235 a Division Bench of this Court was dealing with a petition under Section 491 of the Criminal Procedure Code for release of an infant aged about three months from the custody of the respondents No.2 and 3 therein. It was urged that the petitioner was the father of the child and after delivery of the child his wife expired. He handed over custody of the child to the respondents No.3 and 4 at the Lady Elgin Hospital for temporary care. When a claim for restoration of the child was put forth the respondents filed a return stating, inter alia, the petitioner's wife had died on the labour table and he took custody of the dead-body but refused to take into his custody the boy from the lady doctor who was on duty in the hospital, saying that there was nobody to look after the child in his house. It was put forth that since the respondents were present there and they were without any issue, they offered to take the child in their custody to bring it up as their own son. Taking various consideration it was also the stand that the petitioner is not in a position to properly take care of the boy and he has been estranged from his parents because of his love marriage with the deceased-wife. On the same circumstances reliance was placed on *Gohar Begum* (supra) to buttress the contention that the respondents had no legal rights whatever to the custody of the infant and the refusal of the respondents to make over the infant to the petitioner did tantamount to illegal detention of the infant within the meaning

of Section 491 of the Code. The Division Bench referred to paragraph 9 of the decision rendered in *Gohar Begum* (supra) and expressed the view that from the Supreme Court decision, it is abundantly clear that their Lordships restated the law that whenever the question of custody of a child arises, irrespective of the proceedings in which it arises, the predominant consideration is the welfare of the child. The Bench opined that that it had been not so, and the observations made by their Lordships in paragraphs 9, 10 and 11 in *Gohar Begum* (supra) would be redundant. Thereafter the Bench proceeded to state as follows:

> *"9. The law is clearly this :- (1) a writ of habeas corpus ad subjiciendum (you have the body to submit or answer), shortly called as a writ of habeas corpus, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. (2) However, the writ further extends its influence to restore the custody of a minor to his guardian, when wrongfully deprived of it. (3) The detention of a minor by a person who is not entitled to the legal custody is treated for the purpose of granting a writ as equivalent to imprisonment of the minor. (4) The power of this Court in granting a writ is qualified and has to be used in exercise of judicial and sound discretion. (5) An application under Section 491, Criminal Procedure Code cannot be thrown out merely on the ground that there is an alternative remedy under the Guardians and Wards Act available to the petitioner. (6) The paramount consideration in every such case is the welfare of the minor. The best interest of the child is the primary consideration; the right of the guardian is secondary, so that the latter will not be enforced by issuance of a writ when it is in conflict with the former consideration. (7) If that paramount consideration does not call for a writ to be issued it will be refused and the petitioner would be left to resort to the remedy provided under the ordinary law. (8) The guardian's claim to the custody of the child is not a right in the nature of property, but it is a right in the nature of trust for the benefit of the minor. This was also the view taken in Bhagwatibai v. Yadav Krishna, 1968 Jab LJ 717 : (AIR 1969 Madh Pra 23)."*

After so stating the Bench proceeded to lay down the principle as under:-

> *"13. The following facts are not without significance, (i) It is stated in the return that the petitioner's parents did not like the love marriage of the petitioner with his deceased wife. They would, therefore, have hardly any affection for the boy,*

who owes his birth to that lady, (ii) The respondents have asserted in the return that the petitioner demanded Rs. 500/- from them which creates a suspicion that the petitioner may be entertaining a thought of giving over the child to some other person, who is without an issue, for the sake of money. (iii) The petitioner's mother or the married sister or the unmarried sister not one of them made any request to us that she wanted to take the custody of the child and bring him up. (iv) The petitioner made two false statements before us : (a) that his mother and unmarried sister reside with him; and (b) that he did not lift the child from the respondent's house, as alleged by them in the return. The first was controverted by his mother herself. His counsel, after a while, told us that the second statement was false and that Col. Inderdev actually intervened.

14. It must be remembered that the scope of the present proceedings is very limited. It is not as if we have to choose between two rival claimants for the guardianship of the minor. That can be done in appropriate proceedings. The only purpose of the above conspectus is to see whether the infant should be taken away from the foster parents and delivered to the natural father. Here, it is not as if the respondents, by force or fraud, removed a minor from lawful guardianship. The initial entrustment of the infant's custody to the respondents was with the petitioner's consent."

18. In *Dr. Mrs. Veena Kapoor vs. Varinder Kumar Kapoor,* AIR 1982 SC 792 the Apex Court held thus:

"2. It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. The High Court, without adverting to this aspect of the matter, has dismissed the petition on the narrow ground that the custody of child with the respondent cannot be said to be illegal."

After so stating their Lordships expressed the view that it is difficult in the habeas corpus petition to take evidence without which the question as to what is in the interest of the child cannot satisfactorily be determined and accordingly the District Judge, Chandigarh submitted a report.

19 In Mumtaz Begum (supra) a Division Bench of this Court has expressed the view as under:-

"10. Having laid out the norms and nuances of the progressive interpretative technology, sanctioned by the Constitution and our judicial mantors, as also noting the judicial exposition in comparable jurisdiction, we propose to re-read the aforequoted sub-para (2). In our view, the mother of the child shall not suffer disqualification to have custody of the child for the mere fact that she is not residing with her husband, the child's father. If there exist circumstances to show that it was difficult for her to reside with her husband or that she had not forsaken voluntarily her husband's company, she should not be penalised. That apart, importance must be attached to the main rider, namely, she resides "at a distance from the father's place of residence". Indeed, we must read the underlying meaning of the rider. Even if the mother must have custody of the child of the tender age, till he attains the age of 7 years, the father must not be denied access to the child. When personal laws are divinely sanctioned, a presumption will naturally arise that such laws have a humanistic content because when great seers, saints and prophets found any faith, they act as benefactors of the mankind as a whole if man is God's child and if child is the father of the Man, no personal law claiming divine sanction, can afford to deny paramount consideration to the welfare of the child. It is not difficult, therefore, to see why the Declaration was unanimously adopted by the United Nations General Assembly in 1959."

20. In the case of *Mrs. Elizabeth Dinshaw vs. Arvand M. Dinshaw and another,* AIR 1987 SC 3 in a 'habeas corpus' petition when the question of interest of a minor child arose their Lordships have expressed the view as under:-

"8. Whenever a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would be best serve the interest and welfare of the minor."

21. In *Idrish Mohd. vs. Memam and another,* 2000 (10) SCC 333 the Apex Court while dealing with the custody of children has held as under:

"4. From the documents filed by the appellant before us, the genuineness of which has not been disputed by the State by filing any counter-affidavit, we find that she has attained majority by now. She cannot, therefore, be kept detained against her wishes. The impugned order of the High Court also indicates that she is willing to go only with the appellant.

We accordingly allow this appeal and direct the authorities of Nari Niketan, Karnal to release respondent 1 forthwith."

22. In *Sangeetha L. vs. The Commsisioner of Police, Kochi and others,* AIR 2002 Kerala 16 in paragraph 21 it has been held as under:

"21. It is well settled proposition of law that custody of children by their very nature is not final but are interlocutory in nature subject to modification upon change of circumstances requiring change of custody and such change of custody must be proved to be in the best interest of the children. Reliance may be placed on the decisions, Rosy Jacob vs. Jacob A. Chakramakkal, (1973) 1 SCC 840, Jai Prakash Khadria v. Srinath Prasad vs. Nandamuri Jayakrishna, 2001 AIR SCW 1033. Some of the cases are coming under the Guardians and Wards Act. Courts have reiterated that paramount consideration is the welfare of the children and Court has got the power to change their custody in the best interest of the children and taking into consideration of various attendant circumstances."

23. In *Rajiv Bhatia vs. Govt. of NCT of Delhi and others,* (1999) 8 SCC 525 the Apex Court while dealing with an appeal arising from a writ of habeas corpus filed by the natural mother of two young girls, namely, Akansha and Jayanti in Delhi High Court. After adverting to the facts and submissions referred to certain excerpts to which we think apt to reproduce:

"6. Before examining the correctness of the rival submissions, we would like to state one fact that in view of the allegations and counter-allegations made, we had called upon the natural mother to produce the child in our Chambers to ascertain the views of the child and pursuant to the said direction, the child was produced in our Chambers. Though the child is quite young and is, therefore, not in a position to express any positive view, on questioning her we have got the impression that the child would like to stay with her natural mother and does not want to be with the alleged adoptive parents. This is borne out from the fact that even in our Chambers when the adoptive parents wanted to talk, the child started crying and did not want to talk to them even. Though Mr. D. N. Goburdhan vehemently submitted that this is the result of tutoring but we are not persuaded to accept the said submission. We could gather, by putting questions to the child, in the absence of the natural mother, adoptive parents and the lawyers that Akansha's natural instinct is to continue with the natural mother."

24. We have referred to the said paragraph as their Lordships had taken pains to study the mind of a young child and record their observations.

25 In *Wazid Ali* (supra) a learned Single Judge of this Court has dealt with the concept of welfare of a child and in that context expressed the view as follows:

> *"The word "welfare of the child" admits of no strait-jacket yardstick. It has many facets, such as financial, educational, physical, moral and religious welfare. The question, where the welfare of the minor lies should be answered after weighing and balancing all factors germane to the decision-making, such as relationships, claims and wishes of parents, risks, choices and all other relevant circumstances. The answer lies in the balancing of these factors and circumstances and determining what is best for the minor's total well being. The cardinal principle is that minors cannot take care of themselves so that the State as pater practice has powers to do all acts and things necessary for their protection. It is, therefore, the primary duty of the Court to be satisfied what would be for the welfare of the minor and to make an order appointing or declaring a guardian accordingly. In the present case, the parties are mahomedan and though paramount consideration in the cases in the cases coming under the Act for appointment of guardian should be the welfare of the minor, it must be as far as possible consistent with the personal law relating to the parties looking to the age of the child which is only four years, it would be appropriate to give her in the custody of her mother."*
>
> (Quoted from the placitum)

26 In *Nil Ratan Kundu and another vs. Abhijit Kundu,* (2008) 9 SCC 413 the Apex Court has expressed thus:-

> *"52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction*

and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

27 In this context we may refer with profit to the decision rendered in *Salamat Ali and another vs. Smt. Majjo Begum,* AIR 1985 Allahabad 29 wherein the learned Judge after referring to various decisions in the field came to hold as follows:-

"7. On a consi leration of the authorities, the legal position appears to be that where under the personal law the mother is entitled to the custody of a minor child, she should normally get the custody of the minor but she may be deprived of the custody if the evidence on record shows that it would not be in the interest of the minor to give the minor in the custody of the mother. Thus the provisions of the personal law are to be applied consistently with the provisions of the Guardians and Wards Act. The welfare of the minor can be determined only on the basis of evidence for which opportunity will have to be afforded to the party seeking it. This opportunity in the present case was not afforded to the applicant who wanted to show that Majjo Begum had abandoned the minor and had, therefore, forfeited the right of custody available to her under the personal law."

28 In this context we may fruitfully refer to the decision rendered in *Rosy Jacob vs. Jacob A. Chakramakkal, Jacob* AIR 1973 SC 2090 wherein the Apex Court has expressed the view as follows:-

"....Merely because the father loves his children and is not shown to he otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because if her profession and financial resources may be in a position to guarantee better health, education and maintenance for them. The children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over

the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them."

(Emphasis supplied)

29. In *Syed Saleemuddin v. Rukhsana (Dr.)*, (2001) 5 SCC 247 it has been held thus:

> *".. In an application seeking a writ of habeas corpus for custody of minor children the principal consideration for the court is to ascertain whether the custody of the children can be satd to be unlawful or illegal and whether the welfare of the children requires that the present custody should be changed and the children should be left in the care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration for the Court."*

30. Recently in *Mausami Moitra Ganguli vs. Jayanti Ganguli*, AIR 2008 SC 2262 a two-Judge Bench of the Apex Court has expressed the view thus:

> *"14. The principles of law in relation to the custody of a minor child are well settled, It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obligerate the vital factor of the welfare of the minor. The question of welfare of the minor child has again to be considered in the backgrounds of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the*

statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child, it is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all he relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

31 In the said case their Lordships referred to Halsbury's Laws of England (Fourth Edition Vol.13) pertaining to the custody and maintenance of children which reads as follows:-

"809. Principles as to custody and upbringing of minors. Where in any proceedings before any Court, the custody or upbringing or minor is in question, the Court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same right and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

32 Recently in *Gaurav Nagpal vs. Sumedha Nagpal,* AIR 2009 SC 557 the Apex Ccurt reiterated the principle in the following terms:

"The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child the paramount consideration is the 'welfare of the child' and not rights of the parents under a statute for the time being i force. When the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matter human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise the jurisdiction which is aimed at the welfare of the

minor. The word 'welfare' used in Section 13 of the 1956 Act has to be construed legally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parents patriae jurisdiction arising in such cases."

(Quoted from the placitum)

33. From the aforesaid pronouncement of law it is deducible that the welfare of a child as the paramount consideration cannot be ostracized in any proceeding. It is obligation of the Court even in a writ of habeas corpus to see the interest of the child as that is the primary consideration. Certain inquiries are required to be conducted. The choice of the child definitely is of immense significance. True it is, a child cannot form an opinion but as has been held by their Lordships in *Rajiv Bhatia* (supra) an effort can be made to decipher the choice. The concept of welfare of a child is not a static or stagnant one and keeps changing. True it is, in a habeas corpus petition it is to be seen whether the child is in illegal custody or has been illegally detained by the respondents. Submission of Mr. Agrawal, learned counsel for the petitioner is that the child was given by the doctor in consultation with the sister of the petitioner and that cannot tantamount to her consent and further when the child was demanded, the consent must be deemed to have been withdrawn.

34. Be it noted, Mr. Tiwari, learned senior counsel has invited our attention to the depositions made before the SDM. Mr. Agrawal has contended that the SDM had no jurisdiction and hence, the said depositions are not to be taken into consideration at all.

35. In this context, we may refer with profit to the decision rendered in *Kadiam Paparao v. Siddireddy Satyanarayana and Others,* AIR 1983 Andhra Pradesh 257 wherein the learned single Judge after referring to Section 33 of the Evidence Act and Section 75 of the Indian Registration Act eventually came to hold as follows:

"A reading of this Section makes it clear that it is not only the evidence given in a judicial proceeding but the evidence given before any person authorised by law to take it is admissible in evidence. The expression 'or' used in Sec.33 indicates that not only the evidence given in a judicial proceeding but evidence given before any person who is authorised by law to take it is relevant in a subsequent judicial proceeding or in a

later stage of the same judicial proceeding subject of course to the conditions mentioned therein namely, when the witness is dead or cannot be found etc."

36. In *Sudhindra Nath v. The State,* AIR 1953 Calcutta 339 the Division Bench has ruled thus:

"14. The matter seems to us to be beyond all question. If the proceedings had taken place without jurisdiction, it cannot by any means be said that the evidence given in those proceedings was given in a judicial proceeding. Such proceeding, on the authorities which I have cited, can never be a judicial proceeding. The next question is can such evidence of the complainant, given in the two previous proceedings, be admitted on the ground that it was given before a person authorised by law to take it.

15. It seems to me that when it is said that a person must be authorised by law to take it, it means that the person must be authorised to take that particular deposition or the particular case in which the deposition has been given. As I have said the entire trial had been declared by this Court to have been without jurisdiction. If that is so, it cannot be said that the Magistrate who took deposition in such a trial was a Magistrate who was authorised by law to take that deposition. Such a person must be, as I have indicated, a person authorised to take that particular deposition. But the effect of the decision of this Court in those two Revision Cases, is that he was not authoised to take those deposition- the trials having been declared to be without jurisdiction."

37. It is submitted by Mr. Agrawal, learned counsel for the petitioner that the depositions made before the SDM cannot be pressed into service as he had no jurisdiction to decide the controversy. On a perusal of the decision rendered by the Calcutta High Court there cannot be any doubt that Section 33 of the Evidence Act cannot be pressed into service if the evidence is recorded by a Court having no jurisdiction to try the lis. When the proceeding becomes a proceeding coram non-judice the evidence of the witness cannot be admitted in evidence. But in the case at hand, the SDM had jurisdiction to deal with the application under Section 98 of the Code. Learned sessions judge has dislodged the order as ingredients of Section 98 were not satisfied. Thus, the said facts are in the realm of adjudicatory facts and, therefore, the proceeding before the SDM cannot be regarded as a proceeding coram non-judice. Hence, the same can be looked into, may be for the prima facie view.

38. It is significant to note that Dr. Sandhya has been declared hostile before the SDM. Various aspects with regard to handing over the child, presence of the petitioner and other aspects have come in the evidence. In the said proceeding there is no suggestion whatsoever with regard to marital status of the respondents 3 and 4. Not a single scrap of paper was produced with regard to ailment of the petitioner. It is contended by Mr. Agrawal that in Mohammeden Law that there is no concept of adoption. The learned counsel has invited our attention to Mulla's Principles of Mohomedan Law, Nineteenth Edition, wherein it has been stated that the Mohomedan law does not recognise adoption as a mode of filiation.

39. The said contention does not arise for consideration as Mr. Tiwari, learned senior counsel fairly stated that the respondents 3 and 4 have never claimed to have adopted the child.

40. Mr. Agrawal has submitted that under the Mohammedan Law the mother is best entitled to custody of the child. He has relied on paragraph 435 Outlines of Muhmmadan Law, Forth Edition, by Asaf A.A. Fyzee wherein it has been stated thus:

> *"The mother is, of all persons, the best entitled to the custody of her infant child during marriage and after separation from her husband, unless she be an apostate, or wicked, or unworthy to be trusted."*

41. The learned counsel has also commended us to paragraph 354 of Mulla Principles of Mohomedan Law, seventeenth Edition. The said paragraph reads as under:-

> *"354. **Females when disqualified for custody.**- A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody -*
>
> *"(1)if she marries a person not related to the child within the prohibited degrees (ss. 260 -261), e.g., a stranger (p), but the right revives on the dissolution of the marriage by death or divorce (q); or,*
>
> *(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or,*
>
> *(3) if she is leading an immoral life, as where she is a prostitute (r) ; or*
>
> *(4) if she neglects to take proper care of the child."*

42. We have referred to the aforesaid to show that there are certain instances when a mother can be is dis-entitled. In the case at hand Dr. Sandhya had deposed that there has been some discussion between Tabassum Ban and Ravi Pille and

the child was delivered. Tabassum had deposed that she had been ailing for more than a year after the birth of the child. No material has been produced with regard to her illness. There is material that the child was born prematurely. It is urged by Mr. Agrawal that the consent of the petitioner was not taken. What is asserted is that the doctor and the sister of the petitioner keeping her illness in view gave the child in the custody of the respondents. It is proponed that when the demand was made, consent should be treated to have been withdrawn. Emphasis has been laid on the decision rendered in *Gohar Beguam* (supra) Mr. Tiwari has submitted that the child was given as the petitioner was not inclined to look after the child because of many a reason apart from the fact she was a prematurely born. It is submitted by Mr. Tiwari that the welfare of the child cannot be given a go by while considering the custody in a habeas corpus petition and that is what their Lordships have opined in *Gohar Begum* (supra) and *Buddhulal* (supra). At this stage, it is apposite to state that this Court to have an idea had directed for production of the child. The child was produced before this Court on 6.5.2009. On that day, this Court recorded the proceeding which is as follows:

> *"In pursuance of the aforesaid order, Vanshika has been produced before this Court. We have taken the proceeding on camera. Initially, we called the child Vanshika. Learned counsel for the parties along with the petitioner as well as the respondents remained outside. After talking to Vanshika, we found that she was quite articulate, specific and expressive. She has stated that she is studying in St. Joseph Convent Sschool. She has stated that she is happy with her studies and daily life. A suggestion was given to her that she shall be sent with the petitioner immediately. She, in a decided manner, answered in the negative. To assess her mind, when we repeatedly stated that she has no other option but to go with the petitioner, she burst into tears, in a way, in an uncontrollable manner. At this juncture, we called the petitioner, Tabassum Bano and her counsel Mr. Sanjay Agrawal. She tried to persuade the child Vanshika to comer with her but she did not accept the same and kept on crying.*
>
> *Thereafter, we called Mr. Rajendra Tiwari, Mr. Jayant Nikhra, learned counsel representing the respondents 3 and 4.*
>
> *Mr. Tiwari and Mr. Nikhra came along with Mrs. Asha Pillai, the respondents 3 and 4 herein. In presence of the learned counsel for the parties, we again insisted that Vanshika has to go with Tabassum Bano. She again burst into tears. When we told her that she could leave the place*

where she is sitting. She immediately left the seat and rushed to Asha Pillai.

The aforesaid proceeding has been recorded in presence of learned counsel for the parties. We have not expressed any opinion but recorded what transpired. It is unnecessary to emphasise, recording of camera proceeding and what transpires herein is without prejudice to the contentions to be canvassed by the learned counsel for the parties at the time of hearing."

43. Submission of Mr. Agrawal is that the respondent No.4 is the concubine of the respondent No.3. To bolster his submission he has invited our attention to the return filed by the respondents, especially to paragraph 2.1, wherein it has been mentioned that in reply to paragraphs 5.13 and 5.15 of the petitioner "need no comment". It is urged by him that in the said paragraphs of the petition the petitioner has pleaded that the respondent No.4 is not the legally married wife and she is a maid servant and the respondent No.3 is in visiting terms with the said respondent. Mr.Tiwari has submitted that it cannot be treated to be an admission for conferment or destruction of status and, in any case, Ravi Pille has filed an affidavit stating in categorical and unequivocal terms that Asha Pille is his wife and he had consulted her to take the female child. In view of the aforesaid, we are of the considered opinion that on the basis of "no comment" and, more so, in view of the affidavit filed, it would be inappropriate for a writ court to determine the status of relationship inter se between the respondents 3 and 4. It is a disputed question of fact and has to be dealt with by the appropriate legal forum.

44. From the foregoing analysis and keeping in view the pronouncements in the field, we are disposed to think that the female child was given to the respondents 3 and 4. It cannot be said that the child was not given with the consent of the petitioner. The petitioner has pleaded that her consent was not taken. Simultaneously, it is urged that she was suffering from mental ailment but no prescription has been filed. A stand has been taken in the rejoinder that she had not kept the prescriptions thinking that they would never be required. Whether she had availed the treatment or not or suffered from mental illness or not at all, cannot be stated with certitude in a writ petition of this nature. It is difficult to accept the submission of Mr. Agrawal that once the petitioner had demanded the custody of the child, even if the consent was given, it is withdrawn and, therefore, the retention of the child by the respondents 3 and 4 would tantamount to illegal detention. We are unable to accept the said spacious submission. That apart, as has been held in number of authorities referred to hereinabove the welfare of the child is of paramount consideration. The said aspect cannot be ignored or brushed aside in a writ of habeas corpus. It has also been held that if the mother ignores to look after the child she becomes disentitled to custody.

45. As is evincible from the factual matrix, right from the time of birth the female child has been with the respondents 3 and 4; that the child has been attending the school; that the child is mentally alert and physically healthy; that there is no material on record to come to the conclusion that the child had been taken by fraud or force; and hence, we conclude and hold that the child is not in unlawful detention of the respondents 3 and 4. In view of the aforesaid cumulative facets we are unable to entertain the writ of habeas corpus to grant custody of the female child to the petitioner.

46. The present factual matrix, if we are allowed to say so, really raises complex question of facts and there is a serious dispute which really cannot be satisfactorily decided without taking evidence and it is inaposite to decide the same in the writ proceeding. It is not a case where the court can hold that factual disputes are projected for the sake of raising factual disputes. Certain things are shrouded in mystery and they are to be uncurtained and unveiled by adducing oral and documentary evidence before the appropriate forum. True it is, a writ court can adjudicate the jurisdictional facts but in the case at hand it is not the jurisdictional facts but actually adjudicatory facts which are required to be gone into. In our considered opinion a full scale trial by the appropriate legal forum is necessitous, nay, imperative. Hence, determination by this Court who should be the custodian or guardian of the child need not be decided. We only state that the respondents 3 and 4 have not unlawfully detained the female child, Vanshika. However, we may hasten to state that the custody or the guardianship of the child has to be decided by the competent court of law regard being had to the material brought before it and law in the field and various other aspects which entitle or disentitle the mother or foster parents to have the custody. Our observations are prima facie in nature except the finding that the child is not in unlawful detention of the respondents 3 and 4. Hence, no relief can be granted to the petitioner in this habeas corpus petition.

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

Petition dismissed.

KEDARNATH SHARMA Vs. STATE OF M.P.

I.L.R. [2010] M. P., 62

WRIT PETITION

Before Mr. Justice S.C. Sharma

22 July, 2009*

KEDARNATH SHARMA ... Petitioner

Vs.

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

Notaries Act (53 of 1952), Section 3, Notaries Rules, 1956, Rules 7 & 8 - *Appointment of Notary - Criterion - Held - State Government while appointing a Notary must have to consider a panel so prepared as per merits of the candidates strictly in consonance with provisions of the Act and the Rules made there under and also the law laid down in various judgments delivered on the subject matter.* (Paras 8 to 21)

नोटरी अधिनियम (1952 का 53), धारा 3, नोटरी नियम, 1956, नियम 7 व 8 – नोटरी की नियुक्ति – मानदण्ड – अभिनिर्धारित – राज्य सरकार को नोटरी की नियुक्ति के समय अभ्यर्थियों की मेरिट के अनुसार तैयार किये गये पैनल पर अधिनियम और उसके अधीन बनाये गये नियमों के उपबंधों और विषयवस्तु पर दिये गये विभिन्न निर्णयों में निर्धारित विधि के अनुकूल सर्वथा विचार करना चाहिए।

Cases referred :

W.P. No.194/1998 decided on 21.01.2000, W.P. No.49/2001 decided on 07.09.2005, 1998(1) MPLJ 490, 2009(2) MPHT 245, 2005 AIR SCW 4535.

Alok Sharma, for the petitioner.

Ami Prabal, Dy.A.G., for the respondent Nos.1 to 3.

V.K. Bhardwaj with *Raja Sharma,* for the respondent Nos.4 & 5.

O R D E R

S.C. Sharma, J.:–Regard being had to the similitude of the controversy involved in the aforesaid writ petitions, they were heard analogously together and disposed of by this singular order. For the sake of convenience, the facts in the case of W.P.No.702/2007(S) have been dealt with.

2. The petitioner before this Court who is a practising advocate has filed this present writ petition being aggrieved by the appointment of respondents No.5, Munna Lal Dhakad and No.6, Shyam Sunder Goyanar as notaries under the Notaries Act, 1952 read with the Notaries Rules, 1956 for the area of Kailaras, district Morena by an order dated 22nd December, 2006 (Annexure P/11) and 04th January, 2007 (Annexure P/12) respectively. The contention of the petitioner is that in the year 2007, a notification was issued by the State Government on 30th May, 1997 (Annexure P/2) inviting the applications for appointment of notaries in respect of Kailaras area, District Morena and the petitioner being a permanent

*W.P. No.701/2007 (Gwalior)

resident of Kailaras town and a practising advocate has submitted his application for consideration of his candidature to be appointed as notary. Objections were also invited on 08th June, 1997 and large number of representations were received by the District Judge, Morena. The petitioner's further contention is that the respondents No.1 to 3 without deciding the objections raised by the petitioner and other persons so also, without following the procedure prescribed under the Rules, 1956 appointed Ram Dayal Singh Dhakad and Munna Lal Dhakad as notaries and the petitioner being aggrieved by the appointment of the aforesaid persons came up before this Court. The writ petition filed by the petitioner was registered as W.P.No.194 of 1998 and the same was decided by an order dated 21st January, 2000. The contention of the petitioner is that while deciding the aforesaid writ petition in paragraphs 8, 9 and 10, this Court has held that the proper procedure was not followed and the District Judge has not given any finding in respect of the experience and knowledge about the commercial laws. The contention of the petitioner is that this Court in the earlier round of litigation has held that the knowledge can be tested by written test or personal interview arranged by the competent authority under the Act, 1952 read with the Rules, 1956 and also as regards the knowledge of the applicant's notarial law, commercial law, drafting of various kinds of testamentary or non-testamentary instruments, affidavits, documents, etc., Thus, in short this Court has allowed the writ petition preferred by the petitioner in the earlier round of litigation and the District Judge, Morena was directed to prepare a fresh panel keeping in view the provisions of the Act, 1952 read with Rules, 1956 enabling the Government to appoint notary.

3. The petitioner has further contended that being aggrieved by the action of the District Judge in forwarding a panel to the District Magistrate without following the prescribed procedure as provided under rule 7 of the Rules, 1956 appointing Munna Lal Dhakad and Kedar Nath Sharma as notaries ignoring the directions issued by this Court in W.P.No.194 of 1998(supra), another writ petition was filed and the same was registered as W.P.No.49 of 2001(Lajja Ram Pandey vs. State of Madhya Pradesh & others) and this Court by an order dated 07th September, 2005 has once again held in paragraph 9 that the District Judge while recommending the matter to the State Government has totally ignored the provisions of rule 7 and has also ignored the observations made in paragraph 10 of the earlier passed by this Court in W.P.No.194 of 1998 (supra). The matter was again remanded back to the District Judge to draw a panel keeping in view the provisions of rule 7 of the Rules, 1956 read with paragraph 10 of the judgment passed in W.P.No.194 of 1998 (supra). The grievance of the petitioner is that once again the District Judge, Morena has totally ignored the provisions of rule 7 of the Rules, 1956 and has also not taken into account the observations made in paragraph 10 of W.P.No.194 of 1998 (supra) and W.P.No.49 of 2001 (supra) while recommending the panel to the State Government for appointment on the post of Notary. The

petitioner has further stated that the respondent / State has appointed the persons out of the panel forwarded by the District Judge and the persons who have been appointed are less meritorious and they were placed below in the panel and a method of pick and choose has been adopted by the State Government while issuing the appointment order as notaries. The petitioner has therefore filed the present writ petition and prayed for quashing appointment of the respondents No.5, Munna Lal Dhakad and No.6, Shyam Sunder Goyanar as notaries.

4. A reply has been filed on behalf of the State Government and the appointment of respondents No.5, Munna Lal Dhakad and No.6, Shyam Sunder Goyanar as notaries has been defended. The stand of the State Government in the reply is that they have acted upon a panel forwarded by the District Judge, Morena and no irregularity of any kind has taken place in the matter of appointment of the respondents No.5 and 6 as notaries. The respondent / State has further stated that the provisions of the Act, 1952 read with Rules, 1956 have not been violated while issuing the aforesaid appointment orders. The learned Deputy Advocate General has argued before this Court that as no procedural irregularity has taken place in the matter and, therefore, the writ petition deserves to be dismissed.

5. A joint reply has been filed on behalf of the respondents No.5 and 6. It has been stated in the reply that the present writ petition is not at all maintainable as the petitioner has not availed the alternate remedy available and, therefore, the present writ petition deserves to be dismissed in the light of the judgment delivered in the case of *Mrs. Sanjan M.Wig vs. Hindustan Petroleum Corporation Limited,* AIR 2005 SCW 4535.

6. The respondents have also stated in the return that they are permanent residents of the place in question and having the requisite qualification for being appointed as notaries. They have further stated that their candidature was rightly considered by the District Judge, Morena and the panel was prepared keeping in view their candidature and as they were more qualified candidates, their names have been rightly forwarded by the District Judge, Morena. The respondents have also stated that the order passed by this Court in W.P.No.49 of 2001 (supra) and W.P.No.194 of 1998(supra) have been complied with and the District Judge has recommended and forwarded the matter to the District Magistrate keeping in view the earlier judgments passed by this Court in the earlier round of litigation. The respondents have further stated that the proper procedure as provided under rule 7 of the Rules, 1956 has been followed and it is the domain of the State Government to issue appointment order on the basis of the panel forwarded by the District Judge to the State Government. It has also been argued that the State Government is competent to appoint a person of its choice from the panel as notary.

7. Heard learned counsel for the parties and perused the record.

8. In the present case, it is not in dispute that this is the third round of litigation in respect of the appointment of notary for the area Kolaras, district Morena. On 30th May, 1997 a notification was published by the State Government for appointment of the notary and the applications were received from the practising advocates for appointment to the post of notary. Objections were invited and were filed and thereafter the matter was forwarded to the State Government for appointment of notaries. Ram Dayal Singh Dhakad and Munna Lal Dhakad were appointed as the notaries and the appointments were subjected to the judicial scrutiny in W.P.No.194 of 1998 (supra). This Court while dealing with the appointment of the aforesaid persons in paragraphs 7, 8, 9, 10 and 11 has held as under:

> "7. Notaries Act, 1952 (hereinafter referred to as the 'Act') was enacted for appointment of Notary. The power to appoint Notary is with the Central Government or State Government under section 3 of the Act. Section 8 of the Act provides functions of notaries. Section 8 of the Act is reproduced below:-.
>
> 'Section 8. Functions of notaries (1) A notary may do all or any of the following acts by virtue of his Officer, namely :-
>
> (a) Verify, authenticate, certify or attest the execution of any instrument;
>
> (b) present any promissory note, hundi or bill of exchange for acceptance or payment or demand better security;
>
> (c) note or protest the dishonour by non-acceptance or non-payment of any promissory note, hundi or bill of exchange or protest for better security or prepare acts of honour under the Negotiable Instruments Act, 1881 (XXVI of 1881) or serve notice of such note or protest;
>
> (d) note and draw up ship's protest, boat's protest or protest relating to demmurage and other commercial matters;
>
> (e) administer oath to or take affidavit from any person;
>
> (f) prepare bottomry and respondentia bonds, charter parties and other mercantile documents;
>
> (g) prepare, attest or authenticate any instrument intended to take effect in any country or place outside India in such form and language as may conform to the law of the place where such deed is intended to operate;
>
> (h) translate and verify the translation of any document from one language into another;
>
> (i) any other act which may be prescribed:
>
> (2) No act specified in sub-section (1) shall be deemed to be a

notarial act except when it is done by notary under his signature and Official Seal."

Thus, from bare perusal of the functions of notaries it is apparent that for appointment as Notary a practising Advocate alone can be appointed as Notary having not less than 10 years practice and he is expected to possess knowledge of various laws in general and Stamp Law with Commercial Law in particular.

8. The Rules have been framed known as the Notaries Rules, 1956 (hereinafter referred to as the "Rules"), which prescribed procedure for appointment of Notary. Rule 3 provides that no person shall be eligible for appointment as a notary unless on the date of the application for such appointment he has been practising as a legal practitioner for at least ten years. Rule 4 provides for application for appointment as a notary. Under Rules 6 action on the application is provided. After the applications are received by the competent authority, if the application is not rejected, notice of the application inviting objections shall be published in the newspaper and, if need be, the competent authority may ascertain from any Bar Council, Bar Association, Incorporated Law or other authority in the area where the applicant proposes to practise the objections, if any, to the appointment of the applicant as notary to be submitted within the time fixed for the purpose. Rule 7 of the rules provides for recommendation of the competent authority. Rule 7 of the rules is reproduced below:-

> **7. Recommendation of the Competent Authority:-**
>
> (1) The Competent Authority shall, after holding such inquiry as he thinks fit and after giving the applicant an opportunity of making his representations against the objections, if any, received within the time fixed under sub-rule (2) of Rule 6, make a report to the Appropriate Government recommending either that the application may be allowed for the whole or any part of the area to which the application relates or that it may be rejected.
>
> (2) The competent Authority shall also make his recommendation in the report under sub-rule (1) regarding the persons by whom the whole or any part of the costs of the application including the cost of hearing, if any, shall be borne.
>
> (3) In making his recommendation under sub-rule (1), the Competent Authority shall have due regard to the following matters, namely:-

(a) Whether the applicant ordinarily resides in the area in which he proposes to practice as a notary;

(b) Whether, having regard to the commercial importance of the area in which the applicant proposes to practice and the number of existing notaries practising in the area, it is necessary to appoint any additional notaries for the area;

(c) Whether, having regard to his knowledge and experience of commercial law and the nature of the objections, if any, raised in respect of his appointment as a notary, and in the case of a legal practitioner also to the extent of his practice, the applicant is fit to be appointed as a notary;

(d) Where the applicant belongs to a firm of legal practioners, whether, having regard to the number of existing notaries in that firm, it is proper and necessary to appoint any additional notary from that firm; and

(e) Where applications from other applicants in respect of the area are pending, whether the applicant is more suitable than such other applicants.

Sub-rule (3) of rule 7 of the rules provides that in making the recommendation the competent authority shall have due regard to the matters pertaining to the residence that the applicant resides in the area in which he proposes to practice as a notary and shall consider the knowledge and experience of commercial law of the applicant and nature of objection, if any, raised in respect of appointment as notary. Thus, rule 3(c) provides that before recommending the name the competent authority must adjudge the knowledge and experience of the applicant in commercial law.

The competent authority must satisfy itself that the applicant is competent to appointed as notary. The most important feature in the rule is that the applicant has experience and knowledge in the commercial law. He must be acquainted with the functions of a notary as specified in section 8 of the Act and rules 10 and 11 of the rules. The knowledge can be tested by written test or personal interview arranged by the competent authority concerned as regards the knowledge of applicant about notarial law, commercial laws, drafting of various kinds of testamentary or non-testamentary instruments, affidavits, documents, etc. After the recommendations are made by the competent authority the appropriate Government

shall consider the report and shall allow the application in respect of whole or any part of the area to which it relates or reject the application.

This Court has considered the question of appointment of notary in the case of *Ashok Kumar Chowdhary vs. State of M.P. and others*; reported in 1998(1) MPLJ 490.

Record has been produced. From perusal of record, it is apparent that the District Judge, Morena, who is the competent authority, has not recommended the name after following the procedure laid down in rule 7 of the rules. Rule 7 provides that the competent authority shall determine suitability particularly with regard to the knowledge and experience of commercial law. The competent authority has not ascertained knowledge of the applicants as provided in rule 7(3) (c) of the rules. The recommendations have been made purely on the basis of seniority, which is not proper. The advertisement was for only one post and name of Ram Dayal Singh Dhakad is placed at serial no. 1 on account of years of his practice, whereas the name of Munnalal Dhakad is placed at serial no.8. Thus, the recommendations of names were on the basis of seniority in practice from the date of enrollment and not on the basis of knowledge. Munna Lal Dhakad's name was at serial no. 8. In the list, it is found that the Government has appointed Ram Dayal Singh Dhakad, who was at serial no. 1 and also recommended the appointment of Munna lal Dhakad/respondent No.4 by creating an additional post. No reasons have been assigned for ignoring the candidates, who were placed at serial no. 2 to 7 in the list sent by District Judge. Even otherwise, the procedure for appointment of notary was not followed. Since District Judge, who is a competent authority, was bound to recommend the names according to merits after ascertaining the knowledge about commercial law and other Acts and competence of person to function as notary, the recommendations were not in accordance with rule 7 of the rules and there is no reason for appointment of respondent no. 4 out of the names recommended. No appointment can be made in an arbitrary manner or on the whims of the officer and the person under the Government. The appointment should be strictly on merits. No reasons have been assigned for deviating from the list of District Judge in appointment of respondent no. 4.

In the light of the judgment delivered in the case of *Ashok Kumar Chowdhary* (supra), the appointment of respondent No. 4 is quashed and it is directed that the panel be prepared by District Judge according to merits of each candidate and recommend the

names strictly according to merit and not on the basis of seniority. The competent authority shall also specifically clarify that the person belonging to local area and resident of Kailaras and is practising at Kailaras should alone be given preference for appointment as notary at Kailaras. The person not residing at Kailaras or practising at Kailaras should not be recommended. The State Government shall then pass orders on the merit list prepared by District Judge.

In the result, the petition succeeds and is allowed with the direction to competent authority to examine the merits of each applicant and recommend the names according to merit of each candidates."

9. This Court while deciding the aforesaid case keeping in view the provisions of the rule 7 of the Rules, 1956 has arrived at a conclusion that a person who is appointed as notary must have experience and knowledge in commercial law. He must be acquainted with the functions of a notary as specified in section 8 of the Act and rule 10 and 11 of the rules. It has also been observed in the aforesaid judgment that the knowledge can be tested by written test or personal interview by the competent authority concerned as regards the knowledge of the applicant in regard to various functions to be carried out as notary. This Court has also held that after recommendations are made by the competent authority, the appropriate Government shall consider the report and shall allow the application in respect of whole or part of the area to which it relates or reject the application.

10. After the judgment was delivered by this Court wherein the appointment of am Dayal Singh Dhakad and Munna Lal Dhakad were quashed, the District Judge as directed by this Court has considered the practising advocates who have applied for the post of notary strictly on the basis of merit and again a fresh panel was recommended by the District Judge, Morena and on the basis of the recommendation of the panel, one Munna Lal Dhakad and Kedar Nath Sharma were appointed as the notaries. The appointments were again subjected to judicial scrutiny in W.P.No.49 of 2001 (supra).

11. The appointments of Munna Lal Dhakad and Kedar Nath Sharma were set aside by this Court in W.P.No.49 of 2001 (supra) and the matter was remanded back to the District Judge, Morena. This Court while remanding the matter has also observed that the respondents therein shall proceed to take action in the matter of appointment of notaries afresh from the stage of calling of the recommendations from the District Judge as required under rule 7 and it was further observed that the District Judge, Morena shall forward the recommendations keeping in view the requirements of rule 7 and the observations made by this Court in paragraph 10 of the judgment passed in W.P.No.194 of 1998 (supra).

12. Thereafter, the matter was reconsidered by the District Judge, Morena and

the appointments were made on the basis of the recommendation by the State Government by which the respondent No.5, Munna Lal Dhakad and the respondent No.6, Shyam Sunder Goyanar were appointed as the notaries.

13. The original record relating to the appointments of the notaries maintained by the District and Sessions Judge, Morena has been produced before this Court. This Court has carefully gone through the proceedings which took place in the matter. The District Judge, Morena while preparing the panel as directed by this Court has recommended the names of 10 advocates which are as under:

(a) Shri Ravindra Bharadwaj

(b) Shri Kedarnath Sharma

(c) Shri Munna Lal Dhakad

(d) Shri Ashok Kumar Solanki

(e) Shri Shyam Sunder

(f) Shri Soneram Dhakad

(g) Shri Jagadish Dhakad

(h) Shri Siyaram Gupta

(i) Shri Ramniwas Gupta

(j) Shri Banwarilal Dhakad.

14. The aforesaid panel was prepared on 02nd November, 2006 and the same was forwarded to the State Government, the District Judge has considered the objections raised in the matter in respect of the aforesaid persons. However, the minutes of the panel does not reflect whether the applicants have knowledge and experience of commercial law and various other aspects as detailed in rule 7(3) of the Rules, 1956. The District Judge while preparing the panel has totally ignored the observations of this Court in the first round of litigation as contained in paragraph 10 of W.P.No.194 of 1998 (supra). Not only this, the panel has been prepared once again ignoring the provisions of the rule 7 of the Rules, 1956.

15. The learned counsel appearing for the petitioner has stated before this Court that the panel was prepared by the District Judge ignoring the provisions of rule 7 sub-rule (e) of the Rules, 1956 which reads as under:

> "(e) Where application from other applicants in respect of the area are pending, whether the applicant is more suitable than such other applicants."

From a bare perusal of the aforesaid statutory provision, it is evident that a comparative chart has to be prepared by the District Judge and the panel so prepared should be on the basis of the merits.

16. In the present case, the respondent / District Judge has not prepared a

pannel as per merits nor the pannel has been prepared as per the directions of the Court passed in W.P. No. 49 of 2001 and W.P. No. 194 of 1998.

17. At this stage, the learned Deputy Advocate General has vehemently argued that the State Government has the discretionary power to appoint a person from the panel so forwarded by the District Judge as per choice. There is no dispute with regard to the power of the State Government to appoint a notary but the same cannot be exercised in a discriminatory manner. The power so vested in the State Government has to be exercised judiciously, keeping in view the pannel forwarded by the District Judge. The pannel forwarded by the learned District Judge in the present case is certainly not in consonance with earlier directions passed by this Court.

18. This Court in the case of *Ayaz Ahmad Khan and others vs. State of Madhya Pradesh and others*, 2009(2) MPHT 245 in paragraphs 15 to 26 has held as under:

> Now coming to the merits of the case. The Notaries Act, 1952, has been enacted to regulate the profession of Notaries who are appointed for all recognized notorial purposes. Section 8 of the Act deals with the functions of the notaries which are wide and important in nature. The Notaries Rules, 1956, have been framed under the Act, Rule 3 prescribes qualification for appointment as a Notary. Rule 4 provides for making an application for appointment as a Notary in the form of memorial. Rule 6 provides for preliminary action on the application by the Competent Authority which includes satisfaction by the authority about qualification, earlier rejection of the application etc. and inviting objection from the Bar Association or Bar Council etc. Rule 7 prescribes the detailed procedure to be followed for making recommendations by the Competent Authority and reas as under:-
>
> **7. Recommendation of the Competent Authority:-**
>
> (1) The Competent Authority shall, after holding such inquiry as he thinks fit and after giving the applicant an opportunity of making his representations against the objections, if any, received within the time fixed under sub-rule (2) of Rule 6, make a report to the Appropriate Government recommending either that the application may be allowed for the whole or any part of the area to which the application relates or that it may be rejected.
>
> (2) The competent Authority shall also make his recommendation in the report under sub-rule (1) regarding the persons by whom the whole or any part of the costs of the application including the cost of hearing, if any, shall be borne.

(3) In making his recommendation under sub-rule (1), the Competent Authority shall have due regard to the following matters, namely:-

(a) Whether the applicant ordinarily resides in the area in which he proposes to practice as a notary;

(b) Whether, having regard to the commercial importance of the area in which the applicant proposes to practice and the number of existing notaries practising in the area, it is necessary to appoint any additional notaries for the area;

(c) Whether, having regard to his knowledge and experience of commercial law and the nature of the objections, if any, raised in respect of his appointment as a notary, and in the case of a legal practitioner also to the extent of his practice, the applicant is fit to be appointed as a notary;

(d) Where the applicant belongs to a firm of legal practioners, whether, having regard to the number of existing notaries in that firm, it is proper and necessary to appoint any additional notary from that firm; and

(e) Where applications from other applicants in respect of the area are pending, whether the applicant is more suitable than such other applicants.

It is worthnoting that under sub-rule (1) of Rule 7 the Competent Authority is required to hold such enquiry as he thinks fit. The Competent Authority after receiving the objections, if any, is required to make a report to the appropriate Govt. and the Competent Authority is required to make a recommendation either allowing the application for the whole or any part of the area to which application relates or for rejecting it. Sub-rule (3) requires the matters which are to be taken into consideration while making the recommendation under sub-rule (1). Clause (3) of sub-rule (3) requires the authority to give due regard to the fact whether the applicant is more suitable than such other applicants where applications from other applicants in respect of the area are pending. The report sent by the Competent Authority under Rule 7 is considered by the State Govt. under Rule 8 and the action on the report as prescribed in the rule is taken.

The State had issued the circular dated 17-12-1998 stating that before sending the memorial for appointment, full enquiry will be made Special emphasis was made to comply with the

requirement of Rule 7 and making the recommendation of the competent candidates. By this circular the judgment of this Court reported in *Ashok Kumar Chowdhary* (supra) was required to be considered while making recommendation.

Under Rule 7(1) on receipt of the application forms and objections the Competent Authority is required to hold appropriate enquiry then he is required to make a report to the appropriate Govt. and in that report he is required to make a recommendation and the recommendation should be either that the application may be allowed for the whole or any part of the area to which the application relates or that it may rejected.

This Court in the matter of *Ashok Kumar Chowdhary* (supra), has considered the scope of Rule 7 of the Notary Rules and has held that the Competent Authority is required to make endorsement regarding knowledge and experience of each applicant and their suitability for appointment. In the absence of any material before the State Govt. and without determining the comparative suitability of the applicants, no appointment can be made. This Court in the matter of *Ashok Kumar* (supra), after noting Rule 7 held that:-

> 11. After the applications are received, the Competent Authority, that is, District Judge, should not act as a post-office and forward the papers to the State Govt. The Competent Authority is bound to follow the procedure laid down in Rule 7 of the Rules. When there are more than one applications then the Competent Authority should have made recommendations for appointment of notary indicating the name of applicant, who is more suitable than other applicants. From the file it appears that enquiry as provided under Rule 7 (3) has not been conducted. There is no endorsement by the District Judge regarding knowledge and experience of each applicant and their suitability for appointment. The notaries are required to perform a responsible job and they cannot be appointed in an arbitrary manner. The notary performs very important functions and his actions are having for reaching effects. He must have sound knowledge of the laws referred to in Rule 7 and in respect of Notaries Act, Oaths Act, Stamp Duty, onveyance and various types of documents and local laws. A confidential enquiry in respect of honesty and itegrity before the licence is issued, should be held to determine the suitability fo the applicant to hold such a creditable post of

responsibility and credibility. The Competent Authority should keep in mind and send the recommendations for appointment of notary after receiving the applications. In the present case, the Competent Authority has not sent recommendations.

12. In the absence of any material before the State Govt. and without determining the question as to person who is more suitable for appointment, no appointment could be made. From going through the record, it is apparent that the appointments have been made in an arbitrary manner without following the procedure of Rule 7 (3) (e) of the Rules.

Same issue came up before this Court in the matter of *Suryakant Chandrakar* (supra), wherein this Court after noting Rule 7 held that:-

10.....A plain reading of Rule 7(1) of the Rules makes it clear that the Competent Authority is required to make recommendation either that the application may be allowed for the whole or any part of the area to which the application relates or that it may be rejected under Rule 7(3) of the Rules, the Competent Authority while making recommendation is required to give due regard to various aspects enumerated in clauses (a) to (e). After the report of the Competent Authority is required to consider the same and make appointment of Notaries. The State Govt. while making appointment of a Notary is required to consider the report. Here, in the present case, the Competent Authority has stated in clear terms that he did not make any recommendation. From the letter of Competent Authority dated 2nd March, 1998, it is apparent that he has just forwarded the memorials of 7 persons including respondent Nos.3 to 5 along with the other documents to the State Govt. for appropriate action. The original records have been produced before me by Mr. Ghildiyal and a perusal thereof also does not show that the Competent Authority had made any recommendation as required under Rule 7 of the Rules. Non-rejection of the memorials under Rule 6 of the Rules and forwarding the same along with the documents of the respective memorialists, in my opinion, cannot be construed as recommendation of the Competent Authority. He has thus failed to discharge his statutory obligation. That

being so, appointment of the respondent Nos.3 to 5 as Notaries suffers from procedural *ultra vires* and cannot be allowed to stand. The view which I have taken finds support from the judgment of this Court in the case of *Ashok Kumar Chowdhary* (supra).

Supreme Court also in the matter of *S.D. Chaddha Vs. State of U.P. And others*, (2003) 12 SCC 119, has declined to approve the appointment made in violation of Rule 7.

In the present case, the reports which were sent by the respondent No.4 for Tehsil Barhi, Rithi, Dheemarkheda, Bohriband, Badwara and Katni in terms of Rule 7 to the State Govt. are available in the original record submitted by the Counsel for the State. A perusal of these reports indicate that the respondent No.4 in these reports had only noted the name, date of birth, caste, place of residence, registration No. and year and number of years of practice of the candidates. The respondent No.4 only by noting the aforesaid factual details had forwarded the report to the State Govt. In the reports in terms of Rule 7 (1), there is no recommendation by the respondent No.4 for accepting the application of any candidate or rejecting it. There is also no recommendation to accept the application of any candidate for the whole of the area or any part of the area to which the application relates. Rule 7(1) requires the Competent Authority to make a recommendation which denotes a positive act of application of mind on the relevant factors enumerated in Rule 7 and a conclusion by the Competent Authority in respect of each candidate for accepting or rejecting the application or accepting the application for whole or any part of the area.

In terms of Rule 7(3) (c) the Competent Authority is required to consider the knowledge and experience of commercial law and the nature of the objections, if any, raised in respect of his appointment as a notary, and in the case of a legal practitioner also to the extent of his practice and record a conclusion if the applicant is fit to be appointed as a Notary. The report does not indicate that any of the factors required to be considered by the Competent Authority under Rule 7 (3) have been considered. In the report, no finding as regards the fitness of the candidate for being appointed as Notary as required by Rule 7(3) (c) has been recorded. The report has been prepared completely ignoring the requirements of Rule 7 of the Rules and the judgment of this Court in the matter of *Ashok Kumar Chowdhary* (supra) and *Suryakant Chandrakar* (supra).

It is worth noting that it is this report which is considered by

the State under Rule 8 to accept or reject the application. Since the report itself does not contain any material in support of the fitness of the candidates to be appointed as Notary, therefore, sufficient material was not available before the State Govt. to take a fair decision to accept or reject any application under Rule 8.

25. A perusal of the original record indicates that all the names, which were forwarded by the respondent No.4, were placed before the Law Minister with certain notings by the Additional Secretary, Law. The Law Minister picked up the names of respondent Nos.5 to 15 for appointment as Notary in Katni, Barhi, Rithi, Dheemarkheda, Bohriband and Badwara. There is nothing on record to show on what basis these names were picked up. Rules nowhere prescribe for appointment by draw of lots. Thus, it is found that the concerned respondents have been selected in complete violation of Rule 7.

In view of the aforesaid analysis it is held that respondent Nos. 5 to 15 have been selected for appointment as Notaries in violation of Rule 7. The report in the form of panel which was forwarded by the respondent No.4 to the State Govt. dated 25-1-2008 was prepared without complying with the requirements of Rule 7. Therefore, the reports dated 25-1-2008 sent by the respondent No.4 in respect of Tehsil Barhi, Rithi and Dheemarkheda, Bohriband, Badwara and Katni are set aside. Any decision taken by the State Govt. in pursuance to the said report and any order issued in favour of respondent Nos.5 to 15 in pursuance to the selection made on the basis of the aforesaid report is also set aside. The matter is remitted back to the Competent Authority to send the fresh report to the Government after complying with the provisions contained in Rule 7 keeping in mind the law settled in the judgments noted above.

The writ petition is accordingly disposed of. No orders as to costs."

19. Keeping in view the judgment delivered by this Court in the case of *Ayaz Ahmad Khan and others* (supra), a perusal of the minutes of the file relating to the panel in the present case reflects that the District Judge, Morena has not followed the provisions of law as enumerated in rule 7 of the Rules, 1956 and he has totally ignored the earlier judgments delivered by this Court in W.P.No.194 of 1998 and W.P.No.49 of 2000 (supra). The findings so recorded by the District Judge does not reflect about the applicants' knowledge relating to notarial law, commercial law, drafting of various kinds of testamentary or non-testamentary instruments, affidavits, documents, etc. The file also reveals that certain objections were received and they have been decided. The panel so prepared by the District Judge is said to be based upon merits though no reason has been assigned in

respect of the placement of the advocates in the merit list / panel and, therefore, the District Judge has not followed the prescribed procedure as per the remand orders passed by this Court in W.P.No.194 of 1998 and W.P.No.49 of 2001 (supra) and the panel so prepared by the District Judge deserves to be quashed and is hereby quashed.

20. As this Court has quashed the panel so prepared by the District Judge, Morena and consequently, the appointment of the respondent No.5, Munna Lal Dhakad vide order dated 22nd December, 2006 (Annexure P/11) and the respondent No.6, dated 04th November, 2007 (Annexure P/12) Shyam Sunder Goyankar are hereby quashed. The matter is remanded back to the District Judge, Morena.

21. Resultantly, the petitions are allowed in part and disposed of with the following directions:

(a) The respondent / State shall proceed in the matter afresh from the stage of calling of the recommendations as required under rule 7of the Rules, 1956;

(b) The District Judge, Morena shall prepare a panel keeping in view the provisions of rule 7 of the Rules, 1956 read with paragraph 10.of judgment delivered by this Court in W.P.No.194 of 1998 (i.e., the first round of litigation).

(c) The State Government on the basis of the recommendations received from the District Judge, Morena shall issue an appointment order as provided under rule 8 of the Rules, 1956.

(d) The aforesaid exercise shall be concluded within a period of 90 (ninety) days from the date of receipt of a certified copy of this order.

22. With the aforesaid, writ petitions stand allowed. No order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 77
WRIT PETITION
Before Mr. Justice Sanjay Yadav
24 July, 2009*

SUNIL PILLAI ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - *Departmental Enquiry - Charge sheet - Criminal trial - Allegation of similar charges in D.E. and criminal trial - Whether both can run simultaneously - Held - D.E. is being held regarding conduct of the petitioner, which is unbecoming of a police official which is different than*

*W.P. No.4394/2009(S) (Jabalpur)

the charges in the criminal case under offence punishable under the Public Gambling (Madhya Pradesh) Act, 1867 - Petition dismissed. (Para 12)

सेवा विधि – विभागीय जाँच – आरोप पत्र – दाण्डिक विचारण – विभागीय जाँच और दाण्डिक विचारण में समरूप आरोपों का अभिकथन – क्या दोनों साथ–साथ चल सकते हैं – अभिनिर्धारित – विभागीय जाँच याची के आचरण के सम्बन्ध में की जा रही है जो एक पुलिस अधिकारी के लिए अशोभनीय है जो सार्वजनिक द्यूत (मध्य प्रदेश) अधिनियम, 1867 के अन्तर्गत दण्डनीय अपराध के अन्तर्गत दाण्डिक मामले में आरोपों से भिन्न है – याचिका खारिज।

Cases referred :

AIR 2006 SC 2129, (2007) 10 SCC 561, (2006) 6 SCC 366, (2006) 1 SCC 275, (2006) 2 SCC 584, (2006) 9 SCC 172, (2008) 3 SCC 729.

D.K. Tripathi, for the petitioner.

ORDER

SANJAY YADAV, J. :–The petitioner, a constable in Police Department, here in this writ petition under Article 226 of the Constitution of India, calls in question the initiation of a departmental enquiry in pursuance to charge sheet dated 21-9-2008, on the ground that the self same charges are being tried by the Criminal Court. Reliance is placed on the judgment rendered in the case of *G. M. Tank vs. State of Gujarat and another* : AIR 2006 S.C. 2129.

2. The facts briefly are that the petitioner while posted at P. S. Ranjhi has been subjected to a criminal case vide Crime No. 510/08 for an offence punishable under section 3/4 of the Public Gambling (Madhya Pradesh) Act, 1976 vide F.I.R. Dated 27/8/08, in respect of incident which took place on 27/8/08 when the petitioner was apprehended gambling at public place. A challan in the Court of Chief Judicial Magistrate, Jabalpur, was filed on 28/8/08. For the same act the petitioner has been subjected to a departmental enquiry when on 21-9-08 a charge sheet was issued to him.

3. It is this charge sheet and further proceeding, which the petitioner seeks quashment of on the anvil that both cannot go together. The petitioner has relied upon the judgment in *G. M. Tank vs. State of Gujarat and another* (supra) to bring home his submissions.

4. In *G. B. Tank* (supra), the facts as referred to in paragraphs 2 and 5 reveal the appellant therein was found in possession of property, movable and immovable, disproportionate to his known sources of income. Whereas in a departmental enquiry he was found guilty and was dismissed from service. However, in a criminal trial under section 5(1)(e) read with Section 5(2) of the Prevention of Corruption Act, 1977, he was not found guilty. Their Lordships while extending the benefit of the acquittal in a criminal trial were please to observe :

> "32. In our opinion, such facts and evidence in the department as well as criminal proceedings were the same without there being any iota of evidence, the appellant should succeed. The distinction

which is usually proved between the departmental and criminal proceedings on the basis of the approach and burden of proof would not be applicable in the instant case. Though finding recorded in the domestic enquiry was found to be valid by the Courts below, when there was an honourable acquittal of the employee during the pendency of the proceedings challenging the dismissal, the same requires to be taken note of and the decision in *Paul Anthony's case* (supra) will apply. We, therefore, hold that the appeal filed by the appellant deserves to be allowed."

(emphasis supplied)

5. The facts of each case differs as was observed by their Lordships in the case of *Divisional Controller, Gujarat SRTC v. Kadarbhai J. Sthar* (2007) 10 S.C.C. 561 :

"5. The orders of both the learned Single Judge and the Division Bench suffer from several infirmities. First and foremost, mere acquittal in a criminal case does not have the effect of nullifying the decision taken in the departmental proceedings. They operate in different areas of considerations. This position was recently highlighted by a three-Judge Bench of this Court in *NOIDA Enterpreneurs' Assn. v. NOIDA*."

6. In *Uttaranchal Road Transport Corporation v. P* (2006) 6 SCC 366 it was observed by their lordship :

"10. The position in law relating to acquittal in a criminal case, its effect on departmental proceedings and reinstatement in service has been dealt with by this Court in *Union of India v. Bihari Lal Sidhana*, it was held in para 5 as follows (SCC pp.387-88)

"5. It is true that the respondent was acquitted by the criminal court but acquittal does not automatically give him the right to be reinstated into the service. It would still be open to the competent authority to take decision whether the delinquent government servant can be taken into service or disciplinary action should be taken under the Central Civil Services (Classification, Control and Appeal) Rules or under the 'Temporary Service Rules. Admittedly, the respondent had been working as a temporary government servant before he was kept under suspension. The termination order indicated the factum that he, by then, was under suspension. It is only a way of describing him as being under suspension when the order came to be passed but that does not constitute any stigma. Mere acquittal of government employee does not automatically entitle the government servant to reinstatement. As stated earlier, it would be open to the appropriate competent authority to take a

decision whether the enquiry into the conduct is required to be done before directing reinstatement or appropriate action should be taken as per law, if otherwise, available. Since the respondent is only a temporary government servant, the power being available under Rule 5(1) of the Rules, It is always open to the competent authority to invoke the said power and terminate the services of the employee instead of conducting the enquiry or to continue in service a government servant accused of defalcation of public money. Reinstatement would be a charter for him to indulge with impunity in misappropriation of public money."

11. The ratio of *Anthony case* can be called out from para 22 of the judgment which reads as follows : (SCC p. 691)

"22. The conclusions which are deducible from various decisions of this Court referred to above are :

(I) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involve complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge-sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the 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 indicated and in case he is found guilty, the administration may get rid of him at the earliest."

7. In *State of Orissa and others v. Mohd. Illiyas* : (2006) 1 SCC 275 it has been held by their lordships :

> "12. Where the allegation is of cheating or deceiving, whether the alleged act is willful or not depends upon the circumstances of the case concerned and there cannot be any straitjacket formula. The High Court unfortunately did not discuss the factual aspects and by merely placing reliance on an earlier decision of the Court held that prerequisite conditions were absent. Reliance on the decision without looking into the factual background of the case before it, is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates : (I) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent.(See *State of Orissa v. Sudhansu Sekhar Misra and Union of India v. Dhanwanti Devi.*) A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament. In *Quinn v. Leathem* the Earl of Halsbury, L.C. observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides."

8. In *South Bengal State Transport Corporation v. Sapan Kumar Mitra and others :* (2006) 2 SCC 584, it is observed by their lordships :-

> "9. We have heard the learned counsel for the parties and also examined the relevant records of this case. Although the Division Bench had not categorically said that the departmental proceeding

could not be continued and punishment could not be imposed on the delinquent employee when the criminal case ended in acquittal, even then the learned counsel for the respondents sought to argue this ground before us. In our view, this ground is no longer res integra. In *Nelson Motis v. Union of India* a three-Judge Bench of this Court observed at SCC p. 714, para 5, as follows :

"5. So far the first point is concerned, namely, whether the disciplinary proceedings could have been continued in the face of the acquittal of the appellant in the criminal case, the plea has no substance whatsoever and does not merit a detailed consideration. The nature and scope of a criminal case are very different from those of a departmental disciplinary proceeding and an order of acquittal, therefore, cannot conclude the departmental proceeding. Besides, the Tribunal has pointed out that the acts which led to the initiation of the departmental disciplinary proceeding were not exactly the same which were the subject-matter of the criminal case."

(emphasis supplied)

10. Similarly in *Senior Supdt. Of Post Offices v. A. Gopalan* the view expressed in *Nelson Motis v. Union of India* was fully endorsed by this Court and similarly it was held that the nature and scope of proof in a criminal case is very different from that of a departmental disciplinary proceeding and the order of acquittal in the former cannot conclude the departmental proceedings. This Court has further held that in a criminal case charge has to be proved by proof beyond reasonable doubt while in departmental proceeding the standard of proof for proving the charge is mere preponderance of probabilities. Such being the position of law now settled by various decisions of this Court, two of which have already been referred to earlier, we need not deal in detail with the question whether acquittal in a criminal case will lead to holding that the departmental proceedings should also be discontinued. That being the position, an order of removal from service emanating from a departmental proceeding can very well be passed even after acquittal of the delinquent employee in a criminal case. In any case, the learned Single Judge as well as the Division Bench did not base their decisions relying on the proposition that after acquittal in the criminal case, departmental proceedings could not be continued and the order of removal could not be passed."

9. In *N. Selvaraj v. Kumbakonam City Union Bank Ltd. and another* : (2006) 9 SCC 172; while observing that acquittal in criminal proceedings does not

–that continuation of departmental enquiry thereafter would be justified were please to held :

> "6. It is contended by the learned counsel for the appellant that since the criminal court acquitted him, continuity of departmental enquiry is not justified and he should be directed to be paid all the back wages on the basis of the acquittal recorded by the criminal court. We are not at all convinced by this contention. By now, it is well-settled principle of taw that the standard of proof between the criminal trial and the departmental proceedings is quite different. In criminal trial the standard of proof is proof beyond all reasonable doubt, whereas in the departmental proceedings it is preponderance of probability which is taken into consideration. It is also to be noted that in continuation of the earlier order passed by this Court as referred to above, the suspension of the appellant is continuing subject to the final decision that may be made on the basis of a second enquiry. It is now well-settled principle of law that pay and allowances including back wages will depend on the outcome of the second enquiry to be decided by the disciplinary authority in accordance with law relevant financial rules. (See *Managing Director. ECIL v. B. Karunakar*.)"

10. In *West Bokaro Colliery (TISCO Ltd.) v. Ram Pramesh Singh,* (2008) 3 SCC 729, their lordship while taking note that the standard of proof in domestic enquiry and the criminal proceedings were please to hold :

> "17. After going through the order of the Industrial Tribunal, we of the opinion that the Tribunal has interfered with the findings recorded by the domestic tribunal as if it was the Appellate Tribunal. There was evidence present on record regarding indecent, riotous and disorderly behaviour of the respondent towards his superiors. The Management witnesses who were present at the scene of occurrence have unequivocally deposed about the misbehavour of the respondent towards his superiors. Their evidence has been discarded by the Tribunal by observing that in the absence of independent evidence, the statements of the workmen who were present at the scene of occurrence could not be believed. The Industrial Tribunal fell in error in discarding the evidence produced by the Management only because the independent witnesses were not produced."

11. In the case at hand the charge levelled against the petitioner is :

> "1. अवैधानिक गतिविधियों को देखते हुए जनता के व्यक्तियों के साथ अवैध रुप

से जुओं का संचालन करना तथा नाल काटना जिससे पुलिस की छबि को धूमिल करना तथा पुलिस आचरण के खिलाफ गैर कानूनी कार्यवाही करना।.

Whereas in a criminal case the petitioner is being prosecuted for an offence under section 3 & 4 of Public Gambling (Madhya Pradesh) Act, 1867, as applicable to Madhya Pradesh, which stipulates :

"**3. Penalty for owning or keeping, or having charge of, a gaming-house.**- Whoever, being the owner or occupier, or having the use, of any house-room, tent, enclosure, space, vehicle, vessel or place situate within the limits to which this Act applies, opens, keeps or uses the same as a common gaming-house; and

whoever, being the owner or occupier of any such house, room, tent, enclosure, space, vehicle, vessel or place as aforesaid knowingly or wilfully permits the same to be opened, occupied, used or kept by any other person as a common gaming-house; and

whoever, has the care or management of, or in any manner assists in conducting, the business or any house, room, tent, enclosure, space, vehicle, vessel or place as aforesaid, opened, occupied, used or kept for the purpose aforesaid; and

whoever advances or furnishes money for the purpose of gaming with person frequenting such house, room, tent, enclosure, vehicles, vessel or place;

shall be punished -

(a) for a first offence with imprisonment which may extend to six months or with fine which may extend to one thousand rupees;

(b) for a second offence with imprisonment which may extend to one year and, in the absence of special reasons to the contrary to be mentioned in the judgment of the Court, shall not be less than fourteen days either with or without fine which may extend to two thousand rupees; and

© for a third or subsequent offence with imprisonment which may extend to one year and, in the absence of special reasons to the contrary to be mentioned in the judgment of the Court, shall not be less than four months together with fine which may extend to two thousand rupees.

4. Penalty for being found in gaming-house.- Whoever is found in any such house, tents, rooms, enclosure, space, vehicle, vessel or place playing or gaming with cards, dice, counters, money or other instruments of gaming, or is found there present for the purpose of gaming, whether playing for any money, wager, stake

or otherwise, shall be liable to a fine not exceeding five hundred rupees or to imprisonment of either description, as defined in the Indian Penal Code (45 of 1860), for any term not exceeding four months,

and any person found in any common gaming-house during any gaming or playing therein, shall be presumed, until the contrary be proved to have been there for the purpose of gaming.

4-A. Punishment for printing or publishing digits, figures, signs, symbols or pictures relating to Worli Matka or other form of gaming.- (1) whoever prints or publishes in any manner whatsoever any digits or figures or signs or symblos or pictures or combination of any two or more of such digits or figures or signs or symbols or pictures relating to Worli Matka or any other form of gaming under any heading whatsoever or by adopting any form or device, or disseminates or attempts to disseminates or abets dissemination of information relating to such digits or figures or signs or symbols or pictures or combination of any two or more of them shall be punishable with imprisonment which may extend to six months and with fine which may extend to one thousand rupees.

(2) Where any person is accused of an offence under sub-section(1), any digits or figures or signs or symbols or pictures or combinations of any two or more of such digits or figures or signs or symbols or pictures in respect of which the offence is alleged to have been committed shall be presumed to relate to Worli Matka gaming or some other form of gaming unless the contrary is proved by the accused."

12. In the present case departmental enquiry into the conduct, which is unbecoming of a police official, is being held which is different than the charges in criminal case.

13. Therefore taking into consideration the entirety of facts and the law as laid down by the Apex Court, this Court do not perceive any illegality in the initiation of departmental enquiry.

14. In the result petition fails and is hereby dismissed in limine.

Petition dismissed.

RAVINDRA SINGH SIKARWAR Vs. STATE OF M.P.

I.L.R. [2010] M. P., 86

WRIT PETITION

Before Mr. Justice S.C. Sharma

13 August, 2009*

RAVINDRA SINGH SIKARWAR ... Petitioner

Vs.

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

Rajya Suraksha Adhiniyam, M.P., 1990 (4 of 1991), Section 8 - *Externment -- Natural Justice - While passing an order under the provisions of Adhiniyam, the District Magistrate must have to provide all the material documents including the statements of witnesses examined in the matter to the person concerned.* (Paras 10 to 21)

राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 8 – निष्कासन – नैसर्गिक न्याय – अधिनियम के उपबंधों के अन्तर्गत कोई आदेश पारित करते समय जिला मजिस्ट्रेट को साक्षियों, जिनकी सम्बन्धित व्यक्ति के मामले में परीक्षा की गयी है, के कथनों को सम्मिलित करते हुए सभी तात्विक दस्तावेज मुहैया करना चाहिए।

Cases referred :

2005(II) MPJR SN 16, 2006(3) MPLJ 592, 2007(2) MPLJ 108, 2007(4) MPHT 60, 2008(2) JLJ 430, (2007) 3 SCC 587, 2003(2) MPHT 17, 2004(1) MPHT 165.

B.M. Patel with *Prasun Maheshwari,* for the petitioner.

Ami Prabal, Dy.A.G., for the respondents.

O R D E R

S.C. Sharma, J.:–Regard being had to the similitude of the controversy involved in the aforesaid writ petitions, they were heard analogously together and disposed of by this singular order. For the sake of convenience, the facts in the case of W.P.No.1801/2009 have been dealt with.

2. The petitioner before this Court has filed this present writ petition being aggrieved by an order of externment dated 06th November, 2008 (Annexure P/2) passed by the District Magistrate, Morena and is also aggrieved by the dismissal of the appeal by an order dated 25th March,2009 by the Commissioner, Chambal Division, Morena (Annexure P/1). The contention of the petitioner is that he belongs to a family having a political background and the father of the petitioner is holding the post of Sarpanch for the last 40 years and he was elected as the President, Cooperative Society Sikronda, Jaura, District Morena. The petitioner has further stated that a show cause notice was issued to him on 03rd December, 2004 as per the provisions of the Madhya Pradesh Rajya Suraksha Adhiniyam, 1990 (hereinafter referred to as the Adhiniyam,1990) and a reply was filed by

*W.P. No.1800/2009 (Gwalior)

him. The petitioner has categorically informed the District Magistrate in the reply filed by him that only 03 cases are pending against him and all the other cases have come to an end without any punishment in the matter. The grievance of the petitioner is that without considering his reply and the cases in which the petitioner has been acquitted, the District Magistrate, Morena has passed an order of externment for a period of one year. His further contention is that the Commissioner, Chambal Division, Morena, in a most mechanical manner has dismissed the appeal vide order dated 26th March, 2009.

3. The learned counsel appearing on behalf of the petitioner has categorically stated before this Court that while issuing the show cause notice to the petitioner on 03rd December, 2004, the respondent / District Magistrate has not provided him copy of the statement of the police officers recorded in the matter and copy of the statement of the witnesses recorded in the matter. Learned counsel has further stated that in paragraph 2 while passing the order of externment, the District Magistrate has categorically observed that he has recorded the statement of certain police officers as well as independent witnesses, however, these statements were not furnished to the petitioner. The petitioner has prayed for quashing the orders passed by the respondents. In support of his contention, he has relied a judgment delivered by this Court in the case of *Dinnu alias Dinesh vs. State of M.P., and others* reported in 2005 II MPJR SN 16.

4. Learned counsel for the petitioner has also argued before this Court that the petitioner's reputation which is an important part of his life has been tarnished on account of the order of externment passed by the District Magistrate and, therefore, the principles of natural justice and fair play should have been observed while passing the impugned order.

5. The learned counsel appearing on behalf of the respondents has vehemently argued before this Court that the order of externment has rightly been passed as per the provisions of the Adhiniyam, 1990. She has placed heavy reliance on section 8 of the Adhiniyam, 1990. It has been argued by her that the aforesaid statutory provision does not provide for supply of the statements of the witnesses recorded in the matter nor provides for supply of statements of the police officers recorded in the matter. She has further argued before this Court that the order of externment has been passed in the case of the petitioner on the basis of the criminal cases recorded in the matter. The record relating to the externment order has also been produced before this Court.

6. By placing reliance upon a judgment delivered by the Chhattisgarh High Court in the case of *Sandeep shouri @ Kake Shouri vs. State of Chhattisgarh and others*, 2003(2) MPHT 17, she has further argued before this Court that the principles of natural justice and fair play are not at all attracted in respects of the cases under the National Security Act and the Adhiniyam, 1990 as the order of

externment in the case of the petitioner has been passed under the provisions of the Adhiniyam, 1990 for taking preventive action against him and it is not an order imposing punishment, hence the petitioner is not entitled for any relief. She has further argued before this Court that the petitioner is an anti-social element and large number of cases were registered against him and the people are afraid of in coming forward to give evidence against the petitioner. The contention of the learned counsel is that the petitioner is involved in all kinds of illegal activities and in fact during pendency of the proceedings under the Adhiniyam, 1990, the petitioner was involved in various criminal activities hence, the order of externment passed by the District Magistrate as well as the order passed by the appellate authority deserves to be upheld.

7. The learned counsel for the respondents has also relied upon a judgment delivered by this Court in the case of *Baboo Khan vs. State of M.P., and another*, 2004(1) MPHT 165, wherein the petitioner therein was continuously involved in the commission of several heinous and serious criminal cases from the year 1991 onwards, the order of externment was upheld by a learned single Judge of this Court holding that under the writ jurisdiction, this Court would only see the jurisdictional aspect of the matter and it cannot now sit as a second appellate Court to examine the inference drawn from the cases which the petitioner therein was facing in the criminal Courts, to contend that the petitioner's plea in the present case that he was acquitted in most of the cases pending against him is not of much importance.

8. The learned counsel appearing on behalf of the respondents has vehemently argued before this Court that the Adhiniyam, 1990 is a special enactment which provides for a procedure for passing an order in respect of externment. She has further argued that the aforesaid statute provides for only issuance of show cause notice informing the person in writing of the general nature of the material allegations against him and to give him a reasonable opportunity of tendering an explanation regarding the nature of material against him and it does not provide for supply of statements of the witnesses nor the statements of the police officers recorded in the matter and therefore, the order passed by the District Magistrate is just, proper and has been passed as per the procedure prescribed in the matter. She has further argued that the object of the Act has to be seen while dealing with such cases and the petitioners who are notorious criminals are not entitled for any relief as there is no jurisdictional error in the matter and this Court cannot sit as a second appellate Court to examine the inference to be drawn from the cases which the petitioner is facing in the criminal Courts.

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

10. In the present case, a show cause notice was issued to the petitioner under section 8(1) of the Adhiniyam, 1990 directing the petitioner to file a reply in the

matter. The petitioner did submit a reply to the aforesaid show cause notice. In the present writ petition, it has been categorically stated by the petitioner that he has been acquitted in respect of most of the offences enlisted in the order of externment, i.e, twenty in number. The petitioner has categorically stated before this Court that now only 03 cases are pending against him.

11. Section 8 of the Adhiniyam, 1990 reads as under:

> 8. Hearing to be given before order under Sections 3,4,5 or 6 is passed:- (1) Before an order Section 3,4,5 or 6 is passed against any person, the District Magistrate shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them.
>
> (2) If such person makes an application for the examination of any witness produced by him, the District Magistrate shall grant such application and examine such witness unless for reason to be recorded in writing, the District Magistrate is of opinion that such application is made for the purpose of vexation or delay.
>
> (3) Any written statement put in by such person shall be filed with the record of the case and such person shall be entitled to appear before the District Magistrate by any legal practitioner for the purpose of tendering his explanation and examining the witnesses produced by him.
>
> (4) The District Magistrate proceeding under sub-section (1) may, for the purpose of securing the attendance of any person against whom any order is proposed to be made under Section 3,4,5 or 6 require such person to appear before him and to execute a security bond with or without sureties for such attendance during the inquiry.
>
> (5) If the person fails to execute the security bond as required or fails to appear before the District Magistrate during the inquiry, it shall be lawful for the District Magistrate to proceed with the enquiry exparte and thereupon such order, as was proposed to be passed against him, may be passed.

12. The aforesaid statutory provision makes it mandatory that the District Magistrate shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them.

13. This Court while deciding a case of externment in the case of *Dinnu @ Dinesh Vs. State of M.P.* 2005 (II) MPJR SN 16 and relied upon by the learned counsel for the petitioners has held in paragraphs 3 and 4 as under:

"A perusal of para 5.1 of the reply filed by the respondents supported by an affidavit of Rai Singh Narveria CSP, Lashkar, Gwalior indicates that on receipt of information from the Superintendent of Police, the matter was taken up, case was registered and after examining the witnesses, show cause notice annexure P/3 was issued to the petitioner. Authorities of police station Janak Ganj, served the aforesaid show cause notice on the petitioner. In the return, it is denied by the respondents that the petitioner was never taken in police custody but the fact remained that only show cause notice was issued to the petitioner and along with the show cause notice, other material on the basis of which, show cause notice was issued namely statement of Station House Officer recorded on 1.4.2004 and statement of other witnesses recorded on the same date were not supplied to the petitioner along with the show cause notice. The record indicates that before issuing show cause notice on 1.4.2004, statements were recorded and it is on the basis of these statements that show cause notice was directed to be issued. Copies of the statements and other documents having not been supplied to the petitioner, the petitioner has been denied proper opportunity of submitting reply to the show cause notice. Record indicates that on 1.4.2004, statement of Shri Arvind Khare, Station House Officer, Janak Ganj, Lashkar so also the statement of one Sonu Auto Driver and Babu Khan auto Driver were recorded and it was on the basis of these, the case was registered and the show cause notice dated 1.4.2004 was issued to the petitioner. Non supply of these vital documents to the petitioner vitiates the entire proceedings. Even during the proceedings that took place on 7.4.2004, 15.4.2004 and 19.4.2004 these documents were not supplied to the petitioner merely because, the petitioner did not appear on 23.4.2004 and therefore, passing of the ex parte order without supplying all these documents to the petitioner is not proper. That being so, this petition has to be allowed in this ground alone.

As order impugned passed removing petitioner from the district in question is without affording him proper opportunity of hearing and without supplying to him all the relevant documents, proceedings have to be quashed on this ground alone and therefore, it is not necessary now to go into the merits of this case and decide other questions raised in the petition. Accordingly, on this ground alone, the petition is allowed. Orders impugned annexure P/1 and P/2 passed by District Magistrate, and the appellate authority on 23.04.2004 and 29.11.2004 are quashed."

A learned single Judge of this Court while deciding the aforesaid case has categorically held that the statements of witnesses recorded in the matter and the statement of police officers recorded in the matter should have been supplied to the person concerned in a format. The order of externment was set aside.

14. The learned counsel for the petitioner has furtehr relied upon a judgment delivered by this Court in the case of *Asaf Ali s/o Sheikh Mubarak Vs. State of M.P. and others* (2006(3)M.P.L.J.592, wherein in paragraph 7 it was held as under:

> Thus, on the basis of such old and stale offences under the Indian Penal Code in which the petitioner has been acquitted and also the petty offences under Sections 107, 110,116(3), 151 of the Criminal Procedure Code, the order of externment under section 5(b) of the Adhiniyam cannot be sustained. See *Bala @ Iqbal Vs. Additional Collector, Indore,* 1996 Cr.L.R. MP 72. In case of *Ayub Khan Vs. State of M.P.,* 1994 (I) VIBHA 168 a Division Bench of this Court has observed that the powers of externment are to be exercised sparingly with care and circumspection. They cannot be used for punishing a man for his past deeds. In view of the aforesaid legal position the petitioner's externment under section 5(b) of the Adhiniyam cannot be sustained and is quashed."

15. The learned counsel for the petitioner has also relied upon a judgment delivered by this Court in the case of *Dharmendra Singh Vs. State of M.P. and others,* 2007 (2) MPLJ 108 and in paragraphs 6 and 7 it has held as under:

> "It is not the case of the respondents that apart from the cases wherein the petitioner was acquitted there was sufficient material which formed basis of satisfaction of the authority to pass the order of externment. Hon'ble Supreme Court of India in the case of *Dharamdas Shamlal Agrawal Vs. The Police Commissioner and another,* reported as 1989 (2) Crimes 53 has held:-
>
> > "From the above decisions it emerges that the requisite subjective satisfaction, the formation of which is a condition precedent to passing of a detention order will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or the other and influenced its mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order. It is clear to our mind that in case on hand, at the time when the detaining authority passed the detention order this vital fact, namely, the acquittal of the detenu in cases Nos. mentioned at serial Nos.2 and 3 have not been

brought to its notice and on the other hand they were withheld and the detaining authority was given to understand that the trial of those cases were pending. The explanation given by the learned counsel for the respondents, as we have already pointed out, cannot be accepted for a moment. The result is that the non-placing of the material fact-namely the acquittal of detenu in the above-said two cases resulting in non-application of mind of the detaining authority to the said fact has vitiated the requisite subjective satisfaction, rendering the impugned detention order invalid."

Learned Government Advocate has made available the original record of the case of externment. It also depicts in favour of the petitioner. On 14-2-2003, the prosecution examined its witnesses and disclosed that no further evidence would be produced. Case was reserved for consideration. Thereafter, no order was passed for more than 2 years and 10 months and again a report from the S.P. Satna dated 12-9-2005 was placed on record. Prior to it, the earlier report of the S.P. Satna dated 2.7.2002 was already on record. There is no material in the file as to how, when and why the second report was requisitioned. Similarly, it is not clear from the file as to who did requisition the second report. Thus, the contention of the learned counsel for the petitioner is strengthened that on the basis of the earlier report dated 2-7-2002 there was no sufficient material to form an opinion against the petitioner that he was liable to be externed and the material available on record was insufficient for the subjective satisfaction. There is no explanation in the return as to why and in what circumstances the order was withheld for more than 2 years and 10 months and what caused the District Magistrate, Satna to withhold the proceedings for more than 2 years and 10 months. Inaction for a period of 2 years and 10 months in a case of externment clearly suggests that the order of externment was not warranted during the said period. It being not the case of the respondents that subsequent events or the record of the petitioner (after exclusion of the cases of acquittal) has provided a basis to form an opinion about subjective satisfaction with regard to externment of the petitioner, this Court in view of the Supreme Court's decision (supra) holds that the authorities have failed to make application of mind to the attending facts and circumstances and the same coupled with the non-consideration of effect of acquittal in so many cases has vitiated the subjective satisfaction about externment of the petitioner rendering the externment order invalid. Consequently, the impugned orders contained in Annexure P/9 and P-10 are not liable to be sustained."

In the aforesaid case, the order of externment was passed by the District Magistrate after holding the proceedings for more than 02 years 10 months and

the same was also taken into account while quashing the order of externment by this Court.

16. In the present case, the District Magistrate took almost 05 years for concluding the proceedings under the Adhiniyam, 1990 and there is no explanation for the same on behalf of the respondents.

17. The learned counsel for the petitioner has relied upon a judgment delivered by this Court in the case of *Pyare Fukki Vs. District Magistrate, Bhopal and others* 2007(4) M.P.H.T.60 and paragraph 4 of the judgment is relevant which reads as under:

> "On a close scrutiny of the record, I find that on receipt of the information from the Superintendent of Police the matter was taken up and the statements of the witnesses were recorded. Thereafter, a show-cause notice under Section 8(1) of the Adhiniyam was issued to the petitioner. I find that along with the show-cause notice other material on the basis of which the said show-cause notice was issued, i.e., statement of witnesses were not supplied to the petitioner. The record indicates that before issuing show-cause notice the statement of four witnesses including the Police Personnels were recorded and it is on the basis of these statements the show-cause notice was directed to be issued. Having not supplied copies of the statements, in my considered view, the petitioner has been denied proper and effective opportunity of submitting reply to the show-cause notice. From the record, I find that the statements of in all four witnesses were recorded and on the basis of the aforesaid statements the case was registered against the petitioner and he was issued a show-cause notice. The non-supply of these vital documents to the petitioner vitiates the entire proceedings. Even after the petitioner appeared through his Counsel the aforesaid documents were not supplied to him and therefore, passing of the ex parte order of externment without supplying all these documents to the petitioner is not proper (See *Dinnu @ Dinesh Vs. State of M.P.* 2005 (II) MPJR SN 16)."

18. In the case of *Pyare Fukki* (supra), the learned single Judge of this Court has again held that the statements of witnesses including the police personnel recorded in the matter should have been supplied to the person facing the proceedings under the provisions of the Adhiniyam, 1990 and as the same was not done, the order of externment and the order passed by the appellate authority affirming the same were set aside.

19. The learned counsel for the petitioner has further relied upon a judgment delivered by a Division Bench of this Court in the case of *Ramkhiladi Gurjar vs.*

State of M.P., and another, 2008(2) JLJ 430 wherein an order of detention of the petitioner therein passed by the competent authority under the National Security Act, 1980 has been set aside on the ground that no objective consideration of the matter was done by the competent authority while passing an order under the Act, 1980.

20. Lastly, the learned counsel for the petitioner has relied upon a judgment delivered by the Hon'ble Apex Court in the case of *State of Maharashtra Vs. Public Concern for Governance Trust and Others* (2007) 3 Supreme Court Cases 587. wherein the Hon'ble Apex Court has held that the principles of natural justice and fair play are to be afforded where an order has been passed against a person adversely effecting the person concerned. Paragraphs 39 to 41 are relevant and the same reads as under:

> "The party-in-person has also pointed out certain findings in the judgment of the High Court. We do not propose to go into the merits of the other contentions which are the subject-matter of Special Leave Petition No.336 of 2006. In our opinion, when an authority takes a decision which may have civil consequences and affects the rights of a person, the principles of natural justice would at once come into play. Reputation of an individual is an important part of one's life. It is observed in *D.F. Marion Vs. Minnie Davis* and reads as follows:
>
> > "The right to enjoyment of a private reputation, unassailed by malicious slander is of an ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property."
>
> This Court also in *Board of Trustees of the Port of Bombay V. Dilipkumar Raghavendranath Nadkarni* has observes that right to reputation is a facet of right to life of a citizen under Article 21 of the Constitution.
>
> It is thus amply clear that one is entitled to have an preserve one's reputation and one also has a right to protect it. In case any authority in discharge of its duties fastened upon it under the law, travels into the realm of personal reputation adversely affecting him, it must provide a chance to him to have his say in the matter. In such circumstances, right of an individual to have the safeguard of the principles of natural justice before being adversely commented upon is statutorily recognized and violation of the same will have to bear the scrutiny of judicial review."

21. Keeping in view the fact that the impugned order of externment dated 06th November, 2008 (Annexure P/2) passed by the District Magistrate, Morena and

the order dated 25th March,2009 passed by the Commissioner, Chambal Division, Morena (Annexure P/1) having been passed without affording proper opportunity of hearing and without supplying all the relevant material documents are therefore set aside, both the writ petitions stand allowed and the matter is remanded to the District Magistrate, Morena, for a fresh decision in the matter. The entire exercise shall be concluded by the District Magistrate, Morena, within a period of sixty days from the date of receipt of a certified copy of this order.

22. The writ petitions stand allowed and disposed of with the aforesaid. No order as to cost.

Petition allowed.

I.L.R. [2010] M. P., 95
WRIT PETITION
Before Mr. Justice K.K. Lahoti & Mr. Justice K.S. Chauhan
18 August, 2009*

BHISMAT PANDEY ... Petitioner
Vs.
PHOOLA & ors. ... Respondents

A. Stamp Act (2 of 1899), Section 2(5) & 2(22) - *Promissory note or bond - An agreement for payment of remaining consideration of sale and also attested by two witnesses - Held - All the essential ingredients of bond are found in the document i.e., (a) an undertaking to pay a definite sum of the amount, (b) the payment was to be made to the plaintiff, (c) the maker had signed it, (d) the instrument has been attested by two witnesses and it is not payable to order or bearer - Document is a bond.* (Para 10)

क. स्टाम्प अधिनियम (1899 का 2), धारा 2(5) व 2(22) – प्रॉमिसरी नोट या बंधपत्र – अनुबन्ध, विक्रय के शेष प्रतिफल के संदाय के लिए और दो साक्षियों द्वारा अनुप्रमाणित – अभिनिर्धारित – दस्तावेज में बंधपत्र के सभी आवश्यक तत्व पाये गये अर्थात् (क) निश्चित धनराशि के संदाय का वचन, (ख) संदाय वादी को किया जाना था, (ग) निष्पादक ने उस पर हस्ताक्षर किये, (घ) लिखत दो साक्षियों द्वारा अनुप्रमाणित किया गया और यह आदेश पर या धारक को देय नही है – दस्तावेज बंधपत्र है।

B. Stamp Act (2 of 1899), Section 2(5) - *Bond - Explained - Held - There must be an undertaking to pay - The sum should be a sum of money but not necessarily certain - The payment will be to another person named in the instrument - The maker should sign it - The instrument must be attested by a witness and it must not be payable to order or bearer.* (Para 9)

ख. स्टाम्प अधिनियम (1899 का 2), धारा 2(5) – बंधपत्र – स्पष्ट किया गया – अभिनिर्धारित – संदाय करने का वचन होना चाहिए – रकम धनराशि के रूप में होनी चाहिए किन्तु उसका निश्चित होना आवश्यक नही है – संदाय लिखत में नामित अन्य व्यक्ति को होगा – निष्पादक

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*W.P. No.5947/2008 (Jabalpur)

को उसे हस्ताक्षरित करना चाहिए – लिखत किसी साक्षी द्वारा अनुप्रमाणित होना चाहिए और यह आदेश पर या धारक को देय नही होना चाहिए।

C. Stamp Act (2 of 1899), Section 2(22) - *Promissory Note - Explained - Held - An unconditional undertaking to pay - The sum should be a sum of money and should be certain - The payment should be to the order of a person who is certain, or to the bearer of the instrument - The maker should sign it.* (Para 9)

ग. स्टाम्प अधिनियम (1899 का 2), धारा 2(22) – प्रॉमिसरी नोट – स्पष्ट किया गया – अभिनिर्धारित – संदाय करने का बिना शर्त वचन – रकम धनराशि के रूप में होनी चाहिए और निश्चित होना चाहिए – संदाय किसी ऐसे व्यक्ति के आदेश द्वारा जो निश्चित हो या लिखत के धारक को होना चाहिए – निष्पादक को उसे हस्ताक्षरित करना चाहिए।

D. Stamp Act (2 of 1899), Section 2(5) & 2(22) - *Bond - Promissory Note - Difference - Held - If money payable under the instrument is not certain, it cannot be promissory note, although it can be a bond - If the instrument is not attested by a witness, it cannot be a bond, although it may be a promissory note - If the instrument is payable to order or bearer, it cannot be a bond, but it can be a promissory note.* (Para 9)

घ. स्टाम्प अधिनियम (1899 का 2), धारा 2(5) व 2(22) – बंधपत्र – प्रॉमिसरी नोट – अंतर – अभिनिर्धारित – यदि लिखत के अन्तर्गत देय धनराशि निश्चित नही है तो यह प्रामिसरी नोट नही हो सकता यद्यपि वह एक बंधपत्र हो सकता है – यदि लिखत एक साक्षी द्वारा अनुप्रमाणित नही है तो यह एक बंधपत्र नही हो सकता यद्यपि यह प्रॉमिसरी नोट हो सकता है – यदि लिखत आदेश पर या धारक को देय है तो यह एक बंधपत्र नही हो सकता किन्तु यह एक प्रॉमिसरी नोट हो सकता है।

E. Stamp Act (2 of 1899), Section 2(5) - *Bond - Peculiar features - Held - Positive - It should be attested by a witness - Negative - It must not be payable to order or bearer.* (Para 9)

ङ. स्टाम्प अधिनियम (1899 का 2), धारा 2(5) – बंधपत्र – विशिष्ट लक्षण – अभिनिर्धारित – सकारात्मक – यह साक्षी द्वारा अनुप्रमाणित होनी चाहिए – नकारात्मक – यह आदेश पर या धारक को संदेय नही होना चाहिए।

F. Stamp Act (2 of 1899), Sections 35 & 38(2) - *Instrument not duly stamped - Procedure for impounding the instrument - discussed.* (Para 13)

च. स्टाम्प अधिनियम (1899 का 2), धाराएँ 35 व 38(2) – लिखत सम्यक् रूप से स्टाम्पित नही – लिखत को परिबद्ध करने की प्रक्रिया – विवेचना की गयी।

Cases referred :

1976 JLJ 235, W.P. No.13974/2008 decided on 22.07.2009, (2002) 10 SCC 427, AIR 1968 Delhi 1.

R.K. Samaiya, for the petitioner.

P. Pareek, for the respondent No.1.

BHISMAT PANDEY Vs. PHOOLA

ORDER

The Order of the Court was delivered by K.K. LAHOTI, J. :–This petition is directed against an order dated 16.4.2008 by the Additional District Judge, Panna in Civil Suit No.29-A/2007, by which the Court found that document in question was a promissory note, not an agreement for payment of remaining consideration of sale and was on a proper stamp duty. Holding it, the trial Court found that the document can be received in evidence.

2. Learned counsel for petitioner submitted that infact the document in question was a 'bond' and not a 'promissory note'. From the language of document it is apparent that a definite amount of money was promised to be paid to the plaintiff/ respondent with a condition that only after payment of the amount the defendant shall be entitled for mutation in the revenue record. If the defendant effects mutation without such payment then the plaintiff would be entitled to object the mutation and for declaration of sale deed as void. The document was signed by both the parties and also attested by two witnesses, so it falls within the purview of "bond" as defined under section 2(5) of the Indian Stamp Act, 1899. He has also placed reliance to a Full Bench judgment of this Court in *Sant Singh Vs. Madandas Panika and another* (1976 JLJ 235) and submitted that this writ petition be allowed, impugned order be set aside, the document in question be declared as bond, the trial Court be directed to impound it and only after recovery of duty and penalty it be permitted to be received in evidence.

3. Learned counsel for plaintiff/respondent no.1 opposed the contention and submitted that in fact the document in question is a "promissory note" by which the defendant agreed to pay unpaid consideration of sale deed to the plaintiff, though it was signed by the parties and attested by witnesses, but it does not fall within the purview of bond. In the alternative, it was argued by Shri Pareek that it is an agreement for payment of unpaid consideration. He placed reliance to Full Bench judgment of Delhi High Court in the matter of *Hamdard Dawakhana (Wakf) Delhi C. Reference* (AIR 1968 Delhi 1) and submitted that this writ petition be dismissed with costs.

4. To appreciate the rival contention of the parties, it would be appropriate if the document in question is referred which reads thus :-

इकरारनामा

इकरारकर्ता : भीष्मत पाण्डेय तनय श्री रमाकान्त पाण्डेय उम्र 46 साल निवासी ग्राम भिलसायं तहसील व जिला पन्ना म0 प्र0 ।

इकरारग्रहीता : फुल्ला तनय गुबरा चमार उम्र 60 साल निवासी ग्राम भिलसायं तहसील व जिला पन्ना म0 प्र0 ।

जो कि मुझ इकरारकर्ता ने इकरारग्रहीता के शामिल खाते की आराजी नम्बर 2581/2 रकवा 0.98 हे0 लगानी 1.45 रुपया स्थित ग्राम भिलसायं प.ह.न. 33

तहसील व जिला पन्ना की जो भू अधिकार ऋण पुस्तिका के क्रमांक ओ 120.95 पर दर्ज है, को मैंने इकरारग्रहीता एवं उसके सह खातेदार श्री गुट्टू तनय थोचन चमार से क्रय की है और उसका पंजीयन आज दिनांक को रजिस्टर्ड करा लिया है।

चूकिं मुझ इकरारकर्ता ने इकरारग्रहीता की विक्रय की रकम में से मात्र 20,000/- रुपया दिये हैं और सहखातेदार के रुप में गुट्टू तनय गुबरा चमार को विक्री की समस्त रकम दे दी है क्योंकि उक्त आराजी में मात्र 0.32 आरे पर गुट्टू का हिस्सा था इससे उसके विक्रय की रकम पूर्ण चुकता हो चुकी है मात्र शेष बची आराजी का 0.66 आरे का रजिस्टर्ड करा दिया है। चूकिं मुझ इकरारकर्ता के पास इकरारग्रहीता की रकम मुव0 1,20,000/- रुपया (एक लाख बीस हजार रुपया) देने की अभी व्यवस्था नही थी और न ही इतने रुपयों की अभी व्यवस्था हो पा रही थी इससे इकरारग्रहीता एवं उसके सहखातेदार ने पंजीयन तो रजिस्टर्ड करा दिया है लेकिन अभी विक्रय की रकम देना बाकी रह गयी है जो मैं इकरारकर्ता 1,20,000/- रुपया (एक लाख बीस हजार रुपया) इकरारग्रहीता फुल्ला चमार को अदा करनें के बाद ही विक्रय पत्र को नामांतरण अपने नाम कराऊंगा तथा यह शेष बची रकम एक लाख बीस हजार रुपया में इकरारकर्ता भीष्मत पाण्डेय, इकरारग्रहीता फुल्ला चमार को अदा आज से एक वर्ष यानि की अप्रैल 2002 तक अदा कर चुकता की रसीद प्राप्त कर लूंगा, और इसके बाद ही दाखिल खारिज (नामांतरण) अपने नाम कराऊंगा। अगर मैं इकरारकर्ता उक्त रकम अदा करने के पूर्व नामांतरण कार्यवाही करता हूँतो इकरारग्रहीता को अधिकार होगा कि वह उक्त नामांतरण में रोक लगावें एवं आपत्ति करें तथा विक्रय पत्र को शून्य घोषित करा देवें। एवं इसमें होने वाले समस्त खर्चो का दायित्व मुझ इकरारकर्ता का ही रहेगा।

इस वास्ते यह इकरारनामा मुझें इकरारकर्ता ने इकरारग्रहीता के पक्ष में ठीक अपने होश हवास में बिना किसी जब्र व दबाव के रुबरु गवाहान लेख करा दिया कि सनद रहे वक्त पर काम आवे।

दिनांक 12.02.2001 हस्ता. इकरारग्रहीता हस्ताक्षर इकरारकर्ता- भीष्मत पाण्डेय

गवाह-1 अंगूठा निशानी

सही/हस्ता0 फुल्ला
शिवकुमार

गवाह-2
सही/अंगूठा/निशानी
लल्लू चमार

From the perusal of aforesaid the following position emerges :

(I) That plaintiff Phoola sold his land survey no.258 1/2 area 0.98 hectares to the defendant. Out of total consideration, Rs.20,000/- was paid by the defendant to the plaintiff at the time of execution of sale deed, which was paid to co-owner Guttu, S/o Thochan

Chamar, who was co-executor of sale deed. Remaining amount Rs.1,20,000/- was not available with defendant, so he had agreed to pay it within one year from the date of sale deed i.e. April 2002.

(ii) It was also stipulated in the agreement that only after payment of entire amount to plaintiff the defendant would be entitled for mutation of his name and in case without payment of amount mutation proceedings were initiated then the plaintiff would be entitled to object it and to get sale deed declared as void. In that regard the cost of proceedings were to be paid by the defendant.

(iii) The document was signed by the defendant Bhismat Pandey, plaintiff Phoola (T.I.) and two witnesses, namely Shivkumar and Lallu Chamar (T.I.).

(iv) As the aforesaid amount was not paid, the suit was filed by the plaintiff for declaration that sale deed dated 12.4.2001 be declared as void, possession of land be delivered to the plaintiff or in the alternative a decree in favour of plaintiff of unpaid consideration at Rs.1,20,000/- alongwith 12% interest from 12.4.2001 be granted.

5. The defendant/petitioner contested the suit by filing written statement, issues were framed. Before recording the evidence the petitioner objected to the document that it was not on appropriate stamp duty and was inadmissible in evidence. The trial Court by the impugned order found that in fact it was a promissory note and not an agreement for the sale of land. The plaintiff was not liable to make payment of stamp duty and penalty on the entire consideration of document. The stamp duty of Rs. 20/- was sufficient.

It is this order, which is under challenge in this petition.

6. To appreciate the rival contention of the parties, it would be appropriate if the definition of bond in the Indian Stamp Act, 1899 may be referred which reads thus :-

"Bond

S.2(5) "Bond" includes -

(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be ;

(b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and

(c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another;"

Promissory note has been defined in section 2(22) which reads thus :-

"Promissory note

S2(22) "Promissory note" means a promissory note as defined by the Negotiable Instruments Act, 1881;

It also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen;

As per section 2(22) the definition of Promissory note shall be as defined by Negotiable Instruments Act, 1881. For ready reference the definition of promissory note as defined in section 4 of the Negotiable Instruments Act may be referred, which reads as under :-

"4. "Promissory note" - A "promissory note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

Now in the light of aforesaid definitions firstly the definition of promissory note may be looked into. Section 4 of the Negotiable Instruments Act provides as under :-

(a) An instrument in writing.

(b) an unconditional undertaking, signed by the maker, to pay a certain sum of money only.

(c) Money is payable to the person in whose favour the promissory note is executed or to the order of a certain person or to the bearer of the instrument. It should be signed by the maker.

From the perusal of aforesaid document it is apparent that except the money was payable to the order of or the bearer of instrument, other conditions were incorporated in the document.

7. Under section 2(h) of the Indian Contract Act, 1872, an agreement enforceable by law is a contract. Under section 10 of the Contract Act all agreements are contracts if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void.

An "agreement" or a "memorandum of agreement to sale of immovable property" has been provided in schedule 1-A of Indian Stamp Act, which provides stamp duty when possession of property is delivered or is agreed to be delivered without executing the conveyance, the stamp duty as of conveyance on the market

value of property is to be paid. But when possession of property is not given 1% of the total consideration of property, set forth in the agreement or in the memorandum of agreement, is payable. But in the present case, the sale deed was already executed and possession was also delivered to the petitioner herein. In the set of facts, it does not fall within the purview of agreement as provided under Schedule 1-A of Indian Stamp Act.

8. Now the definition of "bond" may be looked into, as provided under section 2(5) of the Indian Stamp Act, which has been referred hereinabove. As per the definition, the essential ingredients of bond are as under :-

(1) The person obliges himself to pay money to another.

(2) On a condition that the obligation shall be void if the specific act is performed or not performed, as the case may be.

(3) The instrument must be attested by a witness.

(4) That the amount shall not be payable to order or bearer and a person obliges himself to pay money to another.

9. A Full Bench of this Court had an occasion in *Sant Singh* (supra) to consider the essential and distinctions of bond and promissory note. The Full Bench held the essentials of a promissory note as under :-

"(1) An unconditional undertaking to pay;

(2) The sum should be a sum of money and should be certain;

(3) The payment should be to the order of a person who is certain, or to the bearer of the instrument; and

(4) The maker should sign it.

If these four conditions exist, the instrument is a promissory note."

In respect of bond, the Full Bench held that following are the essentials of a "bond".-

"(1) There must be an undertaking to pay;

(2) The sum should be a sum of money but not necessarily certain;

(3) The payment will be to another person named in the instrument;

(4) The maker should sign it;

(5) The instrument must be attested by a witness; and

(6) It must not be payable to order or bearer,

The Full Bench on a comparison between the essentials of promissory note and those of bond found that there are three distinguishing features, which are as under :-

"(i) If money payable under the instrument is not certain, it cannot be a promissory note, although it can be a bond.

(ii) If the instrument is not attested by a witness, it cannot be a bond, although it may be a promissory note.

(iii) If the instrument is payable to order or bearer, it cannot be a bond, but it can be a promissory note."

Defining aforesaid the two peculiar features of bond has been narrated as under :-

(a) Positive – it must be attested by a witness.

(b) Negative – it must not be payable to order or bearer.

Appreciating aforesaid the Full Bench held in paras 7, 8 & 9 as under :-

"7. It is also clear that if in an instrument the above two distinguishing features (positive and negative) are present, then, even if the four essentials of a promissory note are also present, the instrument will still be a bond, because all the ingredients of a promissory note are also present in a bond with the exception that whereas a promissory note can be payable, apart from the person named in it, to the order of that person or to the bearer of the instrument, a bond cannot be payable to order or bearer.

8. Therefore, an instrument, which is not payable to bearer or order but is attested by a witness will also be a bond within the definition of section 2(5) of the Stamp Act, although simultaneously it may also fall within the definition of a promissory note within the meaning of section 2(22) of the Stamp Act read with section 4 of the Negotiable Instrument Act.

9. Having thus pointed out the distinction between promissory note and a bond, we may at once say that in the last mentioned situation that is, where an instrument comes within the description of a promissory note as well as that of a bond, by virtue of section 6 of the Stamp Act, it will be chargeable only with the highest of the duties chargeable, i.e., stamp duty as chargeable on a bond. That section reads thus :-

"Subject to the provisions of the last preceding section, an instrument so framed as to come within two or more of the descriptions in Schedule I, shall, where the duties chargeable thereunder are different be chargeable only with the highest of such duties :

Provided that nothing in this Act contained shall render chargeable with duty exceeding one rupee a counterpart or

duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid."

10. In view of the settled law by the Full Bench, now the factual position in the present case may be looked into. The document in question is attested by a witnesses and is not payable to order or bearer. Apart from this all the essential ingredients of bond are found in the document, i.e., (a) an undertaking to pay a definite sum of the amount, (b) the payment was to be made to the plaintiff, (c) the maker had signed it, (d) the instrument has been attested by two witnesses and it is not payable to order or bearer.

In view of aforesaid settled law by the Full Bench there is no iota of doubt that the document in question is a bond.

11. Now the judgment relied on by the learned counsel for respondent no.1 may be looked into. The Delhi High Court in the matter of *Hamdard Dawakhana* (supra) considering the test to determine nature of instrument for the purposes of stamp duty held in para 9 that the instrument has to be read as a whole to find out its dominant purpose; a single instrument may embody several purposes, but what is relevant for the purpose of the Act, is the dominant purpose of the instrument. Considering the difference of bond and agreement the Full Bench in para 14 held that the test for distinguishing a "bond" from "agreement" in the event of breach the party to the instrument, who had obliged to pay money to the other, is liable to pay the sum stipulated in the instrument. In the latter case, the quantum of damages has to be fixed by the Court. The Full Bench in para 16 of the judgment considering the question whether the instrument was a conveyance or an agreement held that the same did not evidence any transfer of property, so it cannot be considered as a conveyance.

12. In the light of aforesaid ratio, the respondent cannot take any benefit to arrive this Court to a conclusion that the document is not a bond, but is a promissory note. The law laid down by the Full Bench in *Sant Singh* (supra) is fully applicable in the present case and all the ingredients of bonds are present in the document. The document is also attested by witness and is not payable to order or bearer. Apart from this other ingredients of promissory note though are present, but in view of specific two peculiar features of a bond, which exist in present document, no conclusion can be arrived except that the document in question is a bond.

13. Now one more question remains for consideration that after arriving at a finding that the document in question is a bond what procedure is to be adopted by the trial Court. In this regard a recent judgment of this Court in *Mukesh Yaduvanshi Vs. Smt.Radhadevi Awasthy* (W.P.No.13974/2008 decided on 22.7.2009 may be referred in which a judgment of Apex Court in *Peteti Subba Rao Vs. Anumala S. Narendra* [2002 (10) SCC 427] is referred thus :-

"Chapter IV of the Indian Stamp Act contains provisions regarding "instruments not duly stamped". Section 35 falls under

the said chapter and empowers the trial Court to direct the party (who wants the document to be acted upon) to pay the stamp duty (or the deficient portion) together with a penalty of rupees fifteen, or, when ten times the amount of the proper duty or deficient portion thereof exceeds fifteen rupees, a sum equal to ten times such duty or portion. This is for the purpose of enabling the document to be admitted in evidence. In such a situation the document would be admitted only on payment of the aforesaid sum. In a case where the party is not willing or he cannot afford to pay the said sum the court has to adopt the procedure envisaged in Section 38(2) of the Act.

In a case where the party fails to pay the penalty suggested by the court the document impounded has to be sent to the Collector for the purpose of taking further steps in respect of that document as provided in Section 40 of the Act. The Collector has the power to require the person concerned to pay the proper duty together with a penalty amount which the Collector has to fix in consideration of all aspects involved. The restriction imposed on the Collector in imposing the penalty amount is that under no circumstances the penalty amount shall go beyond ten times the duty or the deficient portion thereof. That is the farthest limit which means that only in very extreme situations the penalty need be imposed up to that limit. The Collector is not required by law to impose the maximum rate of penalty as a matter of course whenever an impounded document is sent to him. He has to take into account various aspects including the financial position of the person concerned.

The impugned judgments passed by the trial court and the High Court are set aside. The trial Court is directed to impound the document as indicated in Section 33(1) and forward the same to the Collector concerned as envisaged in Section 38(2) of the Act."

It was held by the Division Bench thus :-

"In view of the aforesaid settled position of the law, prayer made by the petitioner is allowed. Petitioner is permitted to move an application before the trial Court for forwarding the document under section 38(2) of the Act to the Collector. On filing such an application, the trial Court shall forward the original agreement to the Collector Hoshangabad to complete the proceedings envisaged in Section 40 of the Act, within a period of one month from the date of receipt of the document.

6. In view of the aforesaid, this petition is finally disposed of with the following directions :-

i) Petitioner is permitted to move an application before the trial Court under Section 38(2) of the Stamp Act for forwarding the agreement to the Collector, Hoshangabad for initiating proceedings as envisaged under Section 40 of the Act.

ii) The trial Court on filing such an application shall forward the document with a specific direction to the Collector to complete the proceedings within a period of one month from the date of receipt of the document.

iii) The Collector, Hoshangabad shall proceed in the matter in accordance with Section 40 of the Act. The Collector while considering the question of payment of duty and penalty shall follow the law laiddown by the Apex Court in para 6 of *Peteti Subbarao* (supra) and remit the document after due ascertainment as per Section 40 of the Act. Thereafter, the trial Court shall proceed in the matter, in accordance with law.

Considering the facts of the case, there shall be no order as to costs."

14. In view of aforesaid, it is directed that the trial Court shall impound the document in question and shall send it to the Collector, Panna with a specific direction to him for dealing with the document as per section 40 of the Indian Stamp Act, within a period of sixty days from the date of receipt of such document.

15. With the aforesaid direction, this petition is allowed. The impugned order is set aside. Considering the facts of the case, there shall be no order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 105
WRIT PETITION
Before Mr. Justice R.S. Jha
20 August, 2009*

AYODHYA PRASAD NARMADA PRASAD UCHCHATTER MADHYAMIK SHALA & anr. ... Petitioners
Vs.
STATE OF M.P. & ors. ... Respondents

A. Ashaskiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmchariyon Ke Vetano Ka Sanday) Adhiniyam, M.P. (20 of 1978), Sections 1(4) & 2(e) - *Can an educational institution be compelled to receive*

*W.P. No.13959/2008 (Jabalpur)

grant-in-aid - Held - No, the petitioner institution cannot be forced to receive the grant-in-aid - As it is not receiving any grant from the State Government since April 2007, it does not fall within the definition of an "institution" as provided u/s 2(e) of the Adhiniyam and is, consequently, excluded from the applicability of the Adhiniyam, in view of S. 1(4) thereof. (Para 13)

क. अशासकीय शिक्षण संस्था (अध्यापकों तथा अन्य कर्मचारियों के वेतनों का संदाय) अधिनियम, म.प्र. (1978 का 20), धाराएँ 1(4) व 2(ई) – क्या किसी शैक्षणिक संस्था को सहायता अनुदान प्राप्त करने के लिए विवश किया जा सकता है – अभिनिर्धारित – नही, याची संस्था को सहायता अनुदान प्राप्त करने के लिए बाध्य नही किया जा सकता – चूंकि वह राज्य सरकार से अप्रेल 2007 से कोई अनुदान प्राप्त नही कर रही है, वह अधिनियम की धारा 2(ई) के अन्तर्गत उपबंधित "संस्था" के अन्तर्गत नहीं आती है और परिणामतः अधिनियम के लागू होने से उसकी धारा 1(4) को दृष्टिगत रखते हुए अपवर्जित है।

B. Ashaskiya Shikshan Sanstha (Institutional Fund) Rules, M.P. 1983, Rule 5(3), Ashaskiya Shikshan Sanstha Anudan Niyam, M.P. 2008, Rule 8 - *DEO appointed to operate the account of petitioner institute singally - Order challenged - Held - Upon repeal of the Rules, 1983 by the Niyam, 2008, the State authorities could not have passed any order under the repealed Rule 5(3) conferring power on the DEO to operate the account of the petitioner institution singally by the impugned order dated 22.10.2008 and those proceedings stood repealed and were not saved by Rule 8 of the Rules, 2008.* (Para 15)

ख. अशासकीय शिक्षण संस्था (संस्थागत निधि) नियम, म.प्र. 1983, नियम 5(3), अशासकीय शिक्षण संस्था अनुदान नियम, म.प्र. 2008, नियम 8 – जिला शिक्षा अधिकारी अकेले याची संस्था का लेखा संचालित करने के लिए नियुक्त – आदेश को चुनौती – अभिनिर्धारित – नियम, 2008 द्वारा नियम, 1983 के निरसन पर राज्य प्राधिकारी आक्षेपित आदेश तारीख 22.10.2008 द्वारा जिला शिक्षा अधिकारी को अकेले याची संस्था का लेखा संचालित करने की शक्ति प्रदान करते हुए निरसित नियम 5(3) के अन्तर्गत कोई आदेश पारित नही कर सकते थे और वे कार्यवाहियाँ निरसित हो गयीं और नियम, 2008 के नियम 8 द्वारा व्यावृत्त नही की गयीं।

Sheel Nagu, for the petitioners.
Rahul Jain, G.A., for the respondents/State.
Sanjay Dwivedi, for the interveners.

ORDER

R.S. JHA, J. :–The petitioners have filed this petition being aggrieved by order dated 22-10-2008 passed by the respondent/State whereby it has been directed that the District Education Officer, Jabalpur shall operate the account of the petitioner institution from 22-10-2008.

2. The brief facts leading to the filing of the petition, according to the petitioners, are that the petitioner institution, which is a registered society, is running a primary, middle and higher secondary school in the name "Ayodhya Prasad Narmada

Prasad Higher Secondary School, Cantonment., Jabalpur. Previously the petitioner society was receiving grant from the State Government for the purposes of running its school under the provisions of the M. P. Ashasakiya Shikshan Sanstha (Adhyapakon Tatha Anya Karamchariyon Ke Vetan Ka Sanday) Adhiniyam, 1978 and the provisions of the M.P. Ashaskiya Shikshan Sanstha (Anudan Ka Pradaya) Adhiniyam, 1978. In the meeting of the general body of the petitioner society held on 5-2-2007, it was decided to stop availing of the facility of grant under the aforesaid provisions of the Act with effect from 1st April, 2007. It is stated that thereafter the petitioner society stopped availing of the grant given by the State Government.

3. It is pertinent to note that the provisions of the M. P. Ashasakiya Shikshan Sanstha (Adhyapakon Tatha Anya Karamchariyon Ke Vetan Ka Sanday) Adhiniyam, 1978 underwent widespread amendments on and from 13-4-2000 and the provisions of the Act regarding grant-in-aid, salary etc. were watered down giving elbow room to the State to determine the quantity of grant to be given to the school and also giving freedom to the educational institution to determine salary of its employees. The validity of the amended Act was challenged before this Court wherein the amendments were declared to be unconstitutional. However, pursuant to order passed in Special Leave Petition, which is pending before the Supreme Court against the order passed by this Court, as an ad-interim measure 50% grant-in-aid was to be released to the educational institution. The matter is still pending adjudication.

4. In the year 2008, the State Government in exercise of powers under Section 10 of the Adhiniyam 1978, notified the M. P. Ashasakiya Shikshan Sanstha Anudan Niyam, 2008 repealing amongst others, the M.P. Ashaskiya Shikshan Sanstha (Institutional Fund) Rules, 1983. These Rules came into effect with effect from 20-2-2008. Prior to coming into force of these Rules, the respondent/State issued a notice to the petitioner institution on 1-9-2007 asking it to withdraw the grant from its Bank account released by the State for the period subsequent to 1st April 2007. As the petitioner institution failed to withdraw the grant released by the State, the respondent/State issued another notice dated 24-12-2007 directing it to withdraw the grant failing action under rule 5 (3) (ii) & (iv) of the M. P. Ashaskiya Shikshan Sanstha (Institutional Fund) Rules, 1983 shall be taken by enforcing the provision to operate it's account by a single officer of the State. It is stated that the petitioners having decided not to await grant from the State and run the school on its own its own strength and having informed the State to that effect, did not withdraw the grant forcefully released by the State.

5. Being aggrieved by the aforesaid notice, the petitioners filed a writ petition (WP No. 2815 / 2008) before this Court which was disposed of by order dated 30-4-2008 with liberty to prefer a representation to the Commissioner, Public Instructions, Bhopal taking up all the grounds. Pursuant to the liberty granted by

this Court, the petitioners preferred their representation on 25-5-2008 contending inter alia that as the petitioner society had stopped availing of the facility of grant-in-aid under the provisions of the Act 1978, it was no longer covered by its provisions and, consequently, no action under the Act and Rules framed thereunder could be taken against the petitioner, that the Rules of 1983 have been repealed by the subsequent Rules of 2008 and, therefore, the provisions of rule 5 (3) (ii) & (iv) of the Rules 1983 under which the action is sought to be taken against the petitioner society are no longer in existence and that even otherwise, no cause of action arose as the petitioner institution was regularly disbursing the salary to its staff from its own funds. It is submitted that the respondent/State without applying its mind to the provisions of the Act 1978 and the Rules 1983 has rejected the representation filed by the petitioners by the impugned order dated 22-10-2008 with a direction that the District Education Officer, Jabalpur would singally handle the account of the petitioner institution for a period of one year.

6. The learned counsel for the petitioners submits that since 1st April, 2007, the petitioner institute is a private un-aided school as it does not avail of any grant by the State and in such circumstances no action under the provisions of the Act amended or unamended can be taken against the petitioners in view of the provisions of Section 1 (4) and 2 (e) of the Act 1978 which restrict the applicability of the Act only to institutions receiving grant-in-aid from the State.

7. It is further submitted by the learned counsel for the petitioner that after the repeal of the Rules 1983 by the Niyam of 2008, the power and authority of the State to impose the system of managing the account singally as provided by rule 5 (3) of the Rules 1983 has ceased to exist and, therefore, the State authorities have no power to order that the District Education Officer, Jabalpur would singally manage the account of the petitioner institution.

8. It is next contended that the petitioner institution is on it's own managing the school with its own funds and is paying regular salary to its employees and in such circumstances, when the petitioner institution is able to pay the salary of its staff and manage the school in all respects the impugned order passed by the respondent authority dated 22-10-2008 deserves to be quashed.

9. Per contra, the learned counsel for the respondent/State submits that the petitioner institution was receiving grant from the State prior to April 2007 subsequent to which it unilaterally stopped to withdraw the grant which was deposited in the joint account and in such circumstances, notices were issued on 1-9-2007 and 24-12-2007 under the provisions of rule 5 (3) of the Rules 1983 which was very much in existence at that point of time. It is submitted that in view of the aforesaid facts and circumstances, the action taken by the respondent/ State under the provisions of rule 5 (3) of the Rules 1983 in respect of notices which were issued prior to repeal of Rules 1983 cannot be found fault with. It is further submitted that the action taken by the State authority has been bona fidely

taken only to protect the interest of all the staff and the children studying in the petitioner school and to ensure proper management of accounts and payment of salary to the staff and, therefore, the action taken by the respondent/State is bona fide. It is prayed that the petition be dismissed.

10. Two applications for intervention have been filed, one in support and the other in against the petitioner by the teachers who are all on role of the petitioner institution. While one set of the teachers have expressed satisfaction with the functioning of the petitioner institution, another set, represented by Shri Sanjay Dwivedi, Advocate, has opposed the same and has submitted that the petitioner institution has resorted to the aforesaid method to avoid the regulation and restrictions provided in the Act of 1978 and the provisions of the M.P. Society Registrikaran Adhiniyam, 1973, so that they can continue to manage the school on their own whims and fancies and to avoid payment of salary due to its staff.

11. From a perusal of Section 1(4) of the Adhiniyam, 1978 in juxta position of Section 2 (e), the definition clause, it is clear that the provisions of the Act apply to the institutions as defined under Section 2 (e), i. e., non-government educational institutions for the time being receiving grant from the State Government or from the Madhya Pradesh Uchcha Shiksha Anudan Ayog, as the case may be, established, administered and managed by a society registered or deemed to be registered under the M.P. Society Registrikaran Adhiniyam, 1973, excluding an educational institution established, administered and managed by the State Government, the Central Government, a local authority or any agency managed, controlled, approved or sponsored by the Central or the State Government or by a non-trading corporation formed and registered under the M.P. Non-trading Corporation Act, 1962 or deemed to have been registered thereunder. The same definition of "institution" is again repeated in rule 3 (e) of the Rules 2008.

12. From a perusal of the aforesaid provisions of law, it is also clear that an institution covered under the Act includes an institution when it "for the time being receives grant from the State". There is no provision under the Act or the Rules as it stands today, which makes it mandatory or compulsory for an institution to accept grant-in-aid from the State. In other words, there is no explicit provision in the Act or the Rules which prohibits an institution from stopping to avail of the grant or to refuse to avail of the benefit of the grant or empowers the State to force an institution to accept grant even when it does not wish to do so. However, the words "for the time being" used in Section 2 (e) of the Act in the definition of "institution" and the words "the grant as fixed by the State Government from time to time" under Section 5 (2) of the Act, 1978 does clearly indicate that a grant may be continued, reduced or dis-continued.

12-A. In the instant case, the petitioner society by its resolution dated 5-2-2007 has taken a decision in its general body meeting to manage the school with it's own funds and has decided not to avail of the facility of grant-in-aid under the Act

1978 and acting upon the aforesaid resolution, has sent several communications to the State authorities including a notice through its advocate informing the State that it no longer wishes to avail of the grant-in-aid under the provisions of the Act 1978.

13. In view of the aforesaid facts and circumstances, I am of the considered opinion that the petitioner institution cannot be forced to receive the grant-in-aid, as contended by the learned counsel appearing for the respondent/State and, therefore, as it is not receiving any grant from the State Government since April 2007, it does not fall within the definition of an "institution" as provided under Section 2 (e) of the Act, 1978 and is, consequently, excluded from the applicability of the Act 1978 in view of Section 1 (4) thereof.

14. As far as the second contention of the learned counsel for the petitioner is concerned, it is seen that the notices under Section 5 (3) of the M.P. Ashaskiya Shikshan Sanstha (Institutional Fund) Rules, 1983 were issued to the petitioner institution prior to the coming into force of the Niyam 2008 with effect from 20-2-2008. However, rule 8 of Niyam 2008, which deals with repeal of the existing Rules, does not save any action initiated under the old Rules, more so, in view of the fact that there is no corresponding provision as rule 5 (3) in the Rules 1983, in the Niyam of 2008 empowering the authorities to pass an order enforcing the system of managing the account singally. Rule 8 of the Niyam 2008 reads as under:

> **"8. Repeal of existing rules.** - The Madhya Pradesh Ashasakiya Shikshan Sanstha (Suspension of Teacher and Other Staff) Rules, 1978, Madhya Pradesh Sansthagat Nidhi Rules, 1983, Madhya Pradesh Ashasakiya Shikshan Sanstha (Procedure regarding dismissal, removal of teacher and other staff) Rules, 1983, Madhya Pradesh Ashasakiya Shikshan Sansthan (Promotion of teacher and other staff working in the school) Rules, 1988 and Madhya Pradesh Ashasakiya Shikshan Sanstha (Recruitment of teachers and other employees) Rules, 1979 shall stand repealed. Provided that any order made or any action taken under the rules so repealed shall be deemed to have been made or fallen under the corresponding provisions of these rules.'

15. In view of the aforesaid, upon repeal of the Rules, 1983 by the Niyam 2008, the State authorities could not have passed any order under the repealed rule 5 (3) conferring power on the District Education Officer, Jabalpur to operate the account of the petitioner institution singally by the impugned order dated 22-10-2008 and those proceedings stood repealed and were not saved by Rule 8 of the 2008 Rules. It is also clear from the scrutiny of the impugned order that the authorities of the State, inspite of the that the petitioner institution was directed by this Court to approach the State for redressal of its grievances have not applied their mind as

to the applicability of the Rules and have taken action under the aforesaid provisions by passing a cryptic unreasoned order. Thus, the impugned order has been passed without any application of mind by the respondent authorities and in such circumstances, suffers from perversity, material irregularity and manifest illegality. The impugned order, therefore, deserves to be and is hereby quashed.

16. It is made clear that this Court has addressed itself to the order impugned in the present petition and has not delved into any issue relating to the violation of right of the employees of the petitioner institution, which is a separate issue and is not a subject matter of the present petition.

17. With the aforesaid clarification, the petition filed by the petitioners is allowed. In view of the peculiar facts and circumstances of the present case, there shall be no order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 111
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
25 August, 2009*

BALESHWAR DAYAL JAISWAL ... Petitioner
Vs.
STATE OF M.P. & ors. .... Respondents

A. Municipalities Act, M.P. (37 of 1961), Section 41-A - *Removal of President or Chairman of a committee - Opinion or finding of the State Government formed or recorded must be based upon some cogent material which should be adequate to form such an opinion or reach to the conclusion as required by the section and such a material should be reflected in the order of removal.* (Para 15)

क. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 41–ए – समिति के सभापति या अध्यक्ष का हटाया जाना – राज्य सरकार की बनायी गयी राय या अभिलिखित किये गये निष्कर्ष किसी तर्कपूर्ण सामग्री पर आधारित होना चाहिए जो धारा द्वारा अपेक्षित ऐसी राय बनाने या निष्कर्ष पर पहुँचने के लिए पर्याप्त होना चाहिए और ऐसी सामग्री हटाये जाने के आदेश में प्रतिबिम्बित होनी चाहिए।

B. Municipalities Act, M.P. (37 of 1961), Section 41-A - *Removal of President or Chairman of a committee - Judicial review - High Court can go into the sufficiency, adequacy and correctness of the reasons, and can also look into the sufficiency, adequacy and relevance of the material on the basis of which the opinion is formed by the State Government or conclusion is reached in respect of existence of ground to take an action u/s 41-A.* (Para 16)

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*W.P. No.3764/2008 (Indore)

ख. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 41–ए – समिति के सभापति या अध्यक्ष का हटाया जाना – न्यायिक पुनर्विलोकन – उच्च न्यायालय कारणों की पर्याप्तता, यथायोग्यता और शुद्धता पर विचार कर सकता है और उस सामग्री की पर्याप्तता, यथायोग्यता और सुसंगतता को भी देख सकता है जिसके आधार पर राज्य सरकार द्वारा धारा 41–ए के अन्तर्गत कार्यवाही करने के लिए आधार के अस्तित्व के बारे में राय बनायी गयी या निष्कर्ष निकाला गया।

C. Municipalities Act, M.P. (37 of 1961), Section 41-A - ***Removal of President or Chairman of a committee - Power of State Government - The manner in which it has to be exercised - S. 41-A does not give arbitrary, unbridled and discretionary power to the State Government to remove the elected President on trumpery charges not adequately proved or unreasonably accepted - State is required to form an opinion in respect of the misconduct or incapacity objectively.*** (Para 17)

ग. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 41–ए – समिति के सभापति या अध्यक्ष का हटाया जाना – राज्य सरकार की शक्ति – ढंग जिसमें इसे प्रयोग किया जाना है – धारा 41–ए राज्य सरकार को पर्याप्त रूप से साबित न किये गये या अयुक्तियुक्त रूप से स्वीकार किये गये निरर्थक आरोपों पर चुने हुए सभापति को हटाने की मनमानी, अनियंत्रित और विवेकाधीन शक्ति प्रदान नही करती है – राज्य को कदाचरण या असक्षमता के सम्बन्ध में निष्पक्ष रूप से राय बनाना आवश्यक है।

D. Municipalities Act, M.P. (37 of 1961), Section 41-A - ***Removal of President or Chairman of a committee - Powers when can be exercised - Since the exercise of power u/s 41-A has serious consequence, therefore, it can be invoked only for very strong and weighty reasons and the material on the basis of which such action taken must justify such a serious action.*** (Para 17)

घ. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 41–ए – समिति के सभापति या अध्यक्ष का हटाया जाना – शक्तियाँ कब प्रयोग की जा सकती हैं – चूंकि धारा 41–ए के अन्तर्गत शक्ति के प्रयोग के गम्भीर परिणाम हैं, इसलिए केवल अत्यंत सशक्त और ठोस कारणों से इसका अवलम्ब लिया जा सकता है और सामग्री जिसके आधार पर ऐसी कार्यवाही की गई, से ऐसी गम्भीर कार्यवाही को न्यायोचित ठहराना चाहिऐ।

Cases referred :

1991(1) MPLJ 268, W.P. No.2809/2002 decided on 13.05.2003, 1958 JLJ 589, AIR 1970 SC 150, AIR 1981 SC 136, AIR 1979 SC 1803, AIR 1996 Bombay 227, 1980 JLJ 69.

T.N. Sinh with *Hemlata Gupta,* for the petitioner.
A.S. Kutumbale, Addl.A.G., for the respondent Nos.1 to 3 / State.
A.K. Sethi with *Harish Joshi,* for the respondent No.4.
A.S. Garg with *M. Mansoori,* for the respondent No.5.
Manish Manana, for the proposed intervenor.

ORDER

PRAKASH SHRIVASTAVA, J. :–BY this writ petition, petitioner has challenged the order dated 6th June, 2008 passed by the Principal Secretary, Department of Urban Administration & Development, Government of Madhya Pradesh, Bhopal in exercise of the powers under Section 41-A of the M. P. Municipalities Act, 1961 (for short "the Act") removing the petitioner from the post of the President, Municipality Nagda and debarring him from contesting the election for a period of next 5 years.

2. Petitioner was elected as President of the Municipality Nagda in the election held on 04.11.2005. He was elected as an independent candidate; whereas in the election of Councilors for 36 Wards, 27 seats were won by the Bhartiya Janta Party, 7 by Indian National Congress and 2 by independent candidates. On the complaint of some of the Councilors, the Minister, Urban Administration & Development Department had got the enquiry conducted through the Secretary of the Department who submitted the ex-parte Enquiry Report on 5th September, 2005. The State Government issued show-cause notice dated 10th October, 2005 to the petitioner to remove him from the post of the President under Section 41-A of the Act. Petitioner filed reply to the show-cause notice. Thereafter another notice dated 17.04.2006 was given containing some additional charges for taking action under Section 41-A of the Act. The petitioner submitted reply to the additional charges on 04.07.2006. The Respondent No.1 passed the order dated 29.07.2006 removing the petitioner from the post of President, Municipal Council, Nagda exercising the powers under Section 41-A of the Act. Petitioner had earlier approached this Court by filing Writ Petition No.4644 of 2006 challenging the order of removal and the Single Bench of this Court by the order dated 9th October, 2007 allowed the writ petition on reaching to the conclusion that the order of removal was not authored by the Competent Authority himself; the order of removal was based upon the findings recorded in the Preliminary Enquiry Report which was held behind the back of the petitioner; the order was based upon the non application of mind and that some of the findings in the order were not based upon any evidence. Learned Single Judge set-aside the order dated 29.07.2006 and directed reinstatement of the petitioner as President, Municipal Council, Nagda for the rest of his term. The Writ Appeal No.605 of 2007 filed by the Respondents was dismissed by the learned Division Bench by observing that any expression contained in the order of the learned Single Judge on merits of the case will not preclude any party from taking resort to the provisions of the Act.

3. It is relevant to mention here that when the petitioner was removed from the post of the President by order dated 29.07.2006, to fill up the casual vacancy, initially one Mr. Raj Narayan was appointed under Section 37 (2) of the Act and thereafter election was held and the Court at that stage had made explicit that the Election Commission shall inform all the contesting candidates that the election

will be subject to the result of the writ petition. In the election one Gopal Yadav was elected. The issue of the status of Gopal Yadav came up before the Division Bench in Writ Appeal No.605 of 2007 and the Division Bench held that once the order under Section 41-A of the Act is quashed, the parties would be relegated to the position obtaining on the date of the order and the incumbent who had suffered the order under Section 41-A of the Act becomes entitled to restoration of his Office/Post after the order of removing was struck down. Consequently the petitioner was restored back to the Office of the President, Municipal Council, Nagda, and election of Gopal Yadav being conditional, no right accrued in his favour.

4. The petitioner was thereafter served with a fresh show-cause notice dated 26.12.2007 for removal from the post of President under Section 41-A of the Act. The petitioner submitted reply (Annexure P/16). Since some of the charges were the same which were contained in the earlier show-cause notice, therefore, the petitioner instead of repeating the reply for those charges relied upon his earlier reply submitted on 11.04.2006 (Annexure P/5) and 04.06.2006 (Annexure P/7). Petitioner was given an opportunity of personal hearing and the impugned order dated 6th June, 2008 was passed under Section 41-A of the Act removing the petitioner from the post of President, Municipal Council, Nagda. Aggrieved with this order, the petitioner has filed present writ petition before this Court.

5. Pending this writ petition, no election to the post of President has been held and the vacancy was filled up temporarily in terms of Section 37 of the Act. The matter stands thus when it came up for hearing before this Court.

6. Learned counsel appearing for the petitioner submitted that the impugned order dated 06.06.2008 is a cryptic and non-speaking order which does not contain any reasoning and straightway findings have been recorded. He further submitted that the charges only relate to procedural irregularities and there is no charge of financial gain to the petitioner. He submitted that while passing the impugned order, the reply of the petitioner contained in Annexure P/16 read with Annexures P/5 and P/7 has not been taken into account and that the guidelines which were given by the learned Single Judge in the order dated 09.10.2007 while allowing the Writ Petition No.4644 of 2006 have been ignored.

7. Learned counsel appearing for the Respondents No.1 to 3 – State submitted that the impugned order being an administrative order, does not require to contain reasons. Relying upon Rule 5 (2) of the Madhya Pradesh Municipalities (The Conduct of Business of the Mayor-in-Council/President-in-Council and the Powers and Functions of the Authorities) Rules, 1998, he submitted that the President-in-Council is vested with the financial powers not exceeding rupees two lacs and in the case in hand the item in question was divided in pieces to bring it within the financial limit. He submitted that the impugned order has been passed in accordance with the requirement of law, therefore, no interference is required.

8. Counsel for the Municipal Council submitted that this Court has limited scope of interference in writ jurisdiction since judicial review is not of the order itself but it is of the decision making process. He submitted that by the order of the Division Bench in Writ Appeal No.592 of 2007 liberty was given to take fresh action and accordingly after giving notice to the petitioner, fresh action was taken and the impugned order has been passed.

9. The proposed intervenor Gopal Yadav who was elected after the removal of the petitioner in the first round, has also opposed the writ petition.

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

11. On perusal of the impugned order dated 06.06.2008 passed by the State Government, I find that in the impugned order though the findings have been recorded against the petitioner but there is discussion about the material on the basis of which findings have been recorded. The impugned removal order does not show that while passing the order the concerned Respondent applied his mind to the explanation given by the petitioner in the reply to the show-cause notice. State has also not produced any material before this Court to show that the reply filed by the petitioner was considered before passing of the impugned order, or findings recorded in the impugned order were based upon the same reasons which were separately recorded.

12. Since the learned counsel for the State has raised the argument that an order passed under Section 41-A of the Act need not be a reasoned order, therefore, this Court is required to examine the nature of order passed under Section 41-A, and to see if while exercising this power State can non seat a democratically elected President by passing a non speaking order which contains only the finding without mentioning the reasoning and the material on the basis of which those findings are arrived at.

13. Section 41-A of the Act gives powers to the State Government to remove President on the grounds mentioned in the section. Section 41-A of the Act provides that :-

> **"41-A. Removal of President or Chairman of a Committee.-** (1) The State Government may, at any time, remove a President, Vice President or a Chairman of any Committee, if his continuance as such is not, in the opinion of the State Government desirable in public interest or in the interest of the Council or if it is found that he is incapable of performing his duties or is working against the provisions of the Act or any rules made thereunder.
>
> (2) The State Government may, while ordering the removal under sub-section (1), also order that such President, Vice President or Chairman of any Committee shall be disqualified to hold such post for the next term :

Provided that no such order under this Section shall be passed unless a reasonable opportunity of being heard is given."

14. Under Section 41-A of the Act, the State Government has the power to remove a President on following grounds :-

(i) If State Government forms an opinion that his continuance as such is not, in public interest or in the interest of the Council.

(ii) If it is found that he is incapable of performing his duties.

(iii) If he is working against the provisions of the Act or any rules made thereunder.

15. A perusal of Section 41-A makes it clear that before removing the President under the Section State Government is required to form an opinion, or reach to the finding about existence of reason enumerated in the Section. "Opinion or finding" of the State Government formed or recorded under the Section must be based upon some cogent material which should be adequate to form such an opinion or reach to the conclusion as required by the Section and such a material in order to maintain the transparency should be reflected in the order of removal or produced before the Court when such an order is challenged.

16. This Court while examining the correctness of the order can go into the sufficiency, adequacy and correctness of the reasons, and can also look into the sufficiency, adequacy and relevance of the material on the basis of which the opinion is formed by the State Government or conclusion is reached in respect of existence of ground to take an action under Section 41-A and if the material is adequate to come to the conclusion that the continuance of the elected Office bearer is not in public interest or in the interest of council. The language of the section itself gives a clue that while examining the correctness of the order under the Section the Court can go into the sufficiency, adequacy and relevancy of the material on the basis of which action under the Section was taken.

17. It is the settled position in law that the action of the Government has to be reasonable and it cannot be held that Section 41-A gives arbitrary unbridled and discretionary power to the State to remove the elected president on trumpery charges not adequately proved or unreasonably accepted. The State is required to form an opinion in respect of the misconduct or incapacity objectively. Since the exercise of power under Section 41-A has serious consequence, therefore, it can be invoked only for very strong and weighty reasons and the material on the basis of which such action taken must justify such a serious action. It cannot be ignored that by exercising this power, the State removes a democratically elected President, therefore, such a power cannot be exercised for trivial reasons or the material which is inadequate for taking the action.

18. The aforesaid view taken by this court is supported by the earlier judgment of this court in the matter of *Kaushalya Bai Vs. State of M.P.* reported in 1991

[1] MPLJ 368, where this court while examining the scope of power under Section 41-A has held that :-

> "4. From the provision quoted above it is noteworthy that it confers an extra ordinary and overriding power on the State Government to remove an elected office bearer of a local authority or committee under it on formation of an opinion that continuance of such office bearer is "not desirable in public interest" or "in the interest of the council" or that "he is incapable of performing his duties or is working against the provisions of the Act or any Rules" made thereunder. Similar power of removal of a councilor is vested in the Collector under section 41 of the Act against which there is an appeal provided. For taking action under section 41-A of removal of President, Vice President or Chairman of any Committee, power is conferred on the State Government with no provision of any appeal. The action of removal casts a serious stigma on the personal and public life of the concerned office bearer and may result in his disqualification to hold such office for the next term. The exercise of power, therefore, has serious civil consequences on the status of an office bearer. The nature of power is such that it has to be exercised on an opinion objectively formed by the State Government. The misconduct or incapacity of the office bearer should be of such magnitude as to make his continuance undesirable in the "interest of council", or "in public interest". There are no sufficient guidelines in the provisions of section 41-A as to the manner in which the power has to be exercised except that it requires that reasonable opportunity of hearing has to be afforded to the office bearer proceeded against. Keeping in view the nature of the power and the consequences that flow on its exercise it has to be held that such power can be invoked by the State Government only for very strong and weighty reason. Such a power is not to be exercised for some trivial or minor irregularities in discharge of duties by the holder of the elected post. The material or grounds on which the action is take should be such as to justify the exercise of drastic power of removal of the office bearer with consequence of his disqualification for another term. The provision has to be construed in a strict manner because the holder of office occupies it by election and he is deprived of the office by an executive order in which the electorate has no chance of participation."

19. The same issue relating to the nature of power which is exercised under Section 41-A of the Act came up before this Court in the matter of *Rajiv Sharma*

v/s State of Madhya Pradesh and others, in Writ Petition No.2809 of 2002 and this Court by order dated 13.05.2003 held that :-

> "13. That being so, it is not a case where the general principles governing review of the administrative decision will be applicable. Judicial review in the present case has to be undertaken keeping in view the fact that the power under section 41-A of the Act of 1961, is to be exercised by the State Government for removing an elected office bearer from his office. Meaning thereby that the State Government is acting against the wishes and mandate of the people who have elected the incumbent into office. Accordingly, the opinion with regard to feasibility of keeping such a person in office or the desirability of removing him in public interest has to be viewed objectively and the irregularities or allegations alleged should be of such serious nature and of such magnitude that continuation of such a person is undesirable. As indicated by this Court in the case of *Jaushalya Bai* (Smt.) (Supra), the consequence of exercise of power which is to be invoked by the State Government has serious civil consequence not only on the status of the person concerned but of his future prospects also and as no sufficient guidelines have been prescribed, State Government has to invoke the power only if strong and cogent reasons are available. It has been emphasised by this Court, in the aforesaid case of *Kaushalya Bai (Smt.)* (Supra), power cannot be exercised on some trivial or minor irregularities in the discharge of duties by the holder of the office. As indicated in the aforesaid case, the materials or the grounds on which the allegations are founded and the reasons for removal of the office bearer should justify the exercise of such a drastic power of removal. Keeping in view the aforesaid, the scope of judicial review in such matters is to be considered. That being the legal position, the contention of Shri Jain that this Court cannot sit over the decision of the State Government as an appellate authority has to be scrutinised keeping the aforesaid in view. There is no dispute that this Court cannot sit over the decision of the State Government as an appellate forum and scrutinise the action as if it is deciding an appeal against the order of the State Government, but in the backdrop of the legal principle enumerated hereinabove, in matter concerning removal of democratically elected people, this Court can very well look into the matter to find out whether the removal is based on cogent and compelling reasons, whether interest of the public interest of the Council have been properly considered, whether

material on the basis of which action has been taken is of such a nature that the persons can be held to be responsible for having misused his office to such an extent that retaining him in the office will have serious and far reaching consequences in the interest of the Council and ultimately the public at large. This Court can always look into the matter to find out whether conditions and circumstances extraneous to the main purpose of the statute are being achieved by exercise of its power. In case after appreciating the material on record, this Court comes to a conclusion that the irregularities or misconduct alleged are nothing but some discrepancies or irregularities which cannot be contemplated to and directly attributable to the persons certainly power of judicial review can be exercised. It is in the aforesaid background that the allegations and the material to substantiate the same is to be examined by this Court, to consider the fact as to whether the allegations and the irregularities complained of are so serious in nature that the person has to be unseated from his office. This power of review is approved by this Court in the case of *Kaushalya Bai (Smt.)* (Supra), and therefore, it cannot be said that merely because opportunity of hearing has been given and there is no violation of any statutory provision, the decision of the Government has to be upheld and this Court cannot interfere in the matter. The judgments referred to by learned senior counsel are with regard to scope of judicial review mainly in matters concerning disciplinary action against employee's and the Full Bench judgment in the case of *Natwar Singh* (Rana) (Supra) is with regard to the requirement of passing speaking order in such matters and therefore, are not much relevant for decision in the present case."

20. This Court in the matter of *Rajiv Sharma* (Supra) relied upon the earlier judgment dated 21.02.2003 passed in Writ Petition No.1976 of 2002 *{Daulat Ram Gupta v/s The State of M.P. and another}* wherein it was held :-

"9. Section 41A of the Municipalities Act, 1961 empowers the State Govt. at any time to remove the President, Vice President or Chairman of any Council if a opinion is formed by the State Govt. that continuance of such a person is not desirable in public interest or in the interest of the council or it is found that he is incapable of performing his duties or he is working against the provisions of the Act or any rule made thereunder. From the aforesaid it is clear that the State Govt. has to form a opinion with regard to the desirability, interest of the public, interest of the council and the capacity of the person to perform his duties and then take

action for removal under the aforesaid provision. However, proviso to section contemplates giving reasonable opportunity of being heard to the person concerned before action is taken.

10. President of the Council is elected by direct voting in a democratic manner. That being so, while exercising power of removing such a elected Office bearer the State Govt. is duty bound to take extra care and caution and power under Section 41A cannot be exercised until and unless strong and cogent reasons are available for taking such an action."

21. The issue relating to the nature of power which is exercised while superseding the Municipal Committee or removing the President came up before the Full Bench of this Court in the matter of *Municipal Commissioner, Kareli v/s State*, reported in 1958 JLJ 589, wherein the Full Bench of this Court while examining the issue on supersession of Kareli Municipality under Section 57 (2) of the Central Provinces and Berar Municipalities Act, 1922, held that :-

"9. The short question is that where charges have been framed and the explanation of the municipal committee is in, whether the reasons given for superseding the committee can be examined by the Court. We agree with the learned Judges of the earlier Division Bench that the Court may in its writ jurisdiction interfere if the order is *mala fide*, arbitrary, without jurisdiction, or in utter violation of the principles of law or natural justice. We are, however, not satisfied that the Court is incompetent to consider the sufficiency or adequacy of the material upon which the charges were regarded as proved. We would like to restate this part of the law again. The learned Judges of the earlier Division Bench quite correctly gave the four reasons on which the Court may interfere, but they, however, took away the effect of much that they had said before by observing as follows :-

"We, therefore, decline to consider the sufficiency or adequacy of the material upon which the charges were regarded as proved."

In our opinion, this dictum takes away the power of examining the reasons which may be entirely unrelated to the facts proved, and it is too wide and needs to be restated.

10. The Central Provinces and Berar Municipalities Act, 1922 requires that supersession of a Municipal Committee may be done when one or more of the conditions laid down in sub-section (2) of Section 57 of the Act are found to exist. The reasons must have relation to those conditions and must be sufficient for the exercise

of the power conferred on the Government. The Court will not examine the reasons as in an appeal, but will certainly examine them with advertence to their reasonableness and sufficiency for the legitimate exercise of the power granted to the Government. Whenever action has to be reasonable and the reasons for the action to be recorded, the test is not entirely subjective unless the law says that it should be so: See *Nakkuda Ali vs. M.F.De S. Jayaratne,* 1951 A.C.66. The learned counsel for the Municipal Committee cited *Vishvanath vs. The State of Madhya Bharat,* 1954 M.B.L.J. 1, but that case also goes too far on the other side. We do not agree with all that has been said in the Madhya Bharat case. The issue of supersession is, of course, not to be tried as a law suit with a right of appeal to the High Court. At the same time, the action of the Government has to be reasonable and the reasons for the action have to be stated, and the exercise of power can be examined to see whether in the circumstances under which it has been exercised the necessary power under the Act flows to the Government.

11. In a democratic society it is of the essence that democratic institutions are allowed to function and not, superseded on trumpery charges inadequately brought home or unreasonably accepted. The courts will be vigilant to see that such over reaching powers are kept within the four corners of the statute granting them. We think that the fact that a reasonable opportunity to show cause has been made a condition precedent to the exercise of the power and that reasons for the supersession have to be notified to the electorate shows that there is not to be a subjective appraisal but that the reasons must be sufficient under the Act and an objective test is indicated. The requirements of the law are not satisfied by accepting insufficient or inadequate reasons for supersession. We think that the courts are at liberty to examine the reasons for this limited purpose in addition to the purposes which the learned Judges of the earlier Division Bench (Mangalmurti and Mudholkar JJ.) have already indicated in their order."

22. Learned counsel appearing for the respondent placing reliance upon the full Bench judgment of this court in the matter of *Natwar Singh (Rana) v/s State of M.P. and Others,* reported in 1980 JLJ 69, has submitted that the order passed under Section 41-A is an administrative order, therefore, it need not be an speaking order. The court in the matter of *Rajiv Sharma* (Supra) has already distinguished the judgment in the matter of *Natwar Singh* by holding that the said judgment is not relevant for decision in the case since it deals with the requirement of passing

speaking order in service matter. The judgment in the matter of *Natwar Singh* is on the action taken under Section 41 of the Act; whereas in the present case action is under Section 41-A of the Act and this Court in the matter of *Kaushalya Bai* (Supra) has noted the difference between this two provisions. Therefore, the arguments of the Counsel for the petitioner cannot be accepted.

23. It is worth noting that even in the matter of *Natwar Singh* (Supra), the Full Bench of this court had taken the view that when the order of removal passed by the State Government is challenged in a Court of law, the State Government is required to indicate the reasons for forming the opinion and place before the Court the necessary material which was taken into consideration in forming its opinion. In the present case the State has failed to do that.

24. The Supreme Court in the matter of *A.K. Krainak v/s Union of India* (AIR 1970 SC 150) had noted as far back as in 1970 that the concept of judicial review was under going a radical change and what was considered as an administrative power some years back was then considered as quasi-judicial power. In the matter of *S.L. Kapoor v/s Jagmohan,* AIR 1981 SC 136, the Supreme Court held that action of Supersession of a municipality is administrative action which entails civil consequences. In *Organo Chemical Industries v/s Union of India,* AIR 1979 S.C. 1803, the Supreme Court has taken the view that the power to affect citizen's rights, especially by way of punitive action imposed or damages for wrong doing is quasi-judicial in character even if exercise by executive echelons. The Supreme Court held that :-

> "The power to affect citizen's rights, especially by way of punitive impost or damages for wrong doing, is quasi-judicial in character even if exercised by executive echelons. This Court has underscored the importance of injecting the norms of natural justice when statutory functionaries affect the rights of a person. The most recent of the cases which lay bare the elements of this branch of jurisprudence are: (1) *Siemens Engineering and Manufacturing Co. of India Ltd. V. Union of India,* 1976 Supp SCR 489; (2) *Maneka Gandhi (Mrs) V. Union of India,* (1978) 2 SCR 621; (3) *Mohinder Singh Gill V. Chief Election Commissioner, New Delhi,* (1978) 2 SCR 272."

The Bombay High Court in the matter of *Baburao Vishwanath Nathpati v/s State of Maharashtra and Others,* reported in AIR 1996 Bombay 227, while considering the case of removal of president of Municipal Council, Parbhani under Section 55-A of the Maharashtra Municipal Councils Act, 1965 has held such an action to be quasi judicial action.

25. On examining the impugned order dated 06.06.2008 in the light of the aforesaid position in law, I find that in the impugned order at first charges contained

in the show-cause notice have been noted, thereafter petitioner's reply dated 25.02.2008 has been noted in short without taking note of the explanation given by the petitioner in replies dated 11.04.2006 and 04.06.2006 relating to additional charges. Thereafter straightway findings have been given in a cryptic manner stating that charges are proved. No reasoning has been given for holding the charges as proved and no material has been discussed on the basis of which charges are held proved. The reliance of the counsel for the State on Rule 5 (2) of the Rules of 1998 is misplaced since the application of the Rules can be seen only in the factual background of the material gathered against the petitioner. Even if the charge relating to misuse of Rule 5 (2) is accepted, than also such a charge is of procedural irregularity which alone does not show any financial gain to the petitioner or acting against the interest of municipality or public. It is a case where there is flaw in the decision making process itself, therefore, judicial review is permissible. Therefore, for the reasons stated above the impugned order of removal dated 06.06.2008 passed under Section 41-A of the Act cannot be sustained.

26. So far as intervention by Gopal Yadav is concerned, his fate is already sealed by judgment of the Division Bench in Writ Appeal No.605 of 2007.

27. In view of the aforesaid analysis, the writ petition is allowed and the impugned order dated 06.06.2008 is set-aside. No order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 123
WRIT PETITION

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

RAM KISHAN DWIVEDI ... Petitioner
Vs.
ROHNI PRASAD TIWARI & ors. ... Respondents

A. Transfer of Property Act (4 of 1882), Section 3, Succession Act, 1925, Section 63(c) - ***"attested" - The definition of the word "attested" in S. 63(c) of Succession Act, 1925 and in S. 3 of Transfer of Property Act, 1882 is similar.*** (Para 11)

क. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 3, उत्तराधिकार अधिनियम, 1925, धारा 63(सी) – "अनुप्रमाणित" – शब्द "अनुप्रमाणित" की परिभाषा उत्तराधिकार अधिनियम, 1925 में और सम्पत्ति अंतरण अधिनियम, 1882 में समान है।

B. Notaries Act (53 of 1952), Section 8 - ***Authentication of promissory note by Notary - Meaning - Notary is not an attesting witness - Function of Notary is to authenticate document to attest so as to ensure about as to the***

*W.P. No.1167/2007 (Jabalpur)

authenticity of the document, that would not make the Notary or registering officer or as the case may be or identifier an attesting witness. (Para 13)

ख. नोटरी अधिनियम (1952 का 53), धारा 8 – नोटरी द्वारा प्रॉमिसरी नोट का प्रमाणीकरण – अर्थ – नोटरी अनुप्रमाणक साक्षी नही है – नोटरी का कार्य अनुप्रमाणित करने के लिए दस्तावेज को प्रमाणित करना है ताकि दस्तावेज की प्रमाणिकता सुनिश्चित की जाए, जो नोटरी या रजिस्ट्रीकर्ता अधिकारी या यथास्थिति या पहचान करने वाले को अनुप्रमाणक साक्षी नही बनायेगा।

C. Stamp Act (2 of 1899), Sections 2(5), 2(22) & 4 - *Nature of document - A document has all essential ingredients of promissory note and was not attested by attesting witnesses - Though it was attested by Notary - Notary could not be said to be attesting witness - Document is not a bond but a promissory note.* (Paras 9 to 15)

ग. स्टाम्प अधिनियम (1899 का 2), धाराएँ 2(5), 2(22) व 4 – दस्तावेज की प्रकृति – दस्तावेज में प्रॉमिसरी नोट के सभी आवश्यक तत्व मौजूद और अनुप्रमाणक साक्षियों द्वारा अनुप्रमाणित नही था – यद्यपि वह नोटरी द्वारा अनुप्रमाणित था – नोटरी को अनुप्रमाणक साक्षी नही कहा जा सकता – दस्तावेज बंधपत्र नही है बल्कि प्रॉमिसरी नोट है।

Cases referred :

AIR 1969 SC 1147, 1976 MPLJ 238, AIR 1977 SC 63.

Ashish Shroti, for the petitioner.

Mohd. Ali with *Vijay Shukla*, for the respondents.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–Writ petition has been filed as against the interlocutory order dated 20.3.2006 passed by Ist Addl. District Judge, Shahdol in civil suit no.9-B/2004 holding the document to be bond and recovery of payment of deficit stamp duty from respondent.

2. Petitioner has been asked to make the payment of stamp duty and penalty treating the document as bond, hence the instant writ petition has been filed by the plaintiff-petitioner.

3. The plaintiff has filed the suit for recovery in the sum of Rs.1,65,000/- on the ground that defendant- respondent has obtained sum of Rs. one lac from the petitioner on 23.4.2002. He executed a promissory note to repay the same amount on demand. When the document was tendered in the evidence, application was filed by the defendant u/s 151 of CPC as to admissibility of the document in evidence on the ground that it does not bear stamp duty and penalty.

4. The trial court has held the document to be a bond not a promissory note and has ordered for stamp duty as prescribed under Schedule 1, Article 15 of the Stamp Act together with penalty. It has been held by the trial court that document

could be admitted in evidence. The trial court has rejected the application u/s 151 of CPC as per order dated 13.10.2006.

5. Shri Ashish Shroti, learned counsel for the petitioner, has submitted that document is promissory note, it could not be said to be a bond. He has submitted that document has not been attested by any witness, the trial court ought to have seen that 'promissory note' is not necessarily a 'bond'. In absence of attestation by the witness, the document could not have been held to be a bond. The Notary could not be said to be a witness. Petitioner's counsel has relied upon a decision of the Apex Court in *M.L. Abdul Jabbar Sahib v. H. Venkata Sastri and Sons and others etc.*, AIR 1969 SC 1147.

6. Shri Mohd. Ali, learned counsel with Shri Vijay Shukla appearing on behalf of respondent-defendant, has submitted that document is a bond. Notary has signed the document as a witness, consequently the document could not be said to be promissory note. The order passed by the trial court is proper.

7. The main question for consideration is about the nature of document whether it is a bond or promissory note. Section 2(22) of the Stamp Act defines a promissory note by reference to the Negotiable Instruments Act thus :-

> *"A Promissory note" means a promissory note as defined by the Negotiable Instruments Act 1881;*
>
> *It also includes a note promissing the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may note be performed or happen."*
>
> ***In section 4 of the Negotiable Instruments Act, 'Promissory note' is defined in these words :-***
>
> *"Promissory note" is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking signed by the maker, to pay certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."*

Bond has been defined under section 2(5) of the Indian Stamp Act, 1899 thus :

> *"2(5) "Bond" includes -*
>
> *(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;*
>
> *(b) any instrument attested by a witness and not payable to*

order or bearer, whereby a person obliges himself to pay money to another; and

(c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another;

8. The question whether the document is a promissory note or a bond and the essentials of a promissory note and the distinction has been considered by the Full Bench of this Court in *Santsingh Ladharam v. Madandas Gyandas Panika and another,* 1976 MPLJ 238 in paragraphs 4,5 and 6 thus :

"4. The essentials of a promissory note are:-

(1) An unconditional undertaking to pay;

(2) The sum should be a sum of money and should be certain;

(3) The payment should be to the order a a person who is certain, or to the bearer of the instrument; and

(4) The maker should sign it. If these four conditions exist, the instrument is a promissory note.

5. The question of distinguishing a promissory note from a bond arises by reference to clause (b) of the above definition of bond. The essentials of a bond are:-

(1) There must be an undertaking to pay;

(2) The sum should be a sum of money but not necessarily certain;

(3) The payment will be to another person named in the instrument;

(4) The maker should sign it;

(5) The instrument must be attested by a witness; and

(6) It must not be payable to order of bearer. On a comparison between the essentials of a promissory note and those of a bond, three distinguishing features emerge :-

(i) If money payable under the instrument is not certain, it cannot be a promissory note, although it can be a bond.

(ii) If the instrument is not attested by a witness, it cannot be a bond, although it may be a promissory note;

(iii) If the instrument is payable to order or bearer, it cannot be a bond, but it can be a promissory note.

6. To put it differently, there are two peculiar features of a bond:-

(1) Positive- it must be attested by a witness.

(2) Negative- it must not be payable to order or bearer."

9. The essentials of a promissory note are; an unconditional undertaking to make payment, the sum should be a sum of money and should be certain, the payment should be to the order of a person who is certain or to the bearer of the instrument and the maker should sign it, these four conditions are necessary. In the case of a bond there must be an undertaking to pay, the sum should be a sum of money but not necessarily certain, the payment will be to another person named in the instrument, the bearer/maker should sign it, the instrument must be attested by a witness and it must not be payable to order of bearer. On a comparison between essentials of a promissory note and those of a bond, 3 distinguishing features emerge if money payable under the instrument is not certain, it cannot be a promissory note, although it can be a bond, if the instrument is not attested by a witness, it cannot be a bond, although it may be a promissory note and if the instrument is payable to order or bearer, it cannot be a bond, but it can be a promissory note.

10. In the instant case, reading of the document in question makes it out that amount of Rs.1 lac has been obtained by the petitioner and was payable on demand, there is an unconditional undertaking to pay the amount which is certain, the payment is to order of a person and Rohni Prasad Tiwari has signed it and it has not been attested by any witness, thus, nature of document indicates it to be a promissory note, it could not be said to be a bond.

11. The next question for consideration is whether attestation by Notary would mean that he is a witness who has attested the document in the capacity of a witness. Attests means the Act of testifying; testimonial evidence, formal confirmation by signature, oath etc., administration of an oath. The signing by a witness to the signature of another of a statement that a document was signed in the presence of the witness. 'Attestation' is the signing by a witness to the signature of another of a stage that a document was signed in the presence of the witness. To attest is literally to witness any act or event but the term is not exclusively applied to the signature of the executant of a document. Attestation of the signature, sealing or delivery of deed is not necessary to make a deed as such valid but in case of some instruments notably, wills, bills of sale, attestation is required by statute. The definition of the word "attested" in section 63(c) of the Succession Act, 1925 and in section 3 of the Transfer of Property Act, 1882 is similar. In these Acts, the word 'attested' means that a document is signed by 2 or 3 persons as witnesses, each of whom has seen the executant sign or affix his thumb mark to the instrument in the presence and by the direction of the executant, a personal acknowledgment of his signature or mark or of the signature of such other persons and each of whom has signed the instrument in the presence of the

executant, but it shall not be necessary that more than one of such witnesses shall have been present at the same time. Authentication by a Notary is not mere attestation, but something more. It means that person authenticating has assured himself of the identity of the person who has signed the instrument as well as to the fact of execution. Authentication of notary is to be treated as equivalent to affidavit of identity of the executant and no affidavit of the identity of the executant is necessary.

12. The Apex Court in *M.L. Abdul Jabbar Sahib v. H. Venkata Sastri and Sons and others etc.* (supra) has considered the definition of word "attested" in section 3 of the Transfer of Property Act and has laid down that to attest is to bear witness to a fact. The essential conditions of a valid attestation u/s 3 of T.P. Act are; (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature, (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature "animo attestandi", that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness, thus, he could not be said to be attesting witness at all.

13. In our opinion, very function of Notary is to authenticate document to attest so as to ensure about as to the authenticity of the document, that would not make the Notary or registering officer or as the case may be or identifier an attesting witness, thus, it could not be said from the reading of the document in question in instant case that Notary was attesting witness and had the "animo attestandi". There is no mention in the document that document was signed in the presence of the Notary. Notary affixed the seal that document was read over and admitted to be correct, thus, Notary by affixing his seal renders only authenticity to the document, he was not having animo attestandi. Counsel for respondent submitted that Notary has filed affidavit that he had attested document. No doubt he has attested document as Notary but not as attesting witness. What is mentioned in the document has to be seen so as to construe the nature of the document, thus, filing of affidavit cannot change nature of document as it stands.

14. Shri Mohd. Ali, respondent's counsel has referred a decision of the apex Court in *Beni Chand by L.Rs. v. Smt. Kamla Kunwar and others,* AIR 1977 SC 63 in which 'Attestation' u/s 68 of the Succession Act came to be considered by the Apex Court. In the context of 'attestation' the Apex Court has observed that by attestation is meant the signing of a document to signify that the attestor is a witness to the execution of the document; and by section 63(c) of the Succession Act, an attesting witness is one who signs the document in the presence of the

executant after seeing the execution of the document or after receiving a personal acknowledgment from the executant as regards the execution of the document, the decision buttresses plea raised by petitioner does not help the cause espoused by respondent.

15. We are of the view that document could not be said to be a bond and the Notary could not be said to be attesting witness of the document, thus, the order passed by the trial court being palpably illegal deserves to be set-aside.

16. Resultantly, writ petition is allowed. The document is held to be promissory note. Impugned order is set aside. It is made clear that we have not made any observation as to the genuineness of the document. It has to be decided on evidence by trial court. No costs.

Petition allowed.

I.L.R. [2010] M. P., 129
WRIT PETITION
Before Mr. Justice R.S. Jha
3 September, 2009*

BAIJULAL VERMA ... Petitioner
Vs.
ADDITIONAL COLLECTOR, CHHINDWARA & ors. ... Respondents

A. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rules 3 & 8 - *Non-compliance of Rule 3(2) - Effect - Election Tribunal has recorded categorical findings that the copies of the election petition served on the respondent did not bear his signatures, were not verified and did not bear attestation as required by Rule 3(2) and has accordingly dismissed the election petition - No fault found in the finding - Petition dismissed.* (Para 10)

क. पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995, नियम 3 व 8 – नियम 3(2) का अननुपालन – प्रभाव – निर्वाचन अधिकरण ने सुस्पष्ट निष्कर्ष अभिलिखित किये कि प्रत्यर्थी पर तामील की गई निर्वाचन याचिका की प्रतिलिपियों पर उसके हस्ताक्षर नही थे, सत्यापित नही थीं और नियम 3(2) द्वारा अपेक्षित अनुप्रमाणन नही था और तदनुसार निर्वाचन याचिका खारिज कर दी – निष्कर्ष में कोई दोष नही पाया – याचिका खारिज।

B. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rules 3 & 8 - Non-compliance Rule 3(2) - *Objection can be raised and decided at any stage - Election Tribunal can take and decide the issue regarding defect of non-compliance of the rules at any stage and it is not incumbent upon the authority to do so only at the*

*W.P. No.1337/2007 (Jabalpur)

threshold - There can be no waiver of the requirement of Rule 8 and failure of the authority to dismiss the petition at the threshold would not prohibit or prevent the authority from doing so at the later stage. (Para 10)

ख. पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995, नियम 3 व 8 – नियम 3(2) का अननुपालन – आपत्ति किसी भी प्रक्रम पर उठायी और विनिश्चित की जा सकती है – निर्वाचन अधिकरण किसी भी प्रक्रम पर नियमों के अननुपालन के दोष से सम्बन्धित विवाद्यक को ले सकता है और उसका विनिश्चय कर सकता है और प्राधिकारी केवल प्रारम्भ में ऐसा करने के लिए बाध्य नही है – नियम 8 की आवश्यकता का अधित्यजन नही हो सकता और प्राधिकारी का प्रारम्भ में याचिका खारिज करने में असफल रहना प्राधिकारी को पश्चात्वर्ती प्रक्रम पर ऐसा करने से प्रतिषिद्ध या निवारित नही करेगा।

Cases referred :

AIR 2001 SC 3924, (2005) 2 SCC 188, 1985 MPLJ 411, AIR 1996 MP 43, 2004(2) JLJ 263, AIR 1991 SC 1557, W.A. No.136/2009 decided on 13.05.2009.

Vivek Rusia, for the petitioner.

P.C. Paliwal, for the respondent No.2.

ORDER

R.S. JHA, J. :–The petitioner has filed this petition assailing the legal validity of the order dated 10-1-2007, passed by Additional Collector, Chhindwara whereby the election petition filed by the petitioner assailing the election of the private respondent as President of Janpad Panchayat Chourai, District Chhindwara has been dismissed on account of non-compliance of the provisions of Rule 3(2) of the Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 (hereinafter referred to as the 'Rules of 1995').

2. The brief facts leading to filing of the present petition are that the respondent No. 2 had contested and was declared the returned candidate for the post of President of Janpad Panchayat Chourai, District Chhindwara in the election which took place on 14-2-2005. The petitioner being aggrieved by the election of the respondent filed an election petition under the provisions of the Rules of 1995 before the prescribed authority. The reply was filed, matter was heard and, thereafter, written arguments were filed by the parties. The Election Tribunal, after hearing the parties, dismissed the election petition filed by the petitioner holding that the petition was filed in violation of the mandatory provisions of Rule 3(2) of the Rules of 1995.

3. It is submitted by the learned counsel for the petitioner that a defect of attestation is curable if it is established that there is substantive compliance of the provisions. In support of his submission, the learned counsel has relied upon judgments of the Supreme Court in the cases of *T. Phunzathang v. Hangkhanlian and others,* AIR 2001 SC 3924 and *Chandrakant Uttam Chodankar v. Dayanand Rayu Mandrakar and others,* (2005) 2 SCC 188.

4. Per contra, it is submitted by the learned counsel for the respondent No. 3 that the Election Tribunal has rightly dismissed the petition filed by the petitioner on account of non-compliance of the provisions of rule 3(2) of the Rules of 1995 as the said rule is mandatory and non-compliance of the same would result in dismissal of the petition as prescribed by Rule 8 of the Rules of the Rules of 1995. In support of his submission, the learned counsel has relied upon a judgment of this Court in the cases of *Babulal Kaluram Kirar and another v. State of M.P. and others,* 1985 MPLJ, 411; *Dr. Om Prakash Soni Ashok Kumar Bhargava and others,* AIR 1996 MP, 43; *Sarla Tripathi (smt.) v. Smt. Kaushilya Devi and others,* 2004(2) JLJ, 263; *F.A. Sapa etc. v. Singora and others etc.,* AIR 1991 SC 1557 and an unreported judgment of this Court in Writ Appeal No. 136/2009, *Smt. Phoolwati v. Smt.Rama Patel and others,* dated 13-5-2009.

5. From a perusal of the record of the case as well as the written arguments filed by the respondent No. 3 before the Election Tribunal, copy of which has been filed by the petitioner along with the petition, it is clear that the petitioner did not attest as true copies or sign the copy of the petition that was served upon the respondent No. 3. The issue involved in the present petition is as to whether non-compliance of the provisions of rule 3(2) of the Rules of 1995 entails dismissal of the petition in spite of the fact that the respondent did not raise any objection at that time ?

6. To appreciate the issue involved, it is necessary to look into the provisions of Rules 3 and 8 of the Rules of 1995 which read as under :-

> "**3. Presentation of election petition.**-(1) An election petition shall be presented to the specified Officer during the office hours by the person making the petition, or by a person authorised in writing in this behalf by the person making the petition.
>
> (2) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.
>
> **8. Procedure on receiving petition.**- If the provisions of rule 3 or rule 4 or rule 7 have not been complied with, the petition, shall be dismissed by the specified officers :
>
> Provided that the petition shall not be dismissed under this rule without giving the petitioner an opportunity of being heard."
>
> From a perusal of the aforesaid rules it is clear that the election petitioner was required to file as many copies of the petition as there are respondents in the petition and that every such copy should be attested by the petitioner under his own signature to be

a true copy. It is not disputed that the copies of the petition furnished by the petitioner along with the election petition were not signed by him nor were they attested to be true copies of the petition. It is also true that the Election Tribunal did not dismiss the election petition filed by the petitioner at the threshold but issued notice thereon and dismissed the election petition only after hearing both the parties extensively. It is also clear that the Election Tribunal addressed itself to the defect of non-compliance of rule 3(2) only when the same was pointed out to the Election Tribunal by the respondent No. 3.

7. A perusal of Rule 8 makes it abundantly clear that a petition which does not comply with the rules 3, 4 or 7 shall be dismissed by the specified officer. This Court, in the case of *Babulal Kaluram Kirar,* 1985 MPLJ page 411 (supra), while dealing with the provisions of identical rules of 1962, has held in paragraph 8 that rules 3, 4, 7 and 8 of the rules are para materia with the provisions of Sections 81, 82, 117 and 86 of the Representation of people Act and has further gone on to state that the provisions of rules 7 and 8 are mandatory in nature and has held that violation of the provisions of rules 7 and 8 would result in dismissal of the petition, in the following terms in paragraph 11 and 12 :-

"11. In Rule 8, the expression used is 'the prescribed authority shall dismiss the petition'. This clearly means that duty is cast on the Tribunal to dismiss the petition on the non-compliance of the provisions enumerated in Rule 8. It is an important provision. The Tribunal has no option, but to dismiss the petition, on being satisfied about non-compliance --- the non-compliance may ome to its knowledge--- in any manner. From the language of Rule 7 it appears that as a petition being presented, the Tribunal should verify before taking its cognizance and proceeding with the trial, whether security amount is deposited along with it or not. The proviso to Rule 8 of the Election Rules cannot be read to mean that the Tribunal has the jurisdiction to dismiss for non-compliance of the provisions mentioned in the parent provision of Rule 8 only when an objection is raised by the respondent. To hold that the Tribunal can dismiss for non-compliance only when objection is raised by respondent, would mean adding something which is not there in the Rule and taking out the jurisdiction of the Tribunal. The proviso is nothing but *expresso verbis* incorporation of the *audi alteram partem* rule of natural justice. To uphold the argument of the learned counsel for respondent Nos. 3 and 4 would tantamount to holding that a petition though suffering from the non-compliance of the rules referred to in the parent Rule 8 of the

Election Rules can neer be dismissed when no one appears to oppose the petition and it is proceeding ex parte. Further, the question of waiver also does not arise in view of the fact that we have held the provision as mandatory and a compulsion on the petitioner based on public policy.

12. In the above view of the matter, we hold that even when no objection is raised about the non-compliance of Rule 7 of the Election Rules, it is incumbent on the Tribunal to dismiss the petition on being satisfied about the non-compliance of that rule. It has no jurisdiction to proceed with its trial."

8. In the case of *Dr. Om Prakash Soni*, AIR 1996 MP 43 (supra), this Court, while dealing with the case of non-compliance of the provisions of rules 3 and 8 of the Rules of 1995, has held that rule 3 was para materia with the provisions of Sections 81 and 86 of the Representation of people Act and that violation of rule 3(2) would entail dismissal of the petition, relying upon the judgment of the Supreme Court in the case of *F.A. Sapa etc.*, AIR 1991 SC 1557 (supra). In the case of *Sarla Tripathi (smt.)*, 2004(2) JLJ 263 (supra) a Division Bench of this Court on a matter being referred to it, held the provisions of rules 7 and 8 to be mandatory and has held that in non-compliance of the provisions of these rules at the time of presentation of the petition the petition has to be dismissed in view of rule 8 of the Rules of 1995 in the following terms in paragraph 8 :-

"8. In the present case, it is not disputed that the amount was not deposited at the time of presentation of the petition but later on. In somewhat similar situation, a Division Bench of this Court in *Babulal v. State of M.P.* (supra) has observed that the expression "shall deposit" and the penalty of failure prescribed in rule 8 clearly spell out that the provision of rule 7 is mandatory and the requirement of making the deposit of security amount is along with the petition as clear from the expression "at the time of presentation of an election petition". Para 10.01 of the report containing the said observations reads under :

"10.01. On a plain reading of rule 7 the requirement of making the deposit of security amount is along with the petition. The The expression : "At the time of presentation of an election petition" in rule 7 is very significant. Thus, the requirement of deposit of security amount along with the petition is an essential link in the chain of presentation of the petition. Therefore, if this link is missing, there is no valid presentation of the petition. The Tribunal has a jurisdiction only when there is a validly presented presented petition before it."

The same view has been reaffirmed by a Division Bench of this Court in Writ Appeal No. 136/2009, *Smt. Phoolwati v. Smt.Rama Patel and others,* dated 13-5-2009.

9. In the case of *F.A. Sapa etc.* (AIR 1991 SC 1557) supra, the Supreme Court, while interpreting the provisions of Sections 83 and 86 of the Representation of People Act 1951, has held that while a defect in verification is curable, a defect relating to absence of attestation as true copy is incurable and the petition has to be dismissed, in the following terms in paragraphs 20 and 29 :-

> "20. It must at the outset be realised that Section 86(1) which lays down that the High Court 'shall' dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 does not in terms refer to Section 83. It would, therefore, seem that the legislature did not view the non-compliance of the requirement of Section 83 with the same gravity as in the case of Section 81, 82 or 117. But it was said that a petition which does not strictly comply with the requirements of Section 83 cannot be said to be an election petition within the contemplation of Section 81 and hence Section 86(1) was clearly attracted. in *Murarka Radhey Shyam v. Roop Singh Rathore,* (1 964) 3 SCR 573: (AIR 1964 SC 1545) one of the defects pointed out was that though the verification stated that the averments made in some of the paragraphs of the petition were true to the personal knowledge of the petitioner and the averments in some other paragraphs were verified to be true on advice and information received from legal and other sources, the petitioner did not in so many words state that the advice and information received was believed by him to be true. The Election Tribunal held that this defect was a matter which came within Section 83(1)kc) and the defect could be cured in accordance with the principles of the Code' This Court upheld this view in the following words (at p. 1549 of AIR):-
>
> > "It seems clear to us that reading the relevant sections in Part VI of the Act, it is impossible to accept the contention that a defect in verification which is to be made in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings as required by Cl. (c) of sub-section (1) of S. 83 is fatal to the maintainability of the petition."
>
> It is thus clear from this decision which is binding on us that mere defect in the verification of the election petition is not fatal to the maintainability of the petition and the petition cannot be thrown out solely on that ground. As observed earlier since Section 83 is not one of three provisions mentioned in Section 86(1), ordinarily

it cannot be construed as mandatory unless it is shown to be an integral part of the petition under Sec. 81."

"29. The next objection is based on the language of Section 81 of the R. P. Act. This section deals with the presentation of an election petition. Sub-section (1) thereof says that an election petition may be presented by any candidate at such election or any elector within 45 days from, but not earlier than, the date of election of the returned candidate or if there are more than one returned candidate at the election and the dates of their election are different, the later of those dates. This subsection specifies on what ground or grounds the election of the returned candidate can be challenged, who can challenge the election and imposes a period of limitation for filing such a petition. Sub-section (1) of this section was omitted by Act 47 of 1966. Then comes sub-section (3) which stipulates that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. This sub-section enjoins (i) supply of such number of copies of the petition as are respondents, and (ii) every such copy must be attested by the petitioner under his own signature to be a true copy of the petition. There is no controversy regarding the first aspect, the controversy centres round the second part. It must be remembered that noncompliance with the requirement of sub-section (1) or (3) of Section 81 can prove fatal in view of Section 86(1) of the *R. P. Act. See Satya Naran v. Dhuja Ram* (1974) 4. SCC 237: (AIR 1974 SC 1185), *M. Karunanidhi v. Dr. H. V. Handa,* (1983) 2 SCC 473 : (AIR 1983 SC 558), *Mithilesh Kumar Pandey v. Baidynath Yadav,* (1984) 2 SCR 278: (AIR 1984 SC 305), *Rajender Singh v. Usha Rani* (1984) 3 SCC 339: (AIR 1984 SC 956) and *U. S. Sasidharan v. K. Karunakaran* (1989) 4 SCC 482 : (AIR 1990 SC 924). It is quite obvious from these decisions that the requirements of Section 81(3) are mandatory and failure to comply with them would render the petition liable to summary dismissal under Section 86(1) of the R. P. Act."

The decision of the Supreme Court relied upon by the petitioner rendered in the aforesaid case deals with the defects in verification and non defects in attestation and, therefore, is not applicable to the issue involved in the present petition. Even otherwise, the defect in verification under Rule 5 of the Rules of 1995 is not automatically fatal as rule 8 does not include non-compliance of rule 5 of the Rules of 1995 and, therefore, the defects under rule 5 stands on a different footing from the requirements of the rules 3, 4 and 7.

10. In the circumstances, the contention of the learned counsel for the petitioner which is based on the aforesaid judgment is misconceived. In the case at hand the Election Tribunal has recorded categorical findings that the copies of the election petition served on the respondent did not bear his signatures, were not verified and did not bear attestation as required by rule 3(2) of the Rules of 1995 and has accordingly dismissed the election petition. In my considered opinion the finding cannot be found fault with as has been held by a Division Bench of this Court in the case of *Babulal Kaluram Kirar* 1985 MPLJ, 411 (supra). I am also of the opinion that the Election Tribunal can take and decide the aforesaid issue regarding defect of non-compliance of the rules at any stage and it is not incumbent upon the authority to do so only at the threshold. The decision of the Division Bench of this Court also makes it clear that there can be no waiver of the requirement of rule 8 of the Rules of 1995 and failure of the authority to dismiss the petition at the threshold would not prohibit or prevent the authority from doing so at the later stage. In the circumstances the contention of the petitioner to the contrary also deserves to be rejected.

11. In view of the aforesaid discussions, the petition filed by the petitioner being meritless is accordingly dismissed. The order passed by the Election Tribunal dated 10-1-2007 is hereby confirmed. In the peculiar facts and circumstances of the case there shall be no order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 136

WRIT PETITION

Before Mr. Justice R.S. Jha

22 September, 2009*

ANIS BEG ... Petitioner

Vs.

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

Municipalities Act, M.P. (37 of 1961), Section 43-A(2)(ii) - *Notice - No confidence motion against Vice-President - The requirement of section is that the notice should be despatched to the President and every Councillor ten clear days before the meeting and does not mandate service of notice ten clear days before the meeting.* (Para 8)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 43–ए(2)(ii) – सूचनापत्र – उपाध्यक्ष के विरुद्ध अविश्वास प्रस्ताव – धारा की अपेक्षा है कि अध्यक्ष और प्रत्येक नगरपालिका सदस्य को दस पूर्ण दिवस पूर्व बैठक का सूचनापत्र प्रेषित किया जाना चाहिए बैठक की तारीख के दस पूर्ण दिवस पूर्व सूचनापत्र की तामील आज्ञापक नही है।

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*W.P. No.1989/2009 (Jabalpur)

Cases referred :

2000(4) MPHT 69 (FB), 1995 MPLJ 774, 2003(1) MPHT 415.

U.K. Shukla, for the petitioner.

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

K.K. Trivedi, for the respondent No.2.

O R D E R

R.S. JHA, J. :–The petitioner has filed this petition assailing the proceedings for 'no confidence' held against him on 22.1.2009 whereby the Municipal Council, Waraseoni has passed a resolution expressing no confidence against the petitioner, who at the relevant time was working as Vice President of Muncipal Council, Waraseoni, by a vote of 13:1.

2. The brief facts, leading to the filing of the present petition, are that the petitioner was initially elected as a Councillor from Ward No.10 in Municipal Council, Waraseoni. He was subsequently elected as Vice President by the Councillors in a special meeting held for that purpose on 25.11.2004. On 26.12.2008 eleven ward members signed and forwarded an application under section 43A of the Madhya Pradesh Municipalities Act, 1961 (hereinafter referred to as 'the Act'), moving a motion of 'no confidence' against the petitioner. The competent authority forwarded the same to the Collector who on 9.1.2009 directed convening of a meeting of 'no confidence' on 22.1.2009 and issued notices for that purpose with a further direction to serve notices on all the Councillors within the stipulated period.

3. It is an undisputed fact that notices were served to all the Councillors including the petitioner between 13.1.2009 and 15.1.2009. It is also an undisputed fact that all the Councillors including the petitioner participated in the 'no confidence' proceedings that was held on 22.1.2009. In accordance with the directions issued by the Collector, Balaghat the meeting was presided over by the Sub Divisional Officer and on that date 13 out of the 14 Councillors present voted against the petitioner as a result of which and in accordance with the provisions of Section 43A of the Act, the petitioner stood removed from the post of Vice President and the said post was declared vacant. It is also an undisputed fact that the petitioner, as on date, is continuing to work as a Councillor and that subsequently on 8.6.2009 one Ramesh Devhare has been elected as Vice President of the Municipal Council, Waraseoni.

4. The learned counsel for the petitioner has assailed the impugned motion of 'no confidence' on the ground that the petitioner was not given 10 clear days notice as required by the provisions of section 43A(2) of the Act as the notice of the meeting was served upon him on 15.1.2009. The second contention of the learned counsel for the petitioner is that on account of delayed service of notice, the petitioner was prejudiced from defending the motion and, therefore, the entire

motion for 'no confidence' deserves to be quashed and set aside being contrary to the provisions of law.

5. To properly appreciate the submission of the learned counsel for the petitioner, it is apposite to consider the provisions of Section 43(A) of the Act, which reads as follows:-

> "43A. **No-confidence motion against Vice-President.**- (1) a motion of no confidence may be moved against the Vice-President by any elected Councillor at a meeting specially convened for the purpose under sub-section (2) and if the motion, is carried by a majority of two thirds of the elected Councillors present and voting in the meeting and if such majority is more than half of the total number of elected Councillors constituting the Council, the office of the Vice- President, shall be deemed to have become vacant forthwith a copy of such motion shall be sent by the Chief Municipal Officer to the Collector forthwith for filling up the vacancy:
>
> Provided that no such resolution shall lie against the Vice-President within a period of -
>
> (i) two years from the date on which the Vice-President enters upon his office;
>
> (ii) one year from the date on which the previous motion of no-confidence was rejected.
>
> (2) For the purpose of sub-section (1), a meeting of the Council shall be convened and presided over by the Collector or a Class I Officer in case of a Municipal Council and a Class II officer in case of Nagar Panchayat as nominated by him, in the following manner, namely:-
>
> (i) the meeting shall be convened forthwith on a requisition signed by not less than one-sixth of the total number of elected Councillors constituting the council for the time being;
>
> (ii) the notice of such meeting specifying the date, time and place shall be despatched to the President and every Councillor ten clear days before the meeting.
>
> (iii) the no-confidence motion moved under this section shall be decided through secret ballot."

From a perusal of the aforesaid section it is clear that a motion of 'no confidence' can be moved in a meeting specially convened for that purpose and has to be carried by a majority of two-third of the elected Councillors present and voting and if such majority is more than half of the total number of elected

Councillors constituting the Council, provided that the resolution shall not be passed within two years from the date on which the Vice President enters upon his office and one year from the date on which the previous motion of no-confidence was rejected. The section also stipulates that the meeting for no confidence has to be convened on a requisition signed by not less than one-sixth of the total Councillors; that the notice of the meeting has to be dispatched to the President and every Councillor ten clear days before the meeting; and that the motion is to be decided through a secret ballot.

6. In the instant case, on the insistence of the learned counsel for the petitioner, the record of the Collector, Balaghat was summoned so as to verify the factual aspect of the case. From a perusal of the record it is clear that a motion of 'no confidence' was signed and moved by 11 Councillors on 29.12.2008. On 9.1.2009, the Collector Balaghat, on being satisfied with the fact that the petitioner had been elected as Vice President on 18.1.2005 and, therefore, the motion was beyond the period of two years from the date of his entering upon office and also satisfying himself of the fact that it was the first motion of 'no confidence' against the petitioner, directed holding of a special meeting for the purpose of considering the motion of 'no confidence' on 22.1.2009. It is also clear from the order passed by the Collector, Balaghat dated 9.1.2009 itself that he also issued notices to all the Councillors on the same day with a direction to the Chief Municipal Officer, Waraseoni to ensure service of notice of the meeting who ultimately served the same on all the Councillors between 13.1.2009 and 15.1.2009.

7. From a perusal of the minutes of the proceedings held on 22.1.2009 it is also clear that as many as 15 Councillors including the petitioner and the President were present in the meeting; that all the persons participated in the proceedings and that 14 votes were cast out of which 13 votes went against the petitioner while one vote was cast in favour of the petitioner and, therefore, the presiding officer held the motion of 'no confidence' to have been passed. Consequently, the Collector, Balaghat by order dated 4.2.2009 declared the post vacant.

8. From a perusal of the provisions of Section 43A(2)(ii) of the Act, which deals with the provision of notice, it is clear that the requirement of the Section is that the notice should be dispatched to the President and every Councillor ten clear days before the meeting and does not mandate service of notice 10 clear days before the meeting.

9. In the instant case, as is clear from the order passed by the Collector, Balaghat dated 9.1.2009, he had dispatched all the notices on that very day for service through the Chief Municipal Officer for service to all the Councillors for a meeting that was to be held on 22.1.2009 and, therefore, the notices were apparently and admittedly dispatched 10 clear days before the date of meeting. The fact that the notice was served on the petitioner on 15.1.2009 is in fact immaterial as the requirement of the provision of law is 'despatch of notice 10

clear days before the meeting' and not service of notice of 10 clear days before the meeting. In such circumstances, the contention of the learned counsel for the petitioner that the 'no confidence' meeting and the consequent motion deserves to be quashed in view of the non-compliance of the provisions of Section 43A(2)(ii) of the Act, is misplaced and misconceived.

10. I find support for the aforesaid conclusion from a Full Bench Judgment of this Court rendered in the case of *Smt. Bhulin Dewangan vs. State of M.P. and others*, 2000(4) MPHT 69 (FB), wherein the Full Bench was considering a similar provision of Section 21 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 wherein the requirement of the section was despatch of notice and not service of notice and in that context it was held as under:-

> "9. The legislature has designedly used the expression 'the notice of such meeting specifying date, time and place thereof shall be caused to be dispatched by him through the Secretary' of the Panchayat concerned. The use of the word 'dispatch' appears to be deliberate and it cannot be read as 'receipt' of the notices by the members of the Panchayat. No rule of interpretattion permits reading of one word for the other. As is clear from the contents of the rule, the intention appears clear to us. The law intends that the notice of meeting should be sent to the members concerned seven days in advance of the meeting to enable them to participate in the motion of no-confidence. The Rule does not convey any intention that the motion of no-confidence should be taken up only after each and every member of the Panchayat has been actually served with the notice. Had the intention been such, it would have been easy for the legislature to have clearly said so by use of word 'receipt' instead of the word 'dispatch' of notices 7 days in advance of the meeting. Use of word 'dispatch' in the Rule is clearly with a view that merely on non-service of notice of meeting on one or few members, the consideration of motion of no-confidence should not be frustrated, as in any case the passing of it depends on existence of the requisite majority. Section 21, however, requires that a valid motion of no-confidence can be passed only on a motion mooted by prescribed one third of total number of elected members and passed by majority of not less than 3/4th of the Panchas present and voting and such majority is more than 2/3rd of the total number of Panchas. If the motion is validly passed by the requisite majority, mere non-service of notice of meeting on one or more members would not render the passing of no-confidence motion invalid. The latter part of sub-rule (3) of Rule 3 uses the words 'shall be caused' indicating clearly that the

rule is mandatory and requires due compliance. The literal meaning of word 'despatch' is given in New Standard dictionary, Vol. I as under:-

> "1.The act of dispatching,: a forwarding to some destination: usually with the implication of promptness or celerity; as, as the dispatch of a messenger, or of themails. 2. A message sent by special means and with haste, as by telegraph; especially, a communication on public matters sent by one official to another. 3. Quick transaction, as of business; speedy execution the prompt performance and completion of work; expedition, speed; as, he shows ability to dispatch of business; he concluded the negotiations with dispatch."

10. We have, however, to assign both a literal and legal meaning to the word 'dispatch' otherwise it is open to wicked abuse in the hands of concerned authority who may act in collusion with any of the elected members. It is not mere sending or giving of notice of meeting in the manner best suited to the liking of the Secretary of the Panchayat.

11. In the decision of the Supreme Court in the case of *Delhi Development Authority Vs. H.C. Khurana* (AIR 1993 SC 1488), the question arose was whether sealed cover procedure in the matter of promotion under the circular could be followed in the case of a government servant against whom although a charge-sheet had been issued but it was not served on him on the date of the proceedings of the D.P.C. In that respect, the observations of the Supreme Court in its earlier decision in *Union of India Vs. Jankiraman* [(1991) 4 SCC 109] = (AIR 1991 SC 2010) came up for consideration. The contention advanced on behalf of the employee was that the requirement of issuance of charge-sheet to the employee as a pre-condition for adopting sealed cover procedure should mean actual service of charge-sheet on the employee. Negativing such a contention, the Supreme Court construed the meaning of the word 'issued' used in the circular laying down sealed cover procedure in the case of *H. C. Khurana* (supra). In the circular of sealed cover procedure the word used were "government servants in respect of whom a charge-sheet has been issued". In the Rule 3(3) for construction before us, the expression used in analogous i.e., "notice shall be caused to be dispatched to him". The literal meaning for words "issued" and "dispatched" and the following observations in the decision of

H. C. Khurana's case support the construction placed on the rule by us:

> "The meaning of the word 'issued', on which considerable stress was laid by learned counsel for the respondent, has to be gathered from the context in which it is used. Meanings of the word 'issue' given in the Shorter Oxford English Dictionary include: 'to give exit to; to send forth, or allow to pass out; to let out;.... to give or sent out authoritatively or officially; to send forth or deal out formally or publicly; to emit, put into circulation'. The issue of a charge-sheet, therefore, means its despatch to the Government servant, and this act is complete the moment steps are taken for the purpose, by framing the charge-sheet and despatching it to the Government servant, the further fact of its actual service on the Government servant not being a necessary part of its requirement. This is the sense in which the word 'issue' was used in the expressing 'charge-sheet has already been issued to the employee', in para 17 of the decision in Jankiraman."

11. It is also pertinent to note that in the instant case the petitioner had full knowledge of the date of the meeting and was himself present on that day and also actively participated in the 'no confidence' proceedings. In such circumstances, the contention of the petitioner that he was prejudiced by the fact of delayed service of notice is also misconceived, firstly, for the reason that the provision of law does not require service of notice but only despatch of notice 10 clear days before the date of meeting which has duly been done in the present case and, secondly, in view of the fact that the petitioner had full knowledge of the meeting and himself participated in the proceedings. It is also clear that the petitioner lost the motion of confidence by a clear majority of 13:1. It is, therefore, apparent that the Councillors did not repose any confidence in his continuance as Vice President of Municipal Council, Waraseoni.

12. In view of the aforesaid circumstances, I find no substance in the submission of the learned counsel for the petitioner that the motion of 'no confidence' be quashed. The issue regarding prejudice caused due to non-compliance of a mandatory provision raised by the petitioner was also considered by the Full Bench, in the case of *Smt. Bhulin Dewangan* (supra), and it was held as follows in paras 15 and 16:-

> "15. .....As has been construed by us, even though second part of the rule requiring dispatch of notice of the meeting to the member is mandatory, yet in every case of challenge to the proceeding of no-confidence motion either before the Collector or this Court, it would still be open to the Collector or this Court to find out whether in a given case non-compliance of any part of the rule has in fact

resulted in any failure of justice or has caused any serious prejudice to any of the parties. The general rule is that a mandatory provision of law requires strict compliance and the directory one only substantial. But even where the provision is mandatory, every non-compliance of the same need not necessarily result in nullification of the whole action. In a given situation even for non-fulfillment of mandatory requirement, the authority empowered to take a decision may refuse to nullify the action on the ground that no substantial prejudice had been caused to the party affected or to any other party which would have any other substantial interest in the proceeding. This Court under Article 227 of the Constitution has also a discretion not to interfere even though a mandatory requirement of law has not been strictly complied with as thereby no serious prejudice or failure of justice has been caused. This is how various Single Bench decisions in which even after finding some infraction of the second part of Rule 3(3) of the Rules of 1994, the resolution of no-confidence motion passed was not invalidated on the ground that no substantial prejudice thereby was caused to the affected parties. The intention of the legislature has to be gathered from the provisions contained in Section 21 and the Rule 3(3) framed thereunder. The provisions do evince an intention that a meeting of the no-confidence motion be called within a reasonable period of not later than 15 days and every member has to be informed of the same seven days in advance. A notice of no-confidence motion is required to be moved by not less than 1/3rd of the total number of elected members as required by first Proviso to sub-rule (1) of Rule 3 and can be lawfully carried by a resolution passed by majority of not less than 3/4th of the Panchas present and voting and such majority has to be more than 2/3rd of the total number of Panchas constituting the Panchayat in accordance with sub-section (1) of Section 21 of the Act. This being the substance of the provisions under the Act and the rules, a mere non-compliance of second part of sub-rule (3) would not in every case invalidate the action unless the Collector while deciding the dispute under sub-section (4) of Section 21 or this Court in exercise of its supervisory jurisdiction under Art. 227 of the Constitution comes to the conclusion that such non-compliance has caused serious prejudice to the affected office bearer or has otherwise resulted in failure of justice.

16. We get some support in our conclusion on the construction of the provisions contained in the Rule from Statutory Construction by Francis J. Mc Caffrey, 1953 Edition, Article 52, Page 110 where it stated:

> "Where a statute regulates the time at or within which an act is to be done by a public officer or body, it is generally construed to be permissive only as to the time, for the reason "that the public interests are not to suffer by the laches of any public officer" (*Looney Vs. Hughes*, 26 N.Y.,514). While the Courts are inclined to hold such provisions to be directory only as to time, they will be read as mandatory if the nature of the act to be performed or the phraseology of the statute indicates an intention on the part of the legislature to exact a literal compliance with the requirement of time. The Courts seek to achieve a just result in not ascribing an invalidating effect to the failure of public officers to observe the time provisions of statutes; a contrary rule would operate unfairly in prejudicing the rights of persons who have no control over the conduct of the public officer."
>
> (Emphasis supplied)

and from the following passage in Statutory Interpretation by Francis Bennion, Second Edition, Part I, Section 10 page 34:

> "Even where the duty is mandatory, the Court will not now-a-days hold it to be contravened because of a purely formal or technical defect. This may be described as a defect that does not materially impair the remedy intended to be provided by the enactment for the mischief to which it is directed."

A similar view has also been taken by this Court in the case of *Ajit Singh vs. Nagar Panchayat, Bhitarwar and others*, 1995 MPLJ 774 and *Smt. Saraswati Bai vs. State of M.P. And others*, 2003(1) MPHT 415.

13. In view of the aforesaid facts and circumstances, I do not find any infirmity or illegality in the motion of 'no confidence' passed against the petitioner on 22.1.2009 removing him from the post of Vice President of Municipal Council, Waraseoni, District Balaghat. The petition filed by the petitioner, being misconceived, is accordingly dismissed. In the facts and circumstances of the case there shall be no order as to the costs.

Petition dismissed.

I.L.R. [2010] M. P., 145
WRIT PETITION
Before Mr. Justice Sanjay Yadav
7 October, 2009*

PRAMOD KUMAR AGRAWAL ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rules 14 & 20 - *Departmental Enquiry - Charge-sheet - Quashment of charge-sheet sought on the ground that petitioner being on deputation cannot be charge-sheeted by the borrowing department - Held - Under sub-rule (1) of Rule 20, the borrowing authority has the powers of the appointing authority for the purpose of placing such government servant, on deputation, under suspension and of the disciplinary authority for the purpose of conducting a disciplinary proceeding.* (Para 12)

क. सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14 व 20 – विभागीय जाँच – आरोप पत्र – आरोप पत्र का अभिखंडन इस आधार पर चाहा गया कि याची प्रतिनियुक्ति पर होने से प्रतिनियुक्ति पर लेने वाले विभाग द्वारा आरोप पत्र नही लगाया जा सकता था – अभिनिर्धारित – नियम 20 के उपनियम (1) के अन्तर्गत प्रतिनियुक्ति पर लेने वाला प्राधिकारी ऐसे शासकीय कर्मचारी को प्रतिनियुक्ति पर, निलंबन के अधीन रखने के प्रयोजन के लिए नियुक्ति प्राधिकारी की और अनुशासनिक कार्यवाही करने के प्रयोजन के लिए अनुशासनिक प्राधिकारी की शक्ति रखता है।

B. Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rules 14 & 20 - *Departmental Enquiry - Charge-sheet - Delay in completion of proceedings - Quashment - Quashment of charge-sheet sought on the ground that proceeding continued for 11 long years - Held - The delay can be a ground for interfering in departmental proceeding but in the case at hand delay is not only attributed to the department but to the petitioner also hence no intereference called for.* (Para 16)

ख. सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14 व 20 – विभागीय जाँच – आरोप पत्र – कार्यवाहियों के समापन में विलम्ब – अभिखंडन – आरोप पत्र का अभिखंडन इस आधार पर चाहा गया कि कार्यवाही 11 वर्ष की लम्बी अवधि तक जारी रही – अभिनिर्धारित – विभागीय कार्यवाही में हस्तक्षेप करने के लिए विलम्ब आधार हो सकता है किन्तु प्रस्तुत मामले में विलम्ब न केवल विभाग के कारण हुआ बल्कि याची के कारण भी हुआ, इसलिए किसी हस्तक्षेप की माँग नही की जा सकती।

C. Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rules 14 & 20 - *Departmental Enquiry - Charge-sheet - Quashment sought on the ground that various enquiry officers were changed*

*W.P. No.1604/2008(S) (Jabalpur)

- Held - It is the procedural fairness which is to be observed in the D.E. - In the case at hand procedure envisaged in Rule 14 & 15 has been adhered to and no prejudice is said to have been caused. (Paras 25 & 26)

ग. सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14 व 20 – विभागीय जाँच – आरोप पत्र – अभिखंडन इस आधार पर चाहा गया कि कई जाँच अधिकारी बदल दिये गये – अभिनिर्धारित – यह एक प्रक्रिया संबंधी औचित्य है जिसका विभागीय जाँच में अनुपालन किया जाना चाहिए – प्रस्तुत मामले में नियम 14 व 15 में परिकल्पित प्रक्रिया का अनुसरण किया गया है और कोई पूर्वाग्रह कारित होना नही कहा जा सकता है।

Cases referred :

AIR 1993 SC 1321, (2007) 14 SCC 49, AIR 2006 SC 2064, AIR 1963 SC 779.

V.S. Shroti with *Vikram Johri,* for the petitioner.

Jayalaxmi Ayyer, Panel Lawyer, for the respondents.

ORDER

SANJAY YADAV, J. :–The petitioner in the present writ petition seeks quashment of charge sheet dated 9.7.1996.

2. The facts briefly are that in the year 1995 the State Government detected a defalcation of Government Fund in the Narmada Valley Development Authority (referred to as NVDA) to the tune of Rs.1770 lacs and the petitioner who was Assistant Director of Agriculture posted on deputation to NVDA between January 1990 to October 1998, was found involved along with 11 other persons. The matter was dealt with by the economic offences wing of the State Government. The petitioner was however, dealt with in a departmental enquiry and a charge sheet under Rule 14 M.P. Civil Services (Classification, Control and Appeals) Rules , 1966 was issued on 9.7.1996. Nine charges were levelled against the petitioner of which charge No.1,8 and 9 related to said defalcation of the Government Fund and remaining charges related to the dereliction of duties displayed by the petitioner during said period which was prima facie treated as a conduct unbecoming of Government servant.

3. After receiving the charge sheet the petitioner vide his application dated 17.7.1996 demanded the documents. While demanding the documents, the petitioner vide said representation requested for stay of further proceedings till documents were supplied. Subsequently, thereof the petitioner vide his letter dated 28.10.1999 raised the protest regarding appointment of an enquiry officer which was by order dated 6.7.1999 and requested for staying further proceedings till entire documents were supplied. However, before appointing the enquiry officer on 6.7.1999, the petitioner, vide letter No.1770/24/95/1 dated 31.3.1999 issued by the Madhya Pradesh Narmada Valley Development, was informed that 10 vouchers were made available for inspection and the petitioner was directed to file reply within ten days.

4. That on 24.1.2001 one Shri K.C.Paliwal, Divisional Soil Conservation Officer was appointed as the enquir officer in place of Shri P.R. Pathak who was earlier appointed as enquiry officer on 13.3.2002, the enquiry officer directed the presenting officer to make available the records and the enquiry was fixed on 6.9.2002, whereon the petitioner again repeated the request for the relevant documents.

5. Thereafter one Shri Gyan Singh Thakur, Division Soil Conservation Officer, NVDA Indore, was appointed as Enquiry Officer by order dated 28.9.2002 and Shri L.S.Sharma, Assistant Soil Conservation, Officer Maheshwar was appointed as the presenting officer.

6. That the petitioner, on 26.2.2004, had the opportunity to inspect certain documents and thereafter the petitioner, complaining non-availability of relevant documents furnished the detail reply of the charges on 28.3.2004. The enquiry officer on 28.7.2004 submitted the enquiry report holding the petitioner guilty of charges and one charge was found partially proved. This report was served on the petitioner on 28.7.2004. The petitioner thereafter submitted his reply, Annexure P/7.

7. After receiving reply the enquiry officer issued a letter on 26.2.2005, Annexure P/8, for resolving the objections in the enquiry report regarding prosecution witnesses; accordingly, these witnesses were summoned and petitioner was informed of the date of 3.3.2005 to put forth his defence.

8. On 3.3.2005, the petitioner appeared before the enquiry officer and the note sheet of the said date (Annexure R/9A) reveals that the petitioner raised the objection regarding the procedure adhered to for examination of prosecution witnesses. The petitioner left the enquiry without cross examining the prosecution witnesses.

9. That the procedure adhered to by the enquiry officer was found objectionable as is evident from letter NVDA/ Krishi/DE/2004/1221 dated 30.12.2004. Consequent whereof by order dated 1.6.2005, a new enquiry officer Shri K.C.Paliwal, Joint Director, NVDA was appointed who submitted the enquiry report on 18.1.2006. The State Government did not agree with the finding, and therefore, appointed another enquiry officer Shri R.S. Manral, Director (Agriculture) vide order dated 4.1.2007.

10. The petitioner vide letter dated 8.10.2007 raised the objection against fresh enquiry; whereupon, he was informed by the enquiry officer vide his letter dated 30.10.2007 that no fresh enquiry is being held and it is only on certain issues, further enquiry is conducted. Thereafter , as letter dated 30.10.2007 reveals, that the petitioner did not participate in the enquiry on 8.10.2007. On 17.10.2007 the petitioner was called upon to submit his defence brief . The petitioner did not furnish the defence brief. The enquiry officer therefore furnished his report on

3/5.11.2007. Again vide letter dated 20.11.2007, the petitioner was given the opportunity to submit his reply. The petitioner in response thereof submitted his reply on 28.11.2007, calling upon the respondent to set aside the enquiry report by Shri R.S. Manral and decide the matter at the earliest.

11. The petitioner in the back ground of aforesaid facts, has approached this court seeking quashment of the charge sheet on the ground that the petitioner being an employee of department of agriculture and was on deputation to the NVDA which being a borrowing department had no authority to conduct the departmental enquiry. The quashment of departmental enquiry proceedings is also sought on the ground of delay.

12. To appreciate the aforesaid submissions worth it would be to take note of Rule 20 which makes provisions regarding the disciplinary action to be taken on officers lent to the Union or any other State Government or any subordinate or local authority. It stipulates:

> **"20.Provisions regarding officers lent to the Union or any other State Government or any subordinate or local authority, etc.-**
>
> (1) Where the services of a Government servant are lent by one department to another department or to the Union Government or to any other State Government or any authority subordinate thereto or to a local or other authority (hereinafter in this rule referred to as "the borrowing authority"), the borrowing authority shall have the powers of the appointing authority for the purpose of placing such Government servant under suspension and of the disciplinary authority for the purpose of conducting a disciplinary proceeding against him:
>
> Provided that the borrowing authority shall forthwith inform the authority which lend the services of the Government servant (hereinafter in this rule referred to as "the lending authority") of the circumstances leading to the order of suspension of such Government servant or the commencement of the disciplinary proceeding as the case may be.
>
> (2) In the light of the findings in the disciplinary proceedings conducted against the Government servant:
>
> (i) if the borrowing authority is of a opinion that any of the penalties specified in clauses (i) to (iv) of rule 10 should be imposed on the Government servant, it may, after consultation with the lending authority, make such orders on the case as it deems necessary:

Provided that in the event of a difference of opinion between the borrowing authority and the lending authority, the services of the Government servant shall be replaced at the disposal of the lending authority;

(ii) if the borrowing authority is of the opinion that a penalty specified in rule 11 should be imposed on any member of class IV Government servant, it may impose such penalty without consulting the lending authority;

(iii) if the borrowing authority is of the opinion that any of the penalties specified in clauses (v) to (ix) of rule 10 should be imposed on the Government servant, if shall replace his services at the disposal of the lending authority and transmit to it the proceedings of the inquiry and thereupon the lending authority, may, if it is the disciplinary authority pass such orders thereon as it may deem necessary, or, if it is note the disciplinary authority submit the case to the disciplinary authority, which shall pass such orders on the case as it may deem necessary:

Provided that before passing any such order the disciplinary authority shall comply with the provisions of sub-rules (3) and (4) of rule 15.

Explanation.- The disciplinary authority may make an order under this clause on the record of the inquiry transmitted to it by the borrowing authority, or after holding such further inquiry as it may deem necessary, as far as may be, in accordance with rule 14."

Thus, under sub-Rule (1) of Rule 20 of the Rules of 1966, the borrowing authority has the powers of the appointing authority for the purpose of placing such Government servant, on deputation, under suspension and of the disciplinary authority for the purpose of conducting a disciplinary proceedings.

13. In *P.V. Srihivasa Sastry and others Vs. Comptroller and Auditor General and others* : AIR 1993 SC 1321, their Lordships of the Supreme Court while observing that although Article 311 of the Constitution does not speak as to who shall initiate the disciplinary proceedings but that can be provided and prescribed by the Rules; were pleased to observe:

"6. Reliance was placed on behalf of the appellants on the judgment of this Court in the case of *Scientific Adviser to the Ministry of Defence v. S. Daniel* (1990) 2 SCR 440. From the aforesaid judgment it shall appear that Rule 13 of the Central Civil Services

(Classification, Control and Appeal) Rules, which was under consideration specifically provided :

"13. Authority to institute proceedings

(1) The President or any other authority empowered by him by general or special order may

(a) institute disciplinary proceedings against any Government servant ;"

Although Art. 311 of the Constitution does not speak as to who shall initiate the disciplinary proceedings but, as already stated above, that can be provided and prescribed by the Rules. But if no Rules have been framed, saying as to who shall initiate the departmental proceedings, then on basis of Art. 311 of the Constitution it cannot be urged that it is only the appointing authority and no officer subordinate to such authority can initiate the departmental proceeding. In the present case, it was not brought to our notice that any Rule prescribes that the Accountant General, who is the appointing authority, alone could have initiated a departmental proceeding."

14. In the case at hand the charge sheet dated 9.7.1996 is from the "Madhya Pradesh Shasan: Narmada Ghati Vikas Vibhag, Mantralaya", which is in consonance to Rule 20 of the Rules of 1966. The first contention of the petitioner that the charge sheet has not been issued by the Competent Authority therefore fails and is hereby rejected.

15. The next ground on the basis of which the petitioner seeks quashment of the charge sheet and departmental enquiry proceedings is that the same was issued on 9.7.1996 and has continued for more than 11 years, and therefore, liable to be quashed on the ground of delay.

16. The delay, in a departmental enquiry can be one of the ground for interference; however, in the case at hand the delay cannot be attributed only to the department , when the petitioner submitted his reply on 28.3.2004. Though it is contended that the petitioner was deprived the inspection of relevant documents and its only when some of these documents were given inspection of on 26.2.2004, that the petitioner could submit his reply. Be that as it may, the fact is that till filing of this petition , the petitioner never questioned the propriety of the pendency of the enquiry even till 28.3.2004 when he filed the reply to charge sheet dated 9.7.1996.

17. The *Deputy Registrar, Cooperative Societies, Faizabad V. Sachindra Nath Pandey and Others*: (1995) 3 SCC 134, their Lordships were pleased to observe:

"7.On a perusal of charges, we find that the charges are very

serious. We are, therefore, not inclined to close the matter only on the ground that about 16 years have elapsed since the date of commencement of disciplinary proceedings, more particularly when the appellant alone cannot be held responsible for this delay. So far as the merits are concerned, we regret to say that the High Court has not dealt with the submissions- and facts in support of the submission of the appellant- that in spite of being given a number of opportunities the first respondent has failed to avail of them. If the appellant's allegations are true then the appellant cannot be faulted for not holding a regular inquiry (recording the evidence of witnesses and so on). The High court has assumed, even without referring to Regulation 68 aforesaid that holding of an oral inquiry was obligatory. Indeed, one of the questions in the writ petition may be the interpretation of Regulation 68. On facts, the first respondent has his own version. In the circumstances, the writ petition could not have been allowed unless it was held that the appellant's version of events is not true and that the first respondent's version is true. In the circumstances, we have no alternative but to set aside the order under appeal and remit the matter to the High Court once again for disposal of the writ petition afresh in the light of the observations made herein. Since the matter is a very old one it is but appropriate that the matter is dealt with expeditiously. Perhaps, it would be appropriate if the Court looks into the records relating to the disciplinary proceedings also."

18. In *Government of A.P. and others Vs. V. Appala Swamy:* (2007) 14 SCC 49 it is observed by their Lordships:

"12. So far as the question of delay in concluding the departmental proceedings as against a delinquent officer is concerned, in our opinion, no hard-and-fast rule can be laid down therefor. Each case must be determined on its own facts. The principles upon which a proceeding can be directed to be quashed on the ground of delay are:

(1) where by reason of the delay, the employer condoned the lapses on the part of the employee;

(2) where the delay caused prejudice to the employee.

Such a case of prejudice, however, is to be made out by the employee before the inquiry officer.

16. The High Court did not consider any of the aforementioned aspects.

17. For the reasons aforementioned, the impugned judgment of the High Court cannot be sustained and it is set aside accordingly. We, however, direct the appellants to conclude the departmental proceeding at an early date but not later than six months from the date of communication of this order. It is open to the respondent herein to file additional representation before the appropriate authority within a period of four weeks from date."

19. In view of above, the second submissions of the petitioner that the charge sheet and departmental enquiry deserves to be quashed on the ground of delay, also fails.

20. The petitioner further questions the propriety of the respondents in effecting changes of the enquiry officers. From the material which is brought on record, the change of the enquriy officer viz, Shri P.K. Agrawal, who was appointed on 6.7.1999 to that of Shri K.C.Paliwal by order dated 24.1.2001 and of Shri Gyan Singh Thakur by order dated 28.9.2002 has been in usual course and there is no allegation of mala fide imputed nor is it shown that the same has caused any prejudice to the petitioner.

21. In *P.D.Agrwal V. State Bank of India and others:* AIR 2006 SC 2064, their Lordships were pleased to observe that unless a real prejudice is shown to have been caused to the delinquent that an enquiry can be said to have been vitiated.

"16. The validity of the disciplinary proceeding and/or justifiability thereof on the ground of delay or otherwise had never been raised by the Appellant before any forum. It was not his case either before the Appellate Authority or before the High Court that by reason of any delay in initiating the disciplinary proceeding he had been prejudiced in any manner whatsoever. It may be true that delay itself may be a ground for arriving at a finding that enquiry proceeding was vitiated in the event it is shown that by reason thereof the delinquent officer has been prejudiced, but no such case was made out.

17. Mr. Rao urged that the Respondents must have condoned the misconduct on the part of the Appellant herein as they have not taken any action and initiated disciplinary proceeding after he was placed under suspension. Reliance in this behalf has been placed on *State of M.P. and Ors. v. R.N. Mishra and Anr.* [(1997) 7 SCC 644].

25. In *State of M.P. v. Bani Singh and Anr.* [(1990) Supp SCC 738], whereupon Mr. Rao placed strong reliance, this Court opined that by reason of delay of 12 years in initiating the disciplinary

proceeding, the delinquent officer could not defend himself properly. In that case there was no satisfactory explanation such a long delay. There was also doubt as regards the involvement of the delinquent officer.

26. In *State of Punjab and Ors. v. Chaman Lal Goyal* [(1995) 2 SCC 570], however, this Court refused to set aside those disciplinary proceeding which had been initiated after a delay of 5½ years. Distinguishing the decision of this Court in *Bani Singh and Anr.* (supra), it was stated:

"Now remains the question of delay. There is undoubtedly a delay of five and a half years in serving the charges. The question is whether the said delay warranted the quashing of charges in this case. It is trite to say that such disciplinary proceeding must be conducted soon after the irregularities are committed or soon after discovering the irregularities. They cannot be initiated after lapse of considerable time. It would not be fair to the delinquent officer. Such delay also makes the task of proving the charges difficult and is thus not also in the interest of administration. Delayed initiation of proceedings is bound to give room for allegations of bias, mala fides and misuse of power. If the delay is too long and is unexplained, the court may well interfere and quash the charges. But how long a delay is too long always depends upon the facts of the given case. Moreover, if such delay is likely to cause prejudice to the delinquent officer in defending himself, the enquiry has to be interdicted. Wherever such a plea is raised, the court has to weigh the factors appearing for and against the said plea and take a decision on the totality of circumstances. In other words, the court has to indulge in a process of balancing".

27. In *Additional Supdt. of Police v. T. Natarajan* [1999 SCC (LandS) 646], this Court held:

"In regard to the allegation that the initiation of the disciplinary proceedings was belated, we may state that it is settled law that mere delay in initiating proceedings would not vitiate the enquiry unless the delay results in prejudice to the delinquent officer. In this case, such a stage as to examine that aspect has not arisen."

28. In this case, as noticed hereinbefore, the Appellant did not raise the question of delay before any forum whatsoever. He did not raise such a question even before the Disciplinary Authority. He not only took part therein without any demur whatsoever, but, as noticed hereinbefore, cross- examined the witnesses and entered into the defence.

29. The Principles of natural justice cannot be put in a strait-jacket formula. It must be seen in circumstantial flexibility. It has separate facets. It has in recent time also undergone a sea-change."

22. The change of Shri Gyan Singh Thakur as enquiry officer and his replacement by Shri K.C.Paliwal by order dated 1.6.2005 was because the procedure adhered to by the previous enquiry officer was not in consonance with the principle of natural justice. The reasons finds mention in note sheet F-17-70/95/27-1 dated 19.10.2004 and the same being reproduced in toto to show that the enquiry officer while submitting the enquiry report has ignored the provisions of Rule 14 (6) to 14 (23) of the Rule of 1966.

"(1) जॉच अधिकारी ने इस प्रकरण की जॉच मध्यप्रदेश सिविल सेवा वर्गीकरण नियंत्रण तथा अपील नियम 1966 के नियम 14 (6) से लेकर नियम 14 (23) तक में उल्लेखित किसी भी प्रावधान का पालन नहीं किया है। अर्थात जॉच अधिकारी ने न तो प्रकरण की विधिवत जॉच की और न ही जॉच के दौरान जॉच अधिकारी ने किसी भी शासकीय गवाहों का परीक्षण नहीं किया है और न ही अपचारी अधिकारी को बचाव का पर्याप्त अवसर प्रदान करते हुए उन्हें शासकीय गवाहों से प्रतिपरीक्षण करने का अवसर प्रदान किया है। इसके अतिरिक्त यह भी उल्लेखनीय है कि अपचारी अधिकारी द्वारा अपने बचाव में उनके विरूद्ध जारी आरोप पत्र के साथ संलग्न अभिलेख सूची के दस्तावेजों की मॉग करने के उपरान्त भी उन्हें दस्तावेजों की प्रतियॉ उपलब्ध नहीं कराई है। इस प्रकार जॉच अधिकारी ने मध्यप्रदेश सिविल सेवा वर्गीकरण नियंत्रण तथा अपील नियम 1966 के नियम 14 (5) से लेकर 14 (23) तक में निहित प्रावधानों को ताक में रखकर मनमाने ढंग से बिना किसी जॉच के प्रकरण की विवेचना कर अपचारी अधिकारी के विरूद्ध आरोप प्रमाणित करने की चेष्ठा करते हुए जॉच प्रतिवेदन प्रस्तुत किया है।

(2) जॉच अधिकारी द्वारा अपने कर्तव्यों के प्रति उदासीनता बरतकर मध्यप्रदेश सिविल सेवा (आचरण) नियम 1965 के नियम 3 का स्पष्ट रूप से उल्लंधन किया है जिसके लिए उनके विरूद्ध नियमानुसार अनुशासनात्मक कार्यवाही किया जाना चाहिए क्योंकि विभागीय जॉच में जॉच अधिकारी का निष्पक्ष रूप से अनुचित्यता, औचित्यहीनता और मनमानेपन (unfairness, unreasonableness and arbitrariness) आभास से मुक्त होना चाहिए। डी0के0 यादव बनाम जे0एम0ए0 इन्डस्टीज लिमिटेड : 1993 एस0सी0सी0 (एल0 एण्ड एस0) 723 में उच्च न्यायालय ने दिनांक 7.5.93 को दिये गये निर्णय में निम्न मत व्यक्त किया है जिसका सभी प्राधिकारियों द्वारा पालन करना अनिवार्य है:–

"The carcinal point that has be borne in mind in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and

impartially. It is not so much to act judicially but is to act fairly, namely. the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemmed unheard intenda to prevent the authority from acting arbitrarily affecting the rights of the concerned person."

It is fundamental rule to law that no decision must be taken which will affect the right of any person without first being informed of the case and giving him/her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rule of natural justice. The person concerned must be informed the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken.

उपरोक्त निर्णय के अनुसार जॉच अधिकारी ने अपचारी अधिकारी अर्थात श्री पी0के0 अग्रवाल को आरोप से संबंधित अभिलेखों की प्रतियॉ प्रदान नहीं करते हुये उन्हें बचाव का अवसर प्रदान नहीं किया इसी तरह जॉच अधिकारी ने प्रश्नाधीन विभागीय जॉच में किसी भी शासकीय गवाहों का परीक्षण नहीं किया और न ही अपचारी अधिकारी श्री अग्रवाल को शासकीय गवाहों से प्रतिपरीक्षण किये जाने का अवसर भी प्रदान नहीं किया। चूंकि जॉच अधिकारी अनुशासनिक प्राधिकारी का प्रतिनिधि है और उनका कर्तव्य है कि अपना प्रतिवेदन प्रस्तुत करने के पूर्व नियमों का पालन करते हुए तथा अपचारी सेवक को बचाव का पूर्ण अवसर प्रदान करें किन्तु इस प्रकरण में जॉच अधिकारी ने अपने कर्तव्यों का एवं विभागीय जॉच नियमों का बिल्कुल भी पालन नहीं किया है और मनमानें ढंग से अपचारी अधिकारी के विरूद्ध आरोप प्रमाणित करने की चेष्ठा करते हुए प्रतिवेदन शासन को प्रेषित किया है। इसलिये जांच अधिकारी द्वारा प्रश्नाधीन विभागीय जॉच में की गई कार्यवाही न्याय की दृष्टि से दूषित हो गया है जिसके लिए उनके विरूद्ध अनुशासनात्मक कार्यवाही किया जाना चाहिए।

(3) जॉच अधिकारी ने अपने प्रतिवेदन में आरोप कमॉक 5 के निष्कर्ष अंतिम पंक्ती में व्हाईटनर लगाकर अपचारी अधिकारी के विरूद्ध आरोप प्रमाणित होने का निष्कर्ष दिया है जबकि जॉच अधिकारी को अपने टंकित प्रतिवेदन में किसी प्रकार की कॉट छॉट करनी थी तो कॉट छॉट किये गये स्थान पर अपने लघु हस्ताक्षर करना चाहिये था। जॉच अधिकारी के द्वारा उक्त कार्यवाही नहीं किये जाने से दिये गये निष्कर्ष पर प्रश्न चिन्ह लग जाता है क्योंकि जॉच अधिकारी ने अपना प्रतिवेदन संयुक्त संचालक कृषि (ज.ग्रे.क्षे.उ.) नर्मदा घाटी विकास प्राधिकरण के माध्यम से भेजा है इसलिए यह नहीं कहा जा सकता कि उक्त प्रतिवेदन पर क्या

वास्तव में जॉच अधिकारी ने व्हाईटनर लगाकर कॉटछाट की है अथवा किसी और के द्वारा की गई है।

(4). उपरोक्त कारणों से श्री अग्रवाल तत्कालीन सहायक भूमि संरक्षण अधिकारी के विरूद्ध विभागीय जॉच प्रकरण में जॉच अधिकारी के निष्कर्षो से असहमति व्यक्त करते हुए प्रकरण की जॉच पुनः नये सिरें से किया जाना उचित होगा।"

23. Consequently, by order dated 1.6.2005 the said Shri K.C. Paliwal appointed as the enquiry officer. This Court do not find any illegality in the action of the respondents.

24. Furthermore, the enquiry report furnished by Shri K.C. Paliwal on 18.1.2006. The State Government found the enquiry report lacking in certain particulars therefore by order dated 4.1.2007 appointed one Shri R.S. Manral, Director (Agriculture) for further enquiry, who vide his letter dated 30.10.2007 clarified to the petitioner that he was not holding a fresh enquiry but further enquiry and in the said proceedings the petitioner was afforded an opportunity to participate, the petitioner though appeared but did not participate; this fact is evident from the enquiry report dated 3/5.11.2007 furnished by Shri R.S. Manral, Annexure P/17.

25. It is the procedural fairness which is required to be observed in the departmental enquiry. As has been observed in *State of Orissa and others vs. Bidyabhushan Mohapatra*: AIR 1963 SC 779, the reasonable opportunity contemplated by Article 311 (2) has manifestly to be in accordance with the rules framed under Article 309 of the Constitution. It was observed by their Lordships:

> "There is no substantial difference between the procedure prescribed for the two forms of enquiry. The enquiry in its true nature in quasi-judicial. It is manifest from the very nature of the enquiry that the approach to the materials placed before the enquiring body should be judicial. It is true that by Regulation 490, the oral evidence is to be direct, but even under R. 8 of the Tribunal Rules, the Tribunal is to be guided by rules of equity and natural justice and is not bound by formal rules of procedure relating to evidence. It was urged that whereas the Tribunal may admit on record evidence which is hearsay, the oral evidence under the Police Regulations must be direct evidence and hearsay is excluded. We do not think that any such distinction was intended. Even though the Tribunal is not bound by formal rules relating to procedure and evidence, it cannot rely on evidence which is purely hearsay, because to do so in an enquiry of this nature would be contrary to rules of equity and natural justice. The provisions for maintaining the record and calling upon the delinquent public servant to submit his explanation are substantially the same under Regulation 490 of the Police Regulations and Rule 8 of the Tribunal Rules. It is urged that

under the Tribunal Rules, there is a departure in respect of important matters from the Police Regulations which render the Tribunal Rules prejudicial to the person against whom enquiry is held under those rules. Firstly, it is submitted that there is no right of appeal under the Tribunal Rules as is given under the Police Regulations; secondly, that the Governor is bound to act according to the recommendations of the Tribunal and thirdly, that under the Tribunal Rules, even if the complexity of a case under enquiry justifies engagement of counsel to assist the person charged, assistance by counsel may not be permitted at the enquiry. These three variations, it is urged, make the Tribunal Rules not only discriminatory but prejudicial as well to the person against whom enquiry is held under these Rules. In our view, this plea cannot be sustained. The Tribunal Rules and the Police Regulations in so far as they deal with enquiries against police officers are promulgated under S. 7 of the Police Act, and neither the Tribunal Rules nor the Police Regulations provide an appeal against an order of dismissal or reduction in rank which the Governor may pass. The fact that an order made by a police authority is made appealable whereas the order passed by the Governor is not made appealable is not a ground on which the validity of the Tribunal Rules can be challenged. In either case, the final order rests with the Governor who has to decide the matter himself. Equal protection of the laws does not postulate equal treatment of all persons without discrimination to all persons similarly situated. The power of the Legislature to make a distinction between persons or transactions based on a real differentia is not taken away by the equal protection clause. Therefore by providing a right of appeal against the order of police authorities acting under the Police Regulations imposing penalties upon a member of the police force, and by providing no such right of appeal when the order passed is by the Governor, no discrimination inviting the application of Art. 14 is practised."

The plea that there was discrimination because there was a right of appeal against an order imposing penalty under one set of rules, and no such right under the other, was rejected in AIR 1961 SC 1245. It must therefore be held that the existence of a right of appeal against the order of an administrative head imposing penalty and absence of such a right of appeal against the order of the Governor under the Tribunal Rules does not result in discrimination contrary to Art. 14 of the Constitution.

9. The High Court has held that there was evidence to support the findings on heads (c) and (d) of Charge (1) and on Charge (2). In

respect of charge 1 (b) the respondent was acquitted by the Tribunal and it did not fall to be considered by the Governor. In respect of charges 1(a) and 1(e) in the view of the High Court "the rules of natural justice had not been observed." The recommendation of the Tribunal was undoubtedly founded on its findings on charges 1(a), 1(e), 1(c), 1(d) and Charge (2). The High Court was of the opinion that the findings on two of the heads under Charge (1) could not be sustained, because in arriving at the findings the Tribunal had violated rules of natural justice. The High Court therefore directed that the Government of the State of Orissa should decide whether "on the basis of those charges, the punishment of dismissal should be maintained or else whether a lesser punishment would suffice." It is not necessary for us to consider whether the High Court was right in holding that the findings of the Tribunal on charges 1 (a) and 1 (e) were vitiated for reasons set out by it, because in our judgment the order of the High Court directing the Government to reconsider the question of punishment cannot, for reasons we will presently set out, be sustained. If the order of dismissal was based on the findings on charges 1 (a) and 1(e) alone the Court would have jurisdiction to declare the order of dismissal illegal but when the findings of the Tribunal relating to the two out of five heads of the first charge and the second charge was found not liable to be interfered with by the High Court and those findings established that the respondent was prima facie guilty of grave delinquency, in our view the High Court had no power to direct the Governor of Orissa to reconsider the order of dismissal. The constitutional guarantee afforded to a public servant is that he shall not be dismissed or removed by an authority subordinate to that by which he was appointed, and that he shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The reasonable opportunity contemplated has manifestly to be in accordance with the rules framed under Art. 309 of the Constitution. But the Court in a case in which an order of dismissal of a public servant is impugned, is not concerned to decide whether the sentence imposed, provided it is justified by the rules, is appropriate having regard to the gravity of the misdemeanor established. The reasons which induce the punishing authority, if there has been an enquiry consistent with the prescribed rules, are not justiciable: nor is the penalty open to review by the Court. If the High Court is satisfied that if some but not all of the findings of the Tribunal were "unassailable" the order of the Governor on whose powers by the rules no restrictions in determining the appropriate punishment

are placed was final, and the High Court had no jurisdiction to direct the Governor to review the penalty for as we have already observed the order of dismissal passed by a competent authority on a public servant, if the conditions of the constitutional protection have been complied with, is not justiciable. Therefore if the order may be supported on any finding as to substantial misdemeanor for which the punishment can lawfully be imposed, it is not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. The Court has no jurisdiction of the findings of the enquiry officer or the Tribunal prima facie make out a case of misdemeanor, to direct the authority to reconsider that order because in respect of some of the findings but not all it appears that there had been violation of the rules of natural justice. The High Court was, in our judgment, in error in directing the Governor of Orissa to reconsider the question.

10. The appeal must therefore be allowed and the order passed by the High Court set aside. Having regard to the circumstances of the case, there will be no order as to costs in this court and the High Court.

Appeal allowed."

26. In the case at hand, Rule 14 of the Rules of 1966 which prescribes the procedure to be followed in case of a major penalty charge sheet, and the close look at the facts of present case nowhere reveals the violation thereof. Furthermore, Rule 15 of the Rules of 1966 stipulates action on the enquiry report, and 'Sub-rule (1) thereof provides for that:

> "(1) The disciplinary authority if it is not itself the inquiring authority may, for reasons to be recorded by it in writing, remit the case to the inquiring authority for further inquiry and report and the inquiring authority shall thereupon proceed to hold the further inquiry according to the provisions of rule 14 as far as may be."

The facts of the present case adverted to discloses that the procedure laid down by the relevant Rules , viz, Rule 14 and Rule 15 has been adhered to.

26. Having thus considered, this Court do not find any substance in the challenge put forth by the petitioner, accordingly petition fails and is hereby dismissed. The disciplinary authority is however, directed to pass final orders on the enquiry report furnished by EO 3/5.11.2007 after taking into consideration the defence submissions of the petitioner as expeditiously as possible, but not later than 3 months from the date of communication of this order. No costs.

Petition dismissed.

JOHRA BI Vs. JAGESHWAR

I.L.R. [2010] M. P., 160

WRIT PETITION

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

9 October, 2009*

JOHRA BI & ors. ... Petitioners

Vs.

JAGESHWAR & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Section 115(1), Constitution, Article 227 - *Revision - Other proceedings - Meaning - Explained - Held - Term "other proceedings" cannot be read in a narrow compass and has to be given a very wide meaning - Word "proceedings" cannot be confined to a civil proceedings alone - It has the comprehensive meaning so as to include within it all matters coming up for judicial adjudication.* (Paras 20 & 22)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115(1), संविधान, अनुच्छेद 227 – पुनरीक्षण – अन्य कार्यवाही – अर्थ – स्पष्ट किया गया – अभिनिर्धारित – शब्द "अन्य कार्यवाही" को संकीर्ण विस्तार में नही पढ़ा जा सकता और अत्यंत व्यापक अर्थ देना होगा – शब्द "कार्यवाही" को केवल सिविल कार्यवाही तक सीमित नही किया जा सकता – यह विस्तृत अर्थ रखता है ताकि उसके अन्तर्गत न्यायिक न्यायनिर्णयन के लिए आने वाले सभी मामलों को सम्मिलित किया जाए।

B. Civil Procedure Code (5 of 1908), Section 115(1) & Order 7 Rule 11(b), (c), Constitution, Article 227 - *Revision - Maintainability of Writ Petition or Revision - Held - Under Order 7 Rule 11 CPC order may be final at once and order would be order revisable - Once exigencies are provided in Order 7 Rule 11(b) & (c) are completed, revision would be maintainable not the writ petition - Each case has to be decided whether suit or other proceeding would have been finally disposed of in favour of the party applying for the revision.* (Para 26)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115(1) व आदेश 7 नियम 11(बी), (सी), संविधान, अनुच्छेद 227 – पुनरीक्षण – रिट याचिका या पुनरीक्षण की पोषणीयता – अभिनिर्धारित – सि.प्र.सं. के आदेश 7 नियम 11 के अन्तर्गत आदेश तुरंत अंतिम हो सकता है और आदेश पुनरीक्षण योग्य आदेश होगा – जब एक बार आदेश 7 नियम 11(बी) व (सी) में उपबंधित अत्यावश्यकताएँ पूर्ण हो जाती हैं, पुनरीक्षण पोषणीय होगी न कि रिट याचिका – प्रत्येक मामले का विनिश्चय करना होगा चाहे वाद या अन्य कार्यवाही का पुनरीक्षण के लिए आवेदन करने वाले पक्षकार के हक में अंतिम रूप से निपटारा होता हो।

C. Civil Procedure Code (5 of 1908), Section 115(1) & Order 9 Rule 9, Constitution, Article 227 - *Revision - Maintainability of Writ Petition or Revision - Held - An application under Order 9 Rule 9 CPC has been dismissed, appeal stands dismissed, revision would be maintainable - It would*

*W.P. No.8714/2007 (Jabalpur)

mean proceeding in S. 115(1) CPC - Writ petition cannot be said to be maintainable. (Para 27)

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115(1) व आदेश 9 नियम 9, संविधान, अनुच्छेद 227 – पुनरीक्षण – रिट याचिका या पुनरीक्षण की पोषणीयता – अभिनिर्धारित – सि.प्र.सं. के आदेश 9 नियम 9 के अन्तर्गत आवेदन खारिज कर दिया गया, अपील खारिज कर दी गई, पुनरीक्षण पोषणीय होगी – इसका अर्थ सि.प्र.सं. की धारा 115(1) में कार्यवाही से होगा – रिट याचिका पोषणीय होना नही कही जा सकती।

D. Civil Procedure Code (5 of 1908), Section 115(1) & Order 7 Rule 11, Constitution, Article 227 - *Revision - Maintainability of Writ Petition or Revision - Held - A prayer was made to dismiss the suit as not maintainable on the ground that separate suit was not maintainable beside the objection with respect to court fees, etc. was also taken - Considering the nature of objection taken, the revision petition would be maintainable not the writ petition.* (Para 28)

घ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115(1) व आदेश 7 नियम 11, संविधान, अनुच्छेद 227 – पुनरीक्षण – रिट याचिका या पुनरीक्षण की पोषणीयता – अभिनिर्धारित – इस आधार पर कि पृथक वाद पोषणीय नही था वाद पोषणीय न होने से खारिज करने की प्रार्थना की गई उसके अतिरिक्त न्यायालय फीस आदि के सम्बन्ध में आपत्ति भी ली गई – ली गई आपत्तियों की प्रकृति पर विचार करते हुए पुनरीक्षण याचिका पोषणीय होगी न कि रिट याचिका।

E. Civil Procedure Code (5 of 1908), Section 115(1) & Order 7 Rule 11, Constitution, Article 227 - *Revision - Maintainability of Writ Petition or Revision - Held - Dismissal of the suit was sought on the ground that there was non-joinder of the necessary party, beside suit was not properly valued, considering the nature of objection taken in rejection of plaint, the revision would maintainable not the writ petition.* (Para 29)

ङ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115(1) व आदेश 7 नियम 11, संविधान, अनुच्छेद 227 – पुनरीक्षण – रिट याचिका या पुनरीक्षण की पोषणीयता – अभिनिर्धारित – वाद की खारिजी इस आधार पर चाही गयी कि आवश्यक पक्षकार का असंयोजन था, इसके अतिरिक्त वाद का उचित मूल्यांकन नही किया गया, वाद के नामंजूर किये जाने में ली गई आपत्ति की प्रकृति को विचार में लेते हुए, पुनरीक्षण पोषणीय होगी न कि रिट याचिका।

F. Civil Procedure Code (5 of 1908), Section 115(1) & Order 9 Rule 13, Constitution, Article 227 - *Revision - Maintainability of Writ Petition or Revision - Held - An application under Order 9 Rule 13 CPC was rejected by the trial Court against which miscellaneous appeals were preferred, thus, revision would be maintainable against the appellate orders which have been passed not the writ petition.* (Para 30)

च. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115(1) व आदेश 9 नियम 13, संविधान, अनुच्छेद 227 – पुनरीक्षण – रिट याचिका या पुनरीक्षण की पोषणीयता –

अभिनिर्धारित – विचारण न्यायालय द्वारा सि.प्र.सं. के आदेश 9 नियम 13 के अन्तर्गत आवेदन खारिज किया गया जिसके विरुद्ध विविध अपील पेश की गयीं, इस प्रकार, पारित किये गये अपीलीय आदेशों के विरुद्ध पुनरीक्षण पोषणीय होगी न कि रिट याचिका।

G. **Civil Procedure Code (5 of 1908), Section 115(1), Constitution, Article 227 - *Revision - Maintainability of Writ Petition or Revision - Held - All the writ petitions in which revision would lie and not writ petition directed to be converted to a revision instead of dismissing them as not maintainable.*** (Para 32)

छ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115(1), संविधान, अनुच्छेद 227 – पुनरीक्षण – रिट याचिका या पुनरीक्षण की पोषणीयता – अभिनिर्धारित – सभी रिट याचिकाओं को, जिनमें पुनरीक्षण पोषणीय होगी न कि रिट याचिका, उन्हें पोषणीय न मानकर खारिज करने के बजाय पुनरीक्षण में परिवर्तित करने का निदेश दिया गया।

Cases referred :

2003(3) MPLJ 414, (2003) 6 SCC 675, 2003(2) MPLJ 408, 2003(1) MPLJ 31, (2009) 5 SCC 162, AIR 1975 Calcutta 377, (2003) 6 SCC 659, AIR 2004 MP 225, 2003(2) MhLJ 987, 2002 AIR Kant HCR 1823(1831), 2005(25) All Ind Cas 719(720).

K.B. Bhatnagar, for the petitioners.

Ashok Lalwani, for the respondent Nos.1 & 2.

Rajesh Tiwari, G.A., for the State.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–The question has been raised with respect to maintainability of writ petitions as against the orders which have been impugned in the instant cases in view of proviso to sub-section (1) of Section 115 CPC; whether writ would be maintainable or revision.

2. In WP No. 8714/2007 *(Johra Bi and others vs. Jageshwar and others)* impugned order (P/7) passed on 15th February, 2007 by the Addl.District Judge, Mandla has been assailed. Plaintiff had filed civil suit no.41-A/03 which was dismissed for want of prosecution, restoration of the suit was applied, the trial Court had dismissed the application filed under Order 9 Rule 9 CPC for restoration of the suit, aggrieved thereby said misc. appeal was preferred before the Addl.District Judge which appeal has been dismissed. Aggrieved thereby, the writ petition has been preferred.

3. In WP No.8447/09 *(Amir Islam vs. Paris Grih Nirman Sahkari Sanstha Maryadit and others)* matter relates to rejection of an application filed under Order 7 Rule 11 read with Section 151 CPC to reject the plaint on the ground that valuation was not appropriate, adequate court fees has not been paid and necessary party has not been impleaded.

4. In WP No. 13378/07 *(Arjundas Priyani vs. Arjundas Lalwani and another)* there is rejection of an application filed on behalf of defendant under Order 7 Rule 11 CPC. Question posed for consideration is whether in case application would have been allowed, the proceeding would have been finally disposed of ? Said order passed by the trial Court rejecting the application vide Order (P.5) dated 6.8.07 has been assailed in the writ petition.

5. In WP Nos. 7664/07 *(Shri Jagat Guru Shankrachariya Swami Swaroopanand Saraswati Badrika Dwarika Peethhadhishwar Ashram vs. Kalam Scooter Service and others)*, *4993/08 (Shri Jagat Guru Shankrachariya Swami Swaroopanand Saraswati -Badrika- Dwarika Peethhadhishwar Ashram vs.Kallu Scooter Service)*, 4994/08 *(Shri Jagat Guru Shankrachariya Swami Swaroopanand Saraswati Badrika -Dwarika Peethhadhishwar Ashram vs.Siddhu Engineering Works)* and in WP No.4995/08 *(Shri Jagat Guru Shankrachariya Swami Swaroopanand Saraswati Badrika- Dwarika Peethhadhishwar Ashram vs.Bhatia Tyres)* the facts are that plaintiff had filed a suit for eviction of tenant on the ground of arrears of rent as also on the ground of bona fide need for carrying out the construction. Ex parte decrees were passed. Applications under Order 9 Rule 13 CPC were filed in aforesaid cases. The trial Court vide order dated 23.4.07 dismissed the applications, aggrieved thereby misc.appeals were preferred before the Court of District Judge, Jabalpur. The matter was remanded to the trial Court. Aggrieved thereby aforesaid writ petitions have been preferred on behalf of the petitioner before this Court. Initially the writ petitions were decided by common order dated 5.5.08 passed by esteemed brother Rajendra Menon, J., against which four Writ Appeals no. 704/08, 705/08,706/08 and WA 707/08 were preferred . Division Bench vide order dated 28.8.2008 has observed that learned single Judge shall take up the issue relating to maintainability of the writ application under Article 227 of the Constitution of India or in case a revision is maintainable under Section 115 of CPC. If the learned single Bench is of the opinion that the judgment in the matter of *Shakuntala Singh vs. Basant Kumar Thakur and others* 2003 (3) MPLJ 414 may be referred to a larger Bench in case of disagreement. It was made clear by the Division Bench that "we make it clear that we are deciding the writ appeals on the preliminary submissions and are not touching the merits of the matter which are still to be decided by the learned Single Judge while exercising his powers either under Article 227 of the Constitution of India or under Article 226 of the Constitution of India. It was also observed that Single Judge is requested to provide proper opportunity to the parties to raise their submissions not only on the technical objection or legal ground but even on the merits of the matters. As now as per MP High Court Rules such petitions are to be heard by Division Bench, matters have been placed before us.

6. We have been assisted ably by amicus curiae Shri Ravish Agarwal, learned

Sr.Advocate who was requested to assist the Court in these matters. Shri Ravish Agarwal has submitted that for the purpose of considering the scope of revision under proviso to sub-section (1) of section 115 CPC, it has to be considered by the Court "proceeding" would stand finally disposed of in case order had been passed in favour of a party applying for the revision, in case suit or other proceedings would stand disposed of finally, revision would be maintainable not writ petition. He has submitted that word "proceeding" has not been defined in the CPC. The meaning of that has to be understood in common parlance. He has referred to Law Lexicon and Black's Law Dictionary. He has also placed reliance on a decision of Apex Court in *Surya Dev Rai vs. Ram Chander Rai and others* (2003) 6 SCC 675. He has also placed reliance on a Division Bench decision of this Court rendered in *Surajmal s/o Siddhanathji vs. Sundarlal s/o Nanuram and others* 2003 (2) MPLJ 408. He has also referred to the decision rendered by single Bench of this Court in *Sawal Singh vs. Smt.Ramsakhi and others* 2003 (1) MPLJ 31 considering what is the meaning of "other proceedings" in proviso to sub section (1) of section 115 CPC.

7. Shri Ashok Lalwani, learned counsel appearing for petitioners in WP Nos. 13378/07 and 8447/09 has submitted that as against the impugned orders writ petition is maintainable. Even if this Court comes to the conclusion that writ petition is not maintainable, then too placing reliance on a decision of Apex Court in *Nawab Shaqafath Ali Khan and others vs. Nawab Imdad Jah Bahadur and others* (2009) 5 SCC 162 he contended that conversion can be made of writ petition into a revision.

8. Ms. D.K.Bohre, learned counsel appearing for respondents in WP 1338/07 has submitted that revision would be maintainable not the writ petition. Shri Ankit Saxena, learned counsel appearing for respondents in WP 8447/09 has also submitted that writ petition is not maintainable.

9. Ms.Neelam Goel, learned counsel appearing for petitioners in WP 7664/07, 4993/08, 4994/08 and WP 4995/08 has submitted that there is no bar for exercising the jurisdiction under Article 227 of the Constitution of India. She has submitted that even if revision is maintainable, as no appeal lies against the revisional order, this Court cannot exercise the writ jurisdiction in such a matter. She has also submitted that against the orders which have been impugned in the writ petitions, writ petitions would be maintainable not the revision. She has also submitted that certain observations have been made by the Division Bench while dealing with the writ appeals that in case decision in *Shakuntala Singh vs. Basant Kumar Thakur and others* (supra) requires consideration, the matter should have been referred by the single Bench to a larger Bench, in case revision is held to be maintainable, it would delay the decision of the case as case pertains to senior citizens, it requires to be heard at an early date as matter is before Division Bench. Thus, the Division Bench should decide the aforesaid question on merits, as per

amended High Court of MP Rules,2008 writ petitions have been listed now before the Division Bench for consideration after the order passed by the single Bench was set aside by the writ appeal Court.

10. Shri R.K.Verma, learned counsel appearing for respondents in aforesaid four writ petitions has submitted that writ applications cannot be said to be maintainable as against the impugned orders. That is the first question to be dealt with as per decision rendered by this Court in writ appeals vide judgment dated 28.8.08. Question of examination on merits and legality of the order and correctness of decision in *Shakuntala Singh vs. Basant Kumar Thakur and others* (supra) would arise only in revision, which is maintainable not in writ petition. Thus, when writ petition is not maintainable, merits of the decision of *Shakuntala Singh vs. Basant Kumar Thakur and others* (supra) cannot be gone into and it be left open for decision by the single Bench which has to hear matter.

11. Every day this question is arising in large number of petitions against which order revision is maintainable and which orders passed by Civil Court are amenable to writ jurisdiction of this Court under Article 227 of the Constitution of India. Earlier the power to deal with the matters of interlocutory orders arising out of Civil Courts under old High Court of MP Rules was with the single Bench. Now under the High Court of MP Rules, 2008, the Division Bench has to hear the matters under Chapter 4 clause (d) of sub-rule (7) of Rule 2 as substituted with effect from 15th May,2009 Division Bench has to hear the matters pertaining to challenging interlocutory or final orders passed by the Courts/ Tribunals constituted under section 3 of the MP Civil Courts Act, 1958 and a Family Court under the Family Courts Act, 1984. Problem arises of overlapping of jurisdiction everyday whether the matter is required to be heard by a single Bench in revision or by a Division Bench in a writ petition.

12. Section 115 of CPC which has been amended with effect from 1.7.2002 by substituting the proviso is required to be considered in order to cull out the scope of maintainability of revision under Section 115 CPC. Section 115 CPC is quoted below :-

> **"115.Revision** – (1) The High Court may call of the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lied thereto, and if such subordinate Court appears-
>
> (a) to have exercised a jurisdiction not vested in it by law;or
>
> (b) to have failed to exercise a jurisdiction so vested; or
>
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
>
> the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation – In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding."

First imbroglio created to exercise the revisional jurisdiction is that order should not be appealable. . Power can be exercised if subordinate Court has exercised jurisdiction not vested in it by law or it has failed to exercise the jurisdiction so vested or exercise of its jurisdiction illegally or with material irregularity. Proviso which has been substituted with effect from 1.7.2002 provides that High Court shall not, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

13. When we consider in the common parlance the meaning of word "proceeding", Black's Law Dictionary Sixth Edition deals with the word "proceeding" at page 1204. In a general sense, the form and manner of conducting juridical business before a court or judicial officer is called "proceeding", and includes all possible steps in an action from its commencement till the end. It may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding. In general "proceeding" means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given. Law Lexicon by P.Ramanatha Aiyar 1977 Edition at page 1524 defines "proceeding". A proceeding in a civil action is an act necessary to be done in order to attain a given end. It is a prescribed mode of action for carrying into effect a legal right. In its general acceptation, "proceeding" means the form in which actions are to be brought and defended. Its meaning in general sense may also apply to other proceedings and the civil proceedings. It may also include

administrative proceedings. Corpus Juris Secundum deals with "proceeding" at page 972 thus :-

> **"Proceeding-** The terms "proceeding" and "proceedings" are discussed generally in Actions 1 h (c) and, with reference to bankruptcy, in Bankruptcy 1. The terms have been held to be synonymous with "ease" see Actions 1 b(1), and "cause" see Actions 1 e(1), and also have been held synonymous with, or have been distinguished from, "action", "judgment", "process", "prosecution", and "suit" see Actions 1 h (1)(b)."

14. The word "proceeding" is of larger connotation in Word & Phrases, Permanent Edition 34, published by West Publishing Co.deals with expression "proceeding" at page 141 onwards and it has been observed that the term "proceeding" in its most comprehensive sense includes every step taken in a civil revision except the pleadings. "Proceeding" may assume different acts and different meanings. Even in administration there may be some proceedings.

15. Section 141 of CPC, particularly explanation to Section 141 CPC has been inserted by the Code of Civil Procedure (Amendment) Act, 1976 with effect from 1.2.1977. Amended Section 141 CPC is with respect to applicability of Section 141 to various types of proceedings . Earlier there was controversy particularly whether section applies where an application to set aside ex parte proceedings or orders of dismissal for default are themselves dismissed for default or decided ex parte. Considering the legal imbroglio created whether section 141 CPC applied or section 151, it was considered appropriate to provide the aforesaid explanation. It was also clarified that section 141 CPC does not apply to a "proceeding" under Article 226 of the Constitution. Section 141 CPC is quoted below :-

> **"141.Miscellaneous proceedings-** The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.
>
> Explanation- In this section, the expression, "proceedings" includes proceedings under Order IX, but does not include any proceeding under article 226 of the Constitution."

Explanation to Section 141 set at naught any doubt that "proceeding" includes the proceeding under Order 9 and the procedure provided in the Code in regard to the suit shall be followed in the proceeding under Order 9 also, but it excludes the proceeding under Article 226 of Constitution of India.

16. In *Rathindra Nath Bose vs. Jyoti Bikash Ghosh and others* AIR 1975 Calcutta 377, single Bench opined that in a proceeding under Order 9 Rule 9 CPC, Section 141 CPC does not apply. However, the said decision was rendered

under the unamended provision, after explanation has been added to Section 141 CPC, aforesaid decision cannot be said to be of any utility.

17. No doubt about it that a bare reading of proviso to sub-section (1) of Section 115 CPC makes it clear that power of the High Court has been restricted to exercise the revisional jurisdiction. It can be exercised only keeping in view the proviso to Section 115 (1) CPC which has been added by way of amendment with effect from 1.7.2002. It is also trite law that right of revision is not a vested right. It can be taken away, it belongs to procedural matter whereas right of appeal is a substantive and vested right, it cannot be taken away,its a statutory creation. At the same time, the constitutional jurisdiction of the High Court under Article 226/227 is not abridged away by any manner by restriction put on revisional power by virtue of proviso to section 115 (1) CPC. It is not at all whittled down. In the cases where revision is not maintainable by virtue of proviso, this Court subject to the well defined self-imposed restrictions to which power under Article 227 of the Constitution can be exercised, exercise the power in supervisory jurisdiction to meet the ends of justice and interfere even in interlocutory orders. However, the powers must be exercised sparingly. The power is not to be exercised readily to correct mere errors whether on the facts or law and cannot be exercised as an appellate power.

18. The Apex Court has considered the proviso after amendment added to Section 115 (1) CPC with effect from 1.7.2002 in *Shiv Shakti Coop.Housing Society, Nagpur vs. Swaraj Developers and others* (2003) 6 SCC 659 . The question posed before the Apex Court was about the scope of aforesaid amended proviso. High Court held that because of amended Section 115 CPC the revision filed before it was not maintainable as had an order been passed in favour of a party applying for revision, the same would not have finally disposed of suit or other proceedings. The Apex Court considered the provision before Amendment Act and after amendment and has laid down in para 32 thus :-

> "32. A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is "yes", then the revision is maintainable. But on the contrary, if the answer is "no", then the revision is not maintainable. Therefore, if the impugned order is interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject-matter of revision under Section 115. There is marked distinction in the language of Section 97 (3) of the Old Amendment Act and Section 32(2)(i) of the Amendment Act. While in the former, there was a clear legislative intent to save applications admitted or pending

before the amendment came into force. Such an intent is significantly absent in Section 32(2)(i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation."

The Apex Court has laid down that in case order is interim, it cannot be subject matter of revision under Section 115 CPC. Stress now is on the question whether the order in favour of a party applying for revision would have given finality to suit or other proceedings. If the answer is "yes" then the revision is maintainable. But if answer is "no" revision is not maintainable. This test has to be applied in every case so as to find out whether order is interim or would dispose of the suit or other proceedings.

19. The Apex Court in *Surya Dev Rai vs. Ram Chander Rai and others* (2003) 6 SCC 675 has laid down that section 115 CPC does not permit a revision petition being filed against an order disposing of an appeal against the order of the trial Court whether confirming, reversing or modifying the order of injunction granted by the trial Court. The reason is that the order of the High Court passed either way would not have the effect of finally disposing of the suit or other proceedings. The exercise of revisional jurisdiction in such a case is taken away by the substitution of the proviso to Section 115(1) CPC by said Amendment Act 46 of 1999. Apex Court has observed thus :-

"4. Section 115 of the Code of Civil Procedure ,as amended, does not now permit a revision-petition being filed against an order disposing of an appeal against the order of the Trial Court whether confirming, reversing or modifying the order of injunction granted by the trial Court. The reason is that the order of the High Court passed either way would not have the effect of finally disposing of the suit or other proceedings. The exercise of revisional jurisdiction in such a case is taken away by the proviso inserted under sub-section (1) of S. 115 of the C.P.C. The amendment is based on the Malimath Committee's recommendations. The Committee was of the opinion that the expression employed in S. 115 C.P.C., which enables interference in revision on the ground that the order if allowed to stand would occasion a failure of justice or cause irreparable injury to the party against whom it was made, left open wide scope for the exercise of the revisional power with all types of interlocutory orders and this was substantially contributing towards delay in the disposal of cases. The Committee did not favour denuding the High Court of the power of revision

but strongly felt that the power should be suitably curtailed. The effect of the erstwhile clause (b) of the proviso, being deleted and a new proviso having been inserted, is that the revisional jurisdiction, in respect of an interlocutory order passed in a trial or other proceedings, is substantially curtailed. A revisional jurisdiction cannot be exercised unless the requirement of the proviso is satisfied.'

In interlocutory matters this Court can exercise supervisory jurisdiction and amendment in Section 115 CPC does not have any impact on the jurisdiction under Article 226/227 of the Constitution. The Apex Court in *Surya Dev Rai vs. Ram Chander Rai and others* (supra) has laid down thus :-

"32. The principles deducible, well-settled as they are, have been well summed up and stated by a two-Judges Bench of this Court recently in *State v. Navjot Sandhu,* JT 2003 (4) SC 605= (2003) 6 SCC 641, SCC pp.656-57, para 28. This Court held ;

(i) the jurisdiction under Article 227 cannot be limited or fettered by any Act of the State Legislature;

(ii) the supervisory jurisdiction is wide and can be used to meet the ends of justice, also to interfere even with interlocutory order;

(iii) the power must be exercised sparingly, only to move subordinate courts and Tribunals within the bounds of their authority to see that they obey the law. The power is not available to be exercised to correct mere errors (whether on the facts or laws) and also cannot be exercised "as the cloak of an appeal in disguise".

34. We are of the opinion that the curtailment of revisional jurisdiction of the High Court does not take away - and could not have taken away - the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil court nor the power of superintendence conferred on the High Court under Article 227 of the Constitution is taken away or whittled down. The power exists, untrammelled by the amendment in Section 115 of the CPC, and is available to be exercised subject to rules of self discipline and practice which are well settled."

20. The question still subsist what is the meaning to be given to "other proceedings". In our opinion, there is no reason to restrict the meaning of "proceeding" akin to the suit.There may be proceedings parallel to the suit which may be independent proceedings.The phrase used in proviso to Section 115 is suit or proceeding. Proceeding has to be given wide meaning. Some light is thrown by the explanation added to Section 141 CPC as to the meaning of "proceeding" so as to clarify that provision of CPC is applicable to proceeding under Order 9 CPC also.

Several applications which require independent adjudication before filing of suit as to maintainability of suit before its registration can be "proceeding" within proviso to Section 115(1) CPC, therefore, once an application is decided revision would be maintainable if would have an effect of finally disposing off the "proceeding" though it has no effect on the suit at that point of time. Proceedings may also arise from the suit itself and those may be the proceedings within the meaning of proviso to Section 115 (1) of CPC.

21. In *Surajmal s/o Siddhanathji vs. Sundarlal s/o Nanuram and others* (supra) Division Bench of this Court has considered the effect of the proviso added to sub-section (1) of Section 115 CPC with effect from 1.7.2002. The Division Bench held that the revisional power cannot be exercised unless the order in revision is one if made in favour of petitioner would have finally disposed of the suit or proceedings. Against order of temporary injunction revision cannot be said to be maintainable. Their Lordships also considered the scheme of Order 43 Rule 1 CPC and observed that every order passed in appeal is not interlocutory. It will depend on the nature of the order from which appeal arises as also the effect of the order passed in appeal. This distinction is contained in the rule itself and can be gathered from bare reading of various clauses thereof. Section 104 contains a list of orders from which an appeal lies under the provision of section 104 considered by Division Bench thus :-

> "15. It is true that every order passed in appeal under Order 43 Rule 1 CPC is not interlocutory. It will obviously depend on the nature of the order from which the appeal arises as also the effect of the order passed in appeal. This distinction is contained in the rule itself and can be gathered from bare reading of various clauses thereof. This rule which has to be read with section 104 contains a list of orders from which an appeal lies under the provision of section 104, namely :-
>
> (a) an order under Rule 10 of Order VII returning a plaint to be presented to the proper Court (except where the procedure specified in Rule 10-A of Order VII has been followed);
>
> (c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;
>
> (d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte;
>
> (f) an order under Rule 21 of Order XI;
>
> (i) an order under Rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;

(i) an order under Rule 72 or Rule 92 of Order XXI setting aside or refusing to set aside a sale;

(ja) an order rejecting an application made under sub-rule (1) of Rule 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of Rule 105 of that Order is appealable;

(k) an order under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

(l) an order under Rule 10 of Order XXII giving or refusing to give leave;

(n) an order under Rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(na) an order under Rule 5 or Rule 7 of Order XXXII rejecting an application for permission to sue as an indigent person;

(p) orders in interpleader suits under Rule 3, Rule 4 or Rule 6 of Order XXXV;

(q) an order under Rule 2,Rule 3 or Rule 6 of Order XXXVIII;

(r) an order under Rule 1, Rule 2 (Rule 2-a), Rule 4 or Rule 10 of Order XXXIX;

(s) an order under Rule 1 or Rule 4 of Order XL;

(t) an order of refusal under Rule 19 of Order XLI to readmit, or under Rule 21 of Order XLI to re-hear, an appeal;

(u) an order under Rule 23 (or Rule 23-A) of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court.

(w) an order under Rule 4 of Order XLVII granting an application for review."

Division Bench of this Court has held with respect to the orders under clause (a) dealing with an order under Rule 10 of Order 7 CPC returning a plaint to be presented to the proper Court (except where the procedure specified in Rule 10-A of Order 7 CPC has been followed) which finally dispose of the suit or proceeding in which they are made, an order under Rule 9 of Order 9 CPC rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit would dispose of the suit or other proceedings as contained in under proviso to sub-section (1) of section 115 CPC. With respect to clause (d) of Section 104, an order under Rule 13 of Order 9 CPC rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte has been

considered to be a "proceeding" as contemplated under proviso to Section 115 (1) CPC. Similarly under clause (ja) an order rejecting an application made under sub-rule (1) of Rule 106 of Order 21 CPC, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of Rule 105 of that Order is appealable. In clause (k) an order under Rule 9 of Order 22 CPC refusing to set aside the abatement or dismissal of a suit has been held to be covered under proviso to Section 115(1) CPC. Under clause (n) an order passed under Rule 2 of Order 25 CPC rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit has been held to be a proceeding. Similarly under clause (na) an Order under Rule 5 or Rule 7 of Order 33 CPC rejecting an application for permission to sue as an indigent person has been held to be a proceeding against which revision would be maintainable. Division Bench of this Court has applied the word "proceeding" to the aforesaid matters. We do not find any ground so as to take a different view than taken by Division Bench of this Court in *Surajmal s/o Siddhanathji vs. Sundarlal s/o Nanuram and others* (supra).

22. A single Bench decision rendered in *Sawal Singh vs. Smt. Ramsakhi and others* 2003 (1) MPLJ 31 opined the term "other proceedings". The proviso to Section 115(1) CPC as amended by Act 46 of 1999 have wide meaning and they should not be read in narrow compass. The term "proceedings" cannot be confined to a civil proceeding alone. It has the comprehensive meaning so as to include within it all matters coming up for judicial adjudication. A proceeding instituted under Section 144 of the Code has to be treated as an original proceeding as it relates to different realm altogether. The proceedings under the Land Acquisition Act, Hindu Succession Act, Guardians and Wards Act and order passed under Section 94 of the Code are also in the realm of original proceedings. The point for determination in *Sawal Singh* was whether against rejection of application under Order 6 Rule 17 and Order 39 Rule 1-2 CPC revision is maintainable, the ratio of decision is confined to that revision is not maintainable.

23. Division Bench of this Court in *Surtyomal vs. Smt. Chandabai* AIR 2004 MP 225 in which one of us has considered the proviso of Section 115(1) CPC in the context of revision applicable under Section 23-E of MP Accommodation Control Act. Question posed for consideration was what is the interlocutory order. This Court considered the question thus :-

> 18. The Interlocutory Order has been defined in Halsbury's Laws or England 3rd Edn. Vol 22 at page 743-44 thus :-
>
> > "Interlocutory judgment or order – An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely

directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'. An interlocutory order though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.....

In general a judgment or order which determines the principal matter in question is termed 'final'.

Interlocutory Order has been defined in Webster's Third International Dictionary (Vol. II, p. 1179) thus :-

"Not final or definitive: made or done during the progress of an action: INTERMEDIATE, PROVISIONAL."

"Corpus Juris Secundum (Vol. 49, p. 35) has been relied upon by Shri Alok Aradhe wherein interlocutory order has been defined thus :-

"a final judgment is one which disposes of the cause both as to the subject-matter and the parties as far as the court has power to dispose of it, while an interlocutory judgment is one which does not so dispose of the cause, but reserves or leaves some further question or direction for future determination.....The term 'interlocutory judgment' is, however, a convenient one to indicate the determination of steps or proceedings in a cause preliminary to final judgment, and in such sense the term is in constant and general use even in code states."

"The word 'interlocutory', as applied to rulings and orders by the trial court, has been variously defined. It refers to all orders, rulings, and decisions made by the trial court from the inception of an action to its final determination. It means, not that which decides the cause, but that which only settles some intervening matter relating to the cause. An interlocutory order is an order entered pending a cause, deciding some point or matter essential to the progress of the suit and collateral to the issues formed by the pleadings and not a final decision or judgment on the matter in issue.....An intermediate order has been defined as one made between the commencement of an action and the entry of the judgment."

Shri Alok Aradhe, has further referred to Wharton's Law Lexicon (14th Edn. P. 529), wherein interlocutory order has been defined thus :-

> "An interlocutory order or judgment is one made or given during the progress of an action, but which does not finally dispose of the rights of the parties."

Shri Aradhe, has referred to Apex Court decision in *V.C. Shukla Vs State through CBI* – AIR 1980 SC 962, wherein in Para -23 the Apex Court has observed thus :-

> 23. Thus, summing up the natural and logical meaning of an interlocutory order, the conclusion is inescapable that an order which does not terminate the proceedings or finally decide the rights of the parties is only an interlocutory order. In other words, in ordinary sense of the term, an interlocutory order is one which only decides a particular aspect or a particular issue or a particular matter in a proceeding, suit or trial but which does not however, conclude the trial at all.

19. The 'interim order' is one made in the meantime and until something is done, as defined in Black's Law Dictionary. The Apex Court in *Shiv Shankar and others Vs Board of Directors, UPSRTC and another* – 1995 Supp (2) SCC 726, has observed the 'interim order' thus :-

> 5. We have heard learned counsel for parties. We do not propose to enter into merits of the matter as we are satisfied that the case shall have to be sent back to the High Court for deciding it in accordance with law. But we consider it necessary to observe that the piquant situation arose because of the order dated 4.5.1990 passed by the High Court. Although that order is not under challenge but the Division Bench which issued notice purported to grant by way of interim order a relief to the petitioners which could not have been granted to them without adjudication on merits. The direction by the High Court to absorb within a period of 3 months amounted to disposal of the writ petition and yet the High Court had issued notice only. Once the affidavits were exchanged it would have been appropriate for the High Court to decide the dispute. The issue of notice at this stage unless there were other necessary parties to be heard was not of any purpose. Be that as it may, once the High Court issued the directions to the respondents to absorb the petitioners they had no option but to comply with the order. And once they were absorbed then the

> counsel could not be claimed for making a statement that the petition may be dismissed. At the same time once the petition was dismissed without any adjudication on merits the effect of dismissal was that the interim order stood merged in the final order and the order of absorption stood nullified. This anomalous situation was brought into effect as a result of the interim order granted by the High Court. An interim order is granted by the Court to protect the right or interest of a party approaching the court till the claim is adjudicated finally. It is temporary in nature and is made in the meantime. But the order of the High Court directing the respondents to absorb the appellants could not be termed as interim order. Such order could be granted only by way of final adjudication as a result of decision on merits."

It was held that there is wider powers within Section 23-E(2) of MP Accommodation Control Act than the powers given under Section 115 of CPC. However, the discussion throws light on the interlocutory orders which are final in nature and decides the rights of the parties and the interim order.

24. Application in a suit can be "proceeding" within the meaning of Section 115 CPC. The revision would be maintainable if it had effect of finally disposing of the proceeding has been opined in *Municipal Council, Tiroda vs. K.Ravindra and Co. and others* 2003 (2) Mh.L.J. 987. High Court of Bombay has opined that an application was moved by the defendant before the trial Court for dismissal of the suit was rejected. Revision application under Section 115 CPC challenging the said order of the trial Court was maintainable because if the contention of the revision petitioner was accepted, the suit would stand disposed of finally.

25. In *2002 AIR Kant HCR 1823 (1831),* the petition filed under S.24 of the Civil P.C. before the District Judge for transfer of suit is a proceeding independent of the suit. Order rejecting the petition is revisable. Proviso to S.115 was not attracted in such cases. In *2005 (25) All Ind Cas 719 (720)* it was held that revision against order allowing application under O.9 R.13 is maintainable. Proviso added to S.115 does not bar the revision.

26. Provision of Order 7 Rule 11 CPC has also been referred to which provides various exigencies with respect to rejection of plaint from clause (a) to (f). Order 7 Rule 11 CPC is quoted below :-

> **"Rejection of plaint** - The plaint shall be rejected in the following cases -
>
> (a) where it does not disclose a cause of action;
>
> (b) where the relief claimed is under-valued, and the plaintiff, on

being required by the Court to so correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

There may be two stages of the order as provided in Order 7 Rule 11 (b) and (c). Having failed to comply with the the order, Court may have to pass order as envisaged under the aforesaid Order 7 Rule 11 (b) and (c). In case relief has been sought on other grounds also under Order 7 R.11 CPC order may be final at once and would be revisable. Once exigencies are provided in Order 7 Rule 11 (b) and (c) are completed, revision would be maintainable not the writ petition. Each case has to be decided whether suit or other proceeding would have been finally disposed of in favour of the party applying for the revision.

27. Coming to facts of instant cases, in WP No. 8714/07 *(Johra Bi and others vs. Jageshwar and others)* an application under Order 9 Rule 9 CPC has been dismissed, appeal stands dismissed, revision would be maintainable. It would mean proceeding in Section 115(1) CPC. Writ petition cannot be said to be maintainable.

28. In WP 13378/07 *(Arujundas Priyani vs. Arjundas Lalwani and another)* a prayer was made to dismiss the suit as not maintainable on the ground that separate suit was not maintainable beside the objection with respect to Court fees, etc.was also taken. Considering the nature of objection taken, in our opinion, the revision petition would be maintainable not the writ petition.

29. In WP 8447/09 *(Amir Islam vs. Paris Grih Nirman Sahkari Sanstha Maryadit and others)* dismissal of the suit was sought on the ground that there was non-joinder of the necessary party, beside suit was not properly valued,

considering the nature of objection taken in rejection of plaint, the revision would be maintainable not the writ petition.

30. In WP No. 7664/07 *(Shri Jagat Guru Shankrachariya Swami Swaroopanand Saraswati Badrika Dwarika Peethadhishwar Ashram vs. Kalam Scooter Service and others)*, WP No.4993/08 *(Shri Jagat Guru Shankrachariya Swami Swaroopanand Saraswati Badrika-Dwarika Peethadhishwar Ashram vs. Kallu Scooter Service)*, WP No.4994/08 *(Shri Jagat Guru Shankrachariya Swami Swaroopanand Saraswati Badrika-Dwarika Peethadhishwar Ashram vs. Siddhu Engineering Works* and in WP 4995/08 *(Shri Jagat Guru Shankrachariya Swami Swaroopanand Saraswati Badrika-Dwarika Peethadhishwar Ashram vs. Bhatia Tyres)* an applications under Order 9 Rule 13 CPC were rejected by the trial Court against which misc. appeals were preferred, thus, revision would be maintainable against the appellate orders which have been passed not the writ petition.

31. Ms. Neelam Goel, learned counsel has submitted that there is a direction to refer the cases to Division Bench in the writ appeals. We do not find any such peremptory order has been given. Only an observation has been made. Even otherwise,we are not hearing reference, whether reference has to be made or not at all this question has to be considered by the single Bench. We cannot adjudicate on merits of the cases in the instant writ petitions as civil revision has been held to be maintainable. Decision in *Shakuntala Singh vs. Basant Kumar Thakur and others* (supra) dealt with the sufficiency of grounds to condone the delay though filing of certified copy was not necessary, it was filed. It was held that it may be sufficient ground in the given set of facts to condone the delay. Each case has to be adjudged on its facts ,and sufficiency of the cause made out in each case, this question has to be gone into by the single Bench and single Bench has to determine whether there is any necessity to make reference which is to be made in the facts and circumstances of the cases.

32. With respect to conversion of writ petition into a revision, Shri Ashok Lalwani, learned counsel has relied upon decision of the Apex Court rendered in *Nawab Shaqafath Ali Khan and others vs. Nawab Imdad Jah Bahadur and others* (supra) in which the Apex Court has observed thus :-

> "48. If the High Court had the jurisdiction to entertain either an appeal or a revision application or a writ petition under Articles 226 and 227 of the Constitution of India, in a given case it, subject to fulfilment of other conditions, could even convert a revision application or a writ petition into an appeal or vice versa in exercise of its inherent power. Indisputably, however, for the said purpose, an appropriate case for exercise of such jurisdiction must be made out."

In the peculiar facts and circumstances of the cases, as there is legal imbroglio created , in the light of aforesaid decision of Apex Court in *Nawab Shaqafath Ali Khan and others vs. Nawab Imdad Jah Bahadur and others* (supra), as revision lies to this Court, instead of dismissing the matters as not maintainable, we order conversion of writ petitions into revisions and direct listing of the matters before the appropriate Bench at the stage at which cases have been listed in week commending from 20th October, 2009.

33. Writ petitions are held to be not maintainable. They are ordered to be converted into revisions. So far as regards these writ petitions are concerned, the numbers be struck off from the pendency of writ petitions.

Order accordingly.

I.L.R. [2010] M. P., 179
WRIT PETITION
Before Mr. Justice R.S. Garg & Mr. Justice P.K. Jaiswal
12 October, 2009*

KESHAV PRASAD SHARMA ... Petitioner
Vs.
HALKE RAIKWAR & anr. ... Respondents

A. Civil Procedure Code (5 of 1908), Order 7 Rule 11(d) - *Rejection of plaint - Application under Order 7 Rule 11(d) as suit is barred by limitation and no relief can be granted in view of S. 58(c) of Transfer of Property Act - Application rejected - Held - Plaintiffs pleaded that the sale deed was sham & bogus and it was not to be acted upon - They have also pleaded that they went to the defendant along with the amount for re-conveyance of the property but the defendant refused to do so - In view of the pleadings, it cannot be held that there is no cause of action and suit is barred by limitation - At this stage, Court is not required to enter into the applicability of the provisions contained u/s 58(c) of T.P. Act - Question of maintainability of suit and limitation will have to be decided at the time of hearing - Petition dismissed.* (Para 19)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11(डी) – वादपत्र का नामंजूर किया जाना – आदेश 7 नियम 11(डी) के अन्तर्गत आवेदन क्योंकि वाद परिसीमा वर्जित है और सम्पत्ति अंतरण अधिनियम की धारा 58(सी) को दृष्टिगत रखते हुए कोई अनुतोष प्रदान नही किया जा सकता – आवेदन खारिज – अभिनिर्धारित – वादियों ने यह अभिवचन किया कि विक्रय विलेख मिथ्या और बनावटी था और उस पर कार्यवाही नही की गयी – उन्होंने यह भी अभिवचन किया कि वे सम्पत्ति के प्रतिहस्तांतरण के लिए रकम सहित प्रतिवादी के पास गये किन्तु प्रतिवादी ने ऐसा करने से इंकार कर दिया – अभिवचनों को देखते हुए यह अभिनिर्धारित नही किया जा सकता कि कोई वाद कारण नही है और वाद परिसीमा वर्जित है – इस प्रक्रम पर न्यायालय को सम्पत्ति अंतरण

*W.P. No.10239/2007 (Jabalpur)

अधिनियम की धारा 58(सी) के अन्तर्गत अन्तर्विष्ट उपबंधों के लागू होने को अन्तर्ग्रस्त करना आवश्यक नही है – वाद की पोषणीयता और परिसीमा का प्रश्न सुनवाई के समय विनिश्चित करना होगा – याचिका खारिज।

B. Civil Procedure Code (5 of 1908), Order 7 Rule 11 & Order 14 - *Maintainability of suit - Court only has to see the plaint averments and not the questions, answers of which are dependent upon the evidence.* (Para 17)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 व आदेश 14 – वाद की पोषणीयता – न्यायालय को केवल वादपत्र के प्रकथनों को देखना होगा न कि उन प्रश्नों को, जिनके उत्तर साक्ष्य पर निर्भर हैं।

C. Civil Procedure Code (5 of 1908), Order 7 Rule 11(a) to (f) - *When a question is beyond the scope of Order 7 Rule 11 then such question is to be raised by the defendant in his written statement.* (Para 18)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11(ए) से (एफ) – जब कोई प्रश्न आदेश 7 नियम 11 के विस्तार से परे है तब ऐसा प्रश्न प्रतिवादी द्वारा प्रतिवादपत्र में उठाया जाना चाहिए।

Cases referred :

(2005) 5 SCC 548, (2006) 4 SCC 432, (2005) 6 SCC 243.

A.M. Trivedi with *Aseem Trivedi,* for the petitioner.
Dinesh Upadhyay, for the respondent No.1.
Naman Nagrath, Addl.A.G., for the respondent No.2.

ORDER

The Order of the Court was delivered by **R.S. GARG, J.** :–This order shall finally decide W.P. No. 10239/2007 *(Keshav Prasad Sharma Vs. Halke Raikwar and another)* and W.P. N0.11237/2008 *(Keshav Prasad Sharma Vs. Jodhan Singh and others).*

2. The short facts necessary for disposal of these writ petitions are that Haike Raikwar, in his capacity as plaintiff, and Jodhan Singh also in his capacity as plaintiff, filed different civil suits seeking declaration and injunction against the present petitioner/defendant that the sale deed in question was sham and bogus. It was not to be acted upon. It was a security-cum-guarantee for the loan extended by the defendant to the plaintiffs. It was also submitted in each of the plaint that contemporaneous document was also executed with an understanding that the suit property would be re-conveyed in favour of the plaintiff. In each of the civil suit, each of the plaintiff pleaded that he was in possession of the property, he went to the defendant for re-conveyance, who asserted his title on the basis of sham and bogus documents and intimated the plaintiff that instead of re-conveying the property to the plaintiff, he would sell the property to third party for dispossessing the plaintiff, therefore, the plaintiff was required to file the suit. It

was also pleaded that the defendant is a money lender who had extended loan to number of persons and has also secured identical documents as a guarantee of loan though in fact the possession of the property continued with every such land holder.

3. After notice the defendant appeared before the Court and instead of filing his written statement filed an application under Order VII Rule 11 of the Code of Civil Procedure with a submission that limitation for declaration in relation to a registered document is three years and as the suit has been filed after lapse of seven years, the suit was barred under clause (d) of Rule 11 of Order VII and the plaint be accordingly, rejected.

4. In Civil Suit filed by Halke Raikwar, the trial Court rejected the application, therefore, the defendant filed W.P. No. 10239/2007. However, in civil suit filed by Jodhan Singh, the application filed by the present petitioner/defendant was allowed and on appeal the order was set aside and the suit was remanded back to the trial Court, therefore, the defendant has filed W.P. N0.11237/2008.

5. Shri Trivedi, learned senior counsel for the petitioner, by placing his strong reliance upon the judgment of the Supreme Court in the matter of *N.V.Srinivasa Murthy and others V. Mariyamma (dead) by proposed LRS. and others,* (2005) 5 SCC 548, *Bishwanath Prasad Singh V. Rajendra Prasad and another,* (2006) 4 SCC 432 and *Umabai and another V. Nilkanth Dhondiba Chavan (dead) by LRS. and another,* (2005) 6 SCC 243, vehemently contended that the suit is barred by limitation, therefore, the plaint ought to have been rejected and the fact relating to the alleged mortgage by sale and simultaneous execution of the document has been pleaded by the plaintiff, therefore, in the light of the same the suit is not maintainable.

6. Shri Dinesh Upadhyay, learned counsel for respondent/plaintiff, on the other hand, submitted that in the present suit the plaintiff has come to the Court with a submission that despite the execution of the document, the understanding between the parties was that the document would not be acted upon and the transaction between the parties would be a loan transaction. It is submitted by him that the suit is maintainable and the plaint cannot be rejected at this stage on a ground which can be raised in the written statement.

7. Shri Naman Nagrath, learned Additional Advocate General for respondent/ State, however, raised yet another objection saying that the writ petitions would not be maintainable because if the objections filed by the present petitioner are allowed, the suit would come to an end and, therefore, the matter should have been brought under Section 115 of the Code of Civil Procedure.

8. For proper understanding of the dispute, it would be necessary to refer the provisions contained in Rule 11 of Order VII of the Code of Civil Procedure which reads as under :

"**R.11. Rejection of plaint .-** The plaint shall be rejected in the following cases :-

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of Rule 9.

Provided that the time fixed by the Court for the correction of the valuation of supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

If the plaint does not disclose the cause of action and despite the direction of the Court to correct the valuation, fails to do, where the relief claimed is properly valued, but the plaint is insufficiently stamped and despite direction of this Court the plaintiff does not do it and where the suit from the statement in the plaint appears to be barred by law, then the plaint can be rejected. After the amendment, clause (e) and (f) have also been added which say that where the plaint is not filed in duplicate and where the plaintiff fails to comply with the provisions of Rule 9 of Order VII of CPC then the plaint can be rejected. In the present case, according to Shri Trivedi, the suit from the statement made in the plaint appears to be barred by law of limitation and even otherwise no relief can be granted to the plaintiff in view of Section 58(c) of Transfer of Property Act and the settled legal position.

9. It is trite to say that the Court cannot take into account the material beyond the plaint to declare the case of the plaintiff as frivolous. For rejecting a plaint under Rule 11 of Order VII, plaint averments are only to be seen.

10. When an application under Order VII Rule 11 of the Code of Civil Procedure is filed then the Court only has to read the plaint averments and nothing beyond

that. If the plaint on the first reading does not show availability of the cause of action which is a bundle of facts permitting the plaintiff to come to the Court, Court can reject the plaint. If the plaint prima facie appears to be under valued and despite direction of the Court the plaintiff does not correct the valuation within the time fixed by the Court, then the Court can reject the plaint. In such a situation the Court only has to see that whether the plaint discloses the cause of action and whether the plaint is under valued or not. The Court is not required to see that what would be the correct valuation and is not to give decision on the issue at this stage. The Court on the evidence proposed to be led by the defendant cannot hold that the plaint is liable to be rejected. The Court may also see that whether the plaint is properly valued and is properly stamped. In case the Court finds that the plaint is not properly stamped then without looking into the defence which can be raised by the defendant in his written statement, the court may ask the plaintiff to pay the required court fee. Clause (d) clearly says that the Court has to see that from the statement made in the plaint, the suit appears to be barred by any law.

11. In the present case, according to the defendant, from perusal of the plaint, it would appear that the sale deed was executed in the year 1998 and the suit came to be filed in the year 2006, therefore the suit as barred by limitation and in view of the judgment of the Supreme Court in the matter of *N.V.Srinivasa Murthy and others* (supra), the plaint was liable to be rejected. We take up the said issue.

12. In the matter of *N.V.Srinivasa Murthy and others* (supra), the plaintiffs had come to the Court seeking a declaration simplicitor that they were owner of the property. However, in the pleading it was mentioned that a registered sale deed dated 5/5/1993 was executed. According to the pleading that was only a loan transaction executed for securing the amount borrowed by the plaintiff's predecessor. The plaintiff in the said suit did not ask for a relief of declaration that the registered sale deed dated 5/5/1993 was a loan transaction nor they claimed that they are entitled to enforce the oral agreement for specific performance. True, the Supreme Court observed that in such case the plaint was showing some cause of action but the Supreme Court was also of the opinion that the trial Court was right in coming to the conclusion that if all the averments made in the plaint are accepted, the suit would appear to be barred by limitation. The Supreme Court simply examined the plaint and observed that the suit was barred by limitation on the facts stated in the plaint itself.

13. In the matter on hand the plaintiffs have pleaded that the document was sham and bogus and it was not to be acted upon. They have also pleaded that they went to the defendant along with the amount for re-conveyance of the property but the defendant refused to do so. In view of the said pleadings, it cannot be held that there is no cause of action and suit is barred by limitation. In the present matter, the pleadings are not only that the document was sham and bogus but as the Supreme Court observed in the matter of *N.V.Srinivasa Murthy and*

others (supra), the plaintiffs are also praying for further relief. In our considered opinion the plaint as available with us, prima facie shows availability of the cause of action and the suit does not appear to be barred by limitation.

14. Learned counsel for the petitioner also relied upon the judgment in the matter of *Umabai and another* (supra) to state before us that in the light of Section 58(c) of the Transfer of Property Act, if the agreement to re-convey is not entered in the sale document and is executed contemporaneously then the transaction between the parties would not be a loan transaction but in fact the transaction would be an outright sale with an agreement to re-convey the property.

15. Undisputedly, this question can be raised by the defendant at the time of trial. In any case the plaintiff would be permitted to lead evidence in support of the pleadings that the document was sham and bogus. The finding that the document was sham and bogus, the sale deed was to be acted upon or not and whether the execution of contemporaneous document would bar the plaintiff coming to the Court will have to be recorded by the Court at the time of trial. If the plaintiff convinces the Court that the documents is sham and bogus and it was not to be acted upon and in view of the understanding between the parties, he continues to be in possession of the property then obviously the Court would record such finding in favour of plaintiff and may decree the suit. But if the defendant proves before the Court that there was no understanding between the parties regarding loan and the sale was outright sale and the contemporaneous document in fact is a concession in favour of the plaintiff then the suit of the plaintiff will have to be dismissed. In any case, at this stage, this Court is not required to enter into the applicability of the provisions contained under Section 58(c) of the Transfer of Property Act.

16. Learned counsel for the petitioner also placed his strong reliance upon the judgment in the matter of *Bishwanath Prasad Singh* (supra)*N.V.Srinivasa Murthy and others* (supra). The said matter was again in relation to Section 58 (c) of the Transfer of Property Act and did not deal with the provisions contained in Rule 11 of Order VII of the Code of Civil Procedure.

17. There is always a distinction between Rule 11 of Order VII of CPC and the provisions contained in Order XIV of CPC. Certain questions, answers of which are dependent upon the evidence to be submitted by the parties can never be considered to be question decidable under Rule 11 of Order VII of CPC. For application on Rule 11 of Order VII, a Court only has to see the plaint averments and will have to record a finding that from the plaint averments, the suit does not appear to be maintainable and the same is liable to be rejected. For clause (a) and (d) of Rule 11 of Order VII, the Court cannot look into anything beyond what is said in the plaint itself. A difference is to be marked in clause (a) and (d) on one side and clause (b), (c) and (f) on the other. While clause (a) and (d) are dependent upon the pleadings of plaintiff, Clause (b), (c), (e) and (f) are dependent

upon non-compliance of the Court orders and non-compliance of the procedural law as contained in the Code of Civil Procedure.

18. When a question is beyond the scope of Rule 11 of Order VII, then such question is to be raised by the defendant in his written statement. If such pleadings are raised then the Court would cast issue and if in a given case the Court deems fit, it may decide the issue as preliminary issue, otherwise may decide all issues at the time of conclusion of the trial.

19. In the present matter, the emphasis of the learned counsel for the petitioner was on the provisions contained in Section 58(c) of Transfer of Property Act which, according to the learned counsel, are prima facie goes in favour of defendant. On deeper scrutiny, we would be obliged to say that this is not the stage to decide the said question. The Court on strength of the evidence to be led by the parties has to record a finding that the document was sham and bogus, it was acted upon or not or whether in accordance with the terms the parties are entitled to some or the other relief.

20. In our opinion the Court below was not unjustified in observing that the plaintiff would be entitled to lead evidence and, the question relating to maintainability of the suit and the limitation will have to be decided at the time of hearing.

21. In each of the case, we do not find any cause for interference. Both the petitions are dismissed with costs. Counsel fee quantified at Rs.2500/- in each of the case. Each of the defendant/petitioner would be obliged to deposit the cost in the trial Court for being paid to plaintiff in person. Deposit of the cost shall be a condition precedent for the defendant to take part in the civil suit.

22. Copy of this judgment be kept in Writ Petition No.11237/2008 *(Keshav Prasad Sharma Vs. Jodhan Singh and others).*

Petition dismissed.

I.L.R. [2010] M. P., 185
WRIT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta
27 October, 2009*

NAGAR PALIKA PARISHAD, BALAGHAT ... Petitioner
Vs.
RAJESH BHOJ & anr. ... Respondents

A. Municipalities Act, M.P. (37 of 1961), Section 323 - *Powers to suspend execution of orders, etc of Council - Without assigning any reasons, Collector cancelled the tender proceedings which were passed in a resolution - Held - Collector has only power to stay but has no power to annul the*

*W.P. No.8295/2009 (Jabalpur)

resolution - Resolution, as per S. 323(2) has to be annulled by the State Government after giving due opportunity to the Council - Collector's order quashed. (Para 13)

क. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 323 – परिषद् के आदेशों आदि के निष्पादन को निलंबित करने की शक्ति – कलेक्टर ने कोई कारण समनुदेशित किये बिना निविदा कार्यवाहियाँ विखंडित कीं जो एक संकल्प में पारित की गयीं थीं – अभिनिर्धारित – कलेक्टर को केवल रोकने की शक्ति है किन्तु संकल्प को विखंडित करने की शक्ति नही है – धारा 323(2) के अनुसार राज्य सरकार द्वारा परिषद को उचित अवसर देकर संकल्प विखंडित किया जाना चाहिए – कलेक्टर का आदेश अभिखंडित।

B. Municipalities Act, M.P. (37 of 1961), Section 323 - *Powers to suspend execution of orders, etc of Council - S. 323(1) indicates that two circumstances are required to be fulfilled - First is that the Collector is required to pass an order whether the action which is challenged is not in comformity with law or with the rules or byelaws made thereunder - Second is that such an action is detrimental to the interests of the Council or public or is likely to cause injury or annoyance to the public or any class or body of persons or is likely to lead to a breach of the peace - Without recording such finding, Collector has proceeded to set-aside resolution only on the ground that action was not bona fide - Collector's order set-aside.* (Para 13)

ख. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 323 – परिषद् के आदेशों आदि के निष्पादन को निलंबित करने की शक्ति – धारा 323(1) उपदर्शित करती है कि दो परिस्थितियाँ पूरी की जाना अपेक्षित है – प्रथम यह कि कलेक्टर को आदेश पारित करना आवश्यक है चाहे कृत्य जिसे चुनौती दी गई है विधि या उसके अधीन बनाए गए नियमों या उपविधियों के अनुरूप न हो – द्वितीय यह कि ऐसा कृत्य परिषद् या लोकहितों के लिए अपायकर है या लोक या व्यक्तियों के किसी वर्ग या निकाय को क्षति या क्षोभ होने की संभाव्यता है या उससे शांति भंग होने की संभाव्यता है – ऐसा निष्कर्ष अभिलिखित किये बिना कलेक्टर केवल इस आधार पर संकल्प अपास्त करने के लिए अग्रसर हुआ कि कृत्य सद्भावनापूर्ण नही था – कलेक्टर का आदेश अपास्त।

C. Words & Phrases - *Forthwith - Means within a reasonable time.*

ग. शब्द और वाक्यांश–तत्काल–अर्थ है युक्तियुक्त समय के भीतर ।

Cases referred :

AIR 1969 SC 323, AIR 1975 SC 1807, AIR 1976 Kant. 3, 4.

Rajendra Tiwari with *Brindawan Tiwari*, for the petitioner.

Amit Singh, for the respondent No.1.

P.K. Kaurav, Dy.A.G., for the respondent No.3.

ORDER

The Order of the Court was delivered by **R.K. GUPTA, J.** :–Both the writ petitions involve a common question of fact and law; therefore, they are heard together and are disposed of by this singular order.

2. The reliefs prayed for and challenge in the present petitions is to the order dated 11.8.2009, Annexure P-1, passed by the Collector, District Balaghat whereby exercising the power under Section 323 of the Municipalities Act, 1961 (for short "the Act") he has cancelled the tender proceedings dated 16.6.2009. Be it noted, the said tender proceedings were conducted by the petitioner, Nagar Palika Parishad, Balaghat (for brevity "the Council") pursuant to auction notice dated 21.5.2009, Annexure P-2, for collection of daily and weekly market tax, for Sarekha Bazar, lather market and also for footpath tax. In the proceedings dated 16.6.2009 the tender floated by Raja Chourasia, the petitioner in the connected writ petition, was accepted and later on approved by the Municipal Council in its meeting dated 27.6.2009, Annexure P-6 and work order was also issued in favour of petitioner, Raja Chourasia.

3. Before the Collector one Rajesh Bhoj, respondent herein, filed an appeal under Section 323 of the Act challenging the acceptance of tender in favour of petitioner Raja Chourasia on the ground that the persons who had participated in the tender proceedings owed huge balance to the Council but despite that no objection certificates were issued in their favour whereas the appellant who had applied for no objection certificate on 11.6.2009 as he had no dues of the Council but arbitrarily the proceedings were taken up on 16.6.2009 and he was not allowed to participate in the tender proceedings and therefore, the tender proceedings were vitiated. An objection was filed on behalf of the Council contending, inter-alia, that appellant Raja Bhoj was living with his father and brother in joint family and as per the record of the Council they had huge balance outstanding against them, therefore, no objection certificate was not issued to him. The authority considered the rival submissions advanced by the parties and on scrutiny of the record held the proceedings dated 16.6.2009 as vitiated and directed for cancellation of the proceedings dated 16.6.2009 and further directed the petitioner Council for re-auction of the same.

4. The moot question in the present cases is whether the Collector in exercise of powers under Section 323 of the Act has exceeded its jurisdiction or whether there had been a compliance of Section 323 of the Act by the Collector while passing the order dated 11.8.2009.

5. For ascertaining the aforesaid question in its proper perspective it will be appropriate to refer to Section 323 of the Act, which reads thus:

> "323. Power to suspend execution of orders, etc., of Council.-(1) If, in the opinion of the Divisional Commissioner, the Collector, or any other officer authorised by the State Government, in this behalf, the execution of any order or resolution of a Council, or of any of its Committee or any other authority or officer subordinate thereto, or the doing of any act which is about to be done or is being done by or on behalf of the Council, is not in conformity with law or

with the rules or bye-laws made thereunder and is detrimental to the interests of the Council or the public or is causing or likely to cause injury or annoyance to the public or any class or body of persons or is likely to lead to a breach of the peace, he may, by order in writing under his signature, suspend the execution of such resolution or order or prohibit the doing of any such act.

(2) When any order under sub-section (1) is passed, the authority making the order, shall forthwith forward to the State Government and to the Council affected thereby a copy of the order with a statement of reasons for making it; and it shall be in the discretion of the State Government to rescind the order, or to direct that it shall continue in force with or without modification, permanently or for such period as it thinks fit:

Provided that the order shall not be revised, modified or confirmed by the State Government without giving the Council reasonable opportunity of showing cause against the order."

6. A close scrutiny of the provisions of Section 323 of the Act makes it clear that if the Divisional Commissioner, the Collector, or any other officer authorised by the State Government in this behalf finds that the execution of any order or resolution of a Council, or of any of its Committee or any other authority or officer subordinate thereto, or the doing of any act which is about to be done or is being done by or on behalf of the Council, is not in conformity with law or with the rules or by-laws made thereunder and is detrimental to the interests of the Council or the public or is causing or likely to cause injury or annoyance to the public or any class or body of persons or is likely to lead to a breach of the peace then the authority as such in exercise of its power may suspend the execution of such resolution or order or prohibit the doing of any such act. Sub-section (2) further provides that when the order is passed under sub-section (1), then the order as such along with a statement of reasons for making it shall be forwarded to the State Government and the State Government may direct to rescind the order or direct that it shall continue in force with or without modification, permanently or for such period as it thinks fit. The proviso appended to Sub-section (2) also states that the State Government shall not revise, modify or confirm the order without giving reasonable opportunity of showing cause against the order to the Council. In this background of provisions envisaged in Section 323 if the order dated 11.8.2009, Annexure P-1, is perused then it leaves us in no doubt that the Collector has not recorded any finding that the resolution or the order as such was not in conformity with law or with the rules or by-laws made thereunder and without deciding the same the Collector has set aside the proceedings dated 16.6.2009 only on the ground that the action was not bona fide.

7. It is further relevant to take note of the fact that Section 323 only permits

the Collector to record its reasons which shall be forwarded to the State Government for taking an appropriate action but in this case the Collector himself has set aside the resolution of the Council and from a perusal of the order impugned it is not clear that the same was sent forthwith to the State Government as per the mandate of Sub-section (2) of Section 323 of the Act. However, the ultimate power is vested with the State Government to continue or annul the resolution or even to modify it.

8. In course of argument a letter dated 24.8.2009 sent by the Collector to the State Government had been produced before us but so far as the order impugned dated 11.8.2009 is concerned it does not state that the said letter along with copy of the order was sent forthwith to the State Government.

9. The word "forthwith" has been used in Sub-section (2) of Section 323 of the Act for forwarding the order passed by the authority to the State Government and a copy has also to be given to the Council affected thereby. As it is evident that the order was passed on 11.8.2009 and the same was forwarded on 24.8.2009. There is no explanation offered by the Collector why on the date when the order was passed the same was not forwarded forthwith to the State Government. Even if it could not be forwarded forthwith to the State Government to fulfill the mandatory requirement of Sub-section (2) of Section 323 of the Act then within a reasonable time the same should have been sent to the State Government. For the purposes of taking reasonable time the Collector was under a legal obligation to give some explanation for the same but in the cases at hand, there is no explanation what to say of reasonable explanation for not forwarding the order passed by the Collector to the State Government forthwith or within reasonable time.

10. The word "forthwith" has received consideration in various dictionaries and also in different judicial pronouncements. In *Bidya Deb Barma etc. v. District Magistrate Tripura, Agartala,* AIR 1969 SC 323 their Lordships after quoting the Maxwell in Interpretation of Statutes (11th Edition) observed that when a statute requires that something shall be done 'forthwith' it should be probably understood as allowing a reasonable time for doing it. In this reference, we may profitably refer to a decision rendered by the Apex Court in *Gopal Mondal vs. The State of West Bengal,* AIR 1975 SC 1807 wherein while dealing with the expression "forthwith" their Lordships in para-3 observed thus:-

> "The word 'forthwith' has been interpreted to mean "as soon as possible; without any delay". If there is some delay which is reasonably explained, then there is no violation of the mandatory requirement of the law. In the counter it has been explained that as many as seven detention orders were made by the District Magistrate on 23rd August, 1973. Reports had to be typed in all those cases and they were typed on 24th and 25th August. 26th

August was a Sunday and therefore the report could not be sent earlier than 27th. We are satisfied that, on the facts stated in the counter, the report was sent forthwith, as the apparent delay of three days has been satisfactorily explained."

11. In *Kamaxi Kom Bhikku Shetty vs. Vaman Thippayya Bhattageri,* AIR 1976 Kant. 3, 4 their Lordships were of the opinion that the expression "forthwith" means immediately or without delay. The Bouvier Law Dictionary explains the term "forthwith" as; as soon as reasonably can be; as soon as reasonably possible; as soon as the thing may be done by reasonable exertion confined to that object. In Cooper's Dictionary the term "forthwith" entails; as soon as with reasonable dispatch in the ordinary course of business and further Webster's dictionary defines the expression "forthwith" as; directly.

12. In view of the aforesaid, we are of the considered view that there had been no compliance of Sub-section (2) of Section 323 of the Act by the Collector as the order impugned, Annexure P-1, was not forwarded either forthwith or within a reasonable time and no explanation is offered by the Collector by filing his affidavit. It was necessary for the Collector to have explained that the delay is reasonably caused. The order impugned was forwarded to the State Government after expiry of 13 days and thus, for the reasons stated hereinabove the impugned order is bad in law as it was not forwarded to the State Government as per the mandate of Sub-section (2) of Section 323 of the Act.

13. In this reference, it is to be seen that the Collector in the order dated 11.8.2009, Annexure P-1, himself has set aside the resolution passed in favour of petitioner, Raja Chourasia, was the respondent before the Collector and keeping in view the language employed in Sub-section (1) and (2) of Section 323 of the Act he has only power to stay but has no power to annul the resolution dated 16.6.2009. The resolution, as per Sub-section (2) has to be annulled by the State Government after giving due opportunity to the Council. The order impugned clearly indicates that the Collector himself has set aside the same, therefore, even otherwise we are unable to approve the order of the Collector. That apart, the reasoning given by the Collector in para-5 of the impugned order, Annexure P-1, shows that according to the Collector, the action taken by the Council was not bona fide. The language employed in Sub-section (1) of Section 323 itself indicates that two circumstances are required to be fulfilled; the first is that the Collector is required to pass an order whether the action which is challenged is not in conformity with law or with the rules or by-laws made thereunder and thereafter also has to keep in mind that such an action is detrimental to the interests of the Council or the public or is likely to cause injury or annoyance to the public or any class or body of persons or is likely to lead to a breach of the peace. There is nothing in the order that the Collector has recorded a finding that the action as such is not in conformity with law or the rules or by-laws. Without recording the aforesaid finding the

Collector has proceeded to set aside the resolution only on the ground that the action was not bona fide. There is no recording of any reason that the action as such was detrimental to the interests of the Council or likely to cause injury or annoyance to the public or any class or body of persons or is likely to lead to a breach of the peace. There are no ingredients of the aforesaid aspect in the order passed by the Collector. To say the least, there is nothing to reveal fulfillment of both the requirements whether the action is contrary to the provisions of the law, rules or bylaws and then simultaneously the Collector should also have been satisfied about the later aspect of the provision enumerated in Sub-section (2) of Section 323 of the Act.

14. In view of the aforesaid, we are of the considered view that the Collector has not properly exercised its jurisdiction in accordance with the provisions of Section 323 of the Act and the order impugned is also bereft of the reasons which were required to be given by the Collector while exercising the power under Section 323 of the Act. Therefore, the order dated 11.8.2009, Annexure P-1, passed by the Collector is liable to be set aside and it is accordingly quashed.

15. For the aforesaid reasons, the writ petitions are allowed with no order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 191
WRIT PETITION
Before Mr. Justice S.C. Sharma
20 November, 2009*

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

A. Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 18 - *Departmental Enquiry - Common proceedings - Two delinquent employees tried in a common proceeding but no order in respect of common proceeding under Rule 18 was passed - Held - The requirement of passing such an order arises where the delinquent employees are holding the different ranks - In the present case, the delinquent employees were holding the same ranks and therefore no such order was required to be passed under Rule 18.* (Para 10)

क. सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 18 – विभागीय जाँच – सामान्य कार्यवाहियाँ – दो अपचारी कर्मचारियों का एक ही कार्यवाही में विचारण किया गया किन्तु नियम 18 के अन्तर्गत एक ही कार्यवाही करने के सम्बन्ध में कोई आदेश पारित नही किया गया – अभिनिर्धारित – ऐसा आदेश पारित करने की

*W.P. No.606/2003(S) (Gwalior)

आवश्यकता वहाँ होती है जहाँ अपचारी कर्मचारी भिन्न–भिन्न श्रेणी धारित करते हों – वर्तमान मामले में अपचारी कर्मचारी समान श्रेणी धारित करते थे इसलिए नियम 18 के अन्तर्गत ऐसा आदेश पारित करने की कोई आवश्यकता नही थी।

B. Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 14(5) - *Departmental Enquiry - Enquiry Officer - Presenting Officer - Enquiry Officer acting as a presenting officer - Held - Enquiry Officer acted as a prosecutor and a judge and thus the entire enquiry stand vitiated.* (Para 13)

ख. सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14(5) – विभागीय जाँच – जाँच अधिकारी – प्रस्तुतकर्ता अधिकारी – जाँच अधिकारी ने प्रस्तुतकर्ता अधिकारी के रूप में कार्य किया – अभिनिर्धारित – जाँच अधिकारी ने अभियोजक और न्यायाधीश के रूप में कार्य किया इस प्रकार सम्पूर्ण जाँच दूषित हो गयी।

C. Service Law - Civil Services (Classification, Control & Appeal) Rules, M.P. 1966, Rule 14(5), Police Regulations, M.P. - *Departmental Enquiry - Enquiry Officer - Presenting Officer - Enquiry Officer acting as a presenting officer - The respondent's stand was there is no provision in the Police Regulation to appoint presenting officer - Held - The Rules of 1966 are very much applicable in the case of police personnels and, therefore, once there is provision of appointment of a prosecuting officer, under the Rules of 1966, the same has to be adhere to.* (Para 14)

ग. सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14(5), पुलिस विनियम, म.प्र. – विभागीय जाँच – जाँच अधिकारी – प्रस्तुतकर्ता अधिकारी – जाँच अधिकारी ने प्रस्तुतकर्ता अधिकारी के रूप में कार्य किया – प्रत्यर्थी का यह कहना था कि पुलिस विनियम में प्रस्तुतकर्ता अधिकारी नियुक्त करने के लिए कोई उपबंध नही है – अभिनिर्धारित – पुलिस कर्मचारियों के मामले में 1966 के नियम वृहत रूप से लागू होते हैं इसलिए जब नियम, 1966 के अन्तर्गत प्रस्तुतकर्ता अधिकारी की नियुक्ति का उपबंध है, तब उसका अनुसरण किया जाना चाहिए।

Cases referred :

AIR 1982 MP 459, 2005(2) MPLJ 18, 2005(1) LLJ 931, 2008(II) MPWN 59.

Alok Katare, for the petitioner.

Vishal Mishra, G.A., for the respondent/State.

ORDER

S.C. SHARMA, J. :–Regard being had to the similitude of the controversy involved in both these writ petitions i.e. W.P. No. 606/2003 (S) & W.P. No. 457/2004 (S), they were heard analogously together and disposed of by this singular order. For the sake of convenience, the facts in Writ Petition No. 606 of 2003 (S) are exposited herein.

2. The petitioner before this Court a dismissed Constable has filed this present petition being aggrieved by an order dated 30/09/2002 passed by the respondent no. 4 as well as the order dated 24/02/2003 rejecting the appeal preferred by the petitioner and also the order dated 15/09/2003, by which, a mercy petition has been dismissed.

3. The contention of the petitioner is that he was appointed on the post of Constable in the year 1997 and was posted at Police Station, Kolaras. The petitioner has further stated that on 22/06/2002 he was detailed as a Duty Guard in a public vehicle belonging to Hardoul Bus Service and while the bus was going from Kolaras to Akajhiri was blocked by putting a tractor trolley in the middle of the road and thereafter the passengers were told to come down from the bus. The dacoits thereafter kidnapped the passengers and the contention of the petitioner is that he did not open fire as the same would resulted in loss of innocent lives. The petitioner has further stated that a preliminary enquiry was conducted in the matter and based upon the preliminary enquiry report, a charge-sheet was issued to him on 28/06/2002 as well as to another Constable namely Shri Tarachand Sagar, who was also on duty along with the petitioner. The disciplinary authority granted time to the petitioner to file a reply to the charge-sheet and after taking into account the reply of the petitioner, a joint enquiry took place in the matter. The petitioner has further stated that the Enquiry Officer has recorded statements of number of witnesses and thereafter has also cross-examined the witnesses. The petitioner has further stated that the defence witnesses were also examined and they were also cross-examined by the Enquiry Officer and thereafter a report was submitted on 12/09/2002 and a show cause notice was issued on 16/09/2002. The petitioner did submit a reply to the show cause notice and thereafter an order of punishment of removal from service was passed on 30/09/2002. An appeal preferred by the petitioner was dismissed by an order dated 24/02/2003 and a mercy petition has also been dismissed on 15/09/2003.

4. The petitioner has raised various grounds before this Court and his contention is that no order of holding a joint enquiry as stipulated in Rule 18 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 was passed by the competent disciplinary authority and, therefore, the enquiry proceedings stand vitiated. He has relied upon a judgment delivered by the apex Court in the case of *Moolchand Namdev vs. State of M.P. and others,* reported in AIR 1982 MP 459. The learned counsel for the petitioner has also argued before this Court that the Enquiry Officer has acted as a prosecutor as well as a judge. His contention is that no Presenting Officer was appointed by the disciplinary authority at any point of time and the Enquiry Officer has himself cross-examined the witnesses produced during the course of enquiry. The contention of the petitioner is that because of the conduct of the Enquiry Officer, who has acted as a Presenting Officer, the entire disciplinary proceedings deserves to be quashed in the light of

the judgment delivered by the Division Bench of this Court in the case of *Union of India through its Secretary, Ministry of Railway, New Delhi and others vs. Mohd. Naseem Siddiqui*, 2005 (1) LLJ 931. The petitioner has also stated before this Court that he is not guilty of misconduct as alleged in the charge-sheet. It has been argued before this Court that the petitioner did not open fire as a large number of innocent passengers were also standing along with the dacoits and firing on dacoits would have resulted in loss of lives of innocent passengers also. The petitioner has prayed for quashing of the orders dated 30/09/2002, 24/02/2003 and 15/09/2003.

5. A detailed reply has been filed on behalf of the respondents/State and the record relating to disciplinary enquiry has also been produced before this Court. The respondents/State have admitted that on 22/06/2002, the petitioner and one another Constable namely Shri Tarachand Sagar were deployed to escort the bus belonging to Hardoul Bus Service and while the bus was going from Kolaras to Akajhiri, it was stopped by certain dacoits/anti-social elements. The dacoits forcibly took away all the passengers in the deep forest area and four passengers were kidnapped. The respondents have further stated that a preliminary enquiry took place in the matter and on the basis of statements of witnesses recorded during the preliminary enquiry, the petitioner was prima facie found guilty of dereliction of duties. A charge-sheet was issued on 28/06/2002, wherein, it was alleged that the petitioner has not taken any action to save the passengers and by hiding himself beneath the seat of the bus has committed a misconduct. A reply was also filed in the matter and, thereafter, a joint enquiry was held. It has further been stated in the return that the Enquiry Officer has conducted the departmental enquiry strictly as per the provisions of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 and the petitioner was not able to point out violation of principles of natural justice and fair play in the matter. The respondents have also stated that no order regarding joint enquiry was required in the facts and circumstances of the case as both the delinquent officials were holding the equivalent rank and it is only when delinquent officials are holding the different ranks, then only an order is required to be passed in the matter. The respondents have also stated that merely because there is no order ordering a joint enquiry, the enquiry proceedings does not stand vitiated. The respondents have also stated that under the Police Regulation, there is no provisions for appointment of a Presenting Officer and, therefore, merely because no Presenting Officer was appointed, the equiry proceedings does not stand vitiated. The respondents have further stated that the petitioner was permitted to participate in the departmental enquiry, evidence of witnesses were recorded by Enquiry Officer and, therefore, merely because the Presenting Officer was not appointed, the order of punishment cannot be said to be unjustified, illegal or bad in law. The respondents have also argued before this Court that keeping in view the statements of witnesses adduced during the course

of disciplinary enquiry proceedings, the petitioner has rightly been found guilty for the alleged misconduct and no case for interference can be made out in the matter.

6. The learned counsel appearing for the respondents/State has also argued before this Court that the petitioner has not been able to point out any procedural irregularity in the departmental enquiry and, therefore, in absence of any procedural irregularity committed by the respondents and in absence of violation of principles of natural justice and fair play, this Court is not competent to appreciate the evidence on record and the writ petition deserves to be dismissed.

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

8. In the present case, the petitioner before this Court was holding the post of Constable at the relevant point of time and on 22/06/2002 while he was deployed to escort the bus belonging to Hardoul Bus Service which was going from Kolaras to Akajhiri witnessed an incident, wherein, the bus was stopped by certain dacoits by putting a tractor trolley on the road. It is alleged that the petitioner who was responsible to protect the bus and passengers therein did not take action in the matter and a fact finding enquiry took place in the matter. Based upon the fact finding enquiry, a charge-sheet was issued on 28/06/2002, wherein, it was alleged that the petitioner has not taken any step to save the passengers from dacoits who have looted and terrorized the passengers and on the contrary, the petitioner by hiding himself beneath a seat of the bus have shown himself to be coward and has committed an act of unbecoming of a Government servant. The petitioner did submit a reply to the charges levelled against him and the Enquiry Officer was appointed in the matter by the disciplinary authority. It is pertinent to note that the petitioner was deputed to escort the bus along with one Tarachand Sagar, who was also a Constable and a joint enquiry took place in respect of both the Constables.

9. The learned counsel for the petitioner has argued before this Court that the enquiry proceedings stand vitiated as no order was passed by the disciplinary authority to hold a common proceedings. The learned counsel for the petitioner has relied upon a judgment delivered by the apex Court in the case of *Moolchand Namdeo vs. State of M.P.*, M.P.W.N. SN 459 and also a judgment delivered by this Court in the case of *S.N. Singh vs. State of M.P. and others*, 2005 (2) MPLJ 18.

10. The Rule 18 of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 reads as under:

> "**18. Common proceedings:** (1) Where to or more Government servants are concerned in any case, the Governor or any other authority competent to impose the penalty of dismissal from service on all such Government servants may make an order

directing that disciplinary action against all of them may be taken in a common proceeding.

[Provided that the powers conferred on the Governor under this rule shall in case of Judicial Officers, be exercised by the Chief Justice.]

Note.- If the authorities competent to impose the penalty of dismissal on such Government servants are different, an order for taking disciplinary action in a common proceeding may be made by the highest of such authorities with the consent of the others.

(2) Subject to the provisions of sub-rule (3) of rule 12, any such order shall specify:

(i) the authority which may function as the disciplinary authority for the purpose of such common proceeding;

(ii) the penalties specified in rule 10 which such disciplinary authority shall be competent to impose; and

(iii) whether the procedure laid down in rule 14 and rule 15 or rule 16 shall be followed in the proceeding."

The aforesaid statutory provisions of law provides for holding a common proceedings where two or more Government servants are involved in a disciplinary proceeding. The requirement of passing an order in such case arises where the delinquent employees are holding the different ranks. In the present case, the delinquent employees were holding the same ranks and therefore no such order was required to be passed under Rule 18 of the Rules of 1966 in the peculiar facts and circumstances of the case. In the present case, as both the employees were holding the post of Constables there was no necessity of passing an order as required under Rule 18 of the Rules of 1966.

11. The judgment relied upon by the learned counsel for the petitioners in the case of *Moolchand Namdeo vs. State of M.P* (supra), relates to a case, wherein the employees were from the irrigation department as well as from the education department and there were different disciplinary authorities in the matter and, therefore, in such circumstances, this Court has held that an order was required to be passed under Rule 18 of the Rules of 1966. Another judgment relied upon by the learned counsel for the petitioner in the case of *S.N. Singh vs. State of M.P. and others* (supra), is also distinguishable on facts. A Sub-inspector of Police was charge-sheeted along with one Head Constable and, therefore, an order was required to be passed under Rule 18 of the Rules of 1966 by the competent authority for holding a joint enquiry. Keeping in view the aforesaid, as in the present case, the petitioner was holding the rank of a Constable and other employee was also a Constable and therefore, no such order of the disciplinary authority was required to be passed under Rule 18 of the Rules of 1966.

12. The learned counsel for the petitioner has vehemently argued before this Court that no Presenting Officer was appointed by the disciplinary authority and the Enquiry Officer has acted as a Presenting Officer and has also cross-examined the witnesses produced during the course of departmental enquiry.

13. This Court has carefully gone through the record of the disciplinary enquiry and it is event that the Enquiry Officer has conducted the chief examination and he has also conducted the cross-examined of all the witnesses. Thus, it is evident that the Enquiry Officer himself has played the role of prosecutor. This Court in the case of *Ram Prakash vs. State of M.P. and others*, 2008 (II) MPWN 59 in paragraphs 9, 10, 11 and 12 has held as under:-

> "The Presenting Officer appointed under rule 14 (5) (d) of the CCA Rules of 1966 is in fact is a person appointed like a prosecutor and the person has to prove the misconduct before the Enquiry Officer. It is the Presenting Officer who conducts the chief examination of the prosecution witnesses as well as cross-examination of the defence witnesses. It is again the Presenting Officer who conducts the cross-examination of the delinquent government servant in order to arrive at a finding of guilt. In the present case after going through the record minutely, it is evident that the Enquiry Officer has conducted the chief examination and he has conducted the cross-examination of the defence witnesses as well as cross-examined the delinquent government servant. Thus, the Enquiry Officer himself has played the role of the prosecutor.

A Division Bench of this Court in the case of *Union of India through its Secretary, Ministry of Railway, New Delhi and others vs. Mohd. Naseem Siddiqui* 2005 (1) LLJ 931 in paragraph 16 has held as under:

> We may summarise the principles thus:
>
> (i) The Inquiry Officer, who is in the position of a Judge shall not act as a Presenting Officer, who is in the position of a prosecutor,
>
> (ii) It is not necessary for the Disciplinary Authority to appoint a Presenting Officer in each and every inquiry. Non-appointment of a Presenting Officer, by itself will not vitiate the inquiry.
>
> (iii) The Inquiry Officer, with a view to arrive at the truth or to obtain clarifications, can put questions to the prosecution witnesses as also the defence witnesses. In the absence of a Presenting Officer, if the Inquiry Officer puts any questions to the prosecution witnesses to elicit the facts, he should thereafter permit the delinquent employee to cross- examine such witnesses on those clarifications.

(iv) If the Inquiry Officer conducts a regular examination-in-chief by leading the prosecution witnesses through the prosecution case, or puts leading questions to the departmental witnesses pregnant with answers, or cross-examines the defence witnesses or puts suggestive questions to establish the prosecution case employee, the Inquiry Officer acts as prosecutor thereby vitiating the inquiry.

(v) As absence of a Presenting Officer by itself will not vitiate the inquiry and it is recognised that the Inquiry Officer can put questions to any or all witnesses to elicit the truth, the question whether an Inquiry Officer acted as a Presenting Officer, will have to be decided with reference to the manner in which the evidence is let in any recorded in the inquiry.

Whether an Inquiry Officer has merely acted only as an Inquiry Officer or has also acted as a Presenting Officer depends on the facts of each case. To avoid any allegations of bias and running the risk of inquiry being declared as illegal and vitiated, the present trend appears to be to invariably appoint Presenting Officers, except in simple cases. Be that as it may.

Keeping in view the aforesaid, and also keeping in view the record relating to the disciplinary enquiry in the present case, it is evident that no Presenting Officer was appointed by the disciplinary authority. The evidence on behalf of the prosecution has been appreciated by the Enquiry Officer by conducting a regular examination in chief of prosecution witnesses by taking them through the prosecution case. The Enquiry Officer has also conducted the regular cross-examination of defence witnesses. It is not a case where Enquiry Officer has simply asked the clarificatory questions to the delinquent officials or to the witnesses. It is a case, in which, Enquiry Officer has acted as a prosecutor as well as a judge. Resultantly, the enquiry proceedings stand vitiated and the consequential order passed by the disciplinary authority of removal from service dated 30/09/2002, the order rejecting the appeal dated 24/02/2003 and the order passed in the mercy petition dated 15/09/2003 deserve to be quashed.

14. The respondents in their return have stated that under the Police Regulation there is no such provision for appointment of a Presenting Officer. The respondents/ State in its reply has relied upon the provisions of Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 and a charge-sheet was issued under the provisions of Rules of 1966 and for all purpose, the Rules of 1966 have been relied upon and only for appointment of a Presenting Officer it has been stated that there is no provision for appointing a Presenting Officer. The Rules of 1966 are very much applicable in the case of police personnels and, therefore, once there is provisions of appointment of a Presenting Officer, under the Rules of 1966, the same has to be adhere to. Resultantly, the disciplinary enquiry proceedings as no Presenting Officer was appointed in the matter and the Enquiry

Officer himself has acted as a prosecutor, deserves to be quashed. The writ petition is allowed with the following directions:-

(a) The order passed by the disciplinary authority of removal from service dated 30/09/2002, the order rejecting the appeal dated 24/02/2003 and the order passed in the mercy petition dated 15/09/2003 are hereby quashed.

(b) The respondents are directed to reinstate the petitioner forthwith back in service. The petitioner shall not be entitled for back wages in the matter and he shall be entitled for notional fixation of salary and other consequential benefits.

(c) The respondents shall be at liberty to proceed afresh against the petitioner by following the prescribed procedure as provided under the Rule of 1966.

15. With the aforesaid, the writ petitions stand allowed. No order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 199

WRIT PETITION

Before Mr. Justice Prakash Shrivastava

1 December, 2009*

BHAGVANT SINGH PARIHAR ... Petitioner

Vs.

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

Service Law - Civil Services (Pension) Rules, M.P. 1976, Rule 42(1)(b) - ***Compulsory retirement - Petitioner compulsorily retired after 24 years of service - Held - If the entire record of the petitioner is seen then in 23 years his remarks are either Good or Average only one adverse entry cannot be a ground to compulsorily retire him as he cannot be said to be deadwood especially when his integrity, honesty and decrease in physical efficiency are not at all adverse - Order even does not state that the decision is taken in public interest - Petition allowed.*** (Paras 15 to 17)

सेवा विधि – सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 42(1)(बी) – अनिवार्य सेवानिवृत्ति – याची को 24 वर्ष की सेवा के बाद अनिवार्य रूप से सेवानिवृत्त किया गया – अभिनिर्धारित – यदि याची का सम्पूर्ण अभिलेख देखा जाए तब 23 वर्षों में उसके रिमार्क या तो "उत्तम" हैं या "औसत", केवल एक प्रतिकूल प्रविष्टि उसे अनिवार्य रूप से सेवानिवृत्त किये जाने का आधार नही हो सकती है क्योंकि उसे अनुपयोगी व्यक्ति नही कहा जा सकता विशेषतः जब उसकी अखण्डता, ईमानदारी और शारीरिक क्षमता में कमी प्रतिकूल नही हैं – आदेश यह भी कथित नही करता कि निर्णय लोक हित में लिया गया – याचिका मंजूर।

*W.P. No.13328/2003 (Jabalpur)

Cases referred :

2006(1) MPLJ 183, W.P. No.13445/2003 decided on 17.02.2009, (2001) 3 SCC 314, AIR 1995 SC 111.

R.K. Verma, for the petitioner.

Smt. Sheetal Dubey, G.A., for the respondent/State.

ORDER

PRAKASH SHRIVASTAVA, J. :–This writ has been filed by the petitioner challenging the order of compulsory retirement dated 08.01.99.

2. Brief facts are that the petitioner was working as mechanic with the respondent. The respondent passed the impugned order dated 08.01.99 under Rule 42 (1) (b) of the M.P. Civil Service (Pension) Rules 1976, (for short 'the Rules') on the ground that the petitioner had completed 25 years of government service on 03.02.97. The petitioner represented the matter before the State Government against the order of compulsory retirement. The State Government rejected the representation by order dated 15.06.99.

3. Learned counsel appearing for the petitioner submitted that out of his previous 24 years annual confidential reports, the petitioner has earned 12-B, 11-C and 1-D in the confidential reports. He further submitted that 1-D is in respect of the one adverse remark for the year 1992-93, which was communicated to the petitioner in 1998 against which the petitioner had submitted the representation, which was pending, therefore, on the basis of such an ACR alone, he could not be compulsorily retired. He further submitted that as per the judgment of this court in the matter of *Chandra Shekhar Shrivastava Vs. State of M.P. and Another* reported in 2006 (1) M.P.L.J. 183 and in the matter of *Moti Lal Verma Vs. State of M.P. & Others* dated 17.02.2009 in W.P. No. 13445 of 2003, the order of compulsory retirement cannot be sustained.

4. As against this, learned counsel appearing for the respondents submitted that no error has been committed by the respondent in passing the order of compulsory retirement on the basis of the service record of the petitioner.

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

6. Rule 42 (1) (b) of the Rules provides that the appointing authority may retire a government servant from service on completion of 25 years of qualifying service in the public interest.

7. The petitioner has placed reliance upon the circular dated 13th January, 1997, which relates to the scrutiny of service record for the purpose of compulsory retirement under the rule. In the circular, the criteria has been laid down for the purpose of scrutiny and as per the said criteria, the committee is required to see firstly honesty and integrity of the employee, secondly, the decrease in physical efficiency and thirdly, the assessment of performance of the employee on the basis of his complete service record.

8. The Supreme Court also in the matter of *State of Gujrat Vs. Umed Bhai M. Patel* reported in (2001) 3 SCC 314, has crystallized the principles relating to compulsory retirement as under :

> *"11. The law relating to compulsory retirement has now crystallised into definite principles, which could be broadly summearised thus:*
>
> *(I) Whenever the service of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest*
>
> *(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.*
>
> *(iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.*
>
> *(iv) Any adverse entries made in the confidential record, shall be taken note of and be given due weightage in passing such order.*
>
> *(v) Even uncommunicated entries in the confidential record can also be taken into consideration.*
>
> *(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.*
>
> *(vii) If the officer was given a promotion despite adverse entires made in confidential record, that is a fact in favour of the officer.*
>
> *(viii) Compulsory retirement shall not be imposed as a punitive measure."*

9. This court in the matter of *Chandra Shekhar Shrivastava* (Supra) has taken a view that if the integrity is not in doubt and the record is average, there cannot be any compulsory retirement. This court in the matter of *Chandra Shekhar Shrivastava* (supra) held that :-

> *"Thus on the touchstones of the norms fixed by the Apex Court in the case of* ***Umedbhai M. Patel*** *(supra) the facts of the present case are to be considered. Since the integrity of the petitioner has not been found to be doubtful and his record is "average" there cannot be any compulsory retirement. In that context I may profitably rely the decision of the Supreme*

Court in the case of ***R.C. Mishra*** *(supra) wherein the Apex Court held that merely service record of an employee was found unsatisfactory but his integrity was not questioned, therefore, the order of compulsory retirement could not have been passed. On the same line the decision of* ***Shree Baboo*** *(supra) is there and it can also be relied. The Supreme Court in the case of* ***Brij Mohan Singh Chopra*** *(supra) has held that recent record is to be given more importance while taking decision of compulsory retirement. In the present case there is nothing adverse to the petitioner and his assessment is overall "average" in the recent years before the impugned order was passed. On the same ground the decision of* ***Sukhdeo*** *(supra) can be placed reliance as well as the decision of* ***Narasingh Patnalk*** *(Supra)."*

10. The same view has been taken in the matter of *Moti Lal Verma Vs. State of M.P. & Others* (supra) by holding that-

"7. Accordingly, this is a case where the service record of the petitioner is average, he has earned promotions and there is nothing adverse in his entire service carrier on the basis of which he can be termed as a "dead wood" in the department. Even in the Circular Annexure A/3 the evaluation is to be made after taking note of the integrity. As far as integrity of the petitioner is concerned, there is nothing adverse to him. The only adverse factor that has weighed with the respondents is the average entires, which is treated to be adverse and action taken. This was not permissible as the average entires cannot be treated as adverse for the purpose of compulsorily retiring the petitioner and treating him to be dead wood."

11. Thus, the consistent view of this court is that the average entires cannot be treated as adverse for the purpose of compulsorily retiring an employee and treating him to be dead wood.

12. In the present case, it is undisputed that in the previous 24 years, the petitioner had earned 12 B (Good) 11-C (average) and 1-D (below average). So far as, the one adverse confidential report i.e below average is concerned, it relates to period 1992-93. It was communicated to the petitioner on 06.07.98, vide (Annexure A/1) against which, the petitioner had preferred the representation which, undisputedly was pending at the time, when his case for compulsory retirement was considered. A perusal of the confidential report for the year 1992-93, indicates that in this report, under column 1 to 12. either "good" or "average" was recorded, but at the end in the column No. 13 relating to general note "below average" was recorded. Therefore, the general note in 13 does not tally with the performance of the petitioner recorded under different heads in earlier columns.

13. Even otherwise, one solitary adverse entry cannot form the basis of compulsory retirement, in view of the Supreme Court judgment in the matter of *S. Ramachandra Raju Vs. State of Orissa* reported in AIR 1995 S.C. 111. The case of the petitioner stands on better footing, since even the adverse entry for the year 1992-93 was not communicated immediately and it was communicated almost after five years in the year 1998 and against the said entry the representation was pending.

14. So far as the other ACR's are concerned, they are either good or average. The record also indicates that during the service tenure no charge-sheet was issued to the petitioner, no enquiry was conducted and no penalty was imposed. The integrity and honesty of the petitioner is also not in doubt and there is no material to show that there is decrease in physical efficiency of the petitioner.

15. In view of the judgment of the Supreme Court and this court, it is found that out of the previous 24 years for 23 years the confidential report entires are either good or average, therefore, these entries for 23 years cannot form the basis for compulsorily retiring the petitioner. There is only one entry for period 1992-93, which is adverse entry, but order of compulsory retirement cannot be solely based on that entry in view of the reasons given above.

16. The respondents have failed to bring on record any material, which could justify treating the petitioner as dead wood. If the entire record of the petitioner for previous 24 years is considered, it cannot be ascertained as to how and on what basis he is declared as dead wood. Even as per the circular (Annexure A/4), evolution is to be made after taking note of integrity, honesty and decrease in physical efficiency of the petitioner, but these factors are not shown to be adverse to the petitioner.

17. It is also worth noting that the impugned order even does not state that the respondents have taken the decision to compulsory retire the petitioner in the public interest, which is the only ground on which an employee can be compulsory retired under Rule 42 (1) (b).

18. Accordingly, this court is of the considered view that the action of compulsory retirement of the petitioner has not been taken by the respondents on proper screening of service record and the petitioner has wrongly been retired. Thus, action of the respondents is not sustainable.

19. Accordingly, the order dated 08.01.99, compulsorily retiring the petitioner and the order dated 15.06.99, rejecting the petitioner's representation are quashed. The petitioner shall be deemed to have continued in service till attainment of the age of superannuation and thereafter retired. Treating him to be in service the benefit of salary, pay fixation shall be granted to the petitioner and other consequential benefits arising thereof.

20. The Petition stands allowed and disposed of without any order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 204
ELECTION PETITION
Before Mr. Justice R.C. Mishra
11 August, 2009*

SHUSHIL KUMAR KHATRI ... Petitioner
Vs.
SARTAJ SINGH ... Respondent

Representation of the People Act (43 of 1951), Sections 83 & 86, Civil Procedure Code, 1908, Order 7 Rule 11(a) - *Rejection of election petition for want of cause of action - Election petition not disclosing the source of information of corrupt practices and such allegations were not verified - Effect - Held - Accordingly, in the case on hand, where neither the verification in the petition nor the affidavit gives any indication of the sources of information of the petitioner as to the facts stated in the petition which are not to his knowledge and the petitioner persists that the verification is correct and affidavit in the form prescribed does not suffer from any defect, the allegations of corrupt practices cannot be inquired and tried at all.* (Para 26)

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएँ 83 व 86, सिविल प्रक्रिया संहिता, 1908, आदेश 7 नियम 11(ए) – वाद कारण के अभाव में निर्वाचन याचिका की नामंजूरी – निर्वाचन याचिका से भ्रष्टाचार की जानकारी के स्त्रोत का प्रकटन नही और ऐसे अभिकथनों का सत्यापन नही किया गया – प्रभाव – अभिनिर्धारित – तदनुसार, प्रस्तुत मामले में, जहाँ न तो याचिका में सत्यापन और न ही शपथपत्र याचिका में कथित तथ्यों के बारे में, जो याची के ज्ञान के नही हैं, याची की जानकारी के स्त्रोत्र का कोई संकेत देता है और याची आग्रह करता है कि सत्यापन सही है और विहित प्रारूप में शपथपत्र किसी त्रुटि से ग्रस्त नही है, भ्रष्टाचार के अभिकथनों की जाँच और विचारण नही किया जा सकता।

Cases referred :

(2005) 2 SCC 188, (1999) 4 SCC 274, AIR 1968 SC 1079, (1991) 3 SCC 375, (2001) 1 SCC 481, AIR 2000 SC 694, (2000) 8 SCC 191, 1987 Supp SCC 93, 2001(1) MPLJ 418, (2003) 7 SCC 453, AIR 2004 Karnataka 471, AIR 2006 SC 713, AIR 1969 SC 1201, 1994 AIR SCW 2028, AIR 2004 SC 38.

A.K. Tiwari, for the petitioner.
Arpan J. Pawar with *A.P. Singh,* for the respondent.

ORDER

R.C. Mishra, J. :–This order shall govern disposal of I.A. No.49/2009 that is an application, under Section 86 of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act') read with Order VII Rule 11 of the Code of Civil Procedure (for brevity 'the Code'), for rejection of the election petition inter alia on the ground of non-disclosure of cause of action or a triable issue.

*E.P. No.13/2009 (Jabalpur)

2. In this petition, election of the respondent to M.P. Legislative Assembly Constituency No.136 Seoni-Malwa has been challenged solely on the ground of corrupt practices. In the election, the petitioner was in the fray as an independent candidate whereas the respondent was the official candidate of Bhatriya Janta Party, the then ruling political party in the State.

3. The prayer for rejection of the petition even without entering into a full-dress trial has been made on the following grounds -

(i)The petitioner has failed to comply with the mandatory requirement of Section 81(3) of the Act.

(ii) The annexures, incorporated in and thus forming integral part of the election petition, have not been verified in accordance with Section 83(2) of the Act and further, there is absolutely no verification of annexures/ documents at page nos.22-A and 24-A of the election petition.

(iii) The affidavit filed by the petitioner in support of the corrupt practices alleged in the election petition, is not in Form 25 (as prescribed under Rule 94-A appended to the Conduct of the Election Rules, 1961). The affidavit is vague, ambiguous and self-contradictory.

(iv) There is a total non-compliance of the mandatory provisions contained in Section 83(1)(a) and (b) of the Act as the petitioner has not pleaded the material facts in the election petition and has also failed to give full particulars of the alleged corrupt practices.

4. In a very short reply, the petitioner has termed the preliminary objections as misconceived. According to him, he has clearly and specifically pleaded the material facts regarding the corrupt practices allegedly committed by the respondent and has also duly complied with the provisions of the Act and rules made thereunder regulating procedure for (a) calling an election in question on the ground of corrupt practices (b) furnishing of true copies of the petition and schedules/annexures thereto and verification thereof.

5. In order to appraise the merits of rival contentions in a right perspective, it would be desirable to deal the grounds as raised in the I.A., ad seriatim -

Ground No. (i)

6. According to the respondent, since the copy of election petition served upon him is not attested as "true copy of the petition", the signature of the petitioner thereon, even though duly attested by notary, would not be sufficient to cure the defect.

7. It is true that sub-section (3) of Section 81 of the Act mandates that every copy of the election petition shall be attested by the petitioner under his own

signature to be a true copy of the petition but the report of the Registry raises a presumption, though rebuttable, that the copy of the petition as filed by the petitioner was a true copy (*Chandrakant Uttam Chodankar v. Dayanand Rayu Mandrakar* (2005) 2 SCC 188 referred to). In that case, the following observations made by the Constitution Bench in *T.M. Jacob v. C. Poulose* (1999) 4 SCC 274 were quoted -

> "(a) the expression 'copy' in Section 81(3) of the Act means a copy which is substantially the same as the original, variation if any from the original should not be vital in nature or should not be such that can possibly mislead a reasonable person in meeting the allegation; (b) if the copy differs in material particulars from the original the same cannot be cured after the period of limitation."

8. Accordingly, any defect of whatever nature in the true copy supplied to the respondent would not entail outright rejection of an election petition. The main consideration, which would weigh, is that the returned candidate must get a correct idea of the allegations of corrupt practices so that it may be possible to understand and meet the charges levelled against him.

9. Since the defect, as pointed out by the respondent, can be dealt with under the doctrine of curability, it can not render the petition liable to be dismissed under Section 86 of the Act.

Ground No. (ii)

10. The relevant provisions of law existing in the form of Section 83(2) of the Act, may be reproduced as under -

> **83. Contents of petition.**
>
> (1) .....
>
> (2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same matter as the petition.

11. A bare perusal of the record would reveal that all the six annexures referred to in the petition have been duly verified and the documents at page nos.22-A and 24-A of the election petition are, in fact, typed copies of annexures P-4 and P-5 respectively. This apart, none of the annexures forms an integral part of the election petition as contents thereof have already been pleaded in the election petition. They have been merely appended or referred to as a possible means of proving the corresponding averments. In this view of the matter, the objection as to non-compliance with S.83(2) read with 81(3) of the Act is also devoid of substance (*Sahodrabai v. Ram Singh Aharwar* AIR 1968 SC 1079 relied on).

Ground Nos.(iii) and (iv)

12. To substantiate the contention that the petition neither contains a complete statement of material facts raising a cause of action nor comprises full particulars

of the alleged corrupt practices, learned counsel for the respondent has made extensive reference to averments made in paragraphs 6 to 21 of the petition. He has further pointed out that express consent of the respondent or his election agent to such practices has not been pleaded at all. This apart, validity of the corresponding affidavit has also been questioned on the ground that a definite source in respect of each one of the corrupt practices has not been disclosed. To buttress the contentions, reliance has been placed on the following precedents -

(i) *F.A. Sapa v. Singora* (1991) 3 SCC 375.

(ii) *R.P. Moidutty v. P. T. Kunju Mohd.* (2001) 1 SCC 481.

(iii) *V. Narayanaswamy v. C. P. Thirunavukkarasu* AIR 2000 SC 694.

(iv) *Ravinder Singh v. Janmeja Singh* (2000) 8 SCC 191.

(v) *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi* 1987 (Supp.) SCC 93.

(vi) *Kankar Munjare v. Gaurishankar* 2008 (1) MPLJ 418.

13. In response, learned counsel for the petitioner has submitted that the pleadings are complete in all respects and the affidavit also substantially fulfills the requirements of proviso to sub-section (1) of S.83 and Form 25. Moreover, he is of the view that even if it is assumed that the pleadings or the contents of the affidavit suffer from any deficiency, the election petition cannot be dismissed in limine. In support of the contention, he has placed reliance on the decision of the Apex Court in *Bidesh Singh v. Madhu Singh* (2003) 7 Supreme 453.

14. Before proceeding further, it would be necessary to advert to the following averments made in paragraphs 13 to 21 of the petition under caption **'Corrupt Practices adopted by the respondent'** -

> (A) That, since the respondent was the candidate of ruling party of the State (Bhartiya Janta Party) the government machineries has given the entire illegal support and illegal influence on the voters by creating all sorts of obstruction in the election of the petitioner. The complaints have been made but no action has been taken by the competent authority, they are State Election Commission and Chief Election Officer concern and therefore the petitioner has been defeated and the respondent has been declared the successful candidate from constituency No.136, Seoni Malwa, District Hoshangabad, M.P.
>
> (B) That, the respondent being a candidate of ruling party the complaints made by the petitioner regarding corrupt practices of the respondent during election have been ignored like a cry in the forest. It is further respectfully submitted that unfortunately

all the officers were working under the control and instructions of the government machineries to create obstacle and to create fear among the voters an any how to support the respondent who was the then member of parliament and was contesting the election for member of legislative assembly and that was only the reason as to why the petitioner could not secured the maximum votes and the respondents under the facility and influence of the government machinery has been declared successful.

(C) That, it is very respectfully submitted that the petitioner has been victimized, contrary to the provisions of law which is clear from the visit of Hon'ble the Chief Minister of the State (Head of the ruling party) and the other ministers who visited Seoni Malwa constituency No. 136, District Hoshangabad, M.P. and taking meeting undue influence has been left on the voters declaring and giving assurance to do all the better and best for the public, the ruling party will not left any thing but vote for respondent Shri Sartaj Singh and this has also badly effected the election and due to the corrupt practices of the ruling party the petitioner has been defeated which has also made the entire election of constituency No. 136, Seoni Malwa, District Hoshangabad, M.P. liable to be set aside.

(D) That, under the shed of ceremony either birth ceremony or the others the peoples have been gathered and unduly influenced by the respondent and so also by the government machineries which has also adversely effected the election of the petitioner.

(E) That, it is further respectfully submitted that the voter list was prepared according to the pleasure of the respondent and thereby actual voters have been removed from the list and false voters and dead voters have been shown in the voter list which has also created the obstacle and there being no proper voting the election has been effected.

(F) That, since the model code of conduct was application during the election, when only rally and election meeting could have been arranged but big functions have been arranged for the different caste of peoples and in order to please the voters belonging to different caste the distribution of material according to their choice, distribution of wine through government machinery and creating undue influence has been left to caste their votes in favour of the respondent therefore also the election has become illegal and due to undue influence it has become liable to be declared null and void and is liable to be set aside.

(G) That, since the government vehicles were used to bring the peoples from various places on those vehicles and transportation was sponsored by Bhartiya Janta Party which is clearly violative of model code of conduct and made the entire election liable to be set aside.

(H) It is clear that the respondent was involved in all such corrupt practices and such action was only for the pleasure of the respondent which is apparently violative of the provisions of Representation of People Act and by such act the election of the petitioner was badly effected.

(I) That, it is clear that at the polling booth such a situation was created and therefore free and fare election was not held and the voters have been influenced by the over power due to workers engaged by the respondent and due to this illegal activities the election of the petitioner has been effected and the petitioner has lost the election and the respondent secured the maximum vote by adopting the corrupt practices. If these corrupt practices would not have been adopted by the respondents the petitioner would have secured the maximum vote and would have been declared successful by the majority votes.

15. At this juncture, let it be made clear 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. However, as rightly pointed out by learned counsel for the respondent, any violation of the Model Code could only give rise to an election offence. In other words, violation of the Model Code can not be treated as ground for declaration of an election as void (See. *Bashiruddin Halhipparga v. Rajashekhar Basavaraj Patil* AIR 2004 Karnataka 471).

16. A plain reading of the relevant provisions, as contained in clauses (a) and (b) of sub-section (1) of Section 83 of the Act, would clearly suggest that pleadings in an election petition, particularly one alleging corrupt practices are undoubtedly of paramount importance as they play large part in adjudication thereof. As explained in *F.A. Sapa's case* (supra) -

> "Section 83(1)(a) stipulates that every election petition shall contain a concise statement of the 'material facts' on which the petitioner relies. That means the entire bundle of facts which would constitute a complete cause of action must be concisely stated in an election petition. Section 83(1)(b) next requires an election petitioner to set forth full particulars of any corrupt practice alleged against a

returned candidate. These 'particulars' are obviously different from the 'material facts' on which the petition is founded and are intended to afford to the returned candidate an adequate opportunity to effectively meet with such an allegation. The underlying idea in requiring the election petitioner to set out in a concise manner all the 'material facts' as well as the 'full particulars', where commission of corrupt practice is complained of, is to delineate, the scope, ambit and limits of the inquiry at the trial of the election petition."

17. 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). Accordingly, material facts are facts which if established would give the petitioner the relief asked for even if the respondent had not appeared.

18. In a catena of earlier cases also, the Supreme Court had occasion to explain true nature of the requirements of pleadings as contemplated under S.83 and consequences of non-compliance therewith. Hence, it is not essential to burden this judgment with various authorities on the point. Suffice, however, to refer to the following guiding principles formulated in *Samant N. Balakrishna v. George Fernandez* AIR 1969 SC 1201 -

"Section 83 of the Act is mandatory and requires ;

First, a concise statement of material facts and then requires the fullest possible particulars.

Second, omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad.

Third, the function of particulars is to present in full a picture of the cause of action to make the opposite party understand the case he will have to meet.

Fourth, material facts and particulars are distinct matters. Material facts will mention statements of fact and particulars will set out the names of persons with the date, time and place.

Fifth, material facts will show the ground of corrupt practice and the complete cause of action and the particulars will give the necessary information to present a full picture of the cause of action.

Sixth, in stating the material facts, it will not do merely to quote the words of the section because then the efficacy of the material facts will be lost. The fact which constitutes a corrupt practice,

must be stated and the fact must be correlated to one of the heads of corrupt practice, and,

Seventh, an election petition without the material facts relating to a corrupt practice is no election petition at all. A petition which merely cites the sections cannot be said to disclose a cause of action.

19. However, a reasonable cause of action is said to mean a cause of action with some chance of success when only the allegations in the pleading are considered. As explained further in *Mohan Rawale v. Damodar Tatyaba* 1994 AIR SCW 2028, the distinctions among the ideas of the "grounds" in S.81(1) of "material facts" in Section 83(1)(a) and of "full particulars" in S.83(1)(b) are obvious. The provisions of S.83(1)(a) and (b) are in the familiar pattern of Order VI, Rules 2 and 4 and Order 7, Rule 1(e) of the Code. Further, the distinction between 'Material facts' and 'particulars' which together constitute the facts to be proved or the 'facta probanda' on the one hand and the evidence by which those facts are to be proved facta probantia on the other must be kept clearly distinguished. Thus, disclosure of cause of action is distinct from absence of material particulars. However, in a petition like one under consideration, the statement of material facts as well as full particulars must be so complete as to raise a cause of action or a triable issue.

20. The decision in *Bidesh Singh's case* (supra) is of no avail to the petitioner because firstly in that case the election petition was based on improper rejection of ballot papers and secondly it was not a case where the respondent had contended that the allegations made in the election petition were vague or causing prejudice to him. In a petition on the allegation of corrupt practices cause of action cannot be equated with the cause of action as is normally understood because of the consequences that follow in a petition based on the allegations of corrupt practices. A petition challenging election on the ground of corrupt practices is a serious matter in view of the fact that in case, any such practice is proved, returned candidate would not only suffer ignominy but also disqualification under S.8A of the Act.

21. As observed by the Apex Court in *R.P. Moidutty's case* (above), the legislature has taken extra care to make special provision for pleadings in an election petition alleging corrupt practice. Under Section 83 of the Act ordinarily it would suffice if the election petition contains a concise statement of the material facts relied on by the petitioner, but in the case of corrupt practice the election petition must set forth full particulars thereof including as full a statement as possible of (i) the names of the parties alleged to have committed such corrupt practice, (ii) the date, and (iii) place of the commission of each such practice. An election petition is required to be signed and verified in the same manner as is laid

down in the Code of Civil Procedure, 1908 for the verification of pleadings. However, if the petition alleges any corrupt practice then the petition has additionally to be accompanied by an affidavit in Form No. 25 prescribed by Rule 94A of the Conduct of Elections Rules, 1961 in support of the allegations of such corrupt practice and the particulars thereof. Thus, an election petition alleging commission of corrupt practice has to satisfy some additional requirements, mandatory in nature, in the matter of raising of the pleadings and verifying the averments at the stage of filing of the election petition and then in the matter of discharging the onus of proof at the stage of the trial.

22. However, a bare reading of the pleadings would suggest that the petitioner has utterly failed to fulfill the statutorily mandatory additional requirements while pleading as well as verifying the averments relating to the corrupt practices. Strangely enough, even the material facts as to the consent of the returned candidate or his election agent to the commission of any one of the alleged corrupt practices have not been pleaded at all. Apparently, the petitioner has not been able to point out as to who were involved in the corrupt practices, at what point of time and to what extent. Further, what was the actual mode and measure of the alleged misuse of the Government machinery, who had brought the undue influence upon the voter, who had distributed the liquor, are some of the pertinent questions that had remained unanswered. Moreover, in the light of decision in *Dhartipakar's case* (above), allegations as to statement of promise by the Chief Minister that if the respondent was elected, constituency would be developed did not constitute corrupt practice of bribery or undue influence and in absence of pleadings regarding all the three ingredients, corrupt practice of procuring or hiring of vehicles was not made out. This apart, the affidavit also does not contain particulars as prescribed by the Rules, and the verification of the pleadings has not been done strictly in accordance with Order VI Rule 15(2) of the Code. For this, reference may be made to para 3 of the verification clause reads as under -

VERIFICATION

> 3. The contents of paras 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 are based on personal knowledge, documentary evidence received, believed to be true and produced with the petition as also the information from reliable sources, election agents of the petition and legal advise given by the counsel of the petitioner."

23. There can not be any conflict with the well-settled proposition as re-affirmed in *F.A. Sapa's case* (supra) that the defects in the verification and the affidavit are curable subject to limitation that any material fact, not pleaded earlier can not be brought on record, after expiry of the prescribed period of limitation. For a ready reference, the relevant observations may be reproduced thus -

> "From the text of the relevant provisions of the R.P. Act,

Rule 94-A and Form 25 as well as Order 6 Rule 15 and Order 19 Rule 3 of the Code and the resume of the case law discussed above it clearly emerges (i) a defect in the verification, if any, can be cured (ii) it is not essential that the verification clause at the foot of the petition or the affidavit accompanying the same should disclose the grounds or sources of information in regard to the averments or allegations which are based on information believed to be true (iii) if the respondent desires better particulars in regard to such averments or allegations, he may call for the same in which case the petitioner may be required to supply the same and (iv) the defect in the affidavit in the prescribed Form 25 can be cured unless the affidavit forms an integral part of the petition, in which case the defect concerning material facts will have to be dealt with, subject to limitation, under Section 81(3) as indicated earlier.

24. But, fact of the matter is that even after being apprised of the apparent defects, the petitioner has justified his casual approach by asserting that both the verification and the affidavit substantially fulfill the legal requirements. However, as observed in *R.P. Moidutty's case,* there is gulf of difference between a curable defect and a defect continuing in the verification clause or affidavit without any effort being made to cure the defect. It is necessary for an election petitioner to make a charge of corrupt practice with full responsibility and to prevent any fishing and roving enquiry. In the absence of proper affidavit, disclosing the source of information in respect of the commission of the corrupt practices, the allegations pertaining thereto, could not be put to trial - the defect being of a fatal nature [See *Ravindra Singh's case* (above)].

25. In this view of the matter, the contention that a petition not fulfilling the requirements of Section 83(1) can not be rejected at the threshold is apparently misconceived as by virtue of S.87 of the Act, it is to be tried in accordance with the procedure applicable under the Code, to the trial of suits. The well-settled principles of law on the point as re-affirmed by a three Judge Bench of the Supreme Court in *V. Narayanaswamy's case* (supra) may be extracted as under -

For the purpose of considering a preliminary objection as to the maintainability of the election petition the averments in the petition should be assumed to be true and the Court has to find out whether these averments disclose a cause of action or a triable issue as such.

Sections 81, 83(1)(c) and 86 read with Rule 94-A of the Rules and Form 25 are to be read conjointly as an integral scheme.

"Material facts" mean the entire bundle of facts, which would constitute a complete cause of action and these must be concisely

stated in the election petition, i.e., clause (a) of sub-section (1) of Section 83. Then under clause (b) of sub-section (1) of Section 83 the election petition must contain full particulars of any corrupt practice.

A petition levelling a charge of corrupt practice is required by law to be supported by an affidavit and the election petitioner is obliged to disclose his source of information in respect of the commission of corrupt practice. He must state which of the allegations are true to his knowledge and which to his belief on information received and believed by him to be true.

To plead corrupt practice as contemplated by law it has to be specifically alleged that the corrupt practices were committed with the consent of the candidate and that a particular electoral right of a person was affected. It cannot be left to time, chance or conjecture for the Court to draw inference by adopting an involved process of reasoning.

Charge of corrupt practice being quasi-criminal in nature the Court must always insist on strict compliance with the provisions of law. In such a case it is equally essential that the particulars of the charge of allegations are clearly and precisely stated in the petition.

Non-compliance with the provisions of Section 83 may lead to dismissal of the petition if the matter falls within the scope of the Order 6, Rule 16 and Order 7, Rule 11 of the Code of Civil Procedure.

26. Accordingly, in the case on hand, where neither the verification in the petition nor the affidavit gives any indication of the sources of information of the petitioner as to the facts stated in the petition which are not to his knowledge and the petitioner persists that the verification is correct and affidavit in the form prescribed does not suffer from any defect the allegations of corrupt practices cannot be inquired and tried at all. Taking note of these principles only, a co-ordinate Bench of this Court in *Kankar Munjare's case* (supra) had proceeded to reject an election petition suffering from similar defects.

27. 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).

28. To sum up, the petition deserves to be rejected on the ground nos.(iii) and (iv) [above] as no issue can be raised for trial in absence of complete, precise and specific pleadings in respect of the alleged corrupt practices as well as that of the requisite affidavit in support of the allegations.

29. 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.

30. 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., 215
APPELLATE CIVIL

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava
19 February, 2009*

HINDUSTAN MOTORS LTD. (M/S) ... Appellant
Vs.
D.R. MOTORS (M/S) & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Order 2 Rule 2(3) - ***Effect of grant of leave to file the suit for any relief so omitted - Trial Court dismissed the suit but leave was granted to file a fresh suit for damages - In appeal, High Court held that plaintiff may file a suit against defendants for damages in which the defendants would be debarred from raising the plea of limitation - Fresh suit was filed for damages - Defendants have taken the plea of limitation - Held - Previous decision has attained finality in which permission was granted to file fresh suit - The previous judgment & decree gives a right to plaintiff to maintain the suit and debars the defendant to raise the plea of limitation.*** (Para 9)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 2 नियम 2(3) – किसी ऐसे अनुतोष के लिए वाद पेश करने की इजाजत देने का प्रभाव जिसका लोप कर दिया गया है – विचारण न्यायालय ने वाद खारिज किया किन्तु नुकसानी के लिए नया वाद पेश करने की इजाजत दी गयी – अपील में उच्च न्यायालय ने अभिनिर्धारित किया कि वादी नुकसानी के लिए प्रतिवादियों के विरुद्ध वाद पेश कर सकता है जिसमें प्रतिवादी परिसीमा का अभिवचन करने से विवर्जित हो जायेंगे – नुकसानी के लिए नया वाद पेश किया गया – प्रतिवादियों ने परिसीमा का अभिवचन किया – अभिनिर्धारित – पूर्ववर्ती विनिश्चय, जिसमें नया वाद पेश करने की अनुमति दी गई थी, अंतिम हो गया है – पूर्ववर्ती निर्णय व डिक्री वादी को वाद चालू रखने अधिकार देता है और प्रतिवादी को परिसीमा का अभिवचन करने से विवर्जित करता है।

B. Limitation Act (36 of 1963), Section 14(1) & (3), Civil Procedure Code, 1908, Order 23 Rule 2 & Order 2 Rule 2 - ***As per S. 14(3) of Act, the***

*F.A. No.549/1999 (Jabalpur)

provisions of S. 14(1) shall apply in relation to a fresh suit instituted on permission granted by the Court under Order 23 Rule 1 - The leave of the Court is also contemplated to file suit in case relief has been omitted to be claimed with respect to same cause of action under Order 2 Rule 2 - S. 14(3) of Act does not provide for the exigencies contemplated under Order 2 Rule 2. (Para 8)

ख. परिसीमा अधिनियम (1963 का 36), धारा 14(1) व (3), सिविल प्रक्रिया संहिता, 1908, आदेश 23 नियम 2 व आदेश 2 नियम 2 – अधिनियम की धारा 14(3) के अनुसार, न्यायालय द्वारा आदेश 23 नियम 1 के अन्तर्गत प्रदान की गयी अनुमति पर संस्थित किये गये नये वाद के सम्बन्ध में धारा 14(1) के उपबंध लागू होंगे – यदि अनुतोष का लोप आदेश 2 नियम 2 के अन्तर्गत कर दिया गया है और उसी वाद कारण के सम्बन्ध में दावा पेश करना हो तो वाद पेश करने के लिए न्यायालय की इजाजत अपेक्षित है – अधिनियम की धारा 14(3), आदेश 2 नियम 2 के अन्तर्गत अपेक्षित अत्यावश्यकताओं का उपबंध नही करती।

Cases referred :

(2007) 8 SCC 600, (1996) 4 SCC 453, AIR 1988 SC 2052, 1976 MPLJ 713, AIR 1973 SC 313, (2002) 4 SCC 578, (2002) 3 SCC 533, AIR 2001 Raj 51, (1997) 2 SCC 552, AIR 1965 SC 1970, (1990) 4 SCC 286, (2000) 6 SCC 1, (2005) 10 SCC 51, AIR 1989 Kar 50.

Ravish Agarwal with *Pranay Verma,* for the appellant.
Divesh Jain, for the respondents.

JUDGMENT

The Judgment of the Court was delivered by ARUN MISHRA, J. :–The appeal has been preferred by the defendant/appellant M/s Hindustan Motors Ltd. as against judgment and decree dated 4.5.1999 passed by 9th Addl. District Judge, Jabalpur in Civil Suit No. 190-B/95.

2. The question agitated in the appeal is whether the instant suit filed for seeking damages owing to breach of contract of dealership which was awarded to the plaintiff could be said to be barred by limitation in view of the leave which was granted by the Court under Order II Rule 2 Civil Procedure Code in the previous Civil Suit No. 54-A/1968 and decision rendered by a Division Bench of this Court in First Appeal No.106/1980 decided on 28.7.1987. Further question is whether the defendant can be said to be debarred from raising the plea of limitation.

3. M/s D.R.Motors, Jabalpur was granted dealership of M/s Hindustant Motors Ltd.in respect of business of franchise of Hindustan Ambassador Cars and Bedford Chassis and spare parts. Dealership was terminated by M/s Hindustan Motors Ltd. Prayer was made in Civil Suit No.54-A/1968 to declare the termination of dealership to be illegal, injunction was sought against the Hindustan Motors Ltd. restraining it from preventing the plaintiff from acting as a Dealer. Agency was terminated on 20th May,1968. The suit was dismissed by the trial Court vide judgment and decree dated 24.4.1980. Plaintiff was held entitled to claim the

damages after termination of the dealership, the relief of declaration and injunction was not granted. The trial Court had granted permission under Order II Rule 2 CPC to the plaintiff to sue for damages. Being aggrieved by the judgment and decree, the plaintiff had preferred FA No.106/1980 before this Court which was decided by a Division Bench of this Court vide judgment dated 28.7.1987. Cross objections were preferred by the present defendant appellant M/s Hindustan Motors Ltd. assailing part of the decision permitting the plaintiff to file fresh suit for damages. The appeal as well as cross objections were dismissed. It was held by the Division Bench of this Court that permission has been rightly granted to the plaintiff to file fresh suit to seek the damages, plea taken that after long lapse of time, permission could not have been granted was rejected and Division Bench of this Court held that plaintiff may file a suit against the defendant for damages in which the defendants would be debarred from raising the plea of limitation. Thereafter fresh suit was filed on 19.11.1987 claiming damages for Rs. 13,05,000/- which amount included the investment made, stock purchased, sum spent on tools and the profit which would have been earned etc. It was submitted by the plaintiff that average income from sale of cars and spare parts was Rs.3,00,000 per annum, for three years it was quantified to be Rs.9,00,000, interest was also claimed.

4. In the written statement filed by the defendant, the claims made by the plaintiff have been denied. It is submitted that the suit is barred by limitation, the finding recorded in the previous civil suit and in the first appeal does not operate as res judicata , security amount of Rs.5,000 was not accepted by the plaintiff, no loss has been suffered as such plaintiff is not entitled for any amount on account of damages.

5. The trial Court by the impugned judgment and decree dated 4th May,1999 has decreed the suit for an amount of Rs.13,04,000. Dissatisfied thereby the instant appeal has been preferred.

6. It is submitted by Shri Ravish Agarwal, learned senior counsel appearing with Shri Pranay Verma for appellant that it was not open to Division Bench of this Court in the previous litigation out of which FA No.106/1980 arose to bar the defendant from raising the plea of limitation. It was not open to High Court to act against the statutory provision of Limitation Act. Court could not curtail or extend the limitation prescribed by law for filing suit for damages. It was necessary to institute the suit within the period of limitation. Section 14 of the Limitation Act,1963 could not be said to be applicable. Section 3 of the Limitation Act cast a duty on the Court not to entertain time barred claim,although limitation has not been set up in defence. Even if a plaint is returned for presentation in proper Court, it is not in continuation of first suit, thus, drawing analogy, counsel has submitted that suit for damages, in the instant case, should have been filed within prescribed period of limitation . Cause of action arose on date of termination of agency i.e.20th May,1968. Law of Limitation is not affected by the pendency of the first suit.

Reference has also been made to Order XXIII Rule 2 CPC and the provisions of Order VII Rule 6 CPC. Relying upon Order VII Rule 6 CPC, it is submitted by the counsel that if a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed. Cause of action arose on the date of termination of agency not when the judgment in earlier suit was pronounced. Agency was terminated in the year 1968, suit was filed on 19.11.1987 as such it was barred by limitation.

7. Shri Divesh Jain, learned counsel appearing for the respondent M/s D.R.Motors Ltd. has contended that question as to limitation has been decided in the previous litigation between the same parties. The cross objection preferred against the decision rendered by the trial Court on 24.4.1980 in CS No.54-A/68 were dismissed by this Court vide judgment dated 28.7.1987 rendered in FA No.106/1980. Thus, question of limitation cannot be agitated again. Learned counsel has submitted that inter parties judgment rendered by the Court of competent jurisdiction, even if erroneous, would be binding upon the parties. The decision operates as res judicata . The question has attained finality, hence it cannot be reopened. Alternatively learned counsel has submitted that decision of the previous civil suit has given rise to fresh cause of action . On merits counsel has submitted that compensation prayed was not denied specifically in the written statement filed on behalf of defendant/appellant. There is no cross examination of the plaintiff with respect to the facts which he has stated supported by the documents. Consequently, no case for interference in appeal was made out.

8. The main question for consideration is whether the instant suit can be said to be barred by limitation in view of the decision rendered in the previous civil suit in which the permission was granted under Order II Rule 2 CPC to the plaintiff to file the instant suit for damages. Order II Rule 2 of CPC provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action;however, it is open to the plaintiff to relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Sub-rule (2) of Rule 2 of Order II CPC provides that where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. We are concerned with the omission in the instant case. Sub-rule (3) of Rule 2 of Order II CPC provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. The provision of Order II Rule 2(3) requires all the reliefs to be joined based on the same cause of action, in case of omission, without leave of the Court, fresh suit cannot be filed for the relief so omitted without leave of the Court. Order II Rule 2 CPC is quoted below :-

"2. **Suit to include the whole claim-** (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation :- For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

Leave of the Court is the sine qua non for entertaining a fresh suit to sue for the relief which has been omitted to be claimed. In the instant case, based on the termination of agency, in the previous civil suit relief was sought for declaration and injunction, it was open to the plaintiff to sue for relief of damages also as it was based on same cause of action, but he has omitted to sue for the relief of damages in the previous Civil Suit 54-A/68, however, plaintiff had filed an application under Order II Rule 2 CPC to permit it to file fresh suit seeking the relief for damages due to wrongful termination of the agency which prayer was allowed. It is not in dispute that in the previous civil suit it was held that plaintiff would be entitled for the damages not for declaration and injunction which was prayed for. Aggrieved by the judgment and decree passed in Civil Suit No. 54-A/1968 granting permission to the plaintiff to file fresh suit for relief of damages, cross objections were preferred in FA No. 106/1980 by the defendant/appellant, the cross objections as well as appeal were dismissed vide judgment dated 28.7.1987. Division Bench of this Court in FA No. 106/1980 has considered the cross objections preferred in para 32 and 33 of the judgment thus :-

"32. The plaintiff had filed an application on 17.4.1979 under Order 2 Rule 2 of the Code of Civil Procedure, for leave of the Court for filing another suit for accounts and such other reliefs as the plaintiff may find itself entitled. The trial Court had allowed the application. The counsel for the respondent No.1 argued in support of the cross-objection that such a relief could have been claimed in the suit

itself and the trial Court was not justified in granting the said relief to the plaintiff after lapse of such a long period.

33. Since we have held that the appellant- plaintiff is entitled to damages and for the purpose of ascertaining the amount, all the necessary fact, documents and evidence would be necessary in the suit. A just claim of the plaintiff should not be allowed to be defeated. It is in the interest of justice to grant the relief prayed for. We, therefore, hold that the relief granted by the trial Court is proper. The appellant-plaintiff may now file a suit against the defendants for damages. The defendants are debarred from raising any plea of limitation."

In appeal this question was agitated that whether after long lapse of time permission could have been granted. Division Bench of this Court repelled the submission and held that plaintiff may file fresh suit for damages in which defendants were debarred from raising the plea of limitation. In view of the fact that permission of the Court was required to sue for the relief which could have been claimed, but was omitted in the previous civil suit, the leave was prayed for and it was granted by the trial Court against which cross objections were preferred in FA No.106/ 1980, the fresh suit could not have been preferred till the decision of the FA rendered on 28.7.1987. As the appeal is continuation of the suit and matter of grant of leave to file suit for the relief which was omitted to be claimed was subjudice in the appeal which was decided on 28.7.1987 and thereafter on 19.11.1987 the instant suit was preferred before the trial Court claiming damages of Rs.13,05,000.

When we examine Order XXIII Rule 1(3) CPC which deals with withdrawal of suit or abandonment of part of claim, where the Court is satisfied that a suit must fail by reason of some formal defect, or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, the Court may permit the plaintiff to withdraw the suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. The provision of Order II Rule 2 CPC also provides for the permission of Court to sue with respect to relief which is omitted to be claimed. Order XXIII Rule 1(4) provides that in case withdrawal or abandonment is made without permission of the Court such plaintiff shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. Sub-section (3) of Section 14 of Limitation Act provides notwithstanding anything contained in rule 2 of Order XXIII of CPC, the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under rule 1 of Order XXIII CPC where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the Court or other cause of a like nature. The leave of the Court is

also contemplated to sue, that is, to file suit in case relief has been omitted to be claimed with respect to same cause of action under Order II Rule 2 CPC. Though section 14(3) of the Limitation Act does not provide for the exigencies contemplated under Order II Rule 2 CPC, but fact remains that without leave having been granted to sue with respect to the relief so omitted the suit could not have been preferred as that would have met with the dismissal. It was not in the hands of the plaintiff when the question of leave applied for would attain finality, once the leave has been granted that would have the effect of giving permission to sue with respect to relief omitted and thereafter suit has to be filed expeditiously. Admittedly the previous civil suit was filed in the year 1968 whereas dealership was also terminated in the year 1968, it was open to sue for the relief of damages also which was omitted, consequently permission became necessary to sue for the relief so omitted to be claimed in the previous suit,thus, grant of permission by the Court would have the effect of permitting the plaintiff to file the suit . In the instant case, in the previous civil suit, this question was in issue whether after long lapse of time permission could have been granted to the plaintiff to file suit for damages. In aforesaid para 32 and 33 of the judgment Division Bench of this Court has clearly held that even after long lapse of time such permission deserves to be granted and the defendants would be debarred from raising the plea of limitation in the suit for damages.

9. Shri Ravish Agarwal, learned senior counsel appearing with Shri Pranay Verma has relied upon decision of Apex Court in *Shiv Kumar Sharma vs. Santosh Kumari* (2007) 8 SCC 600 in which the Apex Court has held that if no leave has been taken, a separate suit may or may not be maintainable but even a suit wherefor a prayer for grant of damages by way of mesne profit or otherwise is claimed, must be instituted within the prescribed period of limitation. The Apex Court has laid down thus :-

> "20. In terms of Order 2 Rule 2 of the Code, all the reliefs which could be claimed in the suit should be prayed for. Order 2 Rule 3 provides for joinder of causes of action. Order 2 Rule 4 is an exception thereto. For joining causes of action in respect of matters covered by Clauses (a), (b) and (c) of Order 2 Rule 4, no leave of the court is required to be taken.. Even without taking leave of the Court, a prayer in that behalf can be made. A suit for recovery of possession on declaration of one's title and/or injunction and a suit for mesne profit or damages may involve different cause of action. For a suit for possession, there may be one cause of action; and for claiming a decree for mesne profit, there may be another. In terms of Order 2 Rule 4 of the Code, however, such causes of action can be joined and therefor no leave of the court is required to be taken. If no leave has been taken, a separate suit may or

may not be maintainable but even a suit wherefor a prayer for grant of damages by way of mesne profit or otherwise is claimed, must be instituted within the prescribed period of limitation. Damages cannot be granted without payment of court fee. In a case where damages are required to be calculated, a fixed court fee is to be paid but on the quantum determined by the court and the balance court fee is to be paid when a final decree is to be prepared."

The Apex Court has laid down that if no leave has been taken then suit must be instituted within the prescribed period of limitation. The facts of *Shiv Kumar Sharma vs. Santosh Kumari* (supra) indicates that the parties had entered into an agreement to sell their respective properties. Appellants title over the property which was owned and possessed by him appeared to be defective, the suit was filed praying for the relief of possession and injunction, the suit was decreed, injunction was granted. In appeal the High Court directed subject to such exceptions including limitation, liberty was given to the plaintiff to claim relief by way of damages/mesne profit in separate suit filed before the competent Court. The decision was assailed before the Apex Court and the question was also raised as to directions and damages awarded. The question was agitated that Order II Rule 2 CPC bars a second suit. The Apex Court held in the aforesaid backdrop of the facts that if no leave has been taken, a separate suit may or may not be maintainable, but even a suit wherefor a prayer for grant of damages by way of mesne profits or otherwise is claimed must be instituted within the prescribed period of limitation. He had not claimed damages in the suit, he had full knowledge about his right, thus, plaintiff could not be permitted to get the same indirectly as what cannot be done directly cannot be done indirectly. The equity jurisdiction can be exercised only when no law operates in the field, Court of law cannot exercise discretionary jurisdiction dehors the statutory law. Its discretion must be exercised in terms of existing statute and must yield to law. The decision of the High Court was set aside. In the instant case, previous decision has attained finality in which permission was granted to file fresh suit, the previous judgment and decree gives a right to plaintiff to maintain the suit and debars the defendant to raise the plea of limitation .In case defendant/appellant was aggrieved by the adjudication made by this Court in FA No.106/80 decided on 28.7.87 ought to have assailed the decision, but the decision having attained finality, filing of the fresh suit could not be permitted to be set at naught by permitting to raise the the same pleas afresh which were taken against the grant of permission and defence of lapse of time was also set up against grant of permission to grant leave to sue for damages.

10. Learned counsel for the appellant has relied upon decision in *Union of India and another vs. Kirloskar Pneumatic Co.Ltd.* (1996) 4 SCC 453 in which

the Apex Court considered the directions issued by the High Court not to reject the application on the ground that it is time barred. Referring to *CCE vs. Doaba Coop.Sugar Mills Ltd.* AIR 1988 SC 2052, the Apex Court has posed the question whether it is permissible for the High Court to direct the authorities under the Act to act contrary to the aforesaid statutory provision. The answer was in negative. As the power conferred by Articles 226/227 of the Constitution is designed to effectuate the law, to enforce the rule of law and to ensure that the several authorities and organs of the State act in accordance with law, it cannot be invoked for directing the authorities to act contrary to law. The decision is of no help in view of the provision of Order II Rule 2(3) CPC which provides for grant of leave to sue in case of omitted relief the Court was required to consider it and the decision of the previous suit having attained finality is not open to be challenged in the instant case. It was not merely observation made, it was a right conferred which has been permitted to attain finality. In *Raja Traders, Jagdalpur vs. Union of India and another* 1976 MPLJ 713 it has been held that the Court cannot curtail or extend limitation prescribed by law. There is no dispute with respect to aforesaid proposition. Question of effect of grant of leave on limitation to file the suit for the reliefs omitted and the decision of previous civil suit dealing with question of limitation militates against the submission raised by the defendant/appellant.

11. Section 3 of the Limitation Act has been invoked by Shri Ravish Agarwal, senior counsel to support the submission that even if defendant-appellant is debarred from raising the plea of limitation, in the instant suit in view of the prevision decision , section 3 of limitation mandates the Court to dismiss the suit as it is apparently barred by limitation. We are not impressed by the submission in view of the clear decision in previous suit in which question of limitation was gone into thereafter permission had been granted. In view of the decision of First Appeal No.106/1980 rendered by a Division Bench of this Court, it would not be proper to permit the defendant/appellant to raise the plea of limitation afresh. There is no equity in favour of defendant appellant. Right or wrong, previous decision has attained finality, it cannot be permitted to be reopened.

12. Shri Ravish Agarwal, learned senior counsel has also referred to provision of Order VII Rule 6 CPC which provides that the grounds of exemption from limitation law have to be mentioned in the plaint, where the suit is instituted after the expiration of the period prescribed by the law of limitation. In the instant case, it is clear that the permission granted under Order II Rule 2 CPC has been pleaded including the decision which was rendered in the previous suit, that is sufficient compliance of Order VII Rule 6 CPC.

13. Learned counsel has also referred to provision of Order VII Rule 10 of CPC which provides for return of the plaint and decision of the Apex Court in *Amar Chand Inani vs. Union of India* AIR 1973 SC 313 wherein the Apex Court has held that when plaint is presented in proper Court after its return is not

continuation of a suit initially filed in wrong Court so as to attract section 4 of the Limitation Act. Question in the instant case is not of wrong court, but effect of grant of permission and adjudication as to plea of limitation which was set up as defence as against grant of permission under Order II Rule 2 of CPC in the previous lis. Thus, the decision is of no help to appellant. It cannot be said that Division Bench of this Court has legislated in the previous decision. In *P.Ramchandra Rao vs. State of Karnataka* (2002) 4 SCC 578 it has been held that Courts can declare law, they can interpret the law, they can remove obvious lacunae and fill the gaps,but they cannot entrench upon in the field of legislation properly meant for the legislature. Binding directions, deleting the bars of limitation on the twin grounds was made amounts to judicial legislation, it was not permissible and because they run counter to the doctrine of binding precedents. In the instant case, it could not be said that Division Bench of this Court has legislated while granting permission, what is the effect of grant of permission on the limitation was considered in the previous case and decision was rendered which has attained finality. Similar view has been taken in *Padma Sundara Rao (Dead) and others vs. State of T.N. and others* (2002) 3 SCC 533. In view of clear language of Order II Rule 2(3) of CPC having omitted to claim the relief of damages, it was not open to sue without grant of leave for the relief so omitted, hence, when the question of leave and limitation has attained finality in the previous first appeal, the suit which has been filed could not be said to be barred by limitation.

14. It would be appropriate to refer the decisions relied upon by Shri Divesh Jain, learned counsel appearing for respondents. In *Barkat Ali and others vs. Badrinarain* AIR 2001 Rajasthan 51 it has been held that decision on question of limitation even if erroneous operates as res judicata in subsequent proceedings. An order passed by a Court having jurisdiction over subject-matter and parties cannot be ignored as nullity unless it is corrected in accordance with law. Such orders bind the parties at a subsequent stage of the proceedings and operates as res judicata in subsequent proceedings. Reliance has also been placed on a decision in *Gorie Gouri Naidu (Minor) and another vs. Thandrothu Bodemma and others* (1997) 2 SCC 552 wherein the Apex Court has held that inter parties judgment rendered by Court of competent jurisdiction, even if erroneous, would bind the parties. In *Amireddi Raja Gopala Rao and others vs. Amireddi Sitharamamma and others* AIR 1965 SC 1970, *Life Insurance Corporation of India vs. India Automobiles and Co. and others* (1990) 4 SCC 286, *Baba Charan Dass Udhasi vs. Mahant Basant Das Babaji Chela Baba Laxmandas Udasi Sadhu* (2000) 6 SCC 1 and in *Swamy Atmananda and others vs. Sri Ramakrishna Tapovanam and others* (2005) 10 SCC 51 similar view has been taken. In *Narashalli Kempanna and others vs. Narasappa and othrs* AIR 1989 Karnataka 50 in which the Apex Court has laid down that if the Court dismisses the suit stating that relief has to be sought for partition, such a decree

amounts to permitting the plaintiff to file a separate suit for partition and possession, thus, bar contained in Order II Rule 2 CPC is not attracted because the dismissal of the suit on that ground not only gives rise to a fresh cause of action but also amounts to granting leave for filing another suit for such relief.

15. In view of aforesaid discussion, we are not inclined to accept the submission raised by Shri Ravish Agarwal, learned senior counsel that the instant suit is barred by limitation. The submission is hereby rejected.

16. Coming to the submission made that there is no elaborate discussion with respect to grant of damages. We have gone through the pleadings and entire evidence on record. In the written statement there was general denial of the damages which were claimed, there was no specific denial of the various claims which were made. When we consider the evidence, Chiman Bhai Patel has clearly proved the damages which were suffered including loss of profit and in support of statement certain documents have been placed on record and in rebuttal no evidence has been adduced on behalf of the defendant/appellant. The plaintiff has not been cross examined on the point stated in the examination-in-chief, thus, the statement has been rightly accepted.

17. The trial Court, in the circumstances, is justified in granting damages which have been claimed, with respect to entitlement of the damages, there is no dispute. It was so held in the previous suit also that plaintiff would be entitled for damages in view of the wrongful termination of the agency.

18. Resultantly, the appeal being devoid of merits is hereby dismissed. Parties to bear their own costs as incurred of the appeal.

Appeal dismissed.

I.L.R. [2010] M. P., 225
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik
29 June, 2009*

SHYAMLAL & ors. ... Appellants
Vs.
BABULAL & ors. ... Respondents

A. **Hindu Law** - ***Joint family property - Factum of proof - Determination*** - *Plaintiff is required to establish that there was a sufficient nucleus which could have been the source of acquisition of property - Whole of the money required for the purchase of the property is not required to be proved* (Para 7)

क. हिन्दू विधि – संयुक्त परिवार सम्पत्ति – सबूत का तथ्य – अवधारण – वादी को यह साबित करना आवश्यक है कि पर्याप्त केन्द्रक था जो सम्पत्ति के अर्जन का स्रोत हो

*S.A. No.410/1999 (Gwalior)

सकता था – सम्पत्ति को क्रय करने के लिए अपेक्षित सम्पूर्ण धनराशि साबित किया जाना आवश्यक नही है।

B. Hindu Law - *Self acquired property - Factum of proof - Determination - It is sufficient in law that there is proof about the nucleus which could have been the source of the acquisition - Once the existence of such a nucleus is proved obviously it is for the person asserting his self acquired property to prove affirmatively that he acquired it from his own self acquired funds.* (Para 7)

ख. हिन्दू विधि – स्वअर्जित सम्पत्ति – सबूत का तथ्य – अवधारण – विधि में यह पर्याप्त है कि केन्द्रक के बारे में सबूत हो जो अर्जन का स्त्रोत हो सकता था – जब एक बार ऐसे केन्द्रक का अस्तित्व साबित कर दिया जाता है तब प्रत्यक्षतः अपनी स्वअर्जित सम्पत्ति होने का दावा करने वाले व्यक्ति को सकारात्मक रूप से यह साबित करना होगा कि उसने उसे स्वयं की स्वअर्जित निधियों से अर्जित किया।

Cases referred :

AIR 1969 SC 1076, AIR 1960 SC 335, AIR 1985 All 348, AIR 1968 SC 1276.

K.N. Gupta with *Prakhar Dengula,* for the appellants.

R.P. Rathi, for the respondent Nos.1 & 2.

JUDGMENT

ABHAY M. NAIK, J. :–Plaintiffs/respondents No. 1 and 2 instituted a suit for declaration, partition and perpetual injunction mainly with the allegations that the private parties to the suit were legal heirs of Munnalal and Gyarasibai. After the death of Munnalal, defendant/appellant No. 1 being the eldest, became manager of the Joint Hindu Family, which owns agricultural land in area 56 Bigha and two Biswa at Vidisha, which was recorded in the name of defendant/appellant No.1. Out of this land, an area of 28 Bigha 1 Biswa was sold in the year 1963. Remaining land described in para 3 of the plaint, is the subject-matter of this appeal. It was alleged that a division of the capital of the business of Joint Hindu Family took place on 25/10/1973 between the plaintiffs, defendants No. 1 and 2 and widow of Munnalal. On 12/5/1977, residential houses belonging to the Hindu Joint Family were also divided. However, the suit land remained undivided because the parties used to share the crops of agricultural produce till the year 1987. In the year 1988, defendant/appellant No. 1 refused to provide agriculture share to the plaintiffs. On enquiry, they came to know that the defendant/appellant No. 1 got the suit property partitioned between him and his children and got it recorded separately in separate shares in revenue records. Hence, the suit with the following reliefs:-

"(i) that, it may be declared that the plaintiffs have 1/4th share each in the suit land;

(ii) that, the suit land may be partitioned and separate possession may be delivered to the plaintiffs;

(iii) that, the defendants may be restrained by issuing permanent injunction from interfering in to the land on allotment to the plaintiffs by partition;

(iv) that, mesne profit at the rate of 10,000/- p.a. may be awarded."

2. Defendants Nos. 1,2 and 4 to 7 submitted their written statement denying thereby the claim of the plaintiffs. It was denied that the suit land was Joint Hindu Family property. On the contrary, it was averred that it was self acquired of the defendant/appellant No.1. It was further stated that partition took place on 25/10/1973 and thereafter plaintiffs and defendants No. 1,2 and 3 occupied their respective portions and started independent business. Alleged partition on 12/5/1977 in respect of the house property was denied in specific. Since the suit land was purchased by defendant No. 1 by his self acquired money it was rightly partitioned between him and his sons.

3. Earlier, learned trial judge dismissed the suit vide impugned judgment and decree dated 21/7/1998. On appeal, the same was set aside vide impugned judgment and decree dated 12/8/1999 allowing further the suit of the plaintiffs declaring that the plaintiffs have 1/4th share each in the suit agricultural land and shall have right to obtain possession by partition through the Collector, Vidisha. Mesne profit at the rate of Rs. 2,000/- has also been ordered. Aggrieved by the aforesaid, present appeal is preferred which has been heard on the following substantial question of law in addition to I.A.Nos. 5360/01, 5361/01 & I A. No. 17173/08;

"Whether the findings of the first appellate court are vitiated on the point of nucleus in absence of specific plea of partial partition of Joint Hindu Family?"

4. It is contended on behalf of the appellant that the disputed agricultural land was purchased by the appellant defendant No. 1 in his own name vide registered sale deed 21.09.1985 (Ex. D/1). It is not proved to have been purchased by the funds of HUF. Moreover, a partition having once taken place in the year 1970, suit for further partition is not tenable and the same is liable to be dismissed. Learned counsel for the respondents on the other hand supported the impugned judgment and decree.

5. Learned courts below after appreciating the evidence found that the father Munna Lal was engaged in business which was inherited by his children. Defendant/ appellant No. 1 being the eldest, started managing it. Land in question was purchased in the year 1957 and 1959. No other source of income could be established except the business inherited from the father. Although, the defendant No. 1 has stated in his written statement that the suit land was his self acquired

property, he failed to establish the said fact. On the contrary, in para 2 of his statement, it was earlier stated that the suit land was purchased by money raised on account of sale of jewellery of defendant No. 1's wife. This was objected for want of pleadings and was not allowed to be recorded. Thereafter, defendant/ appellant No. 1 in next para i.e. Para 3 took another stand that it was purchased by him by his own money. It is pertinent to note that the defendant/appellant No. 1 has, in his statement nowhere stated that he had raised sufficient money from any other source for the purchase of the disputed land. On the contrary, he had admitted in para 14 of his statement that the shop left by his father was managed by him and his brother Mangaljeet, after the death of his father. He further admitted in the same para that he was manager of the Joint Hindu Family. Father of defendant/appellant No. 1 and plaintiff namely Munna Lal died in the year 1942 as admitted in para 13 of his statement by defendant/appellant No. 1. In para 18 he further admitted that after the death of his father he along with his mother and brother remained joint up to the year 1957. Plaintiff / respondent No.1 opened shop in the year 1970 with the capital provided by defendant/appellant No. 1 as stated in para 19. Thereafter, in the year 1977 a division took place which according to the plaintiffs did not include the disputed land. This is stated to have been effected vide Ex. P/3. Copy of this document is on record as Ex. P/3-C, which reveals that a division of capital of the business took place vide Ex. P/3 or Ex. P/3-C. Thus, contention of the plaintiffs gets strengthened that at the time of division vide Ex. P/3-C agricultural land was not partitioned but was kept joint.

6. Supreme Court of India in the case of *Mudigowda Gowdappa Sankh and Others Vs. Ramchandra Revgowda Sankh (dead) by his L.Rs.* AIR 1969 SC 1076 has observed :-

> *"The case of the appellants was that these lands were self-acquisition of Goudappa, but the respondents contended that they were joint family properties. The law on this aspect of the case is well settled. Of course there is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as coparcenery property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presume to be joint family property. This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively*

make out that the property was acquired without any aid from the family estate."

Supreme Court of India in the case of *Mst. Rukhmabai Vs Lala Laxminarayan and Others* AIR 1960 SC 335 has observed as under:-

"The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the members of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property."

7. It is again a settled law that the plaintiff seeking partition of a particular property as joint family property is required to establish that there was a sufficient nucleus which could have been the source of acquisition. Whole of the money required for the purchase of the property in partition suit is not required to be proved to have actually come out from nucleus or that the nucleus was sufficient to have yielded all the necessary funds for acquiring the property in dispute. It is sufficient in law that there is proof about the nucleus which could have been the source of the acquisition. Once the existence of such a nucleus is proved obviously it is for the person asserting his self acquired property to prove affirmatively that he acquired it from his own self acquired funds. High Court of Allahabad in the case of *Patram Singh Vs. Bahadur Singh* (AIR 1983 Allahabad 348) has observed in para 14 :-

"Even apart from this principle of blending, the defendant was the Karta of the family. The joint family did have property in the form of agricultural lands and an ancestral house which could very well have been the nucleus from which the money for purchasing the land or building the house in dispute could have come. It is not the law that the whole of the money required for the same must be proved to have actually come out from such nucleus, or that the nucleus was sufficient to have yielded all the necessary funds for acquiring the property in dispute. It is sufficient in law to find that there was a nucleus which could have been the source of the acquisition. It is not necessary to prove that the nucleus was in fact the source of the acquisition. Once the existence of such a nucleus is proved, it is for the person contending that the property is his self-acquired property to prove affirmatively that he acquired it from his own self-acquired funds. It is not sufficient for him to show or to suggest that it could have been acquired from his

self acquisition. He must prove it positively as a fact that the source of the acquisition of the property in dispute was his self-acquired income or fund."

8. Thus, the courts below have rightly found on the basis of correct appreciation of evidence on record that there was nucleus of Joint Hindu Family which could have yielded consideration for the purchase of land in question and that the defendant/appellant No. 1 was managing the business left by father of the parties, namely, Munna Lal and that the defendant/appellant No. 1 has failed to prove that he had purchased the land by his self earned money. Plaintiffs have clearly pleaded in para 4 that on 25.10.1973 there took place a division of merely capital invested in the business of HUF and thereafter their took place a division of residential house on 12.05.1977. It is dearly averred in para 4 of the plaint that the disputed land remained undivided up to the year 1987 and the parties used to share the crops, defendant/appellant No. 1 himself has admitted that the plaintiffs and defendants were maintained by the agricultural produce until they were separated. Thus, it cannot be said that the absence of partition in respect of disputed land was not pleaded. On the contrary, it is found to have been clearly pleaded that the disputed land was not partitioned and was left joint at earlier stages.

9. Thus, in the totality of facts and circumstances, the substantial question of law is decided against the appellants, in favour of the plaintiffs.

10. As regards, substantial question of law proposed by I.A. Nos. 5360/01, 5361/01 & I.A. No. 17173/08, it is observed that the substantial question of law proposed by first two applications are merely in the nature of arguments. As regards, I.A. No. 17173/08, it is observed that in the absence of factual foundation substantial question of law proposed by this application does not deserve consideration. Citation reported in AIR 1968 SC 1276 *(G.Narayana Raju (dead) by his L.Rs. Vs. G. Chamaraju and others)* deals with blending, whereas, in the case in hand it is found proved that the property in question was Joint Hindu Property. Accordingly, all the three I.As' are hereby dismissed.

11. In the result, appeal is dismissed, however, with no order as to costs.

Appeal dismissed.

I.L.R. [2010] M. P., 231
APPELLATE CIVIL
Before Mr. Justice Rajendra Menon
27 August, 2009*

U.P. SHARMA ... Appellant
Vs.
JABALPUR CORPORATION & ors. ... Respondents

A. **Municipal Corporation Act, M.P. (23 of 1956), Section 66** - *Accident due to stock of sand on public road - Claim for compensation against Corporation - Held - Corporation failed to discharge its duty in maintaining properly the road in safe condition and due to use of same plaintiff suffered injuries - Corporation is responsible to pay compensation for the loss or damage suffered by the plaintiff - Appeal allowed.* (Paras 18, 19, 22 & 23)

क. नगर पालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 66 – सार्वजनिक सड़क पर रेत के संग्रह के कारण दुर्घटना – निगम के विरुद्ध प्रतिकर के लिए दावा – अभिनिर्धारित – निगम सड़क को समुचित रूप से सुरक्षित दशा में रखने के अपने कर्तव्य निर्वहन में असफल हो गया और उसके उपयोग के कारण वादी को क्षतियाँ आयीं – निगम वादी को हुई हानि या नुकसान के लिए प्रतिकर अदा करने के लिए उत्तरदायी है – अपील मंजूर।

B. **Law of Torts** - *Negligence - Plaintiff has proved negligence on the part of Municipal Corporation in maintaining a public road in its proper condition which has resulted in accident - Consequently caused loss & damage to the plaintiff - Plaintiff is entitled to compensation for loss and injury suffered by him.* (Paras 20 & 21)

ख. अपकृत्य विधि – उपेक्षा – वादी ने सिद्ध किया कि नगर पालिक निगम ने लोक मार्ग को उपयुक्त दशा में रखने में उपेक्षा की जिसके परिणामस्वरूप दुर्घटना हुई – परिणामतः वादी को हानि और नुकसान कारित हुआ – वादी द्वारा जो हानि और क्षति वहन की गई उसके लिए वह प्रतिकर का हकदार है।

Cases referred :

(1994) 4 SCC 1, 1968 MPLJ 533, (1997) 9 SCC 552, AIR 1999 SC 1929, 1992(1) MPJR 93, AIR 1980 SC 1622.

Kishore Shrivastava with *Manoj Sharma,* for the appellant.
None, for the respondents.

J U D G M E N T

Rajendra Menon, J. :–This is plaintiff's appeal filed under section 96 of the Code of Civil Procedure assailing the judgment and decree dated 29.11.94, passed by the 12th Additional District Judge, Jabalpur in Civil Suit No.94-B/94 *[U.P. Sharma Vs. Jabalpur Corporation and Others].*

*F.A. No.82/1995 (Jabalpur)

2. It is the case of the appellant that in the year 1982, he was posted as a Police Inspector, Incharge of Garha Police Station. In the night intervening 23/24.1.82, at about 1.30 AM, while he was going on his motorcycle on the main road, when he reached a place near Gautamji Ki Madiya, two heaps of earth (sand) were put in a culvert on the road without any warning signal or notice, as a result appellant ran over the mud/sand, his motorcycle skid and he suffered serious injuries on his body. He was admitted to Medical College, Jabalpur in an unconscious state. He was treated in the Medical College from 23.1.82 to 27.3.82. Thereafter, he was shifted to Nagpur, Bombay and Delhi where he underwent treatment. Claiming that because of the accident he had suffered serious injuries on his right hand, this right hand has become non-functional and has suffered permanent disability, suit in question was filed against the Municipal Corporation claiming compensation of Rs.37,000/- for the negligence of the Corporation, which resulted in the accident.

3. Respondent Municipal Corporation appeared and refuted the claim of the plaintiff and contended that the sand in question, on which the appellant is said to have skid alongwith the motorcycle, were never put by the Corporation in the said area, it was their case that no work of the Corporation was going on in the said area and the accident has got nothing to do with any activity of the Corporation. Accordingly, the claim of the appellant was resisted.

4. In order to establish his claim, appellant examined himself as PW-1 and examined two more witnesses namely; PW-2 R.K. Choudhary and PW-3 Shivraj Singh, so also the Doctor, who treated him. Even though the witnesses of the plaintiff and the plaintiff himself testified with regard to occurrence of the accident, the learned court below had held that they were unable to prove that the sand in question, on the road, was put by the Municipal Corporation or its officers. It was not established by them that the Municipal Corporation was carrying out any work in the said area.

5. On behalf of the Municipal Corporation, two witnesses namely; DW-1 Suresh Kumar Chourasia and DW-2 N.L. Dubey were examined and they stated before the Court that they are not aware of the accident, it has not taken place because of the negligence of the Corporation, it was stated by them that the sand in question was never put by the Corporation, no construction activity in the area was going on. Accordingly, the respondents tried to resist the claim of the appellant.

6. After evaluating the totality of the circumstances, finding recorded by the court below is that even though the accident had taken place in the manner as narrated by the appellant, but accident due to the negligence of the Municipal Corporation is not proved and the suit has been dismissed. Assailing the aforesaid, this appeal has been filed.

7. Shri Kishore Shrivastava, learned counsel for the appellant, taking me through

the statement of plaintiff himself, recorded as P.W.-1 and that of his witnesses P.W-2 Shri R.K. Choudhary and P.W.-3 Shri Shiv Raj Singh argued that from the statement of these witnesses occurrence of the accident in the manner as indicated by the plaintiff is proved and in para 14 of the impugned judgment finding recorded while answering issue No.2 is to the effect that accident is proved. Shri Kishore Shrivastava submitted that the suit is dismissed only on the ground that the plaintiff has failed to established the fact that the sand in question, on the road, was put by the municipal corporation and, therefore, they are not responsible for paying damages to the appellant. Shri Kishore Shrivastava, learned Senior Counsel by taking me through the cross-examination of these witnesses and the statements of defendants' witness No.1 Shri Suresh Kumar Chourasiya and D.W.-2 L.N. Dubey submitted that if the statement of these witnesses are scanned and the suggestion to defendants' witnesses in cross-examination by the municipal corporation are also scrutinized, it would be seen that the municipal corporation has not denied putting up of the obstruction completely, but the suggestion was that the obstruction was put in such a manner that sufficient space was available for the plaintiff to move freely on the road. Shri Kishore Shrivastava emphasized that the evidence available on record and the stand of the Municipal Corporation suggest that it was their case that some work was going on about a kilometer or about half kilometer away from the place where accident took place, it is stated that defendants do not denying completely that no work was going on, Shri Kishore Shrivastava submitted that if the entire evidence is scrutinized the contention of the plaintiff that the material was put by the municipal corporation cannot be ruled out, however, he argued that even if it is assumed that the Municipal Corporation had not put the sand in the place as indicated hereinabove, but the fact about availability of the sand in a public road was apparent from the face of record and when the Municipal Corporation, a creation of the statute, i.e. Municipal Corporation Act 1956 is required to discharge its function in such a way so as to protect public safely and if the negligence of the defendants in not removing obstructions in the road results in an accident causing injuries to a member of the general public, it will give rise to a claim for damages under the law of tort and Municipal Corporation cannot wriggle out of liability to pay compensation, in case it is found that obstruction was created on a public way in such a manner that it resulted in the accident, Shri Kishore Shrivastava argued that even if the plaintiff has failed to prove that the sand in question was put by the Municipal Corporation, the availability of the material in the road in the manner that an obstruction is created, the same is enough to claim damages under the general law of Tort, as it is a statutory duty of the Municipal Corporation to keep the public way and road in such a manner that it is safe for use by the public without any obstruction.

8. Placing reliance on a judgment of Supreme Court in the case of *Jay Laxmi Salt Works (P) Ltd. Vs. State of Gujarat,* (1994) 4 S.C.C., 1, and judgment

rendered by Division Bench of this Court in the case of *State of M.P. Vs. Ganpat Chunnilal & Ors.* 1968, M.P.L.J. 533, Shri Kishore Shrivastava argued that in this case as negligence on the part of Municipal Corporation in maintaining the public way is established and, therefore, the liability under the general law of Tort can be imposed upon Municipal Corporation, as they have failed to discharge their statutory duties. Referring to observations made by Supreme Court in para 8 & 9 in *Jay Laxmi Salt Works (P) Ltd.* (Supra) Shri Kishore Shrivastava learned Senior Counsel emphasized that, if damages are caused to a person because of some negligence on the part of the State or its organ in the matter of maintaining essential functions and duties statutorily imposed under law then the State or its authorities are responsible to make good the loss caused to the person concerned under the law of Tort. Accordingly, Shri Kishore Shrivastava as an alternate submission argued that once the accident is held to be proved and when it is established that sand was lying on the public road maintained by municipal corporation, resulting in the accident, then as the municipal corporation has failed to discharge statutory duty imposed upon it in the matter of maintaining roads in a proper manner, keeping in view the safety of the general public using it, a claim against the municipal corporation is maintainable and if the matter is analyzed in the aforesaid background, Shri Kishore Shrivastava argued that it is a fit case where the suit should be decreed and damages granted.

9. That apart, taking me through the finding recorded by learned Court below with regard to issue No.3 to 6 Shri Shrivastava argued that as the claim made by the appellant with regard to the accident and damages caused are proved and, therefore, the said amount should be granted as there is no counter appeal or cross-objection from the respondents.

10. Even though the matter is listed continuously for the last 1 week and the appeal is more than 14 years old, none is appearing for the Municipal Corporation inspite of the fact that they are represented by counsel.

11. Facts that have come on record clearly indicates that plaintiff suffered the injury in the accident that had taken place on 23/01/82 in the manner as narrated by plaintiff in the plaint. The finding recorded by the trial court as contained in para 14 clearly indicates that the trial Court has held the accident to have been proved, but the suit is dismissed only on the ground that the plaintiff has failed to prove negligence on the part of municipal corporation in as much as there is no material to show that the sand in question on the road was put by the municipal corporation.

12. From the statements made by Shri Kishore Shrivastava, learned Senior Advocate, it would be seen that he had made a two fold submission; the first limb of his argument was that the evidence available on record if scanned would indicate that plaintiff has proved putting up of the material in the public way as alleged in the plaint.

13. Plaintiff himself was examined as P.W-1 and his witness P.W.-2 R.K. Choudhary, P.W.-3 as Shiv Raj Singh, who were residing in the vicinity have testified to the effect that the material in question was put by the municipal corporation and certain work with regard to construction of a small culvert was going on in a place, which was between 1 or ½ kilometer away from the place of accident. Work of the culvert being going on is admitted by the witness for defendants namely D.W-1 Suresh Kumar Chourasiya and D.W-2, L.N. Dubey, however, learned Court has rejected the claim of the plaintiff only on the ground that there was no work of the municipal corporation going on in the place of the accident and, therefore, the plaintiff has failed to prove that the sand lying on the road was being used by the municipal corporation or for some work on their behalf, this finding of learned court below is wholly perverse. P.W.-2 Shri R.K. Choudhary and P.W.3 Shiv Raj Singh in their evidence and in cross-examination even though say that no work was going on in the spot where the sand was lying, but they admit that some work with regard to construction of a culvert was going on about 1 to ½ km away. That apart the suggestions put to the witness by the counsel for municipal corporation in cross-examination are only to the effect that no work was going on in the spot where the accident took place, there is nothing to show that for the work going on about ½ k.m. to 1 k.m. away the sand was not being used. However, after evaluating the submission made by Shri Kishore Shrivastava learned Senior Advocate and on analysis of the evidence that has come on record there is much force in the contention of Shri Kishore Shrivastava to the effect that the Corporation admit the accident, the fact of sand lying in the area and their suggestion to the witnesses does indicate that there was ample space for the appellant to move by avoiding the obstruction. If this aspect of the matter is taken note of in the light of the principle laid down in the case of *Jay Laxmi Salt Works (P) Ltd.* (Supra) and applied it would make the Corporation liable for negligence, if there statutory duty in maintaining the road in a safe condition are taking note of. That being so, this Court deems it appropriate at this stage to evaluate the second contention raised by Shri Kishore Shrivastava and to determine the liability of the municipal corporation in the matter of discharging their statutory duty.

14. Section 66 of the M.P. Municipal Corporation Act, 1956 contemplates matters to be provided for by the corporation sub-clause (a), (b) and (f) of sub-section (1) of Section 66 casts a duty on the municipal corporation to provide proper facility for lighting public streets, public places and buildings and keep the street in a clean and healthy condition, so also it imposes a duty upon them to remove obstruction and projections in public streets, if breach of duty this results in damage to a member of public at large the same would attract liability under the general law of Tort against the municipal corporation. In the case of *Jay Laxmi Salt Works (P) Ltd.* (Supra) various presumption with regard to liability under the law of tort are considered and it is held by the Supreme court that if injury or harm

is caused to a person either intentionally or innocently due to negligence on the part of State or its organ the liability of the State in a welfare society cannot be ruled out. In the said case certain damages were caused due to construction activities being carried out by the State and loss was caused due to negligence in the said activities, while dealing with the question of awarding damage to a citizen, who had suffered injuries because of the negligence of the State in the matter of carrying out construction activities the principle of tort and the question of liability of the State and its organ has been dealt with by the Supreme Court in para 8 & 9 in the following manner :

> "Truly speaking entire law of torts is founded and structured on morality that no one has a right to injure or harm others intentionally or even innocently. Therefore, it would be primitive to class strictly or close finality (sic finally) the ever-expanding and growing horizon of tortious liability. Even for social development, orderly growth of the society and cultural refineness, the liberal approach to tortious liability by courts is more conducive.
>
> (9) In between strict liability and fault liability there may be numerous circumstances in which one may be entitled to sue for damages. And it may be partly one or the other or may be both. In a welfare society construction of dam or bundh for the sake of community is essential function and use of land or accumulation of water for the benefit of society cannot be non-natural user. But that cannot absolve the State from its duty of being responsible to its citizens for such violations as are actionable and result in damage, loss or injury. What is fundamental is injury and not the manner in which it has been caused. 'Strict liability', 'absolute liability', 'fault liability' and 'neighbour proximity' are all refinements and development of law by English courts for the benefit of society and the common man. Once the occasion for loss or damage is failure of duty, general or specific, the cause of action under tort arises. It may be due to negligence, nuisance, trespass, inevitable mistake etc. It may be even otherwise. In a developed or developing society the concept of duty keeps on changing and may extend to even such matters as was highlighted in *Donoghue v. Stevenson* where a manufacturer was held responsible for injury to a consumer. They may individually or even collectively give rise to tortious liability. Since the appellant suffered loss on facts found due to action of respondent's officers both at the stage of construction and failure to take steps even at the last moment it was liable to be compensated."
>
> (Emphasis Supplied)

15. Apart from the aforesaid case Supreme Court in the case of *Rajkot Municipal Corporation Vs. Manjulben Jayantilal Nakum & Others,* (1997) 9, S.C.C., 552, has observed as under :

> "When a person uses a road or highway, under common law one has a right to passage over the public way. When the defendant creates by positive action any danger and no signal or warnings are given and consequently damage is done, the proximate relationship gets established between the plaintiff and the defendant and the causation is not too remote. Equally, when the defendant omits to perform a particular duty enjoined by the statute or does that duty carelessly, there is proximity between the plaintiff-injured person and the defendant in performance of the duty and when injury occurs or damage is suffered to person or property, cause of action arises to enable the plaintiff to claim damages from the defendant. But when the causation is too remote, it is difficult to anticipate with any reasonable certainty as ordinary reasonable prudent man, to foresee damage or injury to the plaintiff due to causation or omission on the part of the defendant in the performance or negligence in the performance of the duty.
>
> (Emphasis Supplied) (Para 61)
>
> When the defendant was not in know of the discoverable defect or danger and it caused the damage by accident like sudden fall of the tree, it would be difficult to visualise that the defendant had knowledge of the danger and he omitted to perform the duty of care to prevent its fault. There would be no special relationship between the statutory authority and the plaintiff who is a remote user of the footpath or the street by the side of which the trees were planted, unless the defendant is aware of the condition of the tree that it is likely to fall on the footpath on which the plaintiff/ class of persons to which he belongs frequents it. The defendant by his non- feasance is not responsible for the accident or cause of the death since admittedly there was no visible sign that the tree was affected by disease. It had fallen in a still condition of weather."
>
> (Para 58)

Even though in the said case the Supreme Court had rejected the claim for compensation arising due to fall of tree standing by the roadside, if the observations made in para 61 are taken note of, it would be seen that when the statutory authority omits the performance of particular duty enjoying from a statute or does the duty carelessly then the proximity between the injury caused to the plaintiff and the act of the defendants in not performing the duty are established and the cause arises to the plaintiff enabling him to claim damages from the defendant/

authority. Subsequently in another case *Municipal Corporation of Delhi Vs. Smt. Sushila Devi & Others*, A.I.R. 1999, S.C. 1929, compensation was granted for death of a person passing by the road due to fall of a branch of a tree on his head. In the said case in para 8 and 14 the matter has so dealt with by the Supreme Court :

> 8. The Division Bench has upheld the finding recorded by the learned trial Judge that the Horticulture Department of the Corporation should have carried out periodical inspections of the trees and should have taken safety precaution to see that the road was safe for its users and such adjoining trees as were dried and dead and/or had projecting branches which could prove to be dangerous to the passers-by were removed. This having not been done, the Municipal Corporation has been negligent in discharging such duty as is owed to the road users by the adjoining property owners, especially the Municipal Corporation. The finding has been arrived at on appreciation of evidence by the learned trial Judge as also by the Division Bench and we find ourselves in entire agreement with the said finding.
>
> 14. In our opinion the High Court was right in holding the Municipal Corporation negligent in performing its duty under the common law and, therefore, liable in damages to the plaintiffs for the injury caused to the deceased by fall of the branch of the tree and the consequences flowing therefrom.

16. A Division Bench of this Court in the case of *Citizen and Inhabitants of Municipal Ward No.17, Municipal Corporation Gwalior Vs. The Municipal Corporation, Gwalior & Ors*, 1992(1) MPJR, 93 has considered the question with regard to liability of the Municipal Corporation to provide facilities to the citizens and the duties imposed upon the Municipal Corporation under Chapter V and Chapter XI of the Municipal Corporation Act, 1956 and the effect of Section 66 and 67 of the Act and its implication with regard to a right available to a citizen under Article 21 of the Constitution, in the said case the matter is so dealt with by the learned Division Bench and Justice R.C. Lahoti (as he then was) speaking for the Bench has observed as under :

> The right to life enshrined in Article 21 of the Constitution of India cannot be reduced to mere animal existence. It means something much more than just physical survival. The right of life includes the right to life with human dignity - observed their Lordships in *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746. The widening horizons of right to live with human dignity guarantee man to live as a human being and not as an animal. The obligation of the State and its agencies/instrumentalities

to ensure the fulfillment of that fundamental right, the basic human right, though projected numberless times by the Apex Court, repeatedly reflected in several pronouncements of several High Courts of this country, is yet to be seen in its right perspective and full vision. This is what is reflected by the present petition.

11. ..... Enough if we refer to Part-V of the Act dealing with public health, safety and convenience. Several Chapters included in that part deal with public conveniences such as municipal drains, conservancy, sanitary provisions, water supply, drainage water and water mains, public health and safety, also on restraint of infections and infectious diseases. In a nutshell, the Legislature has contemplated through these provisions almost all that would be needed to be performed by the Municipal Corporation to achieve the fulfillment of the fundamental right of dignified human living by the residents of Municipal Corporation Limits. The Corporation has been vested with powers, wide in scope and ambit, enabling the definite fulfillment of its statutory obligations. Section 66 of the Municipal Corporation Act provides for the obligatory duties of Council as distinguished with discretionary duties listed in Section 67. The resume of these provisions leaves no manner of doubt that what has been complained of by the petitioners and what they expected to be performed by the Municipal Corporation through this petition (see paras 3 and 4 above) are ordinarily the statutory obligations of the Municipal Corporation.

(Emphasis Supplied)

12. *State of MP and Another Vs. Umed Ram Sharma and others,* AIR 1986 SC 847, was a case where the residents of hilly area wanted existence of roads in reasonable conditions, the right was embraced into their right to life in context of the constitutional provisions. Their Lordships interpreted Article 21 as embracing not only physical existence of life but the quality of life. Their Lordships accepted it as a proposition well settled for residents of hilly areas that access to road is access to life itself. Their Lordships further observed:-

> "Accordingly, there should be road for communication in reasonable conditions in view of our Constitutional imperatives and denial of that right would be denial of the life as understood in its richness and fulness by the ambit of the Constitution."

13. In *Vikram Deo Singh Tomar Vs. State of Bihar,* AIR 1988 SC 1782, their Lordships said:-

"We live in an age which recognizes that every person is entitled to a quality of life consistent with his human personality. Their right to live with human dignity is the fundamental right of every Indian citizen."

Thereafter the judgment of the Supreme Court in the case of *Municipal Council, Ratlam Vs. Vordhichand* A.I.R. 1980, S.C. 1622 is taken note of and the observations made by the Supreme Court are considered, which again reads as under :

15. We are reminded of the land mark decision of the Apex Court in *Municipal Corporation, Ratlam vs. Vardhichand,* AIR 1990 SC 1622. An executive Magistrate acting under section 133 CrPC took care of serious nuisance posed to public health by issuing directions for the enforcement of the duties of the Council. With zig-zag orders, at the ladder of superior jurisdictions, the matter reached the Apex Court. Having referred to the duties of the Municipal Council statutorily contemplated, their Lordships observed:-

'The statutory setting being thus plain, the municipality cannot extricate itself from its responsibility. Its plea is not that the facts are wrong but that the law is not right because the municipal funds being insufficient it cannot carry out the duties under S. 123 of the Act. This 'alibi' made us issue notice to the State which is now represented by counsel, Shri Gambhir, before us. The plea of the municipality that notwithstanding the public nuisance financial inability validly exonerates it from statutory liability has no juridical basis. The Criminal Procedure Code operates against statutory bodies and others regardless of the cash in their coffers, even as human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provision. Likewise, S. 123 of the Act has no saving clause when the municipal council is penniless. Otherwise, a profligate statutory body or pachydermic governmental agency may legally defy duties under the law by urging in self-defence a self-created bankruptcy or perverted expenditure budget. That cannot be."

Their Lordships completely repelled the defence of paucity of funds, issuing certain directions to make the compliance with the orders workable by mandating the corporation and its authorities to carry out all the directions which were not merely the right of a

private individual but the health, safety and convenience of the public at large. Their Lordships made the following further observations also:

> 'We are sure that the State Government will make available by way of loans or grants sufficient financial aid to the Ratlam Municipality to enable it to fulfil its obligations under this order. The State will realise that Art. 47 makes it a paramount principle of governance that steps are taken 'for the improvement of public health as amongst its primary duties'. The municipality also will slim its budget on low priority items and elitist projects to use the savings on sanitation and public health.'

17. From the aforesaid principle it is clear that the Municipal Corporation cannot absolve from its duty of being responsible to its citizens, in case of violation, which results in damage loss or injury to a citizen if the occurrence for the loss or damage is failure of duty general or specific in nature imposed upon the Municipal Corporation.

18. In the present case if the facts available are scrutinized. In the back drop of the aforesaid principle laid down by the supreme Court and this Court it would be seen that in the present case certain sand were lying on a public road and maintenance of the public road, in a condition suitable for safe transport or use by public is the statutory duty of the municipal corporation. Even if for a moment it is assumed that sand said lying on the road was not put by municipal corporation or was not being used by municipal corporation in connection with any work being carried out by municipal corporation, the fact that the sand was lying on a public street being used by the public at large is evident from the fact that has come on record, that being so, it was the duty of the Municipal Corporation to ensure that obstructions and other hinderence in the safe passage on public street is removed, if the sand was lying on the road and if the officers and authorities of the municipal corporation have failed to remove them, then it is an act of negligence, breach of duty or fault on the part of the officers of the municipal corporation, in not maintaining the road in such a condition that it is safe for the general public to move on it. The provisions of Section 322 of M.P. Municipal Corporation Act mandates that no person should creating obstruction in the street without written permission of the Commissioner, punishments are prescribed in case obstructions are created in the street by virtue of powers vested on the Municipal Commissioner under Section 322, 323 and 326. It is, therefore, clear that the statue imposes a statutory duty on the Municipal Corporation and provide for imposing penalty on a person, who commits breach of the provision.

19. In the present case the municipal corporation having failed to discharge its duty in maintaining properly the road in a safe condition and due to use of the

same when plaintiff had suffered the accident/injuries this court is of the considered view that Municipal Corporation is responsible to pay compensation for the loss or damage suffered by the plaintiff, as the accident arose due to failure on the part of the municipal corporation in discharging its general and specific duty with regard to maintaining roads and other places of public use in a safe condition, without their being any hinderance or obstruction.

20. That being so this court find much force in the contention advanced by Shri Kishore Shrivastava to the effect that the plaintiff has proved negligence on the part of municipal corporation in not maintaining a public road in its proper condition, resulting in damage to the plaintiff.

21. Accordingly, in the light of the principles laid down in the cases referred to hereinabove and after evaluating the same and applying it in the facts and circumstances of the present case it has to be held that respondent municipal corporation has failed to discharge its duty and had been negligent in performing the duties, which has resulted in the accident, which consequentially caused loss and damages to the plaintiff, accordingly, plaintiff is entitled to compensation for loss and injuries suffered by him and in dismissing the suit, it is the considered view of this court that court below has committed error which requires correction now in this appeal.

22. Having held so, the next question would be as to quantification of the compensation to be awarded to the plaintiff ? From the facts that have come on record it is seen that plaintiff has quantified his claim at Rs.37,000/- for various heads, while evaluating the evidence and while considering the loss caused to the plaintiff and while dealing with issue No.5 & 6 learned Court has recorded a finding that plaintiff has proved loss and damage in the accident as claimed by him. However, grant of decree is rejected only on the ground that plaintiff has failed to prove liability for paying the aforesaid damage on the municipal corporation, once the damage caused and the loss suffered by the plaintiff is quantified in accordance to the pleadings and material available on record then this court is of the considered view that the said amount has to be allowed.

23. Accordingly, this appeal is allowed the suit in question is decreed and it is held that plaintiff is entitled to a sum of Rs.37,000/- being the amount of loss and damage caused to him because of accident. The Municipal Corporation is further liable to pay interest on the aforesaid amount of Rs.37,000/-. Interest @ 6% p.a. shall be paid from the date of filing of the suit till 31/12/05 and interest @ 8% p.a. with effect from 01/01/06 till actual payment of the aforesaid amount.

24. The appeal stands decreed with the aforesaid along with cost as may be certified.

Appeal allowed.

AMMILAL Vs. KAMLA BAI

I.L.R. [2010] M. P., 243

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

9 September, 2009*

AMMILAL & anr. ... Appellants

Vs.

KAMLA BAI ... Respondent

A. **Specific Relief Act (47 of 1963), Section 20, Evidence Act, 1872, Section 91** - *Suit for specific performance of agreement to sell agricultural land - Suit resisted on the ground that it was a loan transaction - Held - When execution of agreement to sell is admitted then in view of S. 91 of the Evidence Act, the oral evidence about loan transaction can not be taken into consideration to draw any inference contrary to the terms of agreement.* (Para 8)

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 20, साक्ष्य अधिनियम, 1872, धारा 91 – कृषि भूमि विक्रय करने के अनुबन्ध के विनिर्दिष्ट पालन का वाद – वाद का विरोध इस आधार पर किया गया कि यह एक ऋण संव्यवहार था – अभिनिर्धारित – जब विक्रय अनुबन्ध का निष्पादन स्वीकार कर लिया जाता है तब साक्ष्य अधिनियम की धारा 91 को दृष्टिगत रखते हुए, अनुबन्ध के निबंधनों के विपरीत कोई अनुमान निकालने के लिए ऋण संव्यवहार के बारे में मौखिक साक्ष्य को विचार में नही लिया जा सकता।

B. **Specific Relief Act (47 of 1963), Section 20** - *Suit for specific performance of agreement to sell agricultural land - Agreement by one co-owner - Held - One co-owner can sell the land till the extent of his undivided share but subject to consent of the other co-sharers of the property - Suit could not be decreed for specific performance contrary to the interest of other co-Bhumiswami - Plaintiffs also failed to prove readiness & willingness to perform their part of contract - Decree of specific performance cannot be granted.* (Para 9 & 10)

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 20 – कृषि भूमि विक्रय करने के अनुबन्ध के विनिर्दिष्ट पालन का वाद – एक सहस्वामी द्वारा अनुबन्ध – अभिनिर्धारित – एक सहस्वामी उसके अविभाजित हिस्से की सीमा तक भूमि विक्रय कर सकता है किन्तु सम्पत्ति के अन्य सहभागीदारों की सम्मति के अधीन – अन्य सहभूमिस्वामियों के हित के विपरीत विनिर्दिष्ट पालन के लिए वाद डिक्री नही किया जा सकता था – वादी संविदा के उनके भाग का पालन करने के लिए तैयार और रजामंद होना साबित करने में भी असफल रहे – विनिर्दिष्ट पालन की डिक्री प्रदान नही की जा सकती।

C. **Specific Relief Act (47 of 1963), Section 20** - *Suit for specific performance of agreement to sell - Held - When it is found that plaintiff was not ready and willing to perform his part of contract then the suit could be decreed for refund of the advance money.* (Para 11)

*S.A. No.172.1994 (Jabalpur)

AMMILAL Vs. KAMLABAI

ग. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 20 – विक्रय अनुबन्ध के विनिर्दिष्ट पालन का वाद – अभिनिर्धारित – जब यह पाया जाता है कि वादी संविदा के उसके भाग का पालन करने के लिए तैयार व रजामंद नही था तब वाद अग्रिम धन की वापसी के लिए डिक्री किया जा सकता है।

Cases referred :

2006 MPLJ(II) page 329, 2007(4) MPLJ 464.

A.B. Khan, for the appellant.

None, for the respondent.

J U D G M E N T

U. C. MAHESHWARI J.:–This appeal is directed by the appellants/plaintiffs under Section 100 of the C.P.C. being aggrieved by the judgment and decree dated 20.01.1994 passed by the Additional District Judge Multai, District Betul in civil regular appeal No.15-A of 1985 reversing the judgment and decree dated 14.11.1984 passed by Civil Judge Class-I Multai in civil original suit no.90-A of 1994, decreeing the suit of the appellants for specific performance with respect of the agricultural land.

2. The facts giving rise to this appeal are that the appellants herein filed the suit for specific performance against the respondent contending that the respondent entered into an agreement with him on 4.3.1977 to sell his revenue paid land area 2.360 hectares, the part of survey no.72 described in the plaint in consideration of Rs.5,000/-. Out of which Rs.1,200/- was paid in advance at the time of execution of the same, while Rs.1,300/- was paid on 7.4.1977. As per further terms of the agreement, the registered sale deed was to be executed by the respondent after receiving the remaining consideration, upto the festival of Holi 1978. Subsequent to agreement, the appellants' remained ready and willing to perform their part of contract but the respondent did not comply his part by executing the registered deed after taking the remaining consideration. On which the impugned suit was filed.

3. In the written statement of the respondent by denying the averments of the plaint, it is stated that she never entered into the alleged agreement with the appellants to sale her agricultural land. In fact, she being in need of money approached the plaintiffs Ammilal through one Ram Rao Patwari to make available the loan, pursuant to that, she took Rs.2,000/- from such Ammilal on 4.3.1977. As per terms she had to return Rs.2,500/- total to the appellants Ammilal with interest. As per further averments the disputed land was given to the appellants' on lease for two years. In such premises, the alleged transaction was only the loan transaction and was not the agreement to sale. However, respondent has admitted her signature on the alleged agreement in the written statement. In such premises the prayer for dismissal of the suit is made.

4. In view of the pleadings of the parties as many as 7 issues were framed on

which the evidence was recorded. On appreciation, the suit of the appellants was decreed by the trial Court. The same was challenged by the respondent before the first appellate Court. On consideration, by allowing the same after setting aside the judgment of the trial Court, the suit of the appellants' has been dismissed in its entirety on which the appellant's have come forward to this Court with this appeal.

5. Earlier vide order dated 8.12.1995 this appeal was admitted on the following substantial questions of law:-

> "Whether under the facts and in the circumstances of the case the appellant is entitled to a decree for specific performance in view of the findings and the admissions made by the respondent ?"

6. Shri A.B. Khan, learned counsel for the appellants after taking me through the pleadings, evidence and the alleged agreement available on record argued that in the light of admission of the respondent in her written statement regarding execution of the agreement Ex.P./1, the trial Court had rightly decreed the suit of the appellants, but the appellate Court has committed error in dismissing the suit by setting aside such decree holding that the impugned transaction of the agreement was not the agreement to sale between the parties but in fact it was a loan transaction. Such approach of the appellate Court is contrary to record and also the existing legal position. He further said that the appellate Court has also committed error in holding that the respondent did not have any right to enter in the agreement with the appellants to sale any part of the aforesaid survey no. In any case, the respondent being co-Bhoomiswami, was entitled to transfer her undivided share in the disputed land. The appellate Court was bound to affirm the decree of the trial Court in favour of the appellants till the extent of right and entitlement of the respondent in the disputed land but contrary to it by allowing the appeal, their entire suit has been dismissed under the wrong premises. In any case even on dismissing the suit for performance of contract, the same ought to have been decreed to refund the sum taken by the respondent in advanced from the appellants'. With this he prayed to answer the aforesaid question in favour of the appellants by allowing this appeal.

7. Having heard the counsel at length, I have gone through the records and also perused the impugned judgments.

8. It is an admitted fact between the parties that the alleged agreement dated 4.3.1977 was executed by the respondent in favour of the appellants. As per case of the plaintiffs, it was an agreement to sell the disputed land, in consideration of Rs.5,000/- out of which, some advance consideration Rs.1,200/- was given to the respondent at the initial stage of such agreement while Rs.1,300/- was paid on 7.4.1977. As per further term the respondent was bound to execute the sale deed after receiving the remaining sum upto the festival of Holi 1978. While the

respondent defended the case on the ground that she never entered in any agreement with the appellants' to sale her land. In fact she took some loan of Rs.2,000/- from the appellant Ammilal and the same was to be repaid with interest of Rs.500/- i.e. total Rs. 2,500/-. It is settled proposition of law that if terms and conditions of the transaction has been reduced in writing between the parties and execution of such document is admitted then in view of Section 91 of Evidence Act, the oral evidence could not be taken into consideration to draw any inference contrary to the terms of such document. In such premises, the approach of the trial Court holding due execution of alleged agreement by the respondent in favour of appellants' to sale the land appears to be correct. In such premises, the finding of the appellate Court holding such transaction to be loan transaction is set aside and till this extent the judgment and decree of trial Court is restored for limited purpose for which the reason are being stated in following paras.

9. It is apparent on record that the impugned suit has been filed by the appellants' stating that they always remained ready and willing to perform their part of the contract to get registered the sale deed in their favour after paying the remaining sum of the consideration. But on perusing the record I have not found any document or admissible evidence showing that subsequent to execution of agreement Ex.P./1, at any point of time the appellants' had shown their readiness or willingness to perform their part of the contract. In the matter of specific performance, the plaintiffs, who wants such decree, are bound to prove their readiness and willingness to perform their part of the contract, failing which, no such decree could be passed in favour of such persons. In the lack of such evidence, no decree for specific performance would have been passed by the trial Court and in such premises, while deciding the appeal, the appellate Court has not committed grave any error in setting aside the decree for specific performance, but committed error in holding the transaction to be a loan transaction, contrary to the terms of agreement and to Section 91 of the Evidence Act.

10. Apart the above, on perusing the certified copy of the Khasra regarding disputed land issued by the Tahsildar, Multai, it is apparent that the same is recorded as Bhoomiswami in the name of as many as eight persons including the present respondent Kamla Bai. So in such premises, in any case, the present respondent did not have any exclusive right or authority to enter into the alleged agreement with the appellant's to sale the disputed land. Although, as per settled position, she could have entered into such agreement to sell the land till the extent of her undivided share, but subject to consent of the other co-sharers of the property as the same has been inherited in succession by all the recorded Bhoomiswami jointly from there predecessor. In such premises, the suit of the appellant's could not be decreed for specific performance contrary to the interest of other co-Bhoomiswami. But in any case the Courts below ought to have passed the decree to refund the advance money taken by respondent.

11. In the abovementioned circumstance while answering the said question it is held, that the appellants' are not entitled for the decree of specific performance even on admission of the respondent regarding execution of the alleged agreement. Consequently, in view of the settled proposition of law that whenever on appreciation of evidence, it is found that the proposed purchaser plaintiff himself was not ready and willing to perform his part of contract then, by refusing the prayer for specific performance, the plaintiffs' suit could be decreed for refund of the advance money given to the defendant-seller as advance consideration. My aforesaid view is fully fortified by the decision of this Court in the matter of *Leeladhar Yadav vs. Siddhartha Housing Co-operative Society Ltd., Garha,* 2006 MPLJ Vol-II, page 329 and in the matter of *Nirmal Kumar vs. Smt. Kanti Devi,* 2007 (4) MPLJ 464.

12. In view of the aforesaid this appeal is allowed in part and by setting aside the judgment and decree of both the Courts below, the suit of the appellants' is partly allowed in following terms.

(a) While refusing the prayer for specific performance of the contract regarding disputed land, the suit is decreed against the respondent for refunding the sum of Rs.2,500/- with the interest @ 6% per annum from the dates 4.3.1977 and 7.4.1977, on which Rs. 1,200/- and Rs.1,300/- respectively were received by the respondent, till realisation of the entire sum.

(b) The respondent shall also pay the cost of the case through out to the appellants' by affording her own costs.

(c) The cost of this appeal is quantified Rs.1,000/-. The decree be drawn up accordingly.

13. The appeal is allowed in part as indicated above.

Appeal partly allowed.

I.L.R. [2010] M. P., 247
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik
12 October, 2009*

SHIVRAJ SINGH CHAUHAN ... Appellant
Vs.
RAJENDRA KUMAR ... Respondent

A. Civil Procedure Code (5 of 1908), Order 41 Rule 14(3) [Sub-rule (3) added by High Court of M.P. vide notification No.5283-A published in M.P. Gazette dated 16.06.1960 part-IV] - *Service of notice - Whether necessary on a person who remained ex parte in the Court of first instance -*

*M.A. No.290/2007 (Gwalior)

Held - Sub-rule (3) empowers an appellate Court to dispense with notice to any respondent against whom the suit was heard ex parte - This being an empowering provision, such power is to be exercised necessarily by passing specific order of dispensation in writing. (Para 7)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 14(3) {म.प्र. उच्च न्यायालय द्वारा म.प्र. गजट तारीख 16.06.1960 भाग–चार में प्रकाशित अधिसूचना क्र. 5283–ए द्वारा जोड़ा गया उपनियम (3)} – सूचना की तामील – क्या उस व्यक्ति पर आवश्यक है जो प्रथम बार के न्यायालय में एकपक्षीय रहा है – अभिनिर्धारित – उपनियम (3) अपील न्यायालय को किसी प्रत्यर्थी पर, जिसके विरुद्ध वाद एकपक्षीय सुना गया था, सूचना की तामील से अभिमुक्त करने के लिए सशक्त करता है – यह सशक्त करने वाला उपबंध होने के कारण ऐसी शक्ति आवश्यक रूप से लिखित में अभिमुक्ति का विनिर्दिष्ट आदेश पारित करके प्रयोग की जानी चाहिए।

B. Civil Procedure Code (5 of 1908), Order 41 Rule 14(4) - *Service of notice - Whether necessary on a person who remained ex parte in the Court of first instance - Held - Service of notice of any proceeding incidental to an appeal on a respondent is necessary only if he has appeared and filed an address for service in the Court of first instance or has appeared in the appeal - Provision applies to any proceeding incidental to an appeal and not to the appeal itself on merits.* (Para 6)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 14(4) – सूचना की तामील – क्या उस व्यक्ति पर आवश्यक है जो प्रथम बार के न्यायालय में एकपक्षीय रहा है – अभिनिर्धारित – किसी प्रत्यर्थी पर किसी अपील की आनुषंगिक किसी कार्यवाही की सूचना की तामील केवल तभी आवश्यक है जब वह प्रथम बार के न्यायालय में उपसंजात हुआ हो और उसने तामील के लिए कोई पता फाइल किया हो या या वह अपील में उपसंजात हुआ हो – उपबंध अपील की आनुषंगिक किसी कार्यवाही को लागू होते हैं न कि गुणदोषों पर स्वयं अपील को।

C. Civil Procedure Code (5 of 1908), Order 41 Rule 14(3) [Sub-rule (3) added by M.P.H.C.] & 14(4) - *Distinction - Held - By virtue of sub-rule (4) proceedings incidental to an appeal are not vitiated merely in the absence of notice on any respondent who did not choose to give appearance and file an address for service in the Court of first instance - Whereas by virtue of sub-rule (3) appellate proceedings may be vitiated even against any respondent against whom the suit was heard ex parte if prejudice is shown to have caused to him and the appellate court has not passed specific order dispensing with notice on any such respondent.* (Para 8)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 14(3) {म.प्र. उच्च न्यायालय द्वारा जोड़ा गया उपनियम (3)} व 14(4) – भेद – अभिनिर्धारित – उपनियम (4) के आधार पर किसी अपील के आनुषंगिक कार्यवाहियाँ केवल किसी प्रत्यर्थी पर सूचना के अभाव में दूषित नही होती हैं जिसने प्रथम बार के न्यायालय में उपसंजात होने और तामील के लिए कोई पता फाइल करने का चयन नही किया – जबकि उपनियम (3) के आधार पर अपील कार्यवाहियाँ

किसी भी प्रत्यर्थी के विरुद्ध दूषित हो सकती हैं जिसके विरुद्ध वाद एकपक्षीय रूप से सुना गया था यदि उसे पूर्वाग्रह कारित होना दर्शित किया जाता है और अपील न्यायालय ने ऐसे किसी प्रत्यर्थी पर सूचना से अभिमुक्ति देते हुए कोई विनिर्दिष्ट आदेश पारित नही किया है।

D. Civil Procedure Code (5 of 1908), Order 5 Rule 17 & Proviso [Added by M.P.H.C.] - *Service of notice - Refusal to accept summon/notice - Held - Refusal to accept summon/notice may be treated as service by virtue of proviso added in Order 5 Rule 17 in the State of M.P. when issued against special process - In case of ordinary process, affixation is to be made despite refusal.* (Para 10)

घ. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 5 नियम 17 व परन्तुक {उच्च न्यायालय द्वारा जोड़ा गया} – सूचना की तामील – समन/सूचना का प्रतिग्रहण करने से इंकारी – अभिनिर्धारित – समन/सूचना का प्रतिग्रहण करने से इंकारी म.प्र. राज्य में आदेश 5 नियम 17 में जोड़े गये परन्तुक के आधार पर तामील मानी जा सकती है जब विशेष आदेशिका के विरुद्ध जारी किया गया हो – साधारण आदेशिका की दशा में, इंकारी के बावजूद चस्पा करना होगा।

Cases referred :

(2007) 14 SCC 42.

R.K. Soni, for the appellant.

D.D. Bansal, for the respondent.

ORDER

Abhay M. Naik, J. :–This Misc. Appeal is directed against an order dated 26/2/07 passed by the court of Fourth Additional District Judge, Morena (M.P.) in MJC No.1/06, rejecting thereby an application under Order 41 Rule 21 of C.P.C.

2. Briefly stated facts are that the plaintiff/respondent instituted Civil Suit No.ll-B/05 for recovery of amount of Rs.49,000/- (Rs. Forty nine thousand only) wherein the defendant/appellant did not appear. Suit was dismissed ex parte on 5/8/05. Aggrieved by it, plaintiff/respondent submitted regular Civil Appeal No.l-B/05 wherein notice was issued to defendant/appellant which came back with an endorsement that the defendant declined to accept it. Ultimately, appeal was allowed in ex parte manner and the suit stood decreed vide judgment and decree dated 16/1/06. Thereafter, the defendant/appellant submitted an application for re-hearing under Order 41 Rule 21 C.P.C., on 20/3/06 alongwith an application under section 5 of the Limitation Act for condonation of delay. It was inter alia alleged that the notice in the appeal was neither tendered to the appellant nor was refused by him. This application was opposed. Lower appellate court after recording the evidence, dismissed the applications under Section 5 of the Limitation Act as well as under Order 41 Rule 21 C.P.C. Aggrieved by the same, present appeal has been preferred.

3. Shri Soni, learned counsel for the appellant contended that the

appellant was not served with the notice of appeal. Accordingly, it is contended that the appeal was liable to be re-heard.

4. Shri D.D.Bansal, learned counsel for the respondent submitted, firstly, that since the defendant was ex parte in the trial court, no notice was required to be issued to him in view of the provisions contained in Order 41 Rule 14 C.P.C. Secondly, it is contended that since the defendant declined to accept notice it has been rightly treated as served and the ex parte proceedings are quite sustainable in law.

5. Considered the rival submissions and perused the record.

6. Order XLI of the Code of Civil Procedure deals with appeals. Sub-rule (1) of Rule 14 requires an appellate court to issue and serve notice on the respondent in the manner provided for the service on defendant of summons to appear and answer. All the provisions applicable to such summons and to proceedings with reference to the service thereof, are made applicable by virtue of this sub-rule. However, sub-rule (4) reads as follows:-

> "Notwithstanding anything to the contrary contained in sub-rule (1), it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent other than a person impleaded for the first time in the Appellate court, unless he has appeared and filed an address for the service in the Court of first instance or has appeared in the appeal."

A bare look on the aforesaid provision makes it clear that it applies to any proceeding incidental to an appeal and not to the appeal itself on merits. However, it is important to take note of sub-rule (3) which has been added by virtue of the amendment caused by the High Court of Madhya Pradesh vide Notification No. 5283-A published in M.P. Gazette dated 16/6/1960 part-IV. Following sub-rule (3)has been added by this court in Rule 14 of Order XLI:-

> "(3) the Appellate Court may, in its discretion, dispense with notice to any respondent against whom the suit was heard ex parte".

7. Aforesaid rule is added by virtue of Chapter 20 of the M.P. High court Rules and Orders. The lower appellate court could have, in its discretion, dispensed with notice of Civil appeal No.l-B/05 to the defendant/appellant. This being an enabling provision, it could have been invoked only by exercising, in specific, the powers conferred thereby on the appellate court. Such a power needs to be exercised by passing specific order of dispensation in writing. On perusal of the order sheets of the lower appellate court, it is found that no such power was exercised by invoking the amended provision contained in Sub-rule (3). On the contrary, the notice was directed to be and, in fact, issued to the defendant/ respondent therein (i.e.,the present appellant) and the plaintiff/appellant was

directed to pay requisite process-fee. Thus, it cannot be said that the appeal could have been legally heard and decided without effecting service on the defendant/respondent therein and the plaintiff/appellant cannot get benefit of Rule 14 (3) of Order XLI of the Code of Civil Procedure, as amended in the State of M.P.

8. Distinction between sub-rule (4) of Rule 14 of Order 41 and Rule 3 added by way of amendment is that by virtue of sub-rule (4) proceedings incidental to an appeal are not vitiated merely in the absence of notice on any respondent who did not chose to give appearance and file an address for service in the Court of first instance whereas by virtue of Rule 3 (supra) appellate proceedings may be vitiated even against any respondent against whom the suit was heard exparte if prejudice is shown to have been caused to him and the appellate Court has not passed specific order dispensing with notice on any such respondent.

9. On further perusal it is found that the notice of the civil appeal was issued in ordinary manner and the plaintiff was directed to pay ordinary process fee in contra-distinction to special process fee. Since the provision applicable to proceedings with regard to summons are made applicable by virtue of sub-rule (1) of Order XLI, it would be appropriate to consider the necessary provision regarding service of summons contained in Rule 17 of Order V of C.P.C., alongwith relevant M.P. Amendment Rules. Order V Rule 17 reads as under:-

> **"17. Procedure when defendant refused to accept service, or cannot be found.-** where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, within report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."
>
> **Madhya Pradesh-** In order V, rule 17, insert the following proviso, namely:-"Provided that where a special service has been issued

and the defendant refuses to sign the acknowledgment it shall not be necessary to affix a copy as directed hereinafter."

10. It is amply clear from the aforesaid that if the defendant refused to accept service which is issued against ordinary process fee and not by special process fee, service was to be necessarily effected by affixation in view of the aforesaid provision. Since notice to the defendant before lower appellate court was issued against ordinary process fee, there could not been valid service without affixation. Since there was, admittedly, no affixation of the notice on defendant's address, it was not within the powers of the lower appellate court to accept lhe service merely on the basis of the denial except after affixation. Thus, it is clear that the defendant/appellant was not duly served in Civil Appeal No.l-B/05 and the learned lower appellate judge has acted illegally in accepting the service on defendant/appellant without affixation.

11. Shri Bansal, learned counsel for the respondent placed reliance on the decision of the Apex court in the case of *Indu Bhushan Vs. Munna Lal and another* (2007)14 SCC 42), which is not applicable to the present case because the local amendment in the State of Madhya Pradesh was not attracted in that case.

12. As regards contention about Order 41 Rule14 C.P.C., it may be seen that this provision empowers the court to dispense with service of notice of any proceeding incidental to an appeal. This provision is of enabling nature which makes it clear that it shall not be necessary to serve notice of any proceeding incidental to an appeal. In the instant case, the lower appellate court does not appear to have exercised this power. On the contrary, service in Civil appeal No.l-B/05 was issued which has been accepted by the lower appellate Judge ignoring the provisions added by way of amendment in the State of Madhya Pradesh in Rule 17 of Order 5 C.P.C.

13. Eventually, the order impugned is not sustainable in law. Service is not found to have been effected in accordance with law. Accordingly, application under Sec. 5 of the Limitation Act also deserved to be allowed and is hereby accordingly allowed. Since the defendant/appellant was not duly served, limitation would commence from the date of knowledge as envisaged under Article 123. Appeal accordingly stands allowed.

14. Parties to appear before the lower appellate court on 16th of November, 09. No fresh notice is required to be issued to the parties. Thereafter, learned lower appellate judge shall decide the appeal latest by 31st of December, 09. No order as to costs.

Appeal allowed.

I.L.R. [2010] M. P., 253
APPELLATE CIVIL
Before Mr. Justice Dipak Misra & Mr. Justice R.S. Jha
1 December, 2009*

KAMLA PATEL & anr. ... Appellants
Vs.
NEERAJ PRASAD PATEL & ors. ... Respondents

Family Courts Act (66 of 1984), Sections 19, 20 & 21, Civil Procedure Code, 1908, Order 43 Rule 1(a) - *Appeal or Miscellaneous Appeal - Family Court directed to return of the plaint for presentation before the competent Court - Held - In view of the non-obstante clause incorporated in S. 19(1) of Act and the overriding effect of the Act as prescribed u/s 20 and conferral of power on High Court to make Rules for carrying out the purpose of Act - Appeal u/s 19 of Act shall lie and not miscellaneous appeal under Order 43 Rule 1(a) CPC.* (Para 6)

कुटुम्ब न्यायालय अधिनियम (1984 का 66), धाराएँ 19, 20 व 21, सिविल प्रक्रिया संहिता, 1908, आदेश 43 नियम 1(ए) – अपील या विविध अपील – कुटुम्ब न्यायालय ने सक्षम न्यायालय के समक्ष प्रस्तुत किये जाने के लिए वादपत्र लौटाने का निदेश दिया – अभिनिर्धारित – अधिनियम की धारा 19(1) में समाविष्ट सर्वोपरि खण्ड और धारा 20 में विहित अधिनियम के अध्यारोही प्रभाव और अधिनियम के प्रयोजन के कार्यान्वयन के लिए उच्च न्यायालय को प्रदत्त शक्ति को दृष्टिगत रखते हुए – अधिनियम की धारा 19 के अन्तर्गत अपील पोषणीय होगी न कि सि.प्र.सं. के आदेश 43 नियम 1(ए) के अन्तर्गत विविध अपील।

Umesh Shrivastava, for the appellants.
Ravish Agrawal, Amicus Curiae.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–**I. A. No. 10468/09**- This is an application for recall/ modification of the order dated 21-4-2008. This Court on 21-4-2008 had passed the following order:

> *"Heard Mr. Umesh Shrivastava, learned counsel for the appellants and Mr. Pranay Verma, learned counsel for the respondents.*
>
> *Perused the office note. Regard being had to the nature of the order passed by the learned Family Judge, Rewa which pertains to return of plaint, we are of the considered opinion, this appeal should be registered as a miscellaneous appeal. Registry is directed to register it as a miscellaneous appeal and list the matter on 23-4-08."*

Thereafter, the matter was listed before another Division Bench and the said Bench on 14-9-2009 passed the following order:

*M.A. No.2160/2008 (Jabalpur)

"Learned counsel for appellant submitted that impugned order was passed by the Family Court returning the plaint of the appellants. Aforesaid order is final order so far as Section 19 of the Family Courts Act, 1984' is concerned. Though a Misc. Appeal is provided under Order 43 Rule l(a) of CPC against the order directing return of the plaint but under Section 19 of the Family Courts Act, 1984, no Misc. Appeal is provided and every such appeal is to be registered as First Appeal.

Under Chapter IV Rule (2) sub-rule (3) clause (b) of the High Court of M.P. Rules, 2008, all appeals under Section 19 of the Family Courts Act, 1984 are to be registered as first appeal and there is no provision in the Rules for registering an appeal against the order returning the plaint passed by the Family Court.

In view of the aforesaid factual position, appellant maybe permitted to move an application for modification/recall of the order dated 21-4-08."

2. Be it noted, the present appeal has been preferred under Section 19 of the Family Courts Act, 1984 [for brevity 'the Act'] against the decision of the Family Court, Rewa, in Civil Case No.27-A/2005, dated 16-10-2007. By the impugned order the learned Family Judge, Rewa tried the issue Nos.7 and 8 which pertain to the jurisdiction of the Court and court-fees and eventually came to hold that the Family Court, Rewa has no jurisdiction to decide the case regarding recovery of property given on dowry and further directed the appellants to pay Court-fees according to the value of property. The learned Family Judge further directed for return of the plaint for presentation before the competent Court. Thus, in essence, the order under challenge is return of plaint.

3. In this context we may reproduce with profit Section 19 of the Act. It reads as under:

"19. Appeal. -

(1) Save as provided in subsection (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties I [or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974). Provided that nothing in this sub-section shall apply to any appeal pending before a High

Court or any order passed under. Chapter IX of the Code of Criminal Procedure 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act 1991].

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

[(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being all interlocutory order, and, as to the regularity of such proceeding.

(5) Except as aforesaid, no appeal or revision shall lie to any Court from any judgment, order or decree of a Family Court.

(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more judges."

4. In this regard we may also reproduce Section 20 of the Act which is as follows:

"20. Act to have overriding effect.

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

5. Section 21 of the Act empowers the High Court to make Rules. Sub-Section (1) of Section 21 reads as under:

"21. Power of High Court to make rules.

(1) The High Court may, by notification in the Official Gazette, make such rules as it may deem necessary for carrying out the purposes of this Act."

6. In view of the aforesaid provisions and the non obstante clause incorporated in Section 19(1) and the overriding effect of the Act as prescribed under Section 21 and conferral of power on the High Court to make Rules for carrying out the purpose of this Act, we are of the considered opinion, the order passed on 21-4-2008 should be recalled and the present appeal should be registered as a First Appeal. Registry is directed to do the needful in the matter.

7. In the result the I.A. stands allowed.

Order accordingly.

I.L.R. [2010] M. P., 256
APPELLATE CRIMINAL

Before Mr. Justice Arun Mishra & Mr. Justice I.S. Shrivastava

3 September, 2009*

RAMCHANDRA KAHAR ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. **Evidence Act (1 of 1872), Section 106** - *Burden of proving the fact which is especially within the knowledge of any person - Wife and daughter of accused died due to burn injuries - At the time of their death the accused was there in their company - It was incumbent upon the accused to have explained the facts which were in his exclusive knowledge as provided u/s 106 of Act - Prosecution by the evidence has not only established the presence of the accused in the company of deceased persons but the evidence also discloses the immediate conduct of the accused which unerringly points out that it was not a case of commission of suicide by deceased persons but accused has commited murder of them.* (Para 7)

क. साक्ष्य अधिनियम (1872 का 1), धारा 106 – उस तथ्य को साबित करने का भार जो विशेषतः किसी व्यक्ति के ज्ञान में हैं – अभियुक्त की पत्नी और पुत्री की मृत्यु जलने से आयी क्षतियों के कारण हुई – उनकी मृत्यु के समय अभियुक्त उनके साथ वहाँ मौजूद था – अभियुक्त उन तथ्यों को स्पष्ट करने के लिए बाध्य था जो अनन्यतः उसके ज्ञान में थे जैसा कि अधिनियम की धारा 106 के अन्तर्गत उपबंधित है – अभियोजन ने साक्ष्य से न केवल मृत व्यक्तियों के साथ अभियुक्त की उपस्थिति साबित की बल्कि साक्ष्य भी अभियुक्त का तुरन्त बाद का आचरण प्रकट करती है जो सुनिश्चित रूप से यह बताता है कि यह मृत व्यक्तियों द्वारा आत्महत्या करने का मामला नही था बल्कि अभियुक्त ने उनकी हत्या की है।

B. **Penal Code (45 of 1860), Section 302 or 306** - *Murder or Suicide - Wife and daughter of accused died due to burn injuries - At the time of their death the accused was there in their company - Accused did not raise hue and cry to call the neighbours and not tried to save the deceased persons - On the contrary, he failed to answer the query made by his son as to how deceased persons were set ablaze - He silently moved away taking the bicycle and reached to the house of daughter-in-law and had made extra-judicial confession to her - He did not lodge the report - Superficial burn injuries found on the person of accused establishes his complicity and presence - It was a case of commission of murder by accused.* (Para 7)

ख. दण्ड संहिता (1860 का 45), धारा 302 या 306 – हत्या या आत्महत्या – अभियुक्त की पत्नी और पुत्री की मृत्यु जलने से आयी क्षतियों के कारण हुई – उनकी मृत्यु के समय अभियुक्त उनके साथ वहाँ मौजूद था – अभियुक्त ने पड़ौसियों को बुलाने के लिए शोरगुल नही किया

*Cr.A. No.2741/2000 (Jabalpur)

और मृत व्यक्तियों को बचाने का कोई प्रयत्न नही किया – इसके विपरीत, वह उसके पुत्र द्वारा किये गये प्रश्न का उत्तर देने में असफल हो गया कि मृत व्यक्तियों को आग कैसे लगी, – वह चुपके से सायकिल लेकर चला गया और पुत्रवधु के घर पहुँचा और उससे न्यायेतर संस्वीकृति की – उसने रिपोर्ट दर्ज नही करायी – अभियुक्त के शरीर पर पायी गई जलने की बाह्य क्षतियाँ उसकी सह–अपराधिता और उपस्थिति साबित करती हैं – यह अभियुक्त द्वारा हत्या करने का मामला था।

C. **Evidence Act (1 of 1872), Section 3 - *Circumstancial Evidence - It is the bounden duty of accused to exaplain the conduct - In case no explanation is offered or the explanation offered is found to be false - That provides additional link in the chain of circumstances so as to fasten the guilt of the accused.*** (Para 8)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 3 – परिस्थितिजन्य साक्ष्य – यह अभियुक्त का बाध्यकारी कर्तव्य है कि आचरण को स्पष्ट करे – यदि कोई स्पष्टीकरण पेश नही किया जाता या पेश किया गया स्पष्टीकरण मिथ्या पाया जाता है – वह परिस्थतियों की श्रृंखला में अतिरिक्त कड़ी मुहैया कराती है ताकि अभियुक्त को दोषी ठहराया जाए।

Cases referred :

(1992) 3 SCC 300, AIR 1994 SC 1597, AIR 1998 SC 942, JT 2006(9) SC 50.

Aseem Dixit, for the appellant.

Ms. C. Sharma, G.A., for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by ARUN MISHRA, J. :–The appeal has been preferred by the accused/appellant aggrieved by judgment dated 3.10.2000 delivered by IVth Addl. Sessions Judge, Rewa in ST No. 153/99 thereby convicting the appellant for commission of offence under section 302 IPC for committing murder of his wife Leelawati and daughter Santosh Kumari.

2. The prosecution case in short is that accused was having evil eye on his daughter and wanted to commit forcible sexual intercourse with her which used to be objected by his wife and daughter. He was also having evil eye towards another daughter Mamta. Report was lodged on 8.7.99 by Ramnaresh son of accused. He was informed by Neelesh Kumar that his mother and sister were lying dead in the house, when he enquired about his father from his brother Laxminarayan, he informed that father had taken the bicycle and had gone towards the eastern direction. For the last 2-3 days dispute was taking place in the family. Marg intimation was registered at No.12/99 and 13/99. Investigation was done. It was found during investigation that the accused used to meet out cruel treatment to the daughter in order to commit forcible sexual intercourse with her and used to harass his wife as well as daughter. As daughter did not succumb to the lust of the accused, prior to four days of the incident, the food,etc. was locked by him in a room. Initially the police registered the case under Section 306 IPC. The trial

Court framed the charge under Section 306 and in alternative under Section 302 of IPC.

3. Accused abjured the guilt and contended that he has been falsely implicated as his sons Laxminarayan and Ramnaresh wanted to usurp the land and the house. Santosh Kumari was having illicit relationship with Neelesh Verma, marriage of Santosh Kumar was settled and was likely to be broken, consequently, the mother and daughter have committed suicide on being objected to by the accused.

4. The prosecution has examined in all eight witnesses. The trial Court has convicted the appellant for committing murder of his wife and daughter. Aggrieved thereby, the appeal has been preferred.

5. Shri Aseem Dixit, learned counsel appearing for appellant has submitted that evidence is not sufficient so as to record the conviction under Section 302 IPC, police has also not found the case under Section 302 IPC. The suicide was committed by the wife and daughter of the accused. It could not be said, in the facts and circumstances of the case, that there was abetment of suicide by the appellant, thus, he deserves to be acquitted.

6. Ms.C.Sharma, learned GA has supported the judgment.

7. In the instant case, it is not disputed that at the time when wife of the appellant as well as daughter died, the appellant was there in their company. Appellant has also sustained superficial burn injuries as proved by Dr.S.K.Shrivastava (PW.7). There were four superficial burn injuries. In the circumstances as accused was in the company of the deceased persons and admittedly they were residing together, it was incumbent upon the accused to have explained the facts which were in his exclusive knowledge as provided under Section 106 of Evidence Act. The prosecution by the evidence has not only established the presence of the accused in the company of deceased persons,in the instant case but the evidence also discloses the immediate conduct of the accused which unerringly points out that it was not a case of commission of suicide by deceased persons, but accused has committed murder of them. We find on record statement of son of accused, namely, Laxminarayan (PW.6). He has stated that he was in the village, when he reached the house, he found that smoke was coming out, he parked his bicycle outside the house and from back side he entered the house and found that his sister and mother were in the flames, his father was standing in the courtyard, he asked his father how they caught fire, on that accused took his bicycle and ran away without uttering even a word. His father was wearing underwear. Hue and cry was raised by the witness, on that villagers assembled, by that time his sister and mother had already died. He has further stated in para 2 of his deposition that conduct of his father was not good. He used to attempt forcible sexual intercourse with his daughter Santosh Kumari on number of times and on being objected, used to beat her. Mother also used to resist the accused, on

that mother also used to be beaten by the accused. On the prior Saturday his father wanted to commit forcible sexual intercourse with his sister, on being objected a quarrel took place in the house, he went away on Sunday and came back in the evening. His father had locked the eatables in a room. When he asked his father not to do so, his father told they should earn and eat. Not only this, we find that the extra judicial confession was also made by the accused immediately after the incident to his daughter-in-law, namely, Rannu Sondhiya (PW.3). She has stated that when she was in her parental house, her father-in-law came on the bicycle and stated that he had set ablaze Santosh Kumari and her mother. Later on in her cross-examination, after about eight months, she tried to change this version and submitted that it was informed that deceased persons had committed suicide, but her earlier version appears to be correct and later version made after eight months appears to be after she was won over. She has also stated that conduct of her father-in-law was not good, he used to harass deceased Santosh Kumari, which used to be objected by her mother-in-law. Accused was also not keeping good eye on her. However, she used to go out whenever the accused started filthy talks.

Yet another daughter Mamta Devi (PW.2), of the accused has also stated that her father used to keep evil eye on her also and wanted to make sexual relationship with her. Santosh Kumari had also complained about the similar conduct of the accused, this conduct of the accused used to be objected to by Lilawati, deceased, but accused never listened to daughter and mother and used to beat them. Either the deceased persons have committed suicide or accused has committed their murder, obviously, as she was not in the house, she could not have stated aforesaid fact precisely. The conduct of accused indicates that he did not go to the police station to lodge the report nor tried to save the deceased persons. He did not raise hue and cry also to call the neighbours in case it was a case of commission of suicide, on the contrary he failed to answer the query made by his son Laxminarayan as to how deceased persons were set ablaze. He silently moved away taking the bicycle and reached to the house of daughter-in-law and had made extra judicial confession to her. Superficial burn injuries found on the person of accused establishes his complicity and presence. It was clearly a case of commission of murder by accused, his conduct indicates that.

8. Ramnaresh Sondhiya (PW.4), yet another son of the accused, was not in the house and was residing separately, he has also stated about the ill deeds of his father and further stated that conduct of the family members was not proper. Mamta Devi had informed him that father used to sexually harass her. The witness has also stated in para 9 that on being asked about the whereabouts of the accused, his brother had informed that he had run away. Thus, conduct of the accused of running away from the spot silently cast a serious doubt as to his conduct, it was incumbent upon him to immediately explain in case it was a case of suicidal burn

injuries, but he has not done so . He has not even disclosed this fact to his son. The injuries caused have been proved by Dr. S.K.Shrivastava (PW.7). He has performed the autopsy of Lilawati and found burn injuries to the extent of 100%, Santosh Kumari's autopsy was also performed and 100% burn injuries were found. Postmortem reports (P/7 & P/8) have been proved. Investigation has been proved by R.K.Shukla. This Court has considered various decisions of Apex Court in Cr. A. No. 86/99 decided on 11.9.2007 laying down that it is the bounden duty of the accused to explain the conduct. In case no explanation is offered or the explanation offered is found to be false, that provides additional link in the chain of circumstances so as to fasten the guilt of the accused thus :-

> "The Apex Court in *State of U.P. v. Dr. Ravindra Prakash Mittal*, (1992) 3 SCC 300, has laid down in the backdrop of the fact that death of wife took place in the house, circumstances required explanation from the husband. In the instant case husband was in the company of wife, thus it was necessary for him to explain the circumstances how homicidal death took place, it was not the case of death by drowning. In *Shri Kishan v. State of Haryana*, AIR 1994 SC 1597, the Apex Court has laid down in the backdrop of the fact that accused was present in the house on the fateful night, medical evidence assumes importance in the case to ascertain cause of death. Medical evidence indicated that death was due to asphyxia as a result of strangulation around the neck. It was not the case of accused that he brought down the dead body and placed it on the cot, the Apex Court held, which corroborated the prosecution version that the death was due to strangulation and accused was responsible for that. In *Sheikh Abdul Hamid and another v. State of Madhya Pradesh*, AIR 1998 SC 942, it was considered whether there was possibility of an outsider to have committed the offence, there was no such possibility found as such accused was convicted. In *Trimukh Maroti Kirkan v. State of Maharashtra*, JT 2006 (9) SC 50, the Apex Court has considered that when an offence takes place inside the privacy of a house, in the instant case husband and wife were in the company, it is held that in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence is insisted upon by the Courts. The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the

prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. It has been further observed that where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

In view of the aforesaid principles of law laid down by the Apex Court and facts projected in the instant case, it is apparent that appellant has been rightly found guilty of offence under section 302 of IPC and sentence imposed upon him is also found to be proper. No case for interference in the appeal is made out.

9. Resultantly, appeal is hereby dismissed. Conviction and sentence imposed on the accused/appellant is hereby affirmed.

Appeal dismissed.

I.L.R. [2010] M. P., 261
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
7 October, 2009*

MOHAMMAD HAFEEZ ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Section 306 - *15 years old prosecutrix all alone in her house - Accused suddenly entered there into and closed the door from inside - Accused squeezed mouth of prosecutrix and gave threats to defame her and came out of the house and run away when inhabitants of the locality came there and called the prosecutrix by name - Just after some time prosecutrix committed suicide by hanging from roof - Held - There was proximate and live*

*Cr.A. No.62/1995 (Jabalpur)

link between offending act of accused and the extreme step taken by the prosecutrix - Accused was rightly held abettor of the suicide. (Para 20)

क. दण्ड संहिता (1860 का 45), धारा 306 – 15 वर्षीय अभियोक्त्री अपने घर में अकेली थी – अभियुक्त ने अचानक वहाँ प्रवेश किया और अन्दर से दरवाजा बंद कर दिया – अभियुक्त ने अभियोक्त्री का मुँह दबाया और उसे बदनाम करने की धमकी दी और जब आसपास के निवासी वहाँ आये और अभियोक्त्री को नाम से पुकारा तब घर से बाहर आया और भाग गया – उसके कुछ समय बाद ही अभियोक्त्री ने छत से लटककर आत्महत्या कर ली – अभिनिर्धारित – अभियुक्त के आपराधिक कृत्य और अभियोक्त्री द्वारा उठाये गये अंतिम कदम के मध्य निकटवर्ती और सीधा सम्बन्ध था – अभियुक्त को उचित रूप से आत्महत्या का दुष्प्रेरक ठहराया गया।

B. Evidence Act (1 of 1872), Section 32(1) - *Just after the incident and before suicide, prosecutrix had described misdemeanour of the accused to eye-witness - Entire statement made by prosecutrix to eye-witness soon before her death was admissible u/s 32(1) of Act.* (Para 21)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32(1) – घटना के तुरन्त बाद और आत्महत्या के पूर्व अभियोक्त्री ने प्रत्यक्षदर्शी साक्षी को अभियुक्त का उपापराध वर्णित किया था – अभियोक्त्री द्वारा अपनी मृत्यु के ठीक पूर्व प्रत्यक्षदर्शी साक्षी से किया गया सम्पूर्ण कथन अधिनियम की धारा 32(1) के अन्तर्गत ग्राह्य था।

C. Evidence Act (1 of 1872), Section 3 - *Appreciation of evidence - Defence plea - Love letters of accused recovered from the house of prosecutrix was suggestive that she was in love with the accused - Held - Such plea was neither raised by the accused in his examination u/s 313 of Cr.P.C. nor in the cross-examination of prosecution witnesses - Further, no love letter said to have been written by prosecutrix to the accused was tendered in evidence - Defence plea cannot be accepted.* (Para 12)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – प्रतिरक्षा का अभिवचन – अभियोक्त्री के घर से बरामद अभियुक्त के प्रेम पत्र यह सुझाव देते हैं कि वह अभियुक्त से प्रेम करती थी – अभिनिर्धारित – ऐसा अभिवचन अभियुक्त ने न तो द.प्र.सं. की धारा 313 के अन्तर्गत अपनी परीक्षा में उठाया और न ही अभियोजन साक्षियों की प्रतिपरीक्षा में – इसके अतिरिक्त, अभियोक्त्री द्वारा अभियुक्त को लिखा जाना कथित किया गया कोई प्रेम पत्र साक्ष्य में निविदत्त नही किया गया – प्रतिरक्षा अभिवचन स्वीकार नही किया जा सकता।

D. Evidence Act (1 of 1872), Section 3 - *Appreciation of evidence - Defence plea of alibi and alternative plea that accused was invited to her house by the prosecutrix only - These inconsistent and alternative pleas cannot be accepted - However, they strengthened the prosecution case.* (Para 12)

घ. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – प्रतिरक्षा का अन्यत्र उपस्थित होने का अभिवचन और यह वैकल्पिक अभिवचन कि अभियुक्त को केवल अभियोक्त्री द्वारा उसके घर बुलाया गया – ये असंगत और वैकल्पिक अभिवचन स्वीकार नही किये जा सकते – तथापि, वे अभियोजन के मामले को दृढ़ बनाते हैं।

E. Evidence Act (1 of 1872), Section 3 - ***Prosecutrix dead - Effect of non-examination*** - *Merely because the prosecutrix was dead and consequently could not be examined, can never be a ground to acquit accused if there is evidence otherwise available proving the criminal act of the accused.* (Para 21)

ङ. साक्ष्य अधिनियम (1872 का 1), धारा 3 – अभियोक्त्री की मृत्यु – परीक्षा न कराने का प्रभाव – केवल इसलिए कि अभियोक्त्री की मृत्यु हो गयी और परिणामस्वरूप उसकी परीक्षा नही करायी जा सकी, अभियुक्त को दोषमुक्त करने का आधार कभी नही हो सकता, यदि अभियुक्त के दाण्डिक कृत्य को साबित करने के लिए अन्यथा साक्ष्य उपलब्ध हो।

Cases referred :

1993 MPLJ 729, 2007(I) & (II) CrCP (MP) 269, AIR 1989 SC 1661, AIR 1991 SC 1532, 2009 AIR SCW 4421, AIR 1992 SC 2043.

L.N. Sakle, for the appellant.

G.S. Thakur, P.L., for the respondent/State.

JUDGMENT

R.C. Mishra, J. :–This appeal has been preferred against the judgment dated 5/1/1995 passed by Additional Sessions Judge, Khurai Distt. Sagar in S.T. No.161/93 whereby the appellant was convicted and sentenced as under with the direction that all the custodial sentences shall run concurrently –

Convicted under Section	Sentenced to
451 of the IPC	undergo R.I. for 2 years and to pay a fine of Rs.1000/-and in default, to suffer S.I. for 1 month.
354 of the IPC	undergo R.I. for 2 years.
306 of the IPC	undergo RI. for 7 years and to pay a fine of Rs.2,000/-and in default, to suffer S.I. for 3 months.

2. Prosecution story, in short, may be narrated thus -

(i) The prosecutrix (since deceased), a girl aged about 15 years, was the daughter of Basant Kushwaha and Sitabai (PW6) and the elder sister of Jagdish (PW4). At the relevant point of time, they were residing in a house situated in Ram Ward at Bina. House of the appellant, who was 20 years of age, was also located in the same vicinity.

(ii) On 10/3/1992 at about 11 a.m., finding the prosecutrix all alone in her house, the appellant suddenly entered thereinto and closed the door from inside. However, Shakun Bai (PW3) [hereinafter

referred to as "Shakun"], one of the inhabitants of the locality, was able to witness his misdeed. She, accordingly, informed Chanda Bai (PW1) [for short "Chanda"], who was also living in the neighbourhood. Both of them came to the house of Basanta and called the prosecutrix by name. Thereupon, the appellant came out of the house and ran away.

(iii) On being asked, the prosecutrix explained that at the time when she was absorbed in studies, the appellant trespassed into the house and after shutting the door, squeezed her mouth and gave threats to defame her and thus, continued to remain inside the house. While narrating what had happened in the room, she also started weeping. After consoling her, both Chanda & Shakun returned home.

(iv) At about 12, on his return from school, Jagdish (PW4), not being able to get any response to his repeated calls and knockings at the door, peeped through the window and found that body of the prosecutrix was hanging from roof with the support of her dupatta. His cries attracted attention not only of Chanda & Shakun but that of other neighbours including Ram Ratan Rao (PW5) and Sunil Kumar (PW9) also, who immediately caused the body to descend. However, by then, the prosecutrix had already expired.

(v) Being informed about the incident, T.R. Ahirwar (PW12), posted as ASI in P.S. Bina, reached the spot. He registered a merg (death case) by scribing Dehati Marg Intimation (Ex.P-1) at the instance of Chanda.

(vi) After inquest proceedings, dead body was sent to the hospital for post mortem. It was conducted by a panel of doctors comprising Dr. Anil Dubey (PW2) and Dr. A.K. Gupta. They opined that cause of prosecutrix's death was asphyxia due to hanging.

(vii) During investigation, the appellant was apprehended and was subjected to medical examination. Dr. Ashok Jain (PW8) found him capable of performing sexual intercourse.

3. The appellant abjured the guilt and pleaded false implication due to prevailing animosity. In the examination, under Section 313 of the Code of Criminal Procedure, he further asserted that it was Chanda, who was solely responsible for driving the prosecutrix to commit suicide. According to him, while scolding the prosecutrix, Chanda not only threatened to defame her but also to make a false complaint to her parents. Ashok Kumar (DW1), a resident of Ram Ward only, came forward to support the assertion. An alternative defence of alibi was sought to be proved by summoning Pramod Kumar Vyas (DW2) and Gulsher Khan (DW3), respectively

the owner of Prabhat Talkies and Cinema Operator. Nevertheless, their evidence only indicated that, at the relevant point of time, the appellant was required to remain present in the Talkies to work as an Assistant Operator.

4. To bring home guilt of the appellant, the prosecution examined as many as 12 witnesses including Chanda and Shakun, Sunil and Ramratan. Learned trial Judge, for the reasons recorded in the impugned judgment, concluded that evidence on record was sufficient to prove all the charges beyond a reasonable doubt whereas probability of none of the alternative pleas of defence was established.

5. Legality and propriety of the impugned convictions have been challenged inter alia on the following grounds –

(a) Even if the allegations made against the appellant are taken at their face value and accepted in their entirety, no offence under S.306 of the IPC would be made out.

(b) The incriminating facts regarding other offences said to have been communicated by the prosecutrix to Chanda and Shakun were not admissible in evidence as dying declaration.

(c) Love letters seized by the Investigating Officer clearly suggested that the appellant's entry into the house of the appellant was not unlawful.

In response, learned Panel Lawyer, while inviting attention to the incriminating pieces of evidence on record, has submitted that the convictions in question were well merited.

6. No serious dispute was raised as to the medical opinion that asphyxia due to hanging was the cause of prosecutrix's death. Reaffirming the view expressed by the Panel, that performed autopsy, Dr. Anil Dubey (PW2) also described external and internal physical features. Relevant findings, as recorded in the postmortem report (Ex.P-2), may be reproduced as under -

(i) No mark of struggle or violence over mouth, throat, wrist, arms, beasts, thighs & inner aspect of thighs or genitalia.

(ii) Hymen intact.

(ii) A blood-stained piece of cloth inside underwear was overlying the vaginal orifice; dried and clotted blood was deposited on inner aspects of labia majora and minora, inner aspects of thighs and at the vaginal orifice.

7. Even in the light of the improvement made by Chanda by deposing that before hanging herself, the prosecutrix had also revealed about the attempted rape, the appellant was not charged with the offence of rape or attempt thereof. Even otherwise, the fact that Dr. Ashok Jain (PW8) did not find any stain or blood mark or mark of struggle or tear on appellant's glans penis also did not assume any

significance as his medical examination was conducted 6 days after the incident in question. However, the above-mentioned findings clearly suggested that the prosecutrix was not subjected to sexual intercourse.

8. Testimony of Sitabai (PW6) to the effect that she had gone to the hospital at 10 a.m. leaving no-one else than the prosecutrix, involved in her studies at home, was not challenged in the cross-examination. Her son Jagdish (PW4) also corroborated the fact that he was first to see body of his sister hanging from the ceiling. As per his statement, hearing his shouts, Sunil (PW9), Ramratan Rai (PW5), Chanda and Shakun had arrived at the spot and the door of the house was broken by Sunil and Ramratan Rai, who also rendered assistance in disembarking the dead body. It is relevant to note that Jagdish was not subjected to cross-examination at all.

9. In the light of these facts and circumstances surrounding her death, it was clearly established that the prosecutrix had met with a suicidal death.

10. Sitabai (PW6) clearly asserted that Chanda had apprised her of what had transpired in the house during her absence. Corroborating Sitabai's version, Chanda reiterated the facts, as recorded in the Dehati Merg Intimation (Ex.P-1) by ASI T.R. Ahirwar (PW12) at the place of occurrence only. Chanda claimed to have witnessed the appellant's exit from door opening in courtyard of Sitabai's house and also to have been informed in the presence of Shakun about his misdemeanor in making entry in to the house at the time when she was occupied in reading. According to her, the prosecutrix had described as to how the appellant had prevented her from responding to calls or opening the door by pressing her mouth and catching hold of her hands. Admission made by Chanda that she had not gone to the police station to lodge any report was not of much consequence as, apparently, the FIR (Ex.P-9) was scribed by Shivraj Singh (PW10) in the wake of the findings of the enquiry into the merg intimation. Chanda was cross-examined at length but nothing could be elicited so as to suggest that she was, in any way, interested in securing conviction of the appellant on absolutely false grounds. The plea that she had scolded the prosecutrix within public view was not only contradicted by her but also by Shakun. This apart, the plea also sounded improbable as Sitabai was emphatic in admitting that she was having family relations with Chanda.

11. Although Ramratan (PW5) and Sunil (PW9) did not depose any incriminating fact against the appellant yet, deposition of Chanda drew ample support from Shakun's testimony. As per statement of Shakun, she had seen the appellant proceeding towards the door of the courtyard of Sitabai's house as well as returning by the same route. Her admission that she was also not able to witness the appellant's entry in to the house had not materially affected the substratum of the prosecution case, that stood substantiated from the remaining part of her evidence coupled with a cogent, consistent, creditworthy and motiveless testimony of Chanda.

12. Inviting attention to the contents of seizure memo (Ex.P-6), learned counsel has submitted that recovery of love letters from the house of the prosecutrix was suggestive that she was in love with the appellant. However, as rightly pointed out by the learned triai Judge, the plea as to the love relationship was neither raised by the appellant in his examination under Section 313 of the Code nor in the cross-examination of the prosecution witnesses. Further, no love letter, said to have been written by the prosecutrix to the appellant, was tendered in evidence. Moreover, the alternative defence of being at work in Prabhat Talkies also ran contrary to the suggestion that the appellant was invited to her house by the prosecutrix only. These inconsistent and alternative pleas further strengthened the prosecution case connecting the appellant with the suicide in question.

13. In the wake of the overwhelming evidence on record, learned trial Judge did not commit any illegality in holding that the prosecutrix had committed suicide after being noticed in an exclusive and closed door company of the appellant.

14. To buttress the contention that the allegations made by Shakun and Chanda, even if accepted as trustworthy, would not prima facie constitute the offence of abetment of suicide, learned counsel for the appellant has placed reliance on the following decisions of this Court

(i) *Deepak Raghunathrao Shohle @ Shoe v. State of M.P.* 1993 MPLJ 729.

(ii) *Hariom v. State of M.P.* 2007 (I) & (II) Cr.C.P. (M.P.) 269.

15. Section 306 of the IPC provides punishment for the offence of abetment of suicide whereas abetment is defined in Section 107 thereof. Accordingly, a person abets to committing of a thing when he instigates any person to commit that thing or engages with one or more other persons in any conspiracy for committing of that thing or intentionally aids by action or omission, the committing of that thing. In absence of any allegation as to conspiracy or intentional aiding, the point to be considered is as to whether the appellant intended commission of suicide by the prosecutrix.

16. In *Deepak's case* (supra), the prosecutrix was with her paramour at late hour of night when both the accused had trespassed in to her room and tried to take advantage of the situation to commit sexual offence against her whereas in Hariom's case (ibid), the prosecutrix, in whose room the accused had allegedly entered, with intent to outrage her modesty, at about 1.30 in the preceding night, had committed suicide in the next morning. However, facts of the case on hand are distinguishable. The appellant, a Muslim boy, entered the house of the prosecutrix, an unmarried Hindu girl aged about 15 years, at the time when she was all alone and within an hour she committed suicide after disclosing that he had not only outraged her modesty by holding her hands but had also remained with her for a considerable period threatening her with injury to reputation.

17. It is true that S.306 of the IPC owes its origin to the custom of Sati but the corresponding legal position has undergone a substantial change. Accordingly, a person would be guilty of the offence in a case where he by his act or omission or by a continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide. The result is that the provision now serves as a formidable framework to deal with Criminal liability for complicity in another's suicide.

18. As explained by the Apex Court in *Brij Lal v. PremChand* AIR 1989 SC 1661, as to what would constitute instigation for the commission of an offence would depend upon the facts of each case. Accordingly, in order to decide whether a person has abetted by instigation, the commission of an offence or not, the act of abetment has to be judged in the conspectus of the entire evidence on record with reference to contemporary standards of the Indian society. *State of Punjab v. Iqbal Singh* AIR 1991 SC 1532 was again a case wherein suicide was committed by wife, who was pushed into taking the extreme step by creating an atmosphere of terror. In this factual scenario, despite non-applicability of the statutory presumption under S.113A of the Evidence Act, the Supreme Court restored the order of conviction holding that the husband had been responsible in creating circumstances which would provoke or force wife into taking the only alternative left open to her, namely suicide?

19. In a recent decision rendered by the Apex Court in *Dammu Sreenu v. State of Andhra Pradesh* 2009 AIR SCW 4421, conviction of the accused/appellant who, admittedly, had illicit relations with wife of deceased and had taken her in presence of close relatives of deceased, for the offence of abetment of suicide was held to be justified as there was proximity and nexus between his conduct and behaviour and the suicide.

20. Applying the well settled principle to the facts of the case, it can easily be concluded that the appellant was rightly held abettor of the suicide as there was a proximate and live link between his offending acts and the extreme step taken by the prosecutrix.

21. Moreover, merely because the prosecutrix was dead and consequently, could not be examined can never be a ground to acquit an accused if there is evidence otherwise available proving the criminal act of the accused concerned (See. *State of Karnataka v. Mahabaleshwar Gourya Naik* AIR 1992 SC 2043. The entire statement made by her to Chanda soon before her death was admissible under S.32(1) of the Evidence Act as dying declaration. Further, testimony of Chanda and Shakun was sufficient to bring home the charge of trespass with a guilty intention as contemplated by Section 441 of the IPC. In this view of the matter, the convictions for the offences under Sections 451 and 354 of the IPC were also well merited in the wake of the evidence on record as re-appreciated above.

22. For these reasons, none of the contentions raised against legality and propriety of the impugned convictions deserves acceptance.

23. Coming to the question of sentence, it may be observed that a period of more than 16 years has already elapsed. The appellant has already suffered a period of six months in custody. Taking into consideration the social impact of the crime and other relevant facts and circumstances of the case including that at the relevant point of time, he was below 21 years of age, interests of justice would be met if the term of jail sentence to be carried in execution is reduced from 7 years to 2 years.

24. In the result, the appeal is allowed in part. While the impugned convictions under Sections 451, 354 and 306 of the IPC and the corresponding fine sentences are maintained, the terms of consequent custodial sentences are reduced from 2, 2 and 7 years to 1, 1 and 2 years respectively. The jail sentences, thus modified, shall run concurrently.

25. The appellant is on bail. He is directed to surrender to his bail bonds before the trial Court on or before 09/12/2009 for being committed to the custody for undergoing the remaining part of the sentence.

Appeal partly allowed.

I.L.R. [2010] M. P., 269
CIVIL REVISION
Before Mr. Justice Abhay M. Naik
12 August, 2009*

VISHNU GOYAL ... Applicant
Vs.
SMT. JYOTI SHARMA & anr. ... Non-applicants

A. Civil Procedure Code (5 of 1908), Sections 115 proviso & 24 - ***Finally disposed of the suit or proceedings - Revision against order rejecting application for transfer of suit - Order, if had been passed in favour of applicant, would have disposed of proceeding for transfer - Revision maintainable.*** (Para 14)

क. सिविल प्रक्रिया संहिता (1908 का 5), धाराएँ 115 परन्तुक व 24 – वाद या कार्यवाही का अंतिम रूप से निस्तारण – वाद के अंतरण के आवेदन को खारिज करने वाले आदेश के विरुद्ध पुनरीक्षण – आदेश, यदि आवेदक के पक्ष में पारित किया गया होता तो अंतरण की कार्यवाही का निस्तारण कर देता – पुनरीक्षण पोषणीय।

B. Civil Procedure Code (5 of 1908), Section 24 - *Application for transfer of case on the ground that lower appellate Court had already given findings and there would be probability that same findings will be maintained*

*C.R. No.73/2009 (Gwalior)

despite remand - In the order of remand, the High Court set-aside the judgment on the basis of consent of parties - Held - Direction of the High Court to decide all the issues warrants hearing from the judge who has not prejudged the issues - Prayer for transfer of case on judicial side cannot be accepted - However, High Court directed case may be transferred on administrative basis. (Para 29)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 24 – मामले के अंतरण के लिए आवेदन इस आधार पर कि निम्न अपीलीय न्यायालय पूर्व में निष्कर्ष दे चुका था और यह संभाव्य है कि प्रतिप्रेषण के बावजूद वही निष्कर्ष कायम रखे जाएँ – प्रतिप्रेषण के आदेश में, उच्च न्यायालय ने पक्षकारों की सम्मति के आधार पर निर्णय अपास्त किया – अभिनिर्धारित – उच्च न्यायालय का सभी विवाद्यकों का विनिश्चय करने का निदेश उस न्यायाधीश से सुनवाई की अपेक्षा करता है जिसने विवाद्यकों का पूर्वनिर्णय नही किया है – न्यायिक पक्ष पर मामले के अंतरण की प्रार्थना स्वीकार नही की जा सकती – तथापि, उच्च न्यायालय ने निदेश दिया कि प्रशासनिक आधार पर मामला अंतरित किया जा सकता है।

Cases referred :

2006(1) MPLJ 568, 2003(1) MPLJ 31, AIR 2003 Karnataka 39, (2008) 3 SCC 659, (1979) 4 SCC 167, AIR 1938 Nagpur 126, AIR (31) 1944 Lahore 400, 2004 AIHC 3135.

S.K. Vajpai, for the applicant.

V.K. Bhardwaj with *Anand Bhardwaj*, for the non-applicant No.1.

O R D E R

Abhay M. Naik, J. :–This revision petition has been preferred against the impugned order dated 15.04.2009 passed by the District Judge, Gwalior in Misc. Civil Case No. 37/2009.

2. Short facts relevant for the purpose of this case are that the plaintiff / non-applicant No. 1 instituted a suit for eviction and recovery of arrears of rent against revisionist and non-applicant No. 2 under the provisions of M.P. Accommodation Control Act, 1961.

3. Defendants submitted their written statement refuting thereby the allegations contained in the plaint. They inter-alia denied relationship of landlord and tenant between plaintiff and defendants.

4. In the light of pleadings, issues to the following effect were framed.

(1) Does there exist a relationship of landlord and tenant between plaintiff *and defendants?*

(2) Whether, the defendants are in arrears of rent w.e.f. January, 2000 at the monthly rent of Rs. 300/- towards plaintiff ?

(3) Does, the plaintiff bonafide require the disputed shop for business of herself and her husband?

(4) Whether, the plaintiff and her husband have no other alternative vacant shop for the said purpose in the city of Gwalior ?

(5) Whether, the defendants have not paid rent to the plaintiff despite demand notice?

(6) Is there defect of non-joinder of the parties in the suit?

(7) Whether, the plaintiff has paid sufficient Court fees ?

(8) Relief and cost?

(9) Whether, the plaintiff is owner of the disputed shop ?

(10-A) Whether, the defendants have denied title of the plaintiff?

(10-B) Whether, the plaintiff is entitled to decree for ejectment under section 12 (l)(b) of M.P. Accommodation Control Act?

5. Learned trial judge after recording the evidence dismissed the suit with a finding that relationship of landlord and tenant between plaintiff and defendants did not exist. He further found that the plaintiff is not an owner of the disputed shop and that the suit suffers from the defect of non-joinder of parties. However, the Court fees paid by the plaintiff was found sufficient. Thus, issue Nos. (1),(6) & (9) were decided by the learned trial judge in favour of the defendants, whereas, issue No. (7) regarding sufficiency of Court fees was decided in favour of the plaintiff. Learned trial judge refrained from giving findings on issue Nos. (2) to (5) and (10-A). Findings on them were not recorded as the same were not warranted according to learned trial judge in the light of the finding about absence of relationship of landlord and tenant between plaintiff and defendants. Accordingly, the suit was dismissed. Aggrieved by the same, plaintiff/non-applicant No. 1 preferred Civil Appeal No.8-A/2008, wherein, order was passed on 11.08.2008. Learned lower appellate judge found that the relationship of landlord and tenant between plaintiff and defendants was duly established. Accordingly, the findings on issue Nos. (1) & (9) were set aside. Since, findings on issue Nos. (2) to (5) and (10-A) were not given by the trial Court, the case was remanded back to the trial Court and the judgment and decree of the trial court dated 20.04.2007 was set aside. Learned trial judge was directed to re-decide the suit.

6. Defendants/revisionist challenged the aforesaid remand order before this Court in M.A. No. 1015/2008.

7. This Court on 9th February, 2009 passed the following consensual order:-

"4. Consequently, the appeal is disposed of with the following directions :-

(1) That, the impugned judgment and decree passed in Civil Appeal No. 8-A/2008 dated 11.08.2008 is hereby set aside.

(2) The matter is remanded back to the First Appellate Court with a direction to decide the appeal on merits. The parties can raise all these issues before the First Appellate Court.

(3) Looking to the nature of the case the First Appellate Court is directed to decide the case within a period of four months from the date of receipt of a copy of this order.

(4) Parties are directed to appear before the First Appellate Court on 25th of February, 2009. Record be sent back immediately to the lower appellate Court. "

8. Since, the matter, after remand was listed before the same presiding officer who had passed the remand order dated 11.08.2008, the revisionist submitted an application under section 24 of C.P.C. for transfer of the appeal to any other competent Court. It was stated in the application that the learned presiding officer of the lower appellate Court had already given findings about existence of relationship of landlord and tenant between plaintiff and defendants after discussing the evidence in paragraph Nos. 8 to 30 of the judgment/order dated 11.08.2008, there would be every probability that the same findings will be maintained by the lower appellate Court despite remand. Thus, according to the revisionist, he would not get fair justice and shall have to suffer mis-carriage of justice.

9. Application of transfer under section 24 of C.P.C was opposed by the plaintiff/non-applicantNo. 1.

10. Learned District Judge after hearing the arguments dismissed the application for transfer vide impugned order. Hence, this revision.

11. Shri Bhardwaj, learned senior counsel raised preliminary objection that the Civil Revision against the impugned order is not maintainable. Reliance has been placed for this purpose on the decisions of this Court in the case of *Ramdas Vs Smt. Amrita and Others* 2006 (1) MPLJ 568 and *Sawal Singh Vs. Smt. Ramsakhi and Others* 2003 (1) MPLJ 31. Placing reliance on the decision of *Sawal Singh* (supra), it is contended by Shri Bhardwaj learned senior counsel that the impugned order, even, if had been passed in favour of the revisionist would not have finally disposed of the suit. Therefore, according to him, the revision petition is not maintainable. He highly placed stress on the following passage extracted from the said decision:-

"Now this Court will not exercise revisional jurisdiction in respect of those orders which would not dispose of the suit finally. Though on the decision of the suit the effect of the order maybe substantial, material, or on jurisdictional issues, but if immediate effect is not the final disposal, the revisional jurisdiction cannot be exercised, though those issues can definitely be raised when regular appeal is preferred."

(underlined by this Court)

12. For appreciating the aforesaid contention, it would be proper to consider the relevant portion of section 115 of C.P.C. applicable to the State of M.P. which is reproduced below :-

> *"115. Revision:- (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies therefrom and if such subordinate Court appears :-*
>
> *(a) to have exercised a jurisdiction not vested in it by law; or*
>
> *(b) to have failed to exercise a jurisdiction so vested; or*
>
> *(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:*
>
> *Provided that the High Court shall not, under this section, vary or reverse any order made or any order deciding an issue, in the course of a suit or other proceeding, except where.....*
>
> *(a) the order, if it had been made infavour of the party applying for the revision, would have finally disposed of the suit or proceeding; or*
>
> *(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.*
>
> *(2).....*
>
> *(3).....*
>
> *Explanation:- ....."*

Proviso to sub-section 1 goes to show clearly that the revision petition within limitations of section 115 CPC may be entertained against an order, if it had been made in favour of the revisionist, would have finally disposed of the suit or proceedings.

13. Thus, the contention of Shri Bhardwaj learned senior counsel that the revisional jurisdiction would be exercisable only if the impugned order, if it had been passed in favour of the revisionist would have disposed of only the suit finally, is highly mis-conceived. The word "or proceeding" occurring in the aforesaid proviso cannot be altogether ignored. In *Sawal Singh* (supra) decision three Civil Revisions were considered, two of them arose from the applications for interim injunction, whereas, third one arose from the application under Order 6 Rule 7 CPC. They arose on account of the applications submitted in the suit itself. In this context, this Court appears to have observed that the revisional jurisdiction will not be exercised because orders impugned in *Sawal Singh's case* would not have disposed of the suit finally. It is clear from the decision in the case

of *Ramdas* (Supra), that the revision against the order setting aside *ex-parte* judgment and decree was found maintainable because the same would have finally disposed of the proceedings under Order 9 Rule 13 CPC.

14. It is perhaps, needless to say that the application under section 24 of CPC is registered independently in the Court of District Judge and the impugned order, if, had been passed in favour of the revisionist would have disposed of the proceedings.

This being so, it cannot be said that the revision under section 115 CPC against the impugned order is not maintainable.

I am fortified in my this view by Karnataka High Court decision in the case of *M.V. Ganesh Prasad, Vs. M.L. Vasudevamurthy and Others* AIR 2003 Karnataka 39 wherein it is observed:-

> *"In the instant case the impugned order is an order passed on a petition filed before the District Judge under S. 24, C.P.C. and in a proceeding independent of 0. S. 92/98 which was pending before the trial Court which was sought to be transferred. It cannot be said that the impugned order, passed by the learned District Judge under S. 24, C.P.C. is an order passed in a pending proceedings in a suit, though the prayer in the application under S. 24 is for transferring the pending suit to some other Court which has jurisdiction. The order cannot be characterized as an order passed in the pending suit itself. If this is so, the proviso to S. 115, C. P. C. is not attracted and as such the preliminary objection sought to be raised on behalf of the respondent cannot be accepted."*

15. Matter of transfer of a suit or any proceedings from one court having a particular presiding judge to another court having another presiding judge is quite sensitive and is to be exercised very cautiously as observed by Supreme Court of India in the case of *Kulwinder Kaur Vs. Kandi Friends Education Trust and Others* (2008) 3 Supreme Court Cases 659: -

> *"22. Although, the discretionary power of transfer of cases cannot be imprisoned within a straitjacket of any cast-iron formula unanimously applicable to all situations, it cannot be gainsaid that the power to transfer a case must be exercised with due care, caution and circumspection."*

It is further observed :-

> *"23. Reading sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by courts. They are balance of*

convenience or inconvenience to the plaintiff or the defendants or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the court feels that the plaintiff or the defendant is not likely to have a "fair trial" in the court from which he seeks to transfer a case, it is not only the power, but the duty of the court to make such order."

16. In the case of *Mrs. Maneka Sanjay Gandhi and Another Vs. Miss Rani Jethmalani* (1979) 4 Supreme Court Cases 167, it was observed long back by the Apex Court:-

"2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini grievances. Something more substantial, more compelling, more imperiling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case."

17. Shri Bhardwaj, learned senior counsel placed reliance on certain citations which I am required to mention below in order to determine their applicability :-

In the case of *Mt. Nathabai Vs. Baijnath Kunjilal and Another* AIR 1938Nagpur 126, it was held that a judge has decided a particular point of law in a previous case, is no reason for transfer in a subsequent case.

In the case of *Mohd. Ashraf and Others Vs. Buta Mal and Others* AIR (31) 1944 Lahore 400, it was held that decision by a judge in the previous case on the question of facts arising in subsequent case before the same judge was held to be no ground for transfer of the subsequent case.

18. Contention of the revisionist is that the lower appellate court had already

recorded finding on crucial issue about relationship of land lord and tenant between plaintiff and defendants. In view of this much reliance has been placed by the respondent on the decision of *Andhra Pradesh High Court in the case of Soundara Raju and Another Vs. Bore Prasad* 2004 A I H C 3135 wherein it is observed.'-

> *"6. The proceedings cannot be transferred from one Court to another on the basis of such contentions. Remanding of matters after setting aside the orders under revision or appeal is not an uncommon feature. In many cases, the matters come to be re-heard and adjudicated upon by the same presiding officers after remand. Almost without exception, it needs to be said to the credit of the officers that the matters were decided dispassionately, uninfluenced by their findings or views in the orders that are set aside. Such a dispassionate consideration is infact, the hallmark of the very adjudicatory process. A Judge worth his name would never associate with any case, much less with the findings recorded in it in the earlier proceedings. The petitioners have not doubted the integrity, impartiality or an independence of the learned presiding officer. There is nothing on record to lend any support to the apprehension of the petitioners. It is needless to observe that if the petitioners feel aggrieved of the outcome of the appeal or any interlocutory orders passed, it is always be open to them to seek appropriate remedy."*

19. In the case of *Mt. Nathabai* (supra), the question involved was propriety of a prayer for transfer of subsequent case because a particular law point was already decided by the same judge in the previous case. In the present case, there is involvement of factual dispute about relationship of landlord and tenant and not of any point of law. In the case of *Mohd. Ashraf* (supra) transfer of subsequent case was sought on the ground that a common question of fact was decided by the same judge in the previous case. In the case in hand, no transfer is sought on the basis of decision of factual aspect in a previous suit. In the case of *Soundara Raju* (supra) remand was made by the higher court after setting aside the findings of the lower court by superior court. In the present case. High Court has set aside the judgment and decree of the lower appellate court without commenting on it's view and has asked the court to decide the appeal afresh. Thus, the factual scenario in the present case is different from that of the case of Andhra Pradesh High Court.

20. Thus, none of the citations referred to by learned counsel for the parties deals with the situation of the present case. In the case in hand, it may be seen that the suit of the plaintiff was dismissed by the learned trial judge with a finding

that there did not exist relationship of landlord and tenant between plaintiff and defendants. In view of this finding, learned trial judge refrained from giving findings on issue Nos. 2 to 5 and 10-A.

21. Learned lower appellate judge after hearing the arguments in the appeal decided the issues pertaining to relationship of landlord and tenant between plaintiff and defendants in favour of the suitor and remitted back the matter to the learned trial court to decide remaining issues.

22. In M.A. No. 1015/2008 preferred against the remand order of the lower appellate court, although, the findings of the learned lower appellate judge about existence of relationship of landlord and tenant were disputed but at the stage of final order on 09.02.2009 a concession in the form of no objection was given by the learned counsel for the landlord that the matter may be remanded back to the First Appellate Court to decide the appeal on all the issues.

23. Learned counsel for the revisionist did not choose at that stage to demonstrate any kind of infirmity in the findings of the learned lower appellate judge about existence of relationship of landlord and tenant between plaintiff and defendants. It is so revealed in the order dated 09.02.2009 passed by this Court in M.A. No. 1015/2008. For convenience, relevant operative portions are reproduced below :-

> *1. Appellant has filed this appeal against the judgment and decree dated 11.08.2008 passed by VIth Additional District Judge, Gwalior in Civil Appeal No. 8-A/2008. By the aforesaid judgment learned First Appellate Court has remanded the case back to the trial Court to record its findings on issues No. 2 to 5 and 10.*
>
> *2. Learned counsel for the plaintiff-respondent No. 1, who is contesting respondent, has submitted that he has no objection if the appeal be remanded back to the First Appellate Court to pronounce its judgment on all the issues after setting aside the order of remand.*
>
> *3. Learned counsel for the appellant also has no objection on the aforesaid proposition.*
>
> *4. Consequently, the appeal is disposed of with the following* directions:-
>
> *(1) That, the impugned judgment and decree passed in Civil Appeal No. 8-A/2008 dated 11.08.2008 is hereby set aside.*
>
> *(2) The matter is remanded back to the First Appellate Court with a direction to decide the appeal on merits. The parties can raise all these issues before the First Appellate Court.*

Perusal of the aforesaid order clearly goes to show that this Court did not

either discuss or consider the manner of appreciation of evidence by the learned lower appellate judge. Correctness or incorrectness of the finding was not gone into by this Court.

24. Although, this Court in its order dated 09.02.2009 passed in M.A. No. 1015/2008 did not discuss or comment on the merits of the findings on issue No. 1 & 9 recorded by the lower appellate court, yet in its best wisdom, this Court set aside the judgment and decree of the lower appellate court dated 11.08.2008 and remanded back the matter to the lower appellate court to decide the appeal on all the issues. Since, the counsel for the landlord himself expressed no objection for directing the lower appellate court to pronounce the judgment on all issues after setting aside the judgment and decree dated 11.08.2008, there was perhaps no occasion for this Court to consider and discuss about merits/demerits of the judgment dated 11.08.2008.

25. Learned counsel for the plaintiff could have indeed prayed / insisted for remand with a direction to decide merely the remaining issues. Instead, he himself conceded to the defendants prayer for setting aside the order of remand (i.e. judgment and decree dated 11.08.2008) with a direction to decide the appeal afresh on all the issues. None of the parties placed before this Court, the memo of appeal in M.A.No. 1015/2008, in order to enable this Court about the scope of challenge to the remand order. Order of this Court dated 09.02.2009 being a consensual order nothing could be gathered from it that what transpired at the stage of arguments in M.A.No. 1015/2008, therefore, this Court requisitioned the record of M.A.No. 1015/2008.

26. From the perusal of memo of appeal, it reveals that there are as many as 15 grounds (ground No. B to ground No. Q) in the memo of appeal to impeach the findings on issue Nos. 1 & 9. Consideradon/ discussion on these grounds was perhaps not warranted before this Court because of the consent of the counsel of the landlord for setting aside the order of remand and direction to the lower appellate court to pronounce the judgment on all the issues. This being so, there did not arise any occasion to consider the merits/demerits of the reasons assigned by the lower appellate court for arriving at the findings recorded against issue Nos. 1 & 9. On perusal of the judgment and decree dated 11.08.2008, it is found that the learned lower appellate court has recorded the findings on issue Nos. 1 & 9 after appreciating the evidence in paragraph No. 8 to paragraph No. 30 of the judgment. This appreciation in the absence of discussion by this Court cannot be treated as correct or incorrect. Likewise, due to the consent of the learned counsel for the landlord there did not arise any occasion even to comment in either way on the appreciation of evidence/material by learned lower appellate court. Thus, it cannot be said that the appreciation or manner thereof and the conclusion arrived at by the lower appellate court while deciding the issue Nos. 1 & 9 were approved or disapproved by this Court vide order dated 09.02.2009. Still it cannot be ignored

that this Court in its best wisdom has set aside the judgment and decree of the lower appellate court dated 11.08.2008 in its entirety which included setting aside of findings on issue Nos. 1 & 9 and has directed to decide all the issues afresh.

27. This Court is quite conscious of the fact that the order of this Court dated 09.02.2009 passed in M.A. No. 1015/2008 does not amount to disapproval of the appreciation or findings recorded by the lower appellate court in its judgment and decree dated 11.08.2008 because of absence of any discussion or comments. Similarly, it may be equally presumed that the counsel for the landlord being aware of ground Nos. B to Q raised in the memo of appeal did not choose to oppose the appeal and rather consented for setting aside the entire order of remand which included findings of the lower appellate court on issue Nos. 1 & 9. Learned counsel for the landlord could have prayed before this Court in M.A No. 1015/2008 to direct the lower appellate court to decide merely remaining issues which were not decided by the lower appellate court in the first round of appeal. Instead, a consent was given by the landlord's counsel to set aside the order of remand in its entirety with a direction to the lower appellate court to decide the appeal on all the issues.

28. In the case of *Soundra Raju* (supra) the findings or views were set aside by the superior court and the matter was remanded back. In the present case, there did not arise any occasion to consider the findings or views of the lower appellate court on account of the consent having been given by the landlord's counsel and resultantly appreciation of the lower appellate court or the reasons assigned by the said court could not be commented in either manner. In this peculiar situation, it is not deemed proper to treat the order of this Court dated 09.02.2009 as approval or disapproval of the appreciation made by the lower appellate court or reasons assigned by the said court in the judgment and decree dated 11.08.2008. Moreover, the honesty, sincerity and integrity of the presiding judge of the lower appellate court seems to be beyond doubt as the same has not been even questioned in the least. This being so, the prayer of the revisionist/tenant for transfer of the case on judicial side cannot be accepted and is found to have been rightly rejected.

29. However, it cannot be ignored that the findings against issue Nos. 1 & 9 by the lower appellate court were disputed by the revisionist in the memo of appeal in M.A. No. 1015/2008 by raising specific ground Nos. B to Q (15 grounds). Learned counsel for the landlord gave his consent in M.A. No. 1015/2008 to set aside the order of the lower appellate court in its entirety with a direction to decide the appeal by the lower appellate court on all the issues. This court vide order dated 09.02.2009 in its best wisdom though on consensual basis has set aside the judgment and decree dated 11.08.2008 which included the findings on issue Nos. 1 & 9 which were recorded by the learned lower appellate judge after appreciating the material vide paragraph Nos. 8 to 30 of the judgment. Due to the consent given by the landlord's counsel, there did not arise any occasion to consider/ discuss the manner of appreciation or the reasons assigned by the lower appellate

court. Yet setting aside of the entire remand order including issue Nos. 1 & 9 by this Court coupled with the direction to decide all the issues afresh warrants hearing from the judge who has not pre-judged the issues. It is a cardinal principle that justice should not be merely done but it should equally appear to have been done. Due to the peculiar and exceptional situation explained hereinabove, learned District Judge, Gwalior could have transferred the case on administrative basis. This Court vide order dated 26.06.2009 had called for the comments from the learned presiding judge of the court of VI Additional District Judge, Gwalior. Learned presiding judge in a very fair and non-partisan manner has expressed her no objection in transferring the appeal from her court. Accordingly, District Judge, Gwalior is hereby directed to transfer the appeal on administrative side to any other court competent to hear and decide the same.

30. Before parting with the matter, it is made clear that the debate of transfer could have been easily avoided, if the counsel for the revisionist had been alert at the time of order dated 09.02.2009 because such a prayer could have been conveniently made before this Court then and there. It is further made clear that the transfer of the case is being directed due to the peculiar and exceptional situation stated herein above and has absolutely no concern with the presiding judge of the lower appellate court whose intelligence, honesty, integrity and sincerity were not even questioned in the least during entire arguments.

31. In view of the earlier order of this Court, it is directed that the appeal is to be decided expeditiously latest by the end of the year 2009. No order as to costs.

Order accordingly.

I.L.R. [2010] M. P., 280
CRIMINAL REVISION
Before Mr. Justice Piyush Mathur
26 November, 2009*

BANTI @ SANTOSH ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 2(k) & 7-A - *Juvenile - Opinion of Medical Board - When the opinion of the Medical Board is in confirmation with the established norms in the field of Medicine and Radiology, its opinion becomes primary evidence - Ossification test and exact opinion of Medical Board in relation to fusion of iliac bone gives conclusive evidence for reaching the conclusion about the age of person.* (Paras 9 to 12)

किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56),

*Cr.R. No.789/2009 (Gwalior)

BANTI @ SANTOSH Vs. STATE OF M. P.

धारा 2(के) व 7–ए – किशोर – मेडीकल बोर्ड की राय – जब मेडीकल बोर्ड की राय मेडीसिन और रेडियोलॉजी के क्षेत्र के स्थापित मानदण्डों की पुष्टि में है, तब उसकी राय प्राथमिक साक्ष्य बन जाती है – ऑसीफिकेशन टेस्ट और एलिक अस्थि के फ्यूजन के सम्बन्ध में मेडीकल बोर्ड की निश्चित राय किसी व्यक्ति की आयु के सम्बन्ध में निष्कर्ष पर पहुँचने के लिए निश्चायक साक्ष्य होती है।

Cases referred :

(2008) 13 SCC 133.

A.K. Nagarkar, for the applicant.

Mukund Bharadwaj, P.P., for the non-applicant.

ORDER

Piyush Mathur, J. :–This Criminal Revision has been preferred on being aggrieved by the Order passed on Date 11.08.2009 by the Sessions Judge, Gwalior, in Sessions Trial No.206/09, whereby an application filed for determination of the age of Accused Banti alias Santosh, S/o Malkhan Singh Parihar, for declaring him to be a Juvenile has been rejected.

2. The Prosecution has submitted a Chargesheet/Challan against the Petitioner/ Accused Banti alias Santosh under Section 302/34 of the Indian Penal Code read with Section 25/27 of the Arms Act, as Petitioner-Banti and co-accused Soni had caused injuries to one Uma on Date 25.07.2009 who died due to gun shot injuries.

3. The Petitioner has submitted an application on Date 14.7.2009 before the Sessions Court, during the pendency of the Sessions Trial that his age is less than 18 years and as such, he should be tried by the Juvenile Court/Juvenile Board in terms of the provisions of the Juvenile Justice (Care & Protection of Children) Act, 2000, and which was forwarded by the Sessions Court to the Juvenile Board for the ascertainment and determination of the age of the Accused-Petitioner.

4. The Juvenile Board has collected the evidence and subjected the accused to the medical examination and recorded its opinion, based upon the oral and documentary evidence that the Accused Banti was less than 19 years of age, but not more than 21 years of age on the date of the incident, i.e., on Date 25.7.2009.

5. The report of the Juvenile Board Dated 6.8.2009 was considered by the Sessions Court and the application preferred by the Accused was rejected on the ground that the Accused was aged 18 years, 8 months and 13 days on the Date of the incident. The Accused-Petitioner has challenged this order Dated 11.8.2009 passed by the Sessions Court in this Criminal Revision.

6. The Counsel for the Petitioner has submitted that the finding of the Juvenile Board and the conclusion of the Sessions Court, derived on the strength of the Medical Report of the Radiologist, cannot be relied upon as there exists a difference of two years in between the two terminal years and that could not be treated to be a conclusive evidence of the exact age of the petitioner and since the Sessions

Court has primarily and solely based its conclusion on the Report of the Radiologist, therefore, the findings are perverse.

7. The Counsel for the Petitioner has further relied upon the Marksheet of the Board Examination of Class 5th, where a specific date 22.4.1992 has been mentioned and an argument has been advanced on this basis that since the document is 17 years' old, therefore, its content should be considered and relied upon for the purposes of determination of the age of the Petitioner-Accused.

8. The Counsel for the State has opposed the contentions of the Petitioner on the ground that the Sessions Court has not committed any error in determining the age of the Accused. He further submitted that the procedure prescribed in the Juvenile Justice (Care & Protection of Children)Act, 2007, as also the Rules framed in the year 2007, has been followed in letter and spirit both, in as much as the Juvenile Board has examined all the documents including the Report of Medical Board, School Certificate and the statements of the witnesses and has classified the Categories of the evidence, in terms of Rule 12 of the Juvenile Justice Rules, 2007, and as such, there exists sufficient evidence to corroborate the Report of the Radiologist with the exact age of the Accused.

9. It is apparent from the perusal of the record that the Accused was subjected to the Radiological Examination, where a categorical finding has been recorded by the Medical Board that when the X-ray Plates of right elbow joint and right iliac bone were obtained and examined, it was found that there was a clear fusion of the joints and the iliac fusion was on the verge of its completion, which demonstrates that the Accused must be bordering in between 19 to 21 years of age. Therefore, there remains no doubt about the correctness of the conclusion arrived at by the Court below that the Accused was certainly above the age of 18 years and was not a Juvenile on the date of incident, in terms of the provisions of the Juvenile Justice (Care & Protection of Children)Act, 2000.

10. The issue of determination of date of birth had come up before the Supreme Court on many occasions, and in its Latest Decision in the Case of *Babloo Pasi v. State of Jharkhand*, reported as 2008 (13) SCC 133, the Supreme Court had observed that the procedure prescribed in the Juvenile Justice (Care & Protection of Children)Act, 2000 has to be strictly followed and the Report of the Medical Board should be relied upon only when it gives sound reasonings about the age of the person.

11. The ossification test and the exact opinion of the Medical Board in relation to the fusion of the iliac bone, gives a conclusive evidence of the fact that the Accused was about to complete 21 years of age and as such, it could not be said that he was below the age of 18 years at the time of the occurrence of the incident.

12. Therefore, when the opinion of the Medical Board find confirmation with the established norms in the field of Medicine and Radiology, the Expert's Opinion

becomes the primary evidence for reaching the conclusion about the age of the person, who was subjected to such medical examination. The Sessions Court has analytically and correctly examined the other evidence brought on the record on behalf of the Accused about his age and has rightly given weightage to the Medical Report in comparison to other set of evidence, on being found to be trustworthy and reliable. Therefore, this Court find no reason to interfere with the Order passed by the Sessions Court.

Consequently, the Revision Petition is dismissed.

A copy of this order be sent to the concerned Trial Court.

Petition dismissed.

I.L.R. [2010] M. P., 283
MISCELLANEOUS CIVIL CASE
Before Mr. Justice Rajendra Menon
9 November, 2009*

VIDHYAWATI CONSTRUCTION CO. (M/S) ... Applicant
Vs.
UNION OF INDIA & ors. ... Non-applicants

A. Arbitration and Conciliation Act (26 of 1996), Section 11(3)(6) *- Appointment of Arbitrator - Without taking to recourse to the procedure already agreed to between the parties in the agreement, application directly filed before Court for appointment of an Arbitrator - Held - To take recourse to the procedure contemplated in the agreement itself, is a general rule - Appointing an independent Arbitrator is an exception to be resorted to for valid reasons - No valid and justifiable reason for deviating from the general rule is pointed out - It is not proper to appoint an independent Arbitrator as the same would be contrary to the well settled principle laid down by the Supreme Court in the case of Northern Railway Administration [(2008) 10 SCC 240] - Application is disposed of granting liberty to the parties to proceed further in the matter in accordance with the provisions of agreement.* (Paras 19 & 20)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(3)(6) – मध्यस्थ की नियुक्ति – पक्षकारों के मध्य पहले से अनुबन्ध में तय प्रक्रिया का आश्रय लिये बिना मध्यस्थ की नियुक्ति के लिए आवेदन सीधे न्यायालय के समक्ष पेश किया गया – अभिनिर्धारित – अनुबन्ध में अनुध्यात प्रक्रिया का आश्रय लेना एक सामान्य नियम है – स्वतंत्र मध्यस्थ की नियुक्ति करना विधिमान्य कारणों से प्रयोग किया जाने वाला एक अपवाद है – सामान्य नियम से विचलित होने के लिए कोई विधिमान्य और न्यायसंगत कारण नही बताया गया – यह उचित नही है कि एक स्वतंत्र मध्यस्थ की नियुक्ति की जाए क्योंकि यह उच्चतम न्यायालय द्वारा नार्दन रेलवे एडमिनिस्ट्रेशन [(2008) 10 SCC 240] के मामले में निर्धारित सुस्थापित सिद्धांत के प्रतिकूल होगा – पक्षकारों को

*M.C.C. No.1613/2004 (Jabalpur)

अनुबन्ध के उपबंधों के अनुसार मामले में आगे कार्यवाही करने की स्वतंत्रता देते हुए आवेदन का निपटारा किया गया।

B. Arbitration and Conciliation Act (26 of 1996), Section 11(3)(6) - *Department officer - Appointed as Arbitrator - No material is adduce to show that a department officer will not act independently - Mere vague allegation unsupported by any cogent material, cannot be a ground for deviating from the general principles laid down by the Supreme Court in the case of Northern Railway Administration [(2008) 10 SCC 240].* (Para 15)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(3)(6) – विभाग अधिकारी – मध्यस्थ के रूप में नियुक्त – यह दर्शाने के लिए कोई सामग्री पेश नही की गई कि विभाग अधिकारी स्वतंत्र रूप से कार्य नही करेगा – किसी तर्कपूर्ण सामग्री से असमर्थित केवल अस्पष्ट अभिकथन, उच्चतम न्यायालय द्वारा नार्दन रेलवे एडमिनिस्ट्रेशन [(2008) 10 SCC 240] के मामले में निर्धारित सामान्य सिद्धांतों से विचलित होने का आधार नही हो सकता है।

Cases referred :

(2009) 8 SCC 520, (2008) 10 SCC 240.

V.R. Rao with *Shravan Rao,* for the applicant.

Sheel Nagu, for the non-applicants.

ORDER

RAJENDRA MENON, J. :–This application has been filed by the applicant under section 11(3)(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act of 1996') seeking appointment of an arbitrator for resolution of the dispute existing between the parties.

2. Brief facts of the case, necessary for deciding this application are as under: Applicant M/s Vidhyawati Construction Company, with its Head Office at Vidhya Kunj, Allahabad is a Partnership Firm, and this application is filed by one of the Partners, who is authorized to file it. The Firm is a registered firm with the competent authority in the State of Uttar Pradesh.

Non-applicant No.2, General Manager, Central Railway is Head of the Department and certain tenders were floated for construction work on behalf of Union of India. Offer made by the applicant was accepted and a contract entered into on 6.6.01, for the purpose of making certain construction activities, as are detailed in the contract agreement. Clauses 63 and 64 of the contract agreement, which is the General Conditions of Contract, contemplates a provision for settlement of dispute and for making demand for arbitration. It is the case of the applicant that the said work, which was entrusted to the applicant, was completed successfully and to the full satisfaction of the non-applicants on 25.11.2002 and a certificate – Annexure 1 was issued by the Executive Engineer (Construction) Bhopal in this regard. It is stated that after the work was completed the applicant submitted a final bill vide Annexure 2, demanding a sum of Rs.89,16,602=81, after

deducting amount already paid to the tune of Rs.2,18,91,502=71. It is stated that after about five months on 16.4.03, vide Annexure 3, certain information were sought for and correspondence took place vide Annexure 4, in this regard. It is stated that finally vide Annexure 5, on 6.6.03, applicant raised a claim to the tune of Rs.89,16,602. Thereafter, reminders were sent, but instead of adjudicating the claim as per Clause 63 of the General Terms and Conditions, vide Annexure 8, non-applicants informed the applicant that they should nominate an arbitrator from the panel indicated in Annexure 8, so that the dispute can be resolved by arbitration. Applicant again submitted the claim and on 9.7.04 proposed the name of one Hon'ble Shri Justice A.N. Dixit, Former Judge of the Allahabad High Court, to be appointed as Arbitrator, vide Annexure 9. When nothing was done, this application has been filed.

3. Shri V.R. Rao, learned Senior Advocate, taking me through the documents and material available on record, submitted that there being a dispute between the parties, when the claim was raised by the applicant, instead of adjudicating the claim in accordance to the terms contemplated under Clause 63 of the General Conditions, non-applicants vide Annexure 8 directly resorted to the procedure of arbitration, when no demand was made for arbitration by the applicant. Subsequently, when demand for arbitration was made vide Annexure 9, as no action was taken it is stated that non-applicants have forfeited their right to nominate the arbitral Tribunal in accordance to the agreement, instead now this Court should appoint an Independent arbitrator. Interalia contending that the claim is for more than 1 Crore and the arbitrator appointed or proposed by the non-applicants in Annexure 8 will not be an independent arbitrator, it is stated that a Former Judge of the High Court should be appointed as arbitrator. Inviting attention of this Court to an order passed in the case of the present applicant themselves, the Hon'ble Supreme Court in SLP(Civil) on 20.11.97, 19.11.2001, Shri V.R. Rao, learned Senior Advocate, argued that exercising jurisdiction in the matter, this Court should now appoint the arbitral Tribunal.

4. Shri Sheel Nagu, learned counsel appearing for the non-applicants, refuted the aforesaid and submitted that as the non-applicants have proceeded to nominate the arbitral Tribunal in accordance with the terms and conditions of the agreement, the applicant should have accepted the same instead chose to file this application under section 11, which was not the proper course to be adopted. Placing reliance on a recent judgment of the Supreme Court, in the case of *Indian Oil Corporation Limited and others Vs. Raja Transport Private Limited,* (2009) 8 SCC 520, Shri Sheel Nagu submitted that the contention of the applicant that the arbitral Tribunal as per the agreement cannot be appointed is unsustainable and taking me through the questions framed by the Supreme Court in the case of *Indian Oil Corporation Limited* (supra), particularly questions No.(i) and (ii) and answers thereto, and placing reliance on an earlier judgment of the Supreme Court in the

case of *Northern Railway Administration Vs. Patel Engineering Company Limited,* (2008) 10 SCC 240, Shri Nagu submits that even now the non-applicants are willing to proceed in accordance to the terms and conditions stipulated in Clause 64 of the General Conditions of the Contract and, therefore, jurisdiction be not exercised in this application.

5. I have heard learned counsel for the parties and perused the record. From the records it is seen that the agreement in question was entered into and applicant had raised the claim as detailed hereinabove and non-applicants vide Annexure 8 had proposed for resolution of the dispute by arbitration.

6. Even though under Clause 63 of the General Conditions of the Contract, the provision is to decide the claim by the competent authority, but in this case the competent authority instead of adjudicating the claim thought it appropriate to refer the matter for arbitration in accordance to Clause 64 of the General Terms and Conditions.

7. Clause 64(1)(I), 64(3)(a)(i) and 64(3)(a)(ii) of the General Conditions of Contract, reads as under:

> **"64(1)(I): Demand for Arbitration:**
>
> In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railways fails to make a decision within 120 days, then and in any such case, but except in any of the expected matters' referred to in Clause 63 of these conditions, the contractor, after 120 days but within 180 days of his resenting his final claim on disputed matters shall demand in writing that the dispute or difference to be referred to arbitration.
>
> **64(3)(a)(i):**
>
> In cases where the total value of all claims in question added together does not exceed Rs.10,00,000/- (Rupees Ten Lac only), the Arbitral Tribunal consist of a sole arbitrator who shall be either the General Manager or a gazetted officer of Railway not below the grade of JA Grade nominated by the General Manager in that behalf. The sole Arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by Railway.
>
> **64(3)(a)(ii):**
>
> In case not covered by clause 64(3)(a)(i), the Arbitral Tribunal

shall consist of a panel of three Gazetted Railway Officers not below JA Grade, as the arbitrators. For this purpose, the Railway will send a panel of more than three names of Gazetted Railway Officers of one or more departments, of the railways to the contractor who will be asked to suggest the General Manager up to 2 names out of the panel for appointment as contractor's nominee. The General Manager shall appoint atleast one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of Arbitrators either from the panel or from outside the Panel duly indicating the presiding arbitrator from amongst the 3 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts Department. An Officer of selection grade of the Accounts Department shall be considered for equal status to the officers in SA Grade of other departments of the Railways for the purpose of appointment of arbitrators."

8. A perusal of the material available on record indicates that when the applicant raised the claim and demanded final payment, non-applicants initially asked the applicant to submit certain particulars, applicant protested and raised his claim, which was considered and vide Annexure 8, non-applicants straight-away proposed reference of the matter for arbitration in accordance to Clause 64 of the General Terms and Conditions of the agreement. Applicant instead of accepting the same has approached this Court.

9. Except for contending that without adjudicating the claim, non-applicants cannot appoint an arbitrator as per the Terms and Conditions of the contract, learned Senior Counsel for the applicant is unable to bring to the notice of this Court any provision, statutory or otherwise, which prohibits such an action to be taken. Nothing is brought to the notice of this Court to indicate that non-applicants cannot take direct recourse to the remedy of arbitration when a dispute exists, without deciding the claim first.

10. Be that as it may be, the question now which requires consideration is as to whether an independent arbitral Tribunal should be appointed or this Court should relegate the parties to take recourse to the procedure already agreed to between them as per Clause 64, of the agreement.

11. The Supreme Court, in the case of *Indian Oil Corporation* (supra) has considered this question in a detailed manner. The questions formulated by the Supreme Court for consideration in the said case are indicated in paragraph 12, which reads as under:

"(i) Whether the learned Chief Justice was justified in assuming that when an employee of one of the parties to the dispute

is appointed as an arbitrator, he will not act independently or impartially?

(ii)In what circumstances, the Chief Justice or his designate can ignore the appointment procedure or the named arbitrator in the arbitration agreement, to appoint an arbitrator of his choice?

xxx xxx xxx xxx .."

13. Question No.(i) is answered in paragraphs 13, 14 and 15 and it is laid down by the Supreme Court that when parties enter into an alternate dispute resolution process by a private forum voluntarily, it is binding on them. Similar arguments advanced were negated by the Supreme Court in the said case and after taking note of the objection with regard to feasibility of appointing a departmental authority as arbitrator and the question of independent exercise of power by such authority, various judgments on the question is considered and after elaborately dealing with the matter, finally in paragraph 30 it has been held that there is no bar under the Act for providing for an employee of the Government Department/Statutory Corporation or Public Undertaking to be appointed as an arbitrator and finally it is held that if a named arbitrator contemplated in the arbitration agreement is an employee, that by itself is not a ground to raise a presumption of bias and partiality or lack of independence on his part.

14. However, certain exceptions are carved out in the case of private establishments. In the case of Government Departments/Public Sector Undertakings and statutory corporations, question No.(i) framed is answered by holding that an employee of one of the parties to the dispute, if appointed, can act independently and in all cases it cannot be said that the person does not act independently except when reasonable grounds are available to hold so, particularly in a case where the person appointed as arbitrator was involved in the work, in the execution of which the dispute arose.

15. In the light of the aforesaid principle, if the case in hand is scanned, it would be seen that except for making vague allegations, unsupported by any cogent material to the effect that a department officer will not act independently, no material is adduced to show that the apprehension of the applicant is based on any material, which justify the apprehension. Mere allegation without any base or foundation cannot be a ground for deviating from the general principles laid down by the Supreme Court, as indicated hereinabove.

16. Accordingly, the contentions advanced by Shri V.R. Rao, learned Senior Advocate, to the effect that a departmental authority would not act independently, if appointed as an arbitrator, has to be negated in the facts and circumstances of the present case.

17. Having held so, the second question would be as to whether this Court should proceed to appoint an independent arbitrator or is bound to relegate the

parties to follow the procedure contemplated under the agreement. The said question is considered by the Supreme Court in question No.(ii). From paragraph 40 onwards, the matter is considered and after taking note of the principles laid down in the case of *Northern Railway Administration* (supra), in paragraph 45, the matter is so summed up:

> "45. If the arbitration agreement provides for arbitration by a named arbitrator, the Courts should normally give effect to the provisions of the arbitration agreement. But as clarified by Northern Railway Admn., where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the Act. In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons." (Emphasis supplied)

18. Thereafter, the final conclusion is summarized by the Hon'ble Supreme Court in paragraph 48, in the following manner:

> "48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarized thus:
>
> (i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.
>
> (ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member tribunal, the Chief Justice or his designate will exercise power under sub- section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/ institution fails to perform any function entrusted to him/ it under the procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power under sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that

(i) a party failing to act as required under the agreed appointment procedure; or

(ii) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or

(iii) a person/ institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent

arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."

19. From the aforesaid principle laid down by the Supreme Court, it is clear that if the procedure agreed to by the parties is available, then normally the Chief Justice or his designate exercising power under section 11(6) should not appoint an independent arbitral Tribunal, but should direct the parties to take recourse to the procedure contemplated in the agreement itself, as referring the dispute to the arbitrators named in the agreement is the general rule and ignoring the same and appointing an independent arbitrator is an exception to be resorted to for valid reasons. In the present case, no valid and justifiable reason for deviating from the general rule is pointed out. In the case in hand, non-applicants have adhered to the procedure, which was accepted by the parties, and had given a proposal indicating a panel of arbitrators to be nominated by the applicant, on his behalf, as per the requirement of Clause 64. Instead of accepting the offer made and adhering to the process accepted by the applicant, as per the agreement for appointment of arbitrator, for the reasons best known and without any just cause or reason, applicant has approached this Court.

20. Considering the totality of the circumstances and the principles laid down by the Supreme Court, in the case of Indian Oil Corporation Limited (supra), as detailed hereinabove, this Court is of the considered view that in the present application, it is not proper to appoint an independent arbitrator, as the same would be contrary to the well settled principle laid by the Supreme Court, as indicated hereinabove. Instead, applicant and the non-applicants should be directed to proceed further in the matter in accordance to Clause 64 of the Agreement and resolve the dispute by adhering to the said process.

21. Accordingly, finding no merit in the prayer made in this application for appointment of an arbitrator, exercising jurisdiction in these proceedings under section 11, this application is disposed of granting liberty to the parties to proceed further in the matter for resolution of the dispute in accordance to the provisions of Clause 64, of the agreement.

22. Application stands disposed of with the aforesaid without any order so as to costs.

Application disposed of.

I.L.R. [2010] M. P., 292

MISCELLANEOUS CRIMINAL CASE

Before Mrs. Justice Indrani Datta

25 August, 2009*

OMPRAKASH YADAV ... Applicant

Vs.

STATE OF M.P. & anr. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - *Locus standi* - *Offence of murder registered at Firozabad against NA-2 on the FIR of applicant - In order to screen NA-2, police officers of Gwalior registered an offence under Excise Act against NA-2 - Application u/s 482 Cr.P.C. filed by applicant / informant of murder case for quashing the criminal proceedings pending against NA-2 at Gwalior - Held - Applicant has locus standi to file application u/s 482 Cr.P.C. - Inherent power can be invoked to avoid conflicting judgment of two courts - Further proceedings in excise case stayed till the final decision of the murder trial - Application allowed.* (Paras 11 & 12)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – सुने जाने का अधिकार – आवेदक की एफ.आई.आर. पर अनावेदक क्र. 2 के विरुद्ध हत्या का अपराध फिरोजाबाद में रजिस्टर किया गया – अनावेदक क्र. 2 को बचाने के लिए, ग्वालियर के पुलिस अधिकारियों ने अनावेदक क्र. 2 के विरुद्ध आबकारी अधिनियम के अन्तर्गत अपराध रजिस्टर किया – आवेदक/हत्या के मामले के सूचनादाता द्वारा अनावेदक क्र. 2 के विरुद्ध ग्वालियर में लम्बित दाण्डिक कार्यवाहियों के अभिखंडन के लिए द.प्र.सं. की धारा 482 के अन्तर्गत आवेदन पेश किया गया – अभिनिर्धारित – आवेदक को द.प्र.सं. की धारा 482 के अन्तर्गत आवेदन पेश करने का अधिकार है – अन्तर्निहित शक्ति का प्रयोग दो न्यायालयों के परस्पर विरोधी निर्णय को टालने के लिए किया जा सकता है – आबकारी मामले में आगे की कार्यवाहियाँ हत्या के मामले के अंतिम विनिश्चय तक रोकी गयीं – आवेदन मंजूर।

Cases referred :

(2004) 1 SCC 691, (2005) 13 SCC 540, (2008) 4 SCC 471, (2002) 9 SCC 581, (1984) 2 SCC 500.

Sanjay Gupta with *B.S. Chauhan,* for the applicant.

B.D. Mahore, P.P., for the Non-applicant No.1/State.

V.K. Saxena with *Praveen Mishra, Kishore Dixit & S.S. Rajput,* for the Non-applicant No.2.

O R D E R

INDRANI DATTA, J. :–This petition has been preferred by the petitioner under section 482 of Cr.P.C for quashing criminal proceedings concerning Cr.case

*M.Cr.C. No.5971/2008 (Gwalior)

no. 15003 of 2007 pending in the Court of CJM, Gwalior or in alternate for staying proceeding concerning Cr.Case no. 15003 of 2007 till decision of case pending against respondent no.2 at Firozabad concerning Crime no.617 of 2007.

2. As per petition, respondent no.2 and co-accused had committed murder of petitioner's brother Suman Prakash Yadav on 12.10.2007 at 8.30 AM at Firozabad by firing gun shots at him. A report was lodged on the same day at PS Firozabad UP by petitioner and case was registered against respondent no.2 and others for commission of offence under section 147, 148, 149, 302 and 307 of IPC. Copy of the FIR is Annexure P/1. Niranjan Kumar Upadhyay TI Gola Ka Mandir in conspiracy with respondent no.2 in order to screen respondent no.2 Ashok Dixit in connection with the offence of the murder of petitioner's brother on 12.10.2007 in connivance with ASI Bunkar and Head Constable Vijay Bahadur Singh and Ramvaran Yadav fabricated a false case and registered Crime no.0 of 2007 under section 34 of the Excise Act in Chauki Thatipur of PS Morar against respondent no.2 in order to show that respondent no.2 was not present in Firozabad on 12.10.200.7 and he was present at that time in Gwalior at 9.30 AM where he is involved in the crime punishable under Excise Act. In that case, he had shown fictitious and untrue arrest of respondent no.2 and case is registered against respondent no.2 at 12.08 PM in connection with Crime no.967 of 2007 at Police Station Morar. Charge sheet is filed in the Court of CJM, Gwalior. Copy of the charge sheet is Annexure P/2 and arrest memo is Annexure P/4. Copy of FIR is Annexure P/5 and copy of report of Excise Inspector is submitted as Annexure P/6. Copies of statements of witnesses is Annexure P/7 and P/7A. It is further contended in petition that police Firozabad during investigation of Crime no.617 of 2007 found that Niranjan Upadhyay and some others are involved in the conspiracy of screening respondent no.2 in connection with murder of petitioner's brother and they are responsible for offence under section 120B and 201 of IPC within jurisdiction of PS Dakshin, District Firozabad in Crime no.617 of 2007 and case was registered against Niranjan Kumar Upadhyay and five others and warrant of arrest were issued against them as per Annexure P/9 to P/14, thereafter proclaimation requiring their attendance was issued against them as per Annexure P/15 to P/20. As per petition, Niranjan Upadhyay then filed one writ petition. Annexure P/21 is order passed in Cr.Mis.W.P.no.10181 of 2008. Charge sheet has been filed against Niranjan Upadhyay on 12.10.2007 and against ASI R.P.Gunkar and Head Constables Vijay Bahadur and Ramvaran Yadav on 25.7.2009.

3. As per further averments of petition, Town Inspector Thana Firozabad has also filed one application before CJM Gwalior to stay further proceedings of excise case pending in his Court against respondent no.2 till decision of case pending in Firozabad on the ground that alleged incidence of murder occurred on 12.10.2007 at 8.30 AM at Firozabad and it is impossible that respondent no.2 was present at

9.30 AM on 12.10.2007 at Gwalior which is 160 Kms away from Firozabad. 'Hence, apparently, false manipulated case of Excise Act is registered at Police Station Morar by Town Inspector Niranj-an Upadhyaya and others to screen respondent no.2 in connection with murder of Suman Prakash Yadav. Copy of application is Annexure P/22. That application was rejected by CJM Gwalior vide order dated 23.2.2008. Petitioner has also filed one application on 30.7.2008 in the Court of CJM Gwalior as per Annexure P/24. In that Excise case, respondent no.2 has filed applications in Court of CJM Gwalior as per Annexure P/25 and P/26 that he wants to admit his crime which shows his mala fide intention to create ground of alibi to screen himself from actual offence committed at Firozabad concerning murder of petitioner's brother. Therefore, this petition is filed for staying proceedings of Excise Act in connection with. Cr.Case no. 15003 of 2007 pending in the Court of CJM Gwalior against respondent no.2 till decision of the case pending in Firozabad in connection with Crime no.617 of 2007.

4. Learned counsel for the petitioner contended that case of Excise Act registered at PS Morar is fabricated only to create a ground of alibi for petitioner in order to show that he was far away from Firozabad and is not at all concerned with alleged offence of petitioner brother's murder committed at Firozabad. It is further contended that this case is rarest of rare cases for invoking inherent powers of the Court to secure the ends of justice and abuse of process of Court.

5. It is contended on behalf of the respondent no.2 that petitioner has no locus standi and he cannot file petition under section 482 of Cr.P.C. Second point raised by learned counsel for the respondent no.2 is that no order can be passed which will affect disposal of the case pending at Firozabad and if plea of alibi is found to be false, then respondent no.2 and co-accused will have to suffer consequences and if any order is passed in the case of Excise Act then what bearing it will have in the case pending at Firozabad.

6. Learned counsel for the respondent no.2 relied on following citations.

7. *State of M.P. Vs. Awadh Kishore Gupta and Others* (2004) I SCC 691 wherein, it is held that quashing of proceeding by appreciating the evidence is not permissible even if the charge is framed High Court cannot appreciate the evidence but can evaluate material and documents on record to the extent of its prima facie satisfaction about the existence of sufficient ground for proceeding against the accused.

8. In *State of Orissa and Another Vs. Saroj Kumar Sahoo* (2005) 13 SCC 540 wherein, it is held that exercise of power under section 482 of Cr.P.C is to be exercised sparingly and that too in the rarest of rare cases. It is to be exercised ex debito justitiae, to do real and substantial justice and not to stifle legitimate prosecution.

9. Next reliance was placed on *Central Bureau of Investigation Vs.*

K.M.Sharan (2008) 4 SCC 471 wherein, it is held that High Court- was not supposed to "embark upon the enquiry whether the allegations in FIR and the charge sheet were reliable or not and thereupon, to render definite finding about truthfulness or veracity of the allegations".

10. Learned counsel for respondent no.2 invited my attention to *Vitoori Pradeep Kumar Vs. Kaisula Dharmmaiah and Others* (2002) 9 SCC 581 wherein criminal proceedings initiated against accused for offence under section 420 of IPC were quashed by the High Court on the ground of pendency of civil suit for specific performance, then it was held by the Hon. Apex Court that the order is not proper as pendency of civil suit in respect of the matter concerned would not be a bar to resort to criminal proceedings.

On the basis of these citations, learned counsel for the respondents urged that proceedings pending in the court of CJM Gwalior in Excise Act cannot be quashed or stayed-only on the ground that case is pending against present respondent no.2 at Firozabad for murder of brother of the petitioner.

11. So far as petitioner has no locus standi to file this petition is concerned, this argument is baseless. In case of *A.R.Antulay Vs. Ramdas Sriniwas Nayak and Another* (1984) 2 SCC 500 it is held by Apex Court that punishment of the offender in the interest of society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a strait-jacket formula of locus standi. Locus standi of the complainant is a concept foreign to criminal jurisprudence save and except that where the statute creating an offence provides for the eligibility of the complainant, by necessary implication, the general principle gets excluded by such statutory provision for, it is a well recognized principle of criminal jurisprudence that anyone can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary. In other words, the principle that anyone can set or put the criminal law in motion remains intact unless contra-indicted by a statutory provision. This general principle of nearly universal, application is founded on a policy that an offence that is an act or omission made punishable by any law for the time being in force is not merely an offence committed in relation to the person who suffers harm but is also an offence against society. The society for its orderly and peaceful development is interested in the punishment of the offender. Therefore, prosecution for serious offences is undertaken in the name of the state representing the people which would exclude any element of private vendetta or vengeance. If such is the public policy underlying penal statute, who brings an act of omission made punishable by law to the notice of the authority competent to deal with it, is immaterial and irrelevant unless the statute indicates to the contrary.

12. In the light of the above legal position, the petitioner who is a complainant in

the criminal case in connection with Crime no.617 of 2007 registered against respondent no.2 at Firozabad has locus standi to file this petition under section 482 of Cr.P.C. Now legal aspect and circumstances of the case is to be considered. Suppose for the sake of argument, if respondent no.2 admits his guilt in the case of Excise Act pending in the Court of CJM Gwalior what will be its effect? He will have a good ground of alibi that at the time of alleged murder of petitioner's brother he was not present at Firozabad but was present at Gwalior which is 160 Kms. away from Firozabad. So it will cause a great prejudice in that case and on the other hand, in the interest of justice, if proceedings pending in the court of CJM Gwalior are stayed, it will not cause any prejudice to respondent no.2. Moreover, it will avoid conflicting judgments of two Courts. Therefore, it is good case for invoking inherent powers of the Court.

13. Considering the facts and circumstances of the case, petition is allowed and further proceedings pending in the Court of CJM Gwalior in connection with Excise Act pending in the Court of CJM Gwalior concerning Case no. 15003 of 2007 are hereby stayed till disposal of the Criminal Case pending at Firozabad concerning Crime no.617.of 2007.

Copy to concerned Court.

CC as per rules.

Petition allowed.

I.L.R. [2010] M. P., 296
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice Indrani Datta
13 November, 2009*

TEHMINA QURESHI ... Applicant
Vs.
SHAZIA QURESHI ... Non-applicant

Protection of Women from Domestic Violence Act (43 of 2005), Section 2(q) - *The word used in S. 2(q) of the Act is that 'respondent' means any adult male person and not any adult person - Therefore, complaint against relatives of husband cannot include female members - Female members cannot be made respondents in proceeding under the Act.* (Para 7)

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 2(क्यू) – अधिनियम की धारा 2(क्यू) में प्रयुक्त शब्द 'प्रत्यर्थी' का अर्थ है कोई वयस्क पुरुष व्यक्ति न कि कोई वयस्क व्यक्ति – इसलिए पति के नातेदारों के विरुद्ध परिवाद में महिला सदस्यों को सम्मिलित नही किया जा सकता – महिला सदस्यों को अधिनियम के अन्तर्गत कार्यवाही में प्रत्यर्थी नही बनाया जा सकता।

*M.Cr.C. No.3312/2009 (Gwalior)

Cases referred :

2008(2) Crimes 235, I (2009) DMC 297, 2009 CrLJ (NOC) 819 (AP), AIR 2009 (NOC) 1544 (AP), ILR (2008) MP 963, (2008) 4 SCC 649, (2007) 3 SCC 169.

P.S. Bhadoria Rawat, for the applicant.

J.P. Kushwah, for the non-applicant.

ORDER

INDRANI DATTA, J. :–This petition has been preferred by the petitioner invoking extra ordinary jurisdiction of this court conferred under Section 482 of Code of Criminal Procedure for setting aside order dated 31.3.2009 passed by JMFC Gwalior and for quashing the proceedings of Cr.Case no.2694 of 2009 pending against the petitioner in the Court of Judicial Magistrate, Gwalior.

2. Facts in nutshell giving rise to this petition are that respondent has filed one application under Section 12 of Protection of Women Domestic Violence Act 2005 (in brevity 'the Act of 2005') against petitioner and others in the Court of JMFC, Gwalior. Learned JMFC, after registering the application, issued notice to the petitioner and others. Hence, this petition challenging that order of registering the application and issuing notice to the petitioner is filed on the following grounds :

> (1). that, as provided by section 2 (q) of the Act, such application under Section 12 of the Act cannot be filed against the petitioner who being a lady under Section 2 (q) of the Act of 2005. In Section 2 (q) of the Act, the term resoondent has been defined as under : -
>
> "(q) "respondent" means any adult male person who is or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:
>
> Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

3. It is contended by learned counsel for the petitioner that as per Section 2 (q) of the Act, it is crystal clear that an application can be filed by an aggrieved person including the respondent claiming relief under the Act only against the adult male person. However, as per the proviso appended to this provision, a wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

4. Learned counsel for the petitioner drew this courts attention to a citation *Ajay Kant Sharma and Others Vs. Smt. Alka Sharma* 2008 (2) Crimes 235 in which, a Bench of this Court has held that application for seeking one or more

relief under the Act of 2005 can be filed only against adult male person. Relying that citation, it is further urged that in the present case, petitioner against whom, the application is filed under Section 12 of the Act is not adult male person, therefore, proceedings initiated against her and application filed against her . is not maintainable. It is urged on behalf of the petitioner that considering the view expressed in above citation, the petitioner being a lady, proceedings initiated against her in Cr.Case No.2694 of 2009 be quashed.

5. Learned counsel for the respondent vehemently opposed the application and submitted that while disposing of the application under Sub Section (1) of Section 12 of the Act of 2005, Magistrate may on being satisfied that domestic violence has taken place, pass a residence orders vide Section 19 of the Act:

> (a). restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;
>
> (b). directing the respondent to remove himself from the shared household;
>
> (c). restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;
>
> (d). restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;
>
> (e). restraininig the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or
>
> (f). directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require;
>
> provided that no order under Clause (b) shall be passed against any person who is woman".

It is submitted that the above proviso of Section 19 would indicate that the only embargo against the passing of residence order while disposing of an application under Section 12 (1) of the Act is that if the respondent is a woman the Magistrate shall not direct such woman respondent to remove herself from the shared household. In other words if the respondent to the application is a woman, the Magistrate can grant all the reliefs against such woman in an application under Section 12 (1) of the Act except directing such woman respondent to remove herself from the shared household. Hence, it is urged that the petitioner

is also liable under Section 12 of the Act of 2005 and proceedings are not liable to be quashed.

6. Learned counsel's argument is based on a citation *Remadevi Vs. State of Kerala* 1 (2009) DMC 297 in which, it is held by Kerala High Court that "aggrieved person" under section 12 of the Act can file application not only against adult male relatives including husband but also against any female relatives. Term "respondent" appearing in Section 12 takes within its fold not only adult male. It is further observed that on bare perusal of Section 19 of the Act and the proviso, it is apparent that Magistrate can grant all the relief against woman also in an application filed under Section 12 (1) of the Act except directing such woman respondent to remove herself from shared household. So Act is applicable to female also.

7. So far as citation of Kerala High Court cited by learned counsel for the respondent is concerned, with due respect, I find myself unable to agree with the decision of Kerala High Court. Application for seeking one or more relief under the Act can be filed against adult male member only as is apparent from Section 2 (q) of the Act wherein, it is specifically mentioned that 'respondent' means only adult male person. It is apparent that complaint against relative of husband cannot include female members. In case of *Smt. Menakuru Renuka and others Vs. Menakuru Mona Reddy and Another* 2009 Cri.L.J. (NOC) 819 (A.P): AIR 2009 (NOC) 1544 (AP) similar view is expressed that in view of the contents of Section 2 (q) of the Act of 2005 female members of the domestic relationship .have to be excluded, as the word used in Section 2 (q) of the Act is that respondent means any adult male person. The words used are not like that 'respondent' means any adult person. So complaint against relatives of husband cannot include female members. Female members cannot be made respondents in proceedings under the Protection of Women from Domestic Violence Act, 2005.

8. It is well known that Protection of Women from Domestic Violence Act 2005 came into force from 26th October, 2006 vide S.O. 1776 (E) dated 17th October, 2006 published in Gazette of India, Extra. Pt. II, Section 3 (ii), dated 17th October, 2006 and this Act is to provide more effective protection to the rights of woman guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for members connected therewith or incidentally thereof. The Act is applicable against male persons who can be respondent.

9. In case of *Razzaq Khan Vs. Shahnaz Khan* ILR (2008) MP 963 it is held that wife is entitled to a right of residence in a shared house belonging to husband or house which belongs to joint family of which, husband is a member. In *Vimlaben Ajitbhai Patel Vs. Vatslaben Asok Bhai Patel and Others* (2008) 4 SCC 649 and *S.R.Batra Vs. Tarun Batra* (2007) 3 SCC 169, apex Court has held that even wife could not claim right of residence in the property belonging to her mother in

law that means protection order cannot be passed against Mother in law. Wife is only entitled to the 'residence order which extends only to joint property in which, husband has a share.

10. In the present case, parties are Mohammadans and there is no concept of co-parcenery prevalent in their society. Therefore, considering this legal position and considering that , the Act of 2005 is applicable against adult male members only, this petition is allowed and consequently, the proceeding pending in the Court of JMFC Gwalior in case of 2694 of 2009 so far as petitioner Tehmina Qureshi is concerned, liable to be quashed and hereby quashed. Petition stands disposed of.

Petition disposed of.